No. **06-15093**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DR. REV. MICHAEL NEWDOW, *et al.*,
Plaintiffs-Appellees

v.

U.S.A., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of California

MOTION OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF LEAVE TO FILE LONGER BRIEF; DECLARATION OF PETER D. LEPISCOPO, ESQ. IN SUPPORT OF MOTION

(FRAP 29(d), FRAP 27, and FRAP 32)

Amicus Curiae Pacific Justice Institute hereby moves the Court for leave to file a brief that exceeds the maximum provided for under F.R.A.P. 29(d) and F.R.A.P. 32.

This motion is based upon F.R.A.P. 29(d), F.R.A.P. 27, and F.R.A.P. 32 and the Declaration of Peter D. Lepiscopo in support hereof, which is attached hereto.

/////

Dated: May 31, 2006.

Respectfully submitted

LAW OFFICES OF PETER D. LEPISCOPO

By: _____

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**Counsel of Record and Member of the Bar of the 9th Circuit U.S. Court of Appeals*

DECLARATION OF PETER D. LEPISCOPO

I, Peter D. Lepiscopo, declare as follows:

1. I am an attorney duly licensed and admitted to practice law within the State of California and I am a member of the Bar of this Court. I represent the *Amicus Curiae* Pacific Justice Institute. I am over the age of eighteen and have personal knowledge of the herein stated matters, and, if called upon as a witness, could and would testify competently and accurately to the herein stated matters.

2. Pursuant to F.R.A.P. 29(a), all parties have provided their consent to *Amicus Curiae* Pacific Justice Institute to file a brief in support of Appellants U.S.A. and Rio Linda Union School District for reversal of the district court's decision.

3. In the first round of litigation regarding the Pledge of Allegiance, I represented Pacific Justice in the United States Supreme Court. See ***Elk Grove Unified School Dist. v. Newdow***, 542 U.S. 1 (2004)("*Elk Grove*"). Accordingly, I am completely familiar with not only the standing issues that were raised in *Elk Grove*, but also the substantive constitutional law issues (even though those issues were not decided by the Supreme Court).

4. As this case presents important issues of constitutional law, I have carefully reviewed the arguments set forth in Pacific Justice's *amicus* brief, a copy of which is attached hereto as Exhibit 1. In this regard, I spent considerable time revising and reducing the brief to a more succinct, reduced version. Even so doing, I was only able to reduce the brief to twenty-five **25** pages, which exceeds the page limit provided for by F.R.A.P. 29(d). As I attempted to further reduce it to the fifteen (15) page limit it became disjointed and somewhat incoherent.

The following is an outline of the issues that are addressed in the proposed amicus brief:

I. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE DOES NOT CREATE A JUSTICIABLE CLAIM UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

A. The Phrase "U*nder God*" in the Pledge of Allegiance is Neither a Religious Activity, Profession of Religious Belief, nor Prayer, But is Merely a Restatement of the Political Philosophy Underpinning this Nation's Form of Government

B. As The Phrase "*under God*" In The Pledge Is Not A Religious Act, Profession Of Religious Belief, Or Prayer, It Does Not Contravene The Establishment Clause

5. I am not in the practice of addressing irrelevant issues or being verbose in my written arguments. I am an experienced litigator, including at the appellate level. For example, I have acted as lead and/or *amicus* counsel in the following published cases: ***McCreary County v. ACLU***, 545 U.S. ____ (2005)(Kentucky 10 Commandments case-represented Pacific Justice Institute in U.S. Supreme Court); ***Van Orden v. Perry***, 545 U.S. ____ (2005) (Texas 10 Commandments case-represented Pacific Justice Institute in U.S. Supreme Court); ***Elk Grove Unified School Dist. v. Newdow***, 542 U.S. 1 (2004) (represented Pacific Justice Institute in the ***Pledge of Allegiance case*** before the U.S. Supreme Court); ***Lockyer v. City and County of San Francisco*** (2004) 33 Cal.4th 1055 (represented California State Senators and Assembly Members in the California Supreme Court); ***Costco Companies, Inc. v. Gallant*** (2002) 96 Cal.App.4th 740 (freedom of speech and petition case relating to California Supreme Court decision in *Robins v. Pruneyard* (1979) 23 Cal.3rd 899); ***San Diego Unified Port District v. U.S. Citizens Patrol*** (1998) 63 Cal.App.4th 964 (freedom of speech case relating to political speech at the San Diego International Airport); ***Springfield v. San Diego Unified Port District*** (S.D.Cal.1996) 950 F.Supp. 1482 (freedom of speech case relating to religious speech at airports); ***San Diego County Gun Rights Committee v. Reno*** (9th Cir.1996) 98 F.3rd 1121 (constitutional challenge to 1994 Crime Bill's firearms ban based on 2nd and 9th Amendments, and Interstate Commerce Clause in light of U.S. Supreme Court decision in *United States v. Lopez* , 514 U.S. 549); ***San Diego County Gun Rights Committee v. Reno*** (S.D.Cal.1996) 926 F.Supp. 1415 (constitutional challenge to firearms ban in 1994 Crime Bill); ***Council for Life Coalition v. Reno*** (S.D.Cal.1996) 856 F.Supp. 1422 (constitutional challenge under 1st Amendment (free speech and association), Interstate

Commerce Clause, and Due Process Clause to 1994 Freedom of Access to Clinics Entrances Act); ***Pinnock v. International House of Pancakes*** (S.D.Cal.1993) 844 F.Supp. 574, *cert.den.* 114 S.Ct. 2726 (1994)(constitutional challenge to public accommodations section of the Americans with Disabilities Act based on the Interstate Commerce Clause, Doctrine of Separation of Powers, Due Process (retroactive legislation, void for vagueness, and over-broad), and 10th Amendment).

6. By way of the instant motion, *amicus curiae* Pacific Justice seeks leave to file an oversize brief consisting of twenty-five (25) pages instead of fifteen (15) in light of the complexity and intricacies surrounding the issues presented by this case. In the course of performing the research it became clear that in order to fully and adequately respond to the issues involved, additional length would be necessary.

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

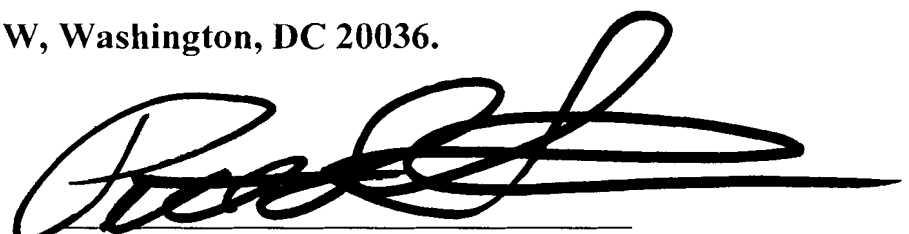
Executed this **31st** day of **May**, 2006 at San Diego, California.

Peter D. Lepiscopo, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of **May**, 2006, true and correct copies of the foregoing were served by U.S. Mail:

1. **Dr. Rev. Michael Newdow, P.O. Box 233345, Sacramento, CA 95823;**
2. **Lowell V. Sturgill, Esq., U.S. Dept. of Justice, Civil Division, Appellate Staff, Washington, DC 20530;**
3. **Terrence J. Cassidy, Esq., Porter, Scott, Weiberg & Delehant, 350 University Avenue, Sacramento, CA 95825;**
4. **Jared N. Leland, Esq., Becket Fund for Religious Liberty, 1350 Connecticut Avenue, NW, Washington, DC 20036.**



Peter D. Lepiscopo, Esq.

No. **06-15093**

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DR. REV. MICHAEL NEWDOW, *et al.*,
Plaintiffs-Appellees

v.

U.S.A., *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of California

BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF APPELLANTS U.S.A. AND RIO LINDA UNION SCHOOL DISTRICT—FOR *REVERSAL*

(Pursuant to FRAP 29(a), all parties have consented to the filing of this Amicus Brief)

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May 31, 2006

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PURSUANT TO F.R.A.P. 29(a), ALL PARTIES HAVE CONSENTED TO THE FILING OF PACIFIC JUSTICE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS U.S.A. AND RIO LINDA UNION SCHOOL DISTRICT FOR REVERSAL OF DECISION OF THE DISTRICT COURT

Pursuant to Federal Rules of Appellate Procedure 29(a), prior to the filing of this *amicus curiae* brief, Pacific Justice Institute ("Pacific Justice") sought and obtained consent from all parties to filing of this brief in support of Appellants U.S.A. and Rio Linda Union School District ("school district") for reversal.

CORPORATE DISCLOSURE PURSUANT TO F.R.A.P. 26.1

As Pacific Justice is an independent, non-profit organization, there is no corporation or other entity that has any ownership interest in or controlling interest over Pacific Justice.

INTEREST OF PACIFIC JUSTICE INSTITUTE

Pacific Justice is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest and is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

Pacific Justice has participated in litigation involving significant constitutional issues in both federal and state courts, including the 1st Pledge of Allegiance case involving Appellee Dr. Newdow, which was decided by the United States Supreme Court in *Elk Grove Unified School District v. Newdow,* 542 U.S. 1 (2004)("*Elk Grove*"). In addition, Pacific Justice was involved in the two Ten Commandments cases recently decided by the United States Supreme Court: *McCreary County v. ACLU of Kentucky,* 545 U.S. ____ (2005)("*McCreary*") and *Van Orden v. Perry*, 545 U.S. ____ (2005)("*Van Orden*").

As set forth above, this *amicus* brief is filed upon the written consent of all the parties. Pacific Justice, and its counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authorized this brief in whole or in part and that no person other than counsel of record drafted the brief. No person or entity, other than *amicus*, made any monetary contribution to the preparation or submission of this brief.

LEGAL ARGUMENT

I. SUMMARY OF ARGUMENT

Although Appellees challenge 4 U.S.C. section 4, California's Patriotic Exercise Statute (Gov. Code section 52720), and the school district's policy that requires teachers to lead willing students in reciting the Pledge of Allegiance (the "Pledge") at the beginning of each school day, this case will turn on this Court's determination of whether the inclusion of the words "*under God*" in the Pledge somehow converts it into a religious act, profession of religious belief, or prayer thereby contravening the First Amendment's Establishment Clause.

Pacific Justice will address the issue of whether the inclusion of the phrase "*under God*" in the Pledge renders 4 U.S.C. section 4, California's Patriotic Exercise Statute (Gov. Code section 52720), and the school district's policy of daily non-compulsory recitation of the Pledge invalid under the Establishment Clause. Specifically, Pacific Justice will argue that the phrase "*under God*" does **not** contravene the Establishment Clause because that phrase is neither a religious act, profession of religious belief, nor a prayer, but is merely a restatement of the political philosophy underpinning this Nation's form of government.

In essence, Pacific Justice will argue that Appellees' claim, that the inclusion of the phrase "*under God*" in the Pledge, is not justiciable, and, therefore, Appellees' entire complaint should have been dismissed by the district court.

II. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE DOES NOT CREATE A JUSTICIABLE CLAIM UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

This section is comprised of two sub-sections. Section A argues that the phrase "*under God*" is not a religious act, profession of religious belief, or prayer, but rather a statement of the political philosophy underpinning this Nation's form of government. Section B argues that Appellants' claim is not justiciable under Establishment Clause jurisprudence.

A. The Phrase "*Under God*" in the Pledge of Allegiance is Neither a Religious Act, Profession of Religious Belief, nor Prayer, But is Merely a Restatement of the Political Philosophy Underpinning this Nation's Form of Government

The following immortal words set forth in the Declaration of Independence serve as an appropriate starting point for this discussion:

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their ***Creator*** with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among men, ***deriving*** *their just Powers from the* ***Consent of the Governed***..."

U.S. Decl. Of Indep. (emphasis added).

A sobering moment is being presented to the Court by way of the instant action. That is to say, if one may not recite the Pledge in a public school, one certainly may not recite the foregoing passage from the Declaration of Independence. Nor may one recite Abraham Lincoln's *Gettysburg Address* because it contains the phrase "**this Nation, *under God.***" In its lengthy opinion, the district court ignored this in its quest to excise the word "*God*" from the Pledge. In truth, that was the Appellees' goal, which subsequently became the goal of the district

court. The goal of those like Appellees has, and continues to be, the same, to wit: to remove any reference to "*God*" from any public discourse, ignoring the fact that in casting aside all references to "*God*" results in our Nation's history and form of government also being cast aside. To make this point, a summary review of the underlying political philosophy of the Founders is in order.

Thomas Jefferson and the other Founders were well versed in the works of Algernon Sydney ("*Discourses*")[1], Charles de Montesquieu ("*Spirit of Laws*")[2], and John Locke ("*2nd Treatise*")[3] relative to their political philosophy; hence, the phrase in the Declaration, "We find these Truths to be ***self-evident***..." Those truths are not, however, self-evident to the district court. If they were, then the conclusion reached by the district court would have been different. That is to say, the phrase "*under God*" would not have been interpreted as a religious act, profession of faith, or prayer, but rather as a paraphrasing of a political philosophy incorporated into the Declaration and Constitution, which finds its genesis in the works of Sydney, Montesquieu, and Locke.

It is important to note that Sydney's *Discourses* was written as a refutation to Sir Robert Filmer's *Patriarcha* (wherein Sir Filmer defends the divine and natural power of kings to rule with **absolute** power over the people and that any rights of the people originate from the king). Consequently, the predominating theme in Sydney's *Discourses* is the ***source*** and ***limits*** of governmental powers. Drawing on Aristotle, Sydney examines the ***source*** of power in a monarchy in order to illustrate how power in that form of government is circumscribed in relation to the source of that power:

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[1] Sydney, Algernon, *Discourses Concerning Government*, (1990) Indianapolis: Liberty Fund, Inc. ("*Discourses*").

[2] Montesquieu, Charles De, *The Spirit of Laws*, (1952) Great Books of the Western World (Vol. 38), Chicago: Encyclopaedia Britannica, Inc. ("*Spirit of Laws*").

[3] Locke, John, *Second Treatise of Government*, (1980) Indianapolis: Hackett Publishing Company, Inc. ("*2nd Treatise*").

> "But if Aristotle deserves credit, the princes who reign for themselves and not for the people, preferring their own pleasure or profit before the publick, become tyrants; which in his language is enemies to God and man."

Discourses, *supra*, at 288. Similarly, Sydney draws upon the experience of Israel[4] under Moses in order to demonstrate that even God-appointed leaders are answerable to the people:

> "[T]he Scriptures declare the necessity of setting bounds to those who are placed in the highest dignities. Moses seems to have had as great abilities as any man that ever lived in the world; but he alone was not able to bear the weight of government, and therefore God appointed seventy chosen men to be his assistants."

Id. Sydney goes on to identify the *source* of Israel's liberty and the *source* of Moses' reign and power: "*God by Moses gave liberty to his people to make a king.*" *Discourses*, *supra*, at 289. Clearly, Moses' leadership was the consequence of God vesting liberty in the people of Israel, not the other way around. Sydney recognized this principle that serves as a barrier between the liberty of the people and the power of the government. As a foreshadowing of the Declaration, Sydney clearly articulates the proper ends of government:

> "[G]overnments are not set up for the advantage, profit, pleasure or glory of one or a few men, *but for the* ***good*** of society."

Discourses, supra, at 91. In short, Sydney was articulating the principle that governments may not be justly constituted except upon the ***consent*** of the people. We see this in the preamble of the Constitution:

> "***We the People*** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to

[4] It is worth noting that in his reliance upon the Scriptures, Sydney drew heavily upon the experiences of Israel under the reigns of Saul, David, and Solomon, and later under the kings who ruled Israel and Judah, in order to demonstrate his points relating to the ***source*** of and ***limits*** on governmental powers.

ourselves and our Posterity, do ***ordain and establish*** this Constitution for the United States of America."

Clearly, the preamble identifies the ***source*** of the powers vested in the federal government: the People. This is consistent with the consent theory mentioned by Sydney in *Discourses*, which is similarly discussed by Montesquieu and Locke in their political treaties.

Moving to Montesquieu, in the *Spirit of Laws* we see two distinct political principles emerge, which were incorporated into our founding principles. The first principle is that government is created by the people (as phrased in the Declaration: "***from the consent of the governed***"). As discussed by Sydney, this principle is fundamental to a republican form of government:

> "The people, in whom the supreme power resides, ought to have the management of everything within their reach: that which exceeds their abilities must be conducted by their ministers. But they cannot properly be said to have ministers, without the power of nominating them: it is, therefore, a ***fundamental maxim*** *that the* ***people should choose*** *their ministers*—that is their magistrates."

Spirit of Laws, supra, at p. 4, § 2 (emphasis added). According to both Sydney and Montesquieu the people are vested with plenary power of selecting those individuals through whom their governmental affairs will be conducted.

Second, Montesquieu argues that the powers reposed in government by the people should not be vested in any one person or small group of persons. This, of course, is the principle of separation of powers. Montesquieu articulates this principle by contrasting liberty with the concentration of governmental powers in any one person or persons. More specifically, the threat to liberty arises when combinations of legislative, executive, and judicial powers are joined and concentrated in one person or group of persons. As Montesquieu explains:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, ***there can be no liberty***; because

apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Spirit of Laws, supra, at p. 70, § 6 (emphasis added).

Consistent with the principles articulated by Montesquieu, on June 13, 1787 the first draft of the Constitution's provisions that established the federal government was introduced at the Constitutional Convention. This draft specifically created the three branches of government contemplated by Montesquieu, which had their constitutional powers clearly separated and circumscribed. *Madison's Journal* at pp. 160-61.[5]

In response to those who opposed ratification of the Constitution during the ratification debates, James Madison, echoing Montesquieu, addressed the issue of separation of powers in Federalist #47[6]:

> "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Federalist Papers, supra, at 301.

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[5] Madison, James, *Journal of the Constitutional Convention (kept by James Madison)*, (1840 Ed.) reprinted 1893, Chicago: Scott, Foresman and Company (*"Madison's Journal"*).

[6] Hamilton, Alexander, Madison, James, Jay, John, *The Federalist Papers*, (1961), New York: NAL Penguin, Inc. (*"Federalist Papers"*).

In his *2nd Treatise*, Locke starts with identifying that we, as humans, desire to enter into society with one another:

> "God have made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society..."

2nd Treatise, supra, at 42.

Locke reasons that in order to understand the origins of civil government, one must first understand the state of humans prior to entering into society. Locke posits what he calls the "*state of nature.*" In this state, humans are vested with all aspects of liberty, including the liberty to execute laws upon one another. Of course, this condition leads to every person being prosecutor, judge, jury, and executioner, which actually results in the **loss** of liberty. *Id.* at 8. That in order to secure liberty, humans enter into society by creating civil government. Hence, Locke argues in favor of consent theory (i.e., that government derives its powers from the consent of the governed). *Id.*

Locke further expounds upon the consent theory by presenting the argument that not only do humans have the plenary power to establish government, but also the power to alter or abolish their government in the event it becomes tyrannical:

> "But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel what they lie under, and see whither they are going; it is not to be wondered, that they should then rouze themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected."

Id. at 113. This passage was paraphrased and incorporated into the Declaration by Thomas Jefferson as the legal basis for separating from Great Britain:

> "But when a long train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it

is their Right, it is their Duty, to throw of such Government, and to provide new guards for their Security."

U.S. Decl. Of Ind.

Once again, it is made clear by Locke that the *source* of these powers (i.e., to institute and abolish government) reposed in the people comes not from government but God:

> "[W]henever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, ***which God hath provided for all men***, against force and violence."

2nd Treatise, supra, at 111 (emphasis added).

As the foregoing discussion of the political philosophy promoted by Sydney, Montesquieu, and Locke establishes, the predominating political principle (that the people obtain their liberty from God, rather than government) is present throughout the writings of the Founders. For example, in his *Summary View of Rights of British America*[7], Thomas Jefferson identifies the source of our Liberty:

> "The God who gave us life, gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them."

Summary View, supra, at 265.

From a legal point of view, what is important to the underpinnings of our Nation's form of government is not whether one believes in God, but rather that the principles upon which our Nation was founded remain intact and known to everyone. That is to say, what is important is that we understand that our government is subordinate to the people because our rights come not from government but God. This is not a theological notion, but a clearly defined political

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[7] Jefferson, Thomas, *A Summary View of the Rights of British America*, (1774), p. 265, reprinted in *Annals of America*, Vol. 2, (1976). Chicago: Encyclopaedia Britannica, Inc., ("*Summary View*").

have a new birth of freedom; and that *government of the people, by the people, and for the people* shall not perish from the earth."[8]

Of course it is no secret that the phrase "*one Nation under God*" in the Pledge is ostensibly quoted from the Gettysburg Address. In writing those words, President Lincoln had in mind the political principles upon which our form of government was established and the writings of the Founders, as well as Sydney, Montesquieu, and Locke.

Similarly, under the district court's view of the Establishment Clause, a public school teacher's recitation of the Emancipation Proclamation during Black History month would transgress the Establishment Clause. In his Emancipation Proclamation, President Lincoln concludes with the following:

> "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the ***gracious favor of Almighty God.***"[9]

Can liberty long survive if the federal courts begin to excise the word "*God*" from our founding documents and the writings of the Founders? Is this Court prepared to make U.S. district courts ***ad hoc*** **editorial boards** vested with power to review and excise words from our founding documents and the writings of the Founders? From where in the Constitution would such a power emanate? This, of course, would be the inevitable outcome if this Court affirms the district court's rationale.

As the foregoing demonstrates, the phrase "*under God*" is an expression of political philosophy studied and adopted by the Founders to mean that the people receive their rights not from government but God. Whether or not one believes in God is irrelevant to the principle, as it protects both believer and unbeliever.

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[8] Lincoln, Abraham, *The Gettysburg Address*, (1863), reprinted in *Annals of America*, Vol. 9, pp. 462-63 (1976). Chicago: Encyclopaedia Britannica, Inc.

[9] Lincoln, Abraham, *The Emancipation Proclamation*, (1863), reprinted in *Annals of America*, Vol. 9, p. 399 (1976). Chicago: Encyclopaedia Britannica, Inc.

As the people are vested with plenary power to govern themselves, government is "instituted" by the will and consent of the people. Essentially, "*under God*" is shorthand for "government is instituted by and subordinate to the people." In accordance with the foregoing history and as supported by the authorities set forth in the following section, the Pledge is neither a religious act, profession of religious belief, nor prayer.

B. As The Phrase "*under God*" In The Pledge Is Not A Religious Activity, Profession Of Religious Belief, Or Prayer, It Does Not Contravene The Establishment Clause

It is clear from its opinion that the district court does not believe that the Pledge is a secular statement, but rather is tantamount to a religious activity, prayer, or profession of faith. As will become clear, this assertion does not survive a proper analysis under *Lee* or *Santa Fe* (see below). Before turning to *Lee* and *Santa Fe* it is worth recounting the U.S. Supreme Court's Establishment Clause decisions in the context of prayer and religious exercises in public schools.

In *Engel v. Vitale*, 370 U.S. 421 (1962)("*Engel*"), the Supreme Court found violative of the Establishment Clause the following **state-*composed*** and ***state-mandated*** *prayer*, which was required to be recited by children attending New York's public school:

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

Id. at 422. In finding that the state-mandated prayer contravened the Establishment Clause, the Supreme Court held:

> "There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regent's **prayer is a *religious activity***. It is a ***solemn avowal of faith*** and ***supplication for the blessing of the Almighty***."

Id. at 424 (emphasis added).

This Court should see the stark contrast between the ***prayer*** in *Engel* and the Pledge in this case. In *Engel*, the New York prayer is directed to a ***deity***, whereas in this case the children's pledge is directed to the Flag of the United States of America. Moreover, the manner in which the Pledge is recited bears none of the hallmarks of a prayer. That is, it is neither a *"solemn avowal of faith"* nor a *"supplication for the blessings of the Almighty."* *Id.* In truth and fact, the Pledge is merely a patriotic act of affirming one's allegiance to the United States of America. Of course, this is the very reason why Appellees could **not** be **compelled** to recite the Pledge. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 645 (1943)("*Barnette*").

Furthermore, in *Engel*, the Supreme Court was careful to distinguish the state-composed and state-mandated *prayer* in that case with what it characterized as "***patriotic***" or "***ceremonial***" occasions:

> "There is, of course, nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contains references to the ***Deity*** or by singing officially espoused anthems which include the composer's profession of faith in a ***Supreme Being***, or with the fact that there are many manifestations in our public life of belief in ***God.*** Such ***patriotic*** and ***ceremonial*** *occasions* ***bear no true resemblance*** to the unquestioned ***religious exercise*** that the State of New York has sponsored in this instance."

Id. at 435, *fn.* 21 (emphasis added). So too, the reciting of the Pledge in public schools "*bears no true resemblance*" to a religious act, profession of religious belief, or prayer. *Id.*

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)("*Schempp*"), the Supreme Court considered similar state statutes from Pennsylvania and Maryland, which required the reading of verses from the Bible

before the commencement of instruction in public schools. The Pennsylvania statute required the reading of ten verses from the Bible; the Maryland statute required the reading of at least one chapter from the Bible in conjunction with the Lord's Prayer. *Id.* at 205 and 211, respectively. The Supreme Court found that these practices constituted: ***"religious exercises."*** *Id.* at 224 (emphasis added). In his concurring opinion, Justice Brennan found that history demonstrates that:

> "[D]aily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially ***religious exercises***."

Id. at 277-78 (emphasis added).

Finally, it is interesting to note that in the Pennsylvania case the Bible reading and recitation of the Lord's Prayer was followed by the students reciting the Pledge (which at that time had the phrase "*under God*" **included** in it). Although the Supreme Court made no constitutional determination at that time, the Pledge (with its inclusion of the phrase "*under God*") did not go unnoticed to Justice Brennan, who made the following observation relating to the constitutional aspects of the Pledge, which is consistent with *amicus* Pacific Justice's position:

> "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.*" Thus, **reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.**"

Id. at 304 (emphasis added). This is precisely the point being made by *amicus* Pacific Justice. No Supreme Court justice has ever considered the reciting of the Pledge to be a *religious exercise* or *activity, profession of religious belief, or prayer.*

In *Wallace v. Jaffree*, 472 U.S. 38 (1985)("*Wallace*"), the Supreme Court was called upon to review an Alabama statute that authorized a 1-minute period of silence in all public schools "*for meditation or voluntary prayer.*" In finding this

provision in contravention of the Establishment Clause, the Supreme Court found that the express legislative intent was to **encourage** ***religious activity*** and return ***prayer*** to public schools:

> "[The statute was enacted] for the sole purpose of expressing the State's endorsement of ***prayer activities*** for one minute at the beginning of each schoolday. The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion."

Id. at 60 (emphasis added). In response to Chief Justice Rehnquist's concern that the *Wallace* logic might result in the Pledge being held unconstitutional because it includes the phrase "*under God*," Justice O'Connor provided assurances this would not be the case:

> "In my view, the words '*under God*' in the Pledge, as codified at 36 U.S.C. § 172, serve as an acknowledgment of religion with 'the *legitimate* ***secular*** purposes of solemnizing public occasions, and expressing confidence in the future.'"

Id. at 78, *fn.* 5 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693; emphasis added).

Keeping the foregoing decisions in mind, review of *Lee* and *Santa Fe* (the cases relied upon by the district court) will demonstrate that the inclusion of the phrase "*under God*" in the Pledge does not run afoul of the Establishment Clause.

In *Lee v. Weisman*, 505 U.S. 577 (1992)("*Lee*"), the Supreme Court considered the constitutionality of a rabbi-led invocation and benediction prayers at a graduation ceremony at a Providence, Rhode Island public middle school. Although both the invocation and benediction were nonsectarian, they both were addressed to "God" and concluded with "Amen." *Id.* at 581-82.

Although invited to by petitioners and the United States in *Lee*, the Supreme Court would not reconsider *Lemon*, instead applying the so called "coercion test." In deferring reconsideration of *Lemon*, the Supreme Court concluded that:

> "The government involvement with religious activity in this case is so pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us."

Id. at 587 (emphasis added). In *Lee*, the government's pervasive involvement include, for example, the State of Rhode Island's official (i.e., the principal):

a. **deciding** that the invocation and benediction prayers should be given at the graduation ceremony;

b. **selecting** the religious participant (i.e., Rabbi Gutterman); and

c. **determining** the content and scope of the prayers.

Id. at 587-88.

The Supreme Court had no qualms with the good faith nature of the principal's actions, but concluded that this was **not** the constitutional issue:

> "The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all *when the object is to* ***produce a prayer*** *to be used in a* ***formal religious exercise*** *which students, for all practical purposes are obliged to attend.*"

Id. at 588-89 (emphasis added). Thus, the constitutionally operative facts are the ***prayer*** and ***formal religious exercise*** and obligatory attendance, all of which occurred under the control of the State of Rhode Island.

In determining that the school district's practice resulted in a violation of the "coercion test," the Supreme Court found that although there was no requirement for students to attend their graduation ceremony as condition for graduating, these types of ceremonies are, for all practical purposes, obligatory. This is because:

> "Everyone knows that, in our society and in our culture, high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself

> from graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that is his or her right and duty to assume in the community and all of its diverse parts."

Id. at 595. Going on to find under the "coercion test" that the prayers in *Lee* were in contravention of the Establishment Clause, the Supreme Court held:

> "The ***prayer exercises*** in this case are especially improper because the State has in every practical sense ***compelled*** attendance and participation in an ***explicit religious exercise*** at an event of singular importance to every student, one the objecting student had no real alternative to avoid."

Id. at 598 (emphasis added).

Clearly, recitation of the Pledge does not implicate the foregoing principles embedded in the "coercion test." Moreover, the underlying premise of *Lee* is a **state-compelled**, ***state*-composed** and ***state*-sponsored** prayer in a ***state*-sponsored** formal ***religious exercise***. In the case at Bar, without a constitutional specter as a *sine qua non*, there can be no coercion. Stated differently, under *Lee* the reciting of the Pledge does not coerce Appellees to listen or be exposed to a ***state*-composed** or ***state*-sponsored *prayer*** during a ***state*-sponsored** formal ***religious exercise***. In the first instance it is not the coercion that makes the constitutional claim under *Lee*, but the state-composed and state-sponsored prayer given during the state-sponsored formal religious exercise. This is precisely where the Appellees' logic and the district court's decision are fatally flawed: they assert and conclude the Pledge **is** a *religious activity, profession of religious belief*, or *prayer,* then rush to the "coercion test" in *Lee* to strike-down the Pledge. Contrary to the Appellees and district court's reasoning but consistent with *Lee*, there is no Establishment Clause violation implicated by the Pledge.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)("*Santa Fe*"), the Supreme Court considered the constitutionality of the recitation of a voluntary student-led, student-initiated prayer by students from the Santa Fe High School over the public address system prior to the kick-off of all home varsity football games. Initially, the Supreme Court distinguished school prayer cases from free speech cases in a limited public forum such as, for example, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995)("*Rosenberger*"). The Supreme Court found that there was no evidence in *Santa Fe* that indicated that the school district opened the forum for unrestricted speech, thereby removing it from the free speech analysis. *Santa Fe, supra*, 530 U.S. at 303-04.

The fact that in *Santa Fe* the school district's policy permitted the students themselves to select their chaplain, who would give the prayers at the football games, was not persuasive to the Supreme Court. This is because the district's policy also provided that the person who was elected would also prepare the prayer, which had the effect of excluding minority views on what should be contained in the prayer. Citing *Barnette, supra*, the Supreme Court explained why such a voting system may not be utilized in the context of the Establishment Clause:

> "[T]his student election does nothing to protect minority views, but rather places the students who hold such minority views at the mercy of the majority. Because 'fundamental rights may not be submitted to vote; they depend on the outcome of no elections,' the District's elections are insufficient safeguards of diverse student speech."

Id. at 304-05. Furthermore, the Supreme Court dismissed the school district's contention that it had a hands-off policy towards the selection and delivery of the prayer at football games:

> "[T]he realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the 'degree of school involvement' makes it clear that the pre-game prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position."

Id. at 305.

In fact, in *Santa Fe* the school district's involvement in the prayer given at high school football games was pervasive. For example, by way of its own policy the school district had the power to do any of the following: permit or deny the delivery of the prayer; designate the procedures for the election of the person giving the prayer; and supervise the student council relative to conducting the election. The most acute violation of all was the fact that the ***only*** type of message that the school district would permit at the beginning of the football games was a ***religious*** one. The Supreme Court also found that the intent of the school district was to ***promote*** a ***religious*** message because the school district's policy indicated that the ***purpose*** of the prayer was "to solemnize the event." *Id.* at 306-07.

As a final point, in the context of Establishment Clause jurisprudence, the standard for assessing whether a state's practice or policy endorses religion is an ***objective*** test as to whether the ***"reasonable observer*** *would view a government practice as endorsing religion."* *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995)("*Capitol Square*"). As explained by Justice O'Connor in her concurring opinion, the "reasonable observer" standard in the context of Establishment Clause cases makes good sense because:

> "...there is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of display might feel uncomfortable."

Id. at 780 (emphasis original). What Justice O'Connor is referring to is not the "reasonable observer" but the unreasonable and hypersensitive observer.

Moreover, this inquiry may not be answered in the abstract or conducted in a vacuum:

> "[T]he reasonable observer in the endorsement inquiry ***must*** *be deemed aware of the* ***history and context*** of the community and forum in which the religious display appears...'the history and ubiquity of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.'"

Id. at 780 (also quoting *County of Allegheny v. ACLU,* 492 U.S. 573, 630).

In *Santa Fe*, the Supreme Court applied the "reasonable observer" test in reaching its conclusion that the pre-game prayer gave the perception that the school district endorsed the prayer:

> "In this context, the members of the listening audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a ***religious*** activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer.'"

Santa Fe, supra, 530 U.S. at 308 (also quoting *Wallace*, *supra*, 472 U.S. at 76; emphasis added).

Of course, in the context of the Pledge, the Court must consider the history and principles discussed in Section II.A, *supra*, in assessing whether the Pledge creates the perceived or actual endorsement of religion. As discussed at length in Section II.A, *supra*, no "reasonable observer" could conclude that the Pledge is a religious act, profession of religious belief, or prayer that endorses religion. In fact, no such evidentiary finding is anywhere to be found in the record. Moreover,

> "[T]he endorsement inquiry is **not** about the perceptions of particular individuals or saving ***isolated nonadherents*** from the discomfort of viewing symbols of a faith to which they do not subscribe."

Id. at 779 (emphasis added). It should be obvious from the Nation's outrage after the Pledge was first declared unconstitutional in *Newdow I* and recently declared unconstitutional by the district court in this case that the Appellees' objection to the Pledge is **not** from the "reasonable observer" perspective, but rather from the "***isolated nonadherent's***" perspective.

Applying the foregoing Establishment Clause decisions, along with the principles discussed in Section II.A, *supra*, the phrase "*under God*" is nothing more than an expression of the political philosophy adopted by the Founders when establishing our form of government. As such, it fails to contravene the Establishment Clause.

First, there is no evidence to establish that the Appellants' purpose of adopting 4 U.S.C. section 4, the California's Patriotic Exercise Statute (Gov. Code section 52720), or the school district's policy that requires teachers to lead willing students in reciting the Pledge of Allegiance (the "Pledge") at the beginning of each school day were done with the intent of promoting or endorsing religion. In fact, the legislative history is to the contrary.

Second, the inclusion of "*under God*" in the Pledge does not *ipso facto* create a profession of faith, as suggested by the district court, but rather a *secular* expression of political philosophy and history.

Third, the inclusion of the phrase "*under God*" in the Pledge does not result in those *swearing* allegiance to God. The plain language of the Pledge clearly disputes this claim in this regard. As articulated in *Engel*, the hallmark of a religious act or prayer is that it is a "*solemn avowal of divine faith and supplication for the blessings of the Almighty.*" *Engel, supra*, 370 U.S. at 425 (emphasis added).

Neither the Pledge nor the manner in which the Pledge is recited has the hallmarks of a religious act or prayer as identified in *Engel*. In reciting the Pledge, one pledges allegiance to the Flag and the Nation, **not** to God. Otherwise, the Pledge would have been written in the conjunctive in which one pledges allegiance to the Flag, the Nation, and ***God***, which is not how it is written. Of course, this is how the district court must interpret it in order to convert it from a secular statement into a religious act, profession of religious belief, or prayer.

Fourth, the inclusion of the phrase "*under God*" is not a religious act, profession of religious belief, or prayer. Prayers are distinctive by their very nature. That is to say, they are directed to a ***deity*** and close with "***amen.***" In contradistinction, the Pledge's focus is the Flag, not a deity. So, as a matter of fact, the Pledge does not constitute a prayer. Only one trying to find an Establishment Clause violation would characterize the Pledge as a religious act, profession of religious belief, or prayer.

Fifth, in contradistinction to the Supreme Court's decision in *Schempp*, the Pledge does not "*possess a devotional and religious character*;" nor is the Pledge "*in effect a religious observance.*" It is also worth mentioning that the religious character of reciting verses from the Bible in *Schempp* was followed by the children reciting the Lord's Prayer. Thus, individually or collectively, the reading of the Bible and recitation of the Lord's Prayer exceeded the state's constitutional boundaries under the Establishment Clause. *Schempp, supra,* 374 U.S. at 210.

Sixth, the Pledge is constitutionally consistent with *Lee* because the Pledge is **not** a "***prayer** to be used in a **formal religious exercise.***" *Lee, supra,* 505 U.S. at 588-89. Unlike the record in *Lee*, there is absolutely no evidence in the record in this matter to support the proposition that the Pledge was designed to be a state-sponsored religious act, profession of religious belief, or prayer to be used in a state-sponsored religious exercise.

Seventh, the Pledge does **not** involve the actual or perceived state-sponsored ***endorsement*** *of religion* as articulated in *Capitol Square* and *Santa Fe, supra.* For example, the Pledge does not have in its title the word "prayer," as did the policy in *Santa Fe* (i.e., "***Prayer*** at Football Games" regulation). Nor was it the intent of Congress, the State of California, or the school district to have the Pledge to serve as a *state-sponsored prayer* to be given during a *state-sponsored religious activity* such as in *Santa Fe.* Of course it is undisputed that the Pledge is state-sponsored as it is mandated by California Education Code § 52720 and the school district's policy. That, however, is only half of the equation under *Capitol Square* and *Santa Fe.* In order for a state action to transgress the Establishment Clause it must be perceived to be **both** *sponsored* by the state **and** an ***endorsement*** *of religion.* The Pledge has never been considered by the Supreme Court to be a religious activity, profession of religious belief, prayer, or an endorsement of religion.

Eighth, the purpose and intent behind the recitation of the Pledge in public schools in California is secular because the schools are commanded to conduct "appropriate ***patriotic*** **exercises**," which may but not necessarily include the Pledge. Cal. Ed. Code, §52720. Unlike all of the Establishment Clause cases where the Supreme Court found a violation, the Pledge is **not** designed or intended for a ***religious*** purpose; nor does its recitation occur within a state-mandated religious exercise or activity; nor can the "*reasonable observer*" come away with the impression that it is a state-sponsored religious act, profession of religious belief, or prayer, or that it occurs during a state-sponsored religious activity. *Santa Fe* and *Capitol Square, supra.*

Ninth, the Pledge is no stranger to the Supreme Court. On numerous occasions in the clear constitutional context of Establishment Clause cases, the Supreme Court has placed the Pledge in **contradistinction** with the state-sponsored activities that constituted **violations** of the Establishment Clause. For

example, in *Schempp*, students recited the Pledge after Bible reading and reciting the Lord's Prayer, and in *Lee* the Pledge was recited before the rabbi gave the invocation at the graduation ceremonies. The Pledge was not included within the findings of state-mandated morning activities that contravened the Establishment Clause. In addition, there are many explicit references by the Supreme Court relative to the constitutionality of the Pledge itself. *See, e.g., Lynch, supra*, 465 U.S. at 676 ("Other examples of reference to our religious heritage are found...in the language 'One nation under God,' as part of the Pledge of Allegiance to the American Flag. That pledge is recited by many thousands of public school children—and adults—every year."); *Allegheny, supra,* 492 U.S. at 602-03 ("Our previous opinions have considered in dicta the motto ["In God we trust"] and the pledge ["under God"], characterizing them as ***consistent*** with the proposition that government may not communicate an endorsement of religious belief."); *Wallace, supra*, 472 U.S. at 78, fn. 5 ("[T]he words "under God" in the Pledge...serves as an acknowledgment of religion with 'the *legitimate* ***secular*** purposes of solemnizing public occasions, and expressing confidence in the future."); *Schempp, supra,* 374 U.S. at 304 ([R]eciting the pledge may be no more a religious exercise than the reading aloud of Lincoln's Gettysburg Address."); *Engel, supra*, 370 U.S. at 440, fn. 5 (In his concurring opinion, Justice Douglas indicated that the Pledge "in no way run[s] contrary to the First Amendment").

Finally, a brief discussion of the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21,* 980 F.2d 437 (7th Cir.1992), *cert. denied,* 508 U.S. 950 (1993)*("Sherman")* is instructive. At issue in *Sherman* was an Illinois statute that mandated that the Pledge must be recited each school day. Consistent with *Barnette*, students were free to not participate in reciting the Pledge. When confronted with the same Establishment Clause challenge to the Pledge as in this case, the Seventh Circuit framed the issue as follows:

> "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?"

Id. at 445. In *Sherman*, the Seventh Circuit answered this question in the **negative**. The Seventh Circuit reasoned that our history, our historical documents (e.g., Declaration, Gettysburg Address, etc.), and the Supreme Court's Establishment Clause decisions (*e.g.*, *Lee*, *Engel*, *Schempp, Lynch,* etc.) demonstrate that the Pledge is **not** a state-sponsored *prayer*, but rather a ***patriotic*** *expression. Sherman, supra*, 980 F.2d at 445-48 (emphasis added). As the reciting of the Pledge was found to be a ***patriotic*** expression (rather than a prayer) it did **not** give rise to a claim under the Establishment Clause. *Id.*

This Court should adopt the Seventh Circuit's decision in *Sherman*.

CONCLUSION

Based upon the foregoing, *Amicus Curiae* Pacific Justice Institute respectfully requests the Court to **reverse** the decision of the district court and remand the case to the district court with instructions to dismiss the case.

Dated: May 31, 2006. Respectfully submitted

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By: _____

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Certificate of Compliance with Type-Volume Limitation,
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1. This brief does not comply with the page limitations imposed by F.R.A.P. 29(d) and does not comply with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **7,639** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

2. Concurrent with the filing of this brief, *Amicus Curiae* Pacific Justice Institute has filed a motion for leave to file longer brief pursuant to F.R.A.P. 29(d).

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft WORD 2003 (11.5604.5606) in 14 Point Font and Times New Roman style.

Dated: May 31, 2006. Respectfully submitted,

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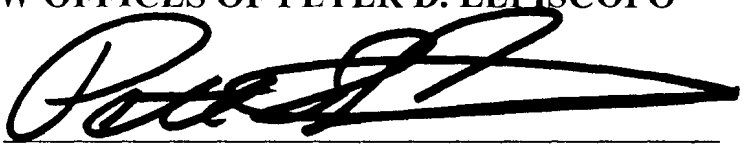
By: 

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I hereby certify that on the 31st day of May, 2006, true and correct copies of the foregoing were served by U.S. Mail:

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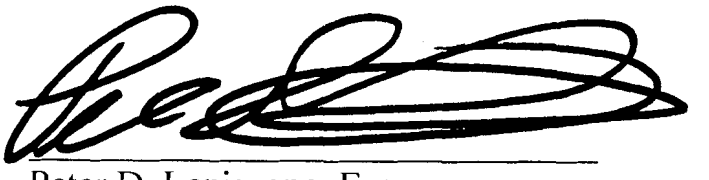

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