No. 05-17344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN ROE; AND ROECHILD-2,
Plaintiffs/Appellees,
vs.
RIO LINDA UNION SCHOOL DISTRICT,
Defendant/Appellant
and
UNITED STATES OF AMERICA,
Defendant/Intervenor - Appellant,
and
JOHN CAREY, *et al.*
Defendants/Intervenors - Appellants

On Appeal from the United States District Court
for the Eastern District of California
Honorable Lawrence K. Karlton
Case No. CIV-05-0017-LKK/DAD

DEFENDANT/APPELLANT RIO LINDA UNION SCHOOL DISTRICT'S OPENING BRIEF

Terence J. Cassidy, SBN #099180
Michael W. Pott, SBN #186156
PORTER, SCOTT, WEIBERG & DELEHANT
350 University Avenue, Suite 200
Sacramento, CA 95825
(916) 929-1481 Telephone
(916) 927-3706 Facsimile
Attorneys for Defendant/Appellant Rio Linda Union School District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

MISCELLANEOUS

I.

STATEMENT OF JURISDICTION

1. District Court Jurisdiction: Subject matter jurisdiction in the district court to consider the claims of Jan Roe and Roe Child-2 against Rio Linda Union School District rested on 28 U.S.C. § 1331 as Plaintiffs alleged violations of 42 U.S.C. §1983 and 42 U.S. C. §§2000bb *et seq.*

2. Jurisdiction in the Court of Appeals: This Court's jurisdiction rests on 28 U.S.C. § 1291.

3. Appealability: The issuance of a permanent injunction by the district court against Rio Linda Union School District disposed of all claims between the remaining parties.

4. Timeliness: The permanent injunction was issued by the district court on November 18, 2005. Excerpt of Record (hereafter referred to as "ER") 241-244. Defendants/Intervenors John Carey, *et al.* filed a Notice of Appeal on November 21, 2005. ER 245-246. Defendant Rio Linda Union School District filed a Notice of Appeal on December 9, 2005. ER 247-250. Defendant/Intervenor United States of America filed a Notice of Appeal on January 13, 2006. ER 251-254. Therefore, the Notices of Appeal filed by Defendants were timely. Fed. R. App. Proc. 4(a)(1)(A) and (B).

II.

STATEMENT OF ISSUES

1. Whether the District Court erred in denying Rio Linda Union School District's Motion to Dismiss and issuing a permanent injunction prohibiting the daily, voluntary recitation of the Pledge of Allegiance for the purpose of satisfying the patriotic exercise requirement of California Education Code Section 52720 because it found that it is bound by the holding in *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) although the United States Supreme Court reversed that decision in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004) on the grounds that the plaintiff in that case lacked prudential standing and therefore the federal courts lacked federal jurisdiction?

2. Whether the district court properly denied Rio Linda Union School District's Motion to Dismiss which sought to uphold a public school district policy requiring the daily, voluntary recitation of the Pledge of Allegiance, which includes the words "under God", on the grounds that recitation is voluntary and the Pledge does not violate the Establishment Clause of the First Amendment as a matter of law?

III.

STATEMENT OF THE CASE

Plaintiffs Michael Newdow, Jan Roe, RoeChild-1, RoeChild-2, Jan and Pat Doe and DoeChild filed a complaint challenging the constitutionality of 4 U.S.C. § 4, which codifies the wording of the Pledge of Allegiance. ER 1-142. In the lawsuit, the Plaintiffs also challenged the practices of four public school districts that have policies which allow for recitation of the Pledge of Allegiance to be used to satisfy the patriotic observance requirement of California Education Code Section 52720. ER 1-142, 199. Named as Defendants were the United States of America, the United States Congress, Peter Lefebre (who is a congressional officer), the State of California, the Governor of California, California's Education Secretary, the Rio Linda Union School District ("RLUSD") and its Superintendent, the Elk Grove Unified School District ("EGUSD") and its Superintendent, the Elverta Joint Elementary School District ("EJESD") and its Superintendent, and the Sacramento City Unified School District ("SCUSD") and its Superintendent. ER 1, 9-11 and 199.

In 2000, Newdow filed suit against the EGUSD and a number of other Defendants seeking a declaration that the addition of the words "under God" to the Pledge of Allegiance in 1954 violated the Establishment and Free Exercise Clauses of the United States Constitution. *Elk Grove Unified School District v. Newdow*, 542

U.S. 1, 8 (2004). Newdow also requested an injunction be issued against the EGUSD's policy requiring daily recitation of the Pledge. *Id.* In that case, the District Court dismissed the case on July 21, 2000, finding that the Pledge does not violate the Establishment Clause. *Id.* at 9. Newdow appealed and this Court found that he had standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. *Id.* On the merits, over a dissent by Judge Fernandez, this Court held that the 1954 Act of Congress adding the words "under God" to the Pledge and the EGUSD's policy violates the Establishment Clause of the First Amendment. *Id; Newdow v. U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002) (referred to herein as *Newdow I*).

After that decision was announced, new information came to light regarding legal custody issues between Newdow and the mother of his daughter. *Id.* This resulted in a closer examination of Newdow's standing and on September 25, 2002, this Court issued an order prohibiting Newdow from including his daughter in the lawsuit as an unnamed party or suing as her "next friend." *Id.* at 10; *Newdow v. U.S. Congress*, 313 F.3d 500, 502 (9th Cir. 2002) (referred to herein as *Newdow II*).

On February 28, 2003, this Court issued an amended opinion eliminating the original opinion's discussion of Newdow's standing to challenge the 1954 Act and declining to find whether Newdow was entitled to some constitutional relief as it

pertains to the Act. (*Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) (referred to herein as *Newdow III*). Left intact was the this Court's decision that EGUSD's policy violates the Establishment Clause. (*Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 10 (2004) (hereafter referred to as *EGUSD).*

EGUSD then sought review of this Court's decision by the Supreme Court. *Id.* On June 14, 2004, the Supreme Court reversed this Court's decision and held that Newdow lacked prudential standing to bring his lawsuit in federal court. *Id.* at 17-18. After the *EGUSD* decision, Newdow and the additional Plaintiffs mentioned above filed this lawsuit.

Motions to Dismiss were filed by the various Defendants and the District Court issued an order on the Motions to Dismiss on September 14, 2005. ER 198-227. In their opposition to the Motions to Dismiss, Plaintiffs conceded that the Superintendents should be dismissed and the District Court granted the motion to dismiss as it pertained to the Superintendents. ER 199 and 227. The District Court also granted the school district Defendants' Motion to Dismiss as it pertained to the claims brought by Newdow against the EGUSD and the SCUSD on the grounds he lacked prudential standing and he did not have taxpayer standing. ER 210-216. His was the only claim asserted against SCUSD; therefore it was dismissed from the case.

The District Court then examined the effect of the *Newdow III* decision in conjunction with the Supreme Court's decision in *EGUSD* and found that there is a distinction between a case being reversed on other grounds and a case being vacated. ER 219. Next, the District Court found that there is a distinction between prudential standing and Article III standing and held that a federal court may reach the merits when only prudential standing is at issue. ER 220. The District Court thus held that where an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court's decision binds the District Court. ER 221. Because the District Court concluded it was bound by this Court's decision in *Newdow III*, it found that the school districts' patriotic observance policies violate the Establishment Clause. ER 221-223. The District Court then invited Plaintiffs to file a request for entry of a restraining order. ER 223. Based on the finding that the District policies violate the Establishment Clause, the District Court held that Plaintiffs' claims against the federal defendants (United States of America, United States Congress and Peter Lefebre) were moot and any claims relating to the federal statute must be dismissed. ER 223-223.

On October 26, 2005, the District Court granted the Plaintiffs' and school district Defendants' stipulation that Plaintiffs Jan Roe and RoeChild-1were dismissing the case against the EJESD. ER 238-240. As they were the only Plaintiffs asserting claims against the EJESD, EJESD was dismissed from the case.

After a status conference was held, the District Court ordered the remaining Plaintiffs to file affidavits in support of an injunction regarding their standing and the merits. ER 241. On November 16, 2005, EGUSD moved to dismiss the claims of Plaintiffs Jan and Pat Doe and DoeChild that had been brought against it. ER 242. On November 18, 2005, the District Court granted the motion on the grounds the Doe Plaintiffs did not have standing to challenge the EGUSD pledge policy. ER 242-243. This resulted in the dismissal of EGUSD from the case. ER 243. Additionally, this left only Jan Roe and RoeChild-2 as Plaintiffs in the case.

By the Order dated November 18, 2005, the District Court also granted Jan Roe and RoeChild-2's request for a permanent injunction against the RLUSD prohibiting the RLUSD from: (1) applying its Board Policy AR 6115 to the extent the policy requires the recitation of the Pledge of Allegiance so as to fulfill the patriotic exercise requirement of California Education Code Section 52720; and (2) having its employees and agents lead students in reciting the Pledge of Allegiance for the purpose of satisfying the patriotic exercise requirement of California Education Code Section 52720. ER 243.

The District Court then stayed the permanent injunction pending the resolution of any and all appeals regarding this matter brought before this Court and the United States Supreme Court. ER 244. Thereafter, Defendants timely filed their Notices of

Appeal. ER 245-254.

IV.

STATEMENT OF FACTS

Plaintiff Jan Roe is an atheist who denies the existence of God. ER 18, ¶76. Roe is the parent of RoeChild-2, who is a student enrolled in one of the RLUSD's schools. ER 18, ¶77. When the First Amended Complaint was filed, RoeChild-2 was in kindergarten. ER 19, ¶86. The Roe Plaintiffs allege that the Pledge of Allegiance has been recited in RoeChild-2's class. ER 19, ¶77. Roe has been present in RoeChild-2's class when the teacher has led the class in reciting the Pledge. ER 19, ¶79. RoeChild-2 alleges that he or she has been forced to confront the Pledge when the class has been led by a teacher in reciting the Pledge or when RoeChild-2 has attended assemblies. ER 19, ¶87.

RLUSD's Board Policy 6115 titled "Ceremonies and Observances" contains the subheading "Patriotic Exercises." ER 190. Pursuant to that subheading, the RLUSD policy states "Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each day. The Pledge of Allegiance to the flag will fulfill this requirement. (Education Code 52720). Individuals may choose not to participate in the flag salute for personal reasons." ER 190-191.

In fulfilling the mission of a public school, the RLUSD is required to teach to the Academic Content Standards adopted by the California State Board of Education. ER 172-178. As early as kindergarten, students are to be taught examples of honesty, courage, determination and patriotism in American and world history stories and folklore. ER 173. In third grade, students are exposed to the reasons for rules, laws, and the United States Constitution, and know the histories of important local and national landmarks, symbols and essential documents that create a sense of unity among citizens. ER 174. By the end of fifth grade, students are to understand how the government derives its power from the people and know songs that express American ideals such as "America the Beautiful" and "The Star Spangled Banner." ER 175.

V.

SUMMARY OF THE ARGUMENT

The District Court erred in holding that it is bound by this Court's decision in *Newdow III* on the merits. The District Court differentiated between Article III standing and prudential standing and found that because the Supreme Court determined there was a lack of prudential standing in *EGUSD* and two other Circuit Court cases suggested that a Court can reach the merits even if there is no prudential standing, the decision on the merits in *Newdow III* remains binding precedent.

However, the Supreme Court has never held that a Court can review a matter on the merits when the plaintiff in the case lacks standing, whether it be Article III standing or prudential standing. To the contrary, Supreme Court precedent indicates that if a plaintiff lacks standing, then the federal court lacks jurisdiction to decide the merits of a case. Moreover, the cases cited by the District Court in support of its decision do not hold that it is appropriate to issue an advisory opinion on a matter of national significance when the plaintiff lacks standing to proceed in federal court. In addition, a decision that is reversed when the plaintiff does not have standing does not have any precedential value. Because the District Court erred in its application of law, the permanent injunction issued by the District Court should be vacated.

The District Court also erred in denying Defendant RLUSD's Motion to Dismiss because its patriotic exercise policy which provides for daily, voluntary recitation of the Pledge in public schools is constitutional as a matter of law. Justices of the Supreme Court have repeatedly stated that the Pledge does not violate the Establishment Clause. In similar cases, the Fourth and Seventh Circuits have upheld state statutes that provide for daily, voluntary recitation of the Pledge in public schools. Even if this Court applies the various Establishment Clause tests that have been adopted by the Supreme Court, recitation of the Pledge pursuant to the RLUSD patriotic exercise policy is constitutional. Further, because recitation of the Pledge is

voluntary, it does not infringe on plaintiffs' rights under the First Amendment.

VI.

STANDARD OF REVIEW

A District Court's decision regarding a question of law is reviewed *de novo*. *Tritchler v. County of Lake*, 358 F.3d 1150, 1154 (9th Cir. 2004). This requires this Court to consider the matter anew as if no decision had previously been rendered. *Ness v. Commissioner*, 954 F.2d 1495, 1497 (9th Cir. 1992).

A District Court's decision to grant a permanent injunction is reviewed for an abuse of discretion or application of erroneous legal principles. *Fortyune v. American Multi-Cinema, Inc.*, 364 F.3d 1075, 1079 (9th Cir. 2004). Underlying legal rulings made in conjunction with a permanent injunction are reviewed de novo. *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1176 (9th Cir. 2002).

VII.

THE DISTRICT COURT ERRED IN DECIDING IT IS BOUND BY THIS COURT'S DECISION ON THE MERITS IN *NEWDOW III*; THEREFORE THE PERMANENT INJUNCTION ISSUED AGAINST RLUSD IS IMPROPER

The District Court denied Defendant RLUSD's Motion to Dismiss on the grounds that is was bound by this Court's decision in *Newdow III*. ER 221-223. Based on that conclusion, the District Court issued a permanent injunction prohibiting the RLUSD from applying its Board Policy AR 6115 to the extent the policy requires

the recitation of the Pledge of Allegiance by willing students to fulfill the patriotic exercise requirement of California Education Code Section 52720. ER 243. The injunction also prohibits its employees and agents from leading students in reciting the Pledge for the purpose of satisfying the patriotic exercise requirement of California Education Code Section 52720. ER 243. Defendant RLUSD respectfully submits that the District Court erred because the Supreme Court reversed this Court and thus this Court did not have federal jurisdiction in *Newdow III* to make a ruling on the merits. Therefore the decision on the merits in *Newdow III* cannot be binding precedent.

A. IT IS INAPPROPRIATE TO MAKE *NEWDOW III* PRECEDENTIAL AUTHORITY ON A MATTER OF GREAT NATIONAL SIGNIFICANCE WHEN NEWDOW WAS NOT ENTITLED TO HAVE THIS OR ANY OTHER FEDERAL COURT DECIDE THE MERITS

In *EGUSD*, the Supreme Court noted that in every federal case the party bringing the lawsuit must establish standing to prosecute the case. *EGUSD,* 542 U.S. at 10. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* at 11, quoting, *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Prudential standing is a judicially self-imposed limit on the exercise of federal jurisdiction. *Allen v. Wright*, 468 U.S. 737, 751 (1984). If a party lacks prudential standing, then the federal Courts lack jurisdiction over the case.

As stated by the Supreme Court in *Steel Co. v. Citizens for a Better*

Environment, 523 U.S. 83, 94 (1998), "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." The question that jurisdiction be established first arises from the limits of the judicial power of the United States and is "inflexible and without exception." *Id.*

If the record reveals that the lower court was without jurisdiction, the Supreme Court has jurisdiction on appeal, not of the merits, but for "correcting the error of the lower court in entertaining the suit." *Id.*, quoting from *Arizonans for Official English v. Arizona*, 520 U.S. 43, 55 (1997). The statutory and constitutional elements of jurisdiction are essential to the separation of powers restraining the court from acting at times and from acting permanently regarding certain subjects. *Steel Co.*, 523 U.S. at 101.

In *Steel Co.* the Supreme Court denounced what this Court had described as the "doctrine of hypothetical jurisdiction," characterized as the practice of assuming jurisdiction for the purpose of deciding the merits *Id.* at 94. "Hypothetical jurisdiction produces nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this court from the beginning." *Id.* at 101. "For the court to pronounce upon the meaning of or the constitutionality of a

state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at 101-102. Thus, the inescapable conclusion is that if a federal court renders a decision in a case and during the case's pendency on appeal it is determined that the party bringing the action lacks the requisite standing, ergo the federal court lacked federal jurisdiction, any decision is void ab initio.

In this case, the District Court differentiated between Article III standing and prudential standing and found that because the Supreme Court determined there was a lack of prudential standing, the decision on the merits in *Newdow III* remains binding precedent. Thus, even though this Court did not have jurisdiction to rule on the merits in *Newdow III* due to Newdow's lack of prudential standing, the District Court held that this Court's decision on the merits is binding on lower courts. By recognizing that the *Newdow III* decision on the merits stands when this Court did not have jurisdiction, the District Court has in essence adopted the concept of hypothetical jurisdiction. If this type of hypothetical jurisdiction is permitted, then courts will be able to bypass the standing analysis and issue advisory opinions on the merits. Because this Court lacked the necessary jurisdiction to render a decision on the merits, *Newdow III* cannot be considered anything more than an advisory opinion. Therefore, a decision such as *Newdow III* over which the federal courts do not have jurisdiction is not binding precedent.

While *Steel Co.* addressed the issue of Article III standing, the Supreme Court has never held that it is appropriate for a lower court to reach the merits and "pronounce upon the meaning of or the constitutionality of a state or federal law" when the plaintiff does not have prudential standing. Further, the Supreme Court did not make such a distinction in *EGUSD* or find that this Court properly reached the merits when this Court lacked jurisdiction to proceed on the cause at all. In fact, the actions of the Supreme Court Justices in *EGUSD* suggest that they understood that their opinion eliminated any binding effect the *Newdow III* decision might have had.

First, in *EGUSD*, the Supreme Court "granted certiorari to review the *First Amendment* issue and, preliminarily, the question whether [Plaintiff Michael] Newdow has standing to invoke the jurisdiction of the federal courts." *EGUSD*, 542 U.S. at 5. Five Justices of the Supreme Court determined that Newdow lacked prudential standing to bring his lawsuit in federal court and reversed this Court's Judgment. *Id.* at 17-18. Three other Justices (Rehnquist, C.J., O'Connor, J., and Thomas, J.) found that Newdow had standing, but concurred in the outcome of the case because they reached the merits and found that the EGUSD's policy does not violate the First Amendment. *Id.* at 18, 45. Thus, the Supreme Court recognized that before even getting to the merits, Newdow had to establish that he had standing to bring the case in federal court.

Second, the Supreme Court stated that "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." *EGUSD*, 542 U.S. at 11. "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.'" *Id.* In so doing, the Court has to balance the obligation to exercise jurisdiction against the "deeply rooted" commitment "not to pass on questions of constitutionality" unless ruling on the constitutional issue is necessary. *Id.*

Therefore, the Supreme Court requires that even in cases where Article III standing arguably exists, federal courts must follow certain rules in an effort to avoid ruling on the constitutionality of an action unless a ruling on that action is necessary. If the Supreme Court avoids exercising its power to rule on the constitutionality of an action such as in *EGUSD*, then a lower court under the same circumstances should not be permitted to reach the merits of a case, nor should its ruling on constitutionality become binding precedent.

Third, the Supreme Court concluded its prudential standing analysis by stating,

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of

> the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. *Id.* at 17.

Under these circumstances, the Supreme Court stated that because of prudential standing concerns it was prudent for it to avoid reviewing the constitutionality of the EGUSD's Pledge recitation policy. Simply put, the Supreme Court found that Newdow was not entitled to have the merits of his dispute regarding a matter of great national significance (recitation of the Pledge of Allegiance in public schools) heard by a federal court because he lacked prudential standing. For that reason, the Supreme Court would certainly not expect that lower courts would treat the decision on the merits in *Newdow III* as binding precedent.

Fourth, a finding that *Newdow III* has precedential effect also ignores the opinions of former Chief Justice Rehnquist and Justices O'Connor and Thomas who expressly found that the EGUSD policy does not violate the Establishment Clause. *See EGUSD*, 542 U.S. at 18-53. Thus, to find that this Court's decision on the merits in *Newdow III* has precedential value, this Court must ignore specific proclamations of the Supreme Court regarding the constitutionality of the EGUSD Pledge recitation policy.

Moreover, based on their positions on the merits, it is clear that Chief Justice Rehnquist and Justices O'Connor and Thomas believed that this Court erred in its decision on the merits in *Newdow III*. Had these Justices believed that the Supreme Court's reversal in *EGUSD* had the effect of preserving the precedential impact of this Court's decision in *Newdow III*, they would have authored dissenting opinions, not concurring opinions. The fact that they authored concurring opinions is consistent with the idea that the Supreme Court intended the reversal to eliminate any precedential impact the *Newdow III* decision might have. Thus, the actions of the Supreme Court indicate that it did not intend its reversal of this court's decision in *Newdow III* to mean that this Court's decision on the merits in *Newdow III* would remain binding on lower courts.

For these reasons, Defendant RLUSD respectfully submits that *Newdow III* does not constitute binding precedent in this Circuit.

B. THE CASES CITED BY THE DISTRICT COURT DO NOT SUPPORT A DETERMINATION THAT THE *NEWDOW III* DECISION ON THE MERITS IS BINDING

To the extent the District Court relied on certain cases for the proposition that a court still has the ability to reach the merits when only prudential standing is in

dispute, Defendant RLUSD respectfully submits that the cases relied upon by the district court are distinguishable. The District Court first points to *American Iron and Steel Institute v. Occupational Safety and Health Admin.*, 182 F.3d 1261, 1274 (11th Cir. 1999), for the proposition that courts can resolve cases on the merits in certain circumstances even though the plaintiff may lack prudential standing. ER 220. In *American Iron*, the Eleventh Circuit reviewed the Occupational Safety and Health Administration's ("OSHA") new standards for respiratory protection in the workplace. 182 F.3d at 1264. One of the issues was whether a group of doctors had standing to challenge certain provisions of the standards. *Id.* The Court first stated that it was not troubled by the standing argument because other parties that had intervened in the case adopted many of the doctors' arguments. *Id.* Thus, a proper party was raising the same concerns as the doctors. Nevertheless, the Court then reviewed the standing issue and decided that it could assume standing because *Steel Co.* suggests that courts can disregard prudential standing issues in order to resolve cases where the merits are relatively easy. *American Iron*, 182 F.3d at 1274 n. 10. Contrary to that finding by the Eleventh Circuit, however, *Steel Co.* does not suggest that prudential standing issues can be ignored in order to reach the merits of a case.[1]

[1] In light of the Supreme Court's opinion in *Steel Co.*, the validity of the Eleventh Circuit's assertion in *American Iron* that prudential standing issues can be ignored in

order to reach the merits is questionable. Although *American Iron* was decided after *Steel Co.*, it does not appear that any of the parties in *American Iron* petitioned the Supreme Court for review to challenge that finding.

The *Steel Co.* Court discussed the fact that in *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974), the Supreme Court reviewed whether a cause of action existed before determining if the plaintiff in that case came within the "zone of interests" for which the cause of action was available. *Steel Co.*, 523 U.S. at 96-97. Only if the statute could be read to provide a private right of action was it necessary to determine if the plaintiff had standing to bring such a claim. *National Railroad*, 414 U.S. at 456. This is presumably what the *American Iron* Court is referring to when it states that courts can disregard prudential standing concerns to resolve cases on the merits. However, whether a statute provides a private right of action is a threshold question of law that does not necessarily constitute resolution on the merits. In any event, *National Railroad* is distinguishable from *EGUSD* because *EGUSD* did not involve a preliminary issue of whether a statute afforded Newdow the opportunity to challenge the constitutionality of the EGUSD's Pledge recitation policy. *American Iron* is also distinguishable because there were other plaintiffs who had standing to challenge the respiratory standards on the merits. *American Iron*, 182 F.3d at 1264.

In addition, assuming arguendo *American Iron* is correct in stating that *Steel Co.* suggests that courts can disregard prudential standing issues in order to resolve cases where the merits are relatively easy, the merits of the *Newdow III* case were

anything but easy to decide.

First, in order to bypass prudential standing so as to permit federal jurisdiction to reach the merits, some express finding by a lower court should be made to justify the nonadherence to *Steel Co.* Because the District Court in this case is rationalizing that possibility ex post facto, no such finding should be implied that this Court would have ruled on the merits in *Newdow III* despite the fact it did not have jurisdiction to do so. Moreover, the fact that the case was not relatively easy to decide should have weighed heavily against allowing prudential standing to be overlooked so as to allow this Court to reach the merits in *Newdow III*. The best example of this is the fact that the Supreme Court did not reach the merits in *Newdow III* because the Supreme Court recognized that Newdow lacked prudential standing.

Second, the merits issue in *Newdow III* was one of great national significance, i.e. whether the EGUSD policy requiring daily recitation of the Pledge of Allegiance by willing students so as to satisfy the patriotic exercise requirement of California Education Code Section 52720 violated the First Amendment. *EGUSD*, 542 U.S. at 9-11. Therefore, the Supreme Court was required to "guard jealously and exercise rarely" its power to make constitutional pronouncements. *Id.* at 11.

Third, the merits were controversial and challenged the limits of the highly unpredictable Establishment Clause jurisprudence. *See EGUSD*, 542 U.S. at 45.

(Thomas, J. concurring). For instance, the Ninth Circuit's rulings in both *Newdow I* and *Newdow III* were split 2-1. Further, the Ninth Circuit's holdings in both cases conflict with *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), as well as prior Supreme Court findings that the Pledge is constitutional, inter alia, *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 616-20 (1989). The Ninth Circuit's decision is also in direct conflict with the Seventh Circuit's decision in *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992). Since the ruling in *EGUSD*, *Newdow III* is also in conflict with the Fourth Circuit which found daily, voluntary recitation of the Pledge to be constitutional in a school setting in *Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005).

The District Court in this case also acknowledged the difficulty in deciding the Establishment Clause issue presented herein as follows:

> This court would be less than candid if it did not acknowledge that it is relieved that, by virtue of the disposition above, it need not attempt to apply the Supreme Court's recently articulated distinction between those governmental activities which endorses religion, and are thus prohibited, and those which acknowledge the nation's asserted religious heritage, and thus are permitted. ER 227, n. 22.

Further, the District Court observed that the doctrine is "inherently a boundary-less

slippery slope," that resolution depends on the "shifting, subjective sensibilities of any five members of the High Court," and that "any conclusion might pass muster." ER 227, n. 22. Therefore, it can not be said that *Newdow III* was a "relatively easy" case on the merits that would have allowed this Court to disregard the prudential standing issue and reach the merits.

The District Court also relied on *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001), for the proposition that the Ninth Circuit's decision on the merits is binding. ER 220. In *Environmental Protection*, the issue was whether a party that had secured a favorable judgment could appeal the prior entry of a preliminary injunction to challenge the findings by the District Court. This Court recognized an exception that would allow a prevailing party in an action to challenge an adverse collateral order. 257 F.3d at 1076. This exception would only permit a review, however, if the party retains a stake in the controversy satisfying Article III *and* the party can demonstrate prudential standing. *Id.* In *Environmental Protection*, this Court held that Pacific Lumber could not establish prudential standing for purposes of allowing the court to review the matter on the merits. *Id.* Instead, this Court reached the merits by finding that the lower Court was prohibited from taking the action it did because the matter was moot. *Id.* This is distinguishable from the instant case because in *Newdow III*, this Court did not

review the issue of prudential standing, nor did it find that it was appropriate to reach the merits of the case despite the fact Newdow did not have prudential standing.[2]

[2] Ironically, it appears that this Court vacated the prior preliminary injunction on the grounds that it was improperly entered due to mootness. Thus, it would seem that by analogy the fact that the *Newdow III* Court was divested of jurisdiction due to a lack of prudential standing would result in that decision necessarily being vacated.

Finally, none of the cases relied upon by the district court stand for the proposition that a lower court's decision on the merits is binding when the Supreme Court has ruled that a plaintiff did not have standing to bring the lawsuit. Even accepting the premise that a court "may reach the merits despite a lack of prudential standing," it does not "follow[]" that "where an opinion is reversed on prudential standing grounds, the remaining portion of the . . . decision binds the district courts below."[3] *See* ER 221. Indeed, had this Court's decision on the merits in *Newdow III* remained the "law" notwithstanding the Supreme Court's decision, the recitation of the Pledge would have been ultra vires conduct in school districts within this Circuit's jurisdiction for the past two years. But that, of course, is not the case, as evidenced by the fact that Newdow and his co-plaintiffs instituted a new action to challenge the school districts' Pledge practices.

---

[3] The reasoning of the District Court must be distinguished from a case where the Court has jurisdiction and only a portion of the case is reversed. That is, a portion of a case over which the Court has jurisdiction that is not reversed will ordinarily remain as binding precedent. In cases where jurisdiction is lacking over the entire action, however, the decision is void ab initio.

C. A DECISION THAT IS REVERSED WHEN THE PLAINTIFF DOES NOT HAVE STANDING DOES NOT HAVE ANY PRECEDENTIAL VALUE

The District Court found that because the Supreme Court in *EGUSD* did not specifically state that *Newdow III* was vacated, the District Court is bound by the ruling on the merits in *Newdow III*. ER 218-221. The District Court stated that a decision that is vacated has no precedential authority whereas a decision that is reversed on other grounds may still have precedential value. ER 219. However, the District Court did not rely on any case law that holds that a reversed decision still has precedential value. Instead, the District Court cited to *Durning v. Citibank N.A.*, 950 F.2d 1419, 124 n.2 (9th Cir. 1991), for the proposition that a vacated decision does not have precedential value. ER 219. From this and the *Durning* Court's reference to reversals on other grounds, the district court extrapolated that there is a distinction between a reversed decision and a vacated decision for purposes of the precedential impact of the decision. ER 219.The reasoning of the District Court on this issue is incorrect for three reasons.

First, the *Durning* Court did not hold that a decision that is reversed because the court lacked federal jurisdiction can still be precedential authority. Rather, it only commented that a decision that has been vacated has no precedential authority.

Second, courts have held that a reversal can have the same effect as when a

decision is vacated. For example, In *Universal Underwriters Ins. Co. v. McMahon Chevrolet-Oldsmobile*, 866 F.2d 1060, 1062-63 (8th Cir. 1989), the Eighth Circuit rejected the plaintiff's attempt to use a district court ruling as precedent where the Eighth Circuit had reversed the district court's ruling. In *Universal Underwriters*, the plaintiff was arguing about the severability of interests in an insurance policy. In so arguing, the plaintiff cited *Continental Casualty v. Employers Commercial Union Ins. Co.*, 344 F.Supp. 4 (S.D. S.D. 1972) as precedent on the severability issue. The Eighth Circuit rejected *Continental* as precedent because the Eighth Circuit had reversed that case without ever reaching the merits of the severability issue. *Universal Underwriters*, 866 F.2d at 1063. Thus, despite the fact the Eighth Circuit did not indicate in *Continental* that the decision was reversed and vacated, the Eighth Circuit found that a reversal deprived *Continental* of any precedential effect.

More recently, in *Hearn v. R.J. Reynolds*, 279 F.Supp.2d 1096, 1111 (D. Ariz. 2003), the District Court of Arizona stated that "reversed opinions carry no precedential value." In *Hearn*, the Plaintiffs brought suit against a tobacco company after their wife/mother died from smoking-related illness. *Id.* at 1100. The Plaintiffs asserted a failure to warn claim and, in arguing about this claim, cited to a decision regarding the failure to warn that had been reversed. *Id.* at 1111.

In *U.S. v. Munsingwear*, 340 U.S. 36, 39-40 (1950), the Supreme Court defined

a procedure for vacating or reversing moot cases so that they would not have any precedential impact once they lost justiciability. In *Munsingwear*, the underlying lawsuit became moot as it was making its way through the appeals process. *Id.* at 37. The Supreme Court held that it is the ordinary practice of the Court to reverse or vacate the judgment below in such circumstances so as to eliminate a judgment. *Id.* at 39-40. Thus, in *Munsingwear*, the Supreme Court did not find there to be a distinction between reversing a lower court decision and vacating a lower court decision for purposes of precluding the precedential effect of the lower court decision.

In *INS v. Ventura*, 537 U.S. 12 (2002), the Ninth Circuit ruled on a "changed-circumstances" issue regarding deportation proceedings. The Supreme Court reversed without addressing the "changed-circumstances" issue because it found the Ninth Circuit had deprived the Bureau of Immigration Appeals (BIA) of its function by not remanding the case to the BIA for a determination. Initially, the BIA had ruled that Ventura failed to qualify for asylum. *Id.* at 13. On appeal, the Ninth Circuit decided under the "changed-circumstances" doctrine that Ventura should not be deported, despite the fact that the BIA had never had the chance to consider the issue. *Id*. Both parties requested the Ninth Circuit remand the case to the BIA to no avail, and the Supreme Court "summarily reverse[d] its decision not to do so." *Id*. at 14. In reversing the Ninth Circuit, the Supreme Court remanded the case to the BIA so that it

could make an "initial determination" and "bring its expertise to bear upon the matter." *Id*. at 17. This language indicates that the Supreme Court, though reversing only on the Ninth Circuit's over-extension of its authority, did not intend for the Ninth Circuit's ruling to have any precedential effect because the BIA was to consider the matter anew. Thus, the Supreme Court's failure to use the term "vacated" did not result in the Ninth Circuit's decision having a precedential impact in *INS*.

Defendant RLUSD respectfully submits that in reviewing the impact of *EGUSD* on *Newdow III*, there is no distinction between the reversal of this Court's decision in *Newdow III* and the vacating of this Court's decision for purposes of precedential value. Thus, the fact that the Supreme Court did not indicate in *EGUSD* that it was "vacating" this Court's decision on the merits in *Newdow III*, does not mean that this Court's decision is still binding precedent. To the contrary, the Supreme Court's reversal on the threshold issue of standing necessarily undermines any determination in *Newdow III* regarding the merits.

As a result, Defendant RLUSD respectfully submits that the District Court erred in finding that it was bound by this Court's decision in *Newdow III*. Because the District Court erred on a matter of legal interpretation, the permanent injunction that was issued by the district court should be vacated.

VIII.

THE DISTRICT COURT ERRED IN DENYING DEFENDANT RLUSD'S MOTION TO DISMISS AS ITS PATRIOTIC EXERCISE POLICY WHICH PROVIDES FOR DAILY VOLUNTARY RECITATION OF THE PLEDGE IS CONSTITUTIONAL

Jan Roe and RoeChild-2 assert the Pledge of Allegiance violates the Establishment Clause and is thus unconstitutional because it contains the words "under God." ER 22, ¶¶ 101-102. Plaintiffs further assert that RLUSD's Patriotic Exercise policy which provides for daily voluntary recitation of the Pledge is an unconstitutional restriction on their First Amendment rights. ER 27, ¶¶ 133.

The RLUSD policy was enacted to satisfy the mandates of California Education Code Section 52720 which is titled "[d]aily performance of patriotic exercises in public schools." Education Code Section 52720 states that appropriate patriotic exercises must be conducted at the beginning of the first regularly scheduled class or activity at which the majority of the students at the school normally begin the school day. The recitation of the Pledge is noted as satisfying the requirements of the statute. *Id.*

The RLUSD Board Policy provides that "Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each school day. The Pledge of Allegiance to the flag will fulfill this requirement. (Citation omitted.) Individuals may choose not to participate in the flag salute for personal reasons. ER 190-191.

In determining whether the RLUSD policy violates the Establishment Clause, "There is no single mechanical formula that can accurately draw the constitutional line in every case." *Myers*, 418 F.3d 395, 402 (4th Cir. 2005) quoting *Van Orden v. Perry*, 125 S.Ct. 2854, 2868 (2005) (Breyer, J., concurring). Instead, in borderline cases, there is no test-related substitute for the exercise of legal judgment. *Myers*, 418 F.3d at 402, citing *Van Orden*, 125 S.Ct. at 2868 (Breyer, J., concurring).

A. THE SUPREME COURT HAS CONSISTENTLY OPINED THE PLEDGE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

The issue of whether the Defendant RLUSD's policy violates the Constitution hinges on the constitutionality of the Pledge. Logically, if the Pledge is consistent with the Establishment Clause of the First Amendment, then RLUSD's patriotic exercise policy is consistent with the Establishment Clause as well. Here, the repeated references by the Supreme Court to the constitutionality of the Pledge provide a clear guide as to the exercise of legal judgment in this case. Because precedent supports the constitutionality of the Pledge as a matter of law, the District Court erred when it denied Defendant RLUSD's Motion to Dismiss.

The Supreme Court and individual Justices of the Court have repeatedly stated that daily recitation of the Pledge in public schools does not run afoul of the Establishment Clause. In fact, in every case in which the Justices of the Supreme

Court have mentioned the Pledge, they have indicated that the Pledge does not violate the Establishment Clause. See *Engel v. Vitale*, 370 U.S. 421, 449-450 (1962) (Stewart, J., dissenting); *Wallace v. Jaffree*, 472 U.S. 38, 78 n. 5 (1985) (O'Connor, J., concurring) ("In my view, the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future" (internal quotation marks omitted)); *Wallace*, 472 U.S. at 88 (Rehnquist, J., dissenting) (holding Pledge unconstitutional "would of course make a mockery of our decisionmaking in Establishment Clause cases"); *Lynch*, 465 U.S. at 716(Brennan, J., dissenting); *County of Allegheny*, 492 U.S. at 674 n. 10(Kennedy, J., concurring in part and dissenting in part); *Lee v. Weisman*, 505 U.S. 577, 638-39 (1992) (Scalia, J., dissenting); *EGUSD*, 542 U.S. at 19-53 (Rehnquist, C.J., O'Connor, J., and Thomas, J., concurring).

In *Lynch*, the Supreme Court determined that inclusion of a nativity scene in a city's Christmas display was constitutional. 465 U.S. at 680. The Supreme Court reasoned that the nativity scene depicted the "historical origins of this traditional event" and noted the words "under God" in the Pledge carry a similar purpose of "acknowledgment of our religious heritage." *Id.* at 676, 675. The Supreme Court came to the same conclusion in *County of Allegheny*, 492 U.S. at 616-20, where it determined that a Menorah was a permissible part of a holiday display under the

Establishment Clause. The Supreme Court looked to the *Lynch* decision and opined that the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03 (citations omitted).

While neither *Lynch* nor *County of Allegheny* directly address challenges to the Pledge, the Supreme Court's analysis supporting its decisions is not "mere *obiter dicta*." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996). Rather, it is well-established rationale upon which the Court based the results of its decisions. *Id.* at 66-67. Such dicta "have a weight that is greater than ordinary judicial dicta as a prophecy of what [the] Court might hold" and should not be "blandly shrug[ged]...off because they were not a holding." *Zal v. Steppe*, 968 F.2d 924, 935 (9th Cir. 1992). Observations by the Supreme Court interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence "constitute the sort of dicta that has considerable persuasive value in the inferior courts." *Myers*, 418 F.3d at 406, quoting *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 271 (4th Cir. 2005). As noted in *Myers*, "[I]t is perhaps more noteworthy that, given the vast number of Establishment Clause cases to come before the Court, *not one Justice has ever suggested that the Pledge is unconstitutional*." 418 F.3d at 406. Thus, the authoritative opinions by

numerous Justices of the Supreme Court compel the conclusion that the Pledge does not violate the Establishment Clause.

B. THE FOURTH AND SEVENTH CIRCUITS HAVE HELD THAT STATE STATUTES PROVIDING FOR DAILY VOLUNTARY RECITATION OF THE PLEDGE DO NOT VIOLATE THE ESTABLISHMENT CLAUSE

In addition to the proclamations of Supreme Court Justices regarding the constitutionality of the Pledge, two Circuit Courts have held that the Pledge does not amount to an establishment of religion and have accordingly upheld the continued voluntary recitation of the Pledge in public schools. *Myers*, 418 F.3d at 408; *Sherman*, 980 F.2d at 447-48. In *Myers*, the Fourth Circuit relied on the history of official acknowledgments of religion in American life, the statements of the Supreme Court Justices noted above and the fact that recitation of the Pledge is not a religious exercise in finding that a Virginia statute that required daily, voluntary, recitation of the Pledge in the classrooms of Virginia's pubic schools was constitutional. 418 F.3d at 408. In *Sherman*, the Seventh Circuit distinguished ceremonial references to God from prayer and found that an Illinois state statute requiring that the Pledge be recited each day by students in public elementary schools did not violate the establishment

clause.

Therefore, precedent dictates that the Pledge with the words "under God" does not violate the Establishment Clause. Because the Pledge does not violate the Establishment Clause, RLUSD's patriotic exercise policy does not violate the Establishment Clause.

C. THE PLEDGE WITH THE WORDS UNDER GOD IS CONSISTENT WITH THE UNBROKEN HISTORY OF OFFICIAL ACKNOWLEDGMENT OF THE ROLE OF RELIGION IN AMERICAN LIFE

The Religion Clauses have not been construed by the Supreme Court "with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). There is no constitutional requirement that makes it necessary for government to be hostile to religion "and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach*, 343 U.S. at 313-14. The Establishment Clause does not bar federal or state regulation of conduct whose effect merely happens to coincide with tenets of some or all religions. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

Moreover, the Establishment Clause does not compel the government to purge from the public sphere all religious references. *Van Orden*, 125 S.Ct. at 2868 (Breyer, J., concurring). "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 (internal citations omitted)." *Id.* "Eradicating...references [to divinty in symbols, songs, mottoes and oaths] would sever ties to a history that sustains this nation even today." *EGUSD*, 542 U.S. at 36. (O'Connor, J., concurring).

The historical references to patriotic invocations of God and official acknowledgments of the role of religion in our nation's history were thoroughly chronicled by Chief Justice Rehnquist in his concurring opinion in *EGUSD*, 542 U.S. 25-30. Similarly, the Fourth Circuit specifically examined the significance of the role of religion in American history in concluding that a similar policy providing for daily voluntary recitation of the pledge in public schools does not violate the Establishment Clause. Much earlier, the Supreme Court exhaustively reviewed the historical role of religion in our country and concluded that we are a religious nation. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). Defendant respectfully submits that each of the historical events referenced by those opinions must be considered in determining whether the RLUSD policy in this case violates the Establishment Clause. As recently noted by Justice O'Connor, "ceremonial references to God and religion in our nation are the inevitable consequence of the religious history that gave birth to our founding principals of liberty." *EGUSD*, 542 U.S. at 35 (O'Connor, J. concurring) Given the continuous and consistent historical record of

official references to God and religion throughout the life of our Country, it is clear the history of our nation supports a finding that the Pledge does not violate the Establishment Clause.

D. THE RLUSD'S PATRIOTIC EXERCISE POLICY SATISFIES THE SUPREME COURT'S VARIOUS ESTABLISHMENT CLAUSE TESTS

As referenced above, there is "no single mechanical formula that can accurately draw the constitutional line in every case." *Van Orden*, 125 S.Ct. At 2868 (Breyer, J., concurring). Nevertheless, if one looks at the various tests that have been established by the Supreme Court over time, it is clear that the RLUSD Board Policy is constitutional.

Over the years, the Supreme Court has, at times, referred to *Lemon* as providing the test applicable for evaluating Establishment Clause challenges. *Van Orden*, 125 S.Ct. at 2861. However, just two years after *Lemon* was decided the Supreme Court stated that the factors identified in *Lemon* serve as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

The *Lemon* test has its origins in *Schempp*, where the Supreme Court set forth a test for analyzing whether a legislative enactment violates the Establishment Clause. 374 U.S. at 222. Specifically, the issues in *Schempp* were: (1) whether a Pennsylvania law that required public schools to begin each day by reading ten verses from the bible to the students was constitutional; and (2) whether a Maryland statute which required

the reading of at least one chapter from the Bible in conjunction with recitation of the Lord's Prayer at the beginning of each school day was constitutional. *Id.* at 205, 211. To analyze this, the Court looked to the purpose and primary effect of the enactment. *Id.* at 222. If either the purpose or primary effect is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power. *Id.* Thus, the enactment must have (1) a secular legislative purpose; and (2) a primary effect that neither advances nor inhibits religion. *Id.* at 222-23.

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

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

In 1983, the Supreme Court reviewed the constitutionality of legislative prayer in the Nebraska Legislature. *Marsh v. Chambers*, 463 U.S. 783 (1983). There the Court considered the Nebraska Legislature's practice of opening its daily sessions with a prayer lead by a chaplain who was paid by the state. In reaching a decision, the Court reviewed the history of legislative prayer at both the national and state levels. *Id.* at 792. Also considered was the fact that three days after Congress authorized the appointment of paid chaplains for the houses of Congress, the same men finalized the language of the Bill of Rights. *Id.* at 788. The Court went on to state, "it is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and,

indeed, predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." *Id.* at 790. In light of this unbroken history, the Court concluded the practice of opening legislative sessions with prayer had become a part of the "fabric of our society" and thus did not violate the Establishment Clause. *Id.* at 792.

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

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

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

The relevant issue in the endorsement inquiry is whether an objective observer,

acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of religion. *Id.* at 76. The objective observer is similar to the "reasonable person" in tort law. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring).

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

With the various analytical tests set forth, it is clear that each new Establishment Clause challenge must be evaluated on its own merits to determine whether any of the aforementioned tests, or perhaps some other analytical tool, is best suited to determine whether the challenged action or statute is constitutional.[4] As

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

Justice O'Connor noted in her concurring opinion in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1984), "[e]xperience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches."

1. The Pledge Must Be Considered as a Whole

Regardless of the test applied, the focus of the Court's constitutional inquiry must be on the Pledge as a whole, not just the words "under God." When students recite the Pledge, they do not merely recite the words "under God," they recite the Pledge in its entirety. Thus, it is an analytical anomaly to examine the effect of those two words rather than the effect of the Pledge as a whole. Morever, in conducting Establishment Clause analysis, the Supreme Court has consistently analyzed religious text and symbols in context rather than looking at merely the alleged religious content alone. *Lynch*, 465 U.S. at 680. For example, in *Lynch* the Supreme Court evaluated the effect of a creche that was included in a display that also contained secular symbols of Christmas and found that in context, the creche did not convey a message of governmental endorsement of religion. *Id.* at 680-86.

Similarly, in *County of Allegheny*, the Supreme Court looked at the entirety of a Christmas display that included a Christmas tree, a Menorah and a liberty sign and

found the Menorah did not convey an endorsement of religion. 492 U.S. at 616-20. Thus, despite the fact the words "under God" were added to the Pledge in 1954, they must be evaluated in the context of the larger, patriotic message. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Van Orden*, 125 S.Ct. at 2863.

2. The RLUSD Policy Satisfies the Lemon and Endorsement Tests

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

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

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper.

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

The House Report further noted references to God in the Declaration of Independence, the inscription of "In God We Trust" on currency and coins, and references to God in the Gettysburg Address. *Id.* Representative Louis C. Rabaut, in describing the need for the legislation, stated, "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government." *Id.* at 3. He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." *Id.* These remarks reveal Representative Rabaut felt the amendment had the purpose of helping teach children about the role of religion in the history of the United States. Given the underlying patriotic message of the 1954 Amendment combined with the patriotic references by the U.S. Supreme Court, it is clear that the Districts adopted the voluntary Pledge recitation policies for the purpose of satisfying the Patriotic Observance requirement of California Education Code Section 52720, not to advance

religion. Though the purpose of an enactment need not be exclusively secular to satisfy this prong (*Wallace*, 472 U.S. at 64 (Powell, J., concurring)), the foregoing clearly establishes secular patriotic and historical purposes sufficient to satisfy the first prong of the *Lemon* test.

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

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

No reasonable person would find the RLUSD adopted its patriotic exercise policy to endorse religion. *EGUSD*, 124 S.Ct. at 2323 (O'Connor, J., concurring) (noting that no reasonable observer would perceive the references to God in solemnizing an occasion as signifying a government endorsement of any specific religion, or even of religion over non-religion). Moreover, there is no reasonable basis to find the RLUSD policy endorses religion because, as demonstrated *infra*, the Pledge is not a religious act nor does it convey a religious belief. *EGUSD*, 124 S.Ct. at 2319-20 (Rehnquist, C.J., concurring) ("The phrase "under God" is in no sense a prayer, nor an endorsement of any religion...."); *Loudon*, 481 F.3d at 407-08. Thus, the RLUSD's patriotic exercise policy satisfies the second prong of the *Lemon* test as well as the effect prong of the endorsement test.

The policy also satisfies the excessive entanglement prong of the *Lemon* and endorsement tests as RLUSD does not have to continually exercise governmental control over the recitation of the Pledge. Moreover, because the Pledge is not a religious act, there is not an excessive government entanglement with religion. Therefore, based on the analysis of the *Lemon* and endorsement tests, the RLUSD policy providing for voluntary recitation of the Pledge is constitutional.

It is also worth noting that the RLUSD policy requiring daily voluntary recitation of the Pledge serves a larger purpose as part of a curriculum of public

schools which seeks to instill a sense of history and patriotism in students to better prepare them for citizenship. References to religion are absolutely permissible if they are incorporated into an appropriate study of "history, civilization, ethics, comparative religion, or the like." *Lynch*, 465 U.S. at 679. The Pledge is part of the larger curricular framework which emphasizes patriotism and dignity of American citizenship. This curriculum gives meaning to the words of the Pledge. "[P]ublic education must prepare pupils for citizenship in the Republic" and "schools must teach by example the shared values of a civilized social order." *Bethel School District v. Fraser*, 478 U.S. 675, 681, 683. Patriotism and love of country are such values, and voluntary recitation of the Pledge is a long-standing method of helping achieve the schools' and society's goals. ER 172-177.

From the very first year children enter the pubic school system, they are taught principals of American patriotism. ER 173. This incorporation continues throughout a student's career in the public school system as they learn a sense of community and about principles of American constitutional democracy, individual liberties and the foundation of the American political system. ER 174-177. Clearly, the Pledge, as amended, reflects these impacts on the founding of America and is properly included as one piece of the learning experience necessary to teach the next generation of citizens values that are "essential to a democratic society." *Bethel*, 478 U.S. at 681.

The content of the curriculum in California public schools is also reflected in the California Education Code which requires that:

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

Cal. Educ. Code § 233.5(a).

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

In addition, the Pledge also passes the new test of whether it contains acceptable ceremonial deism. See *EGUSD*, 542 U.S. at 35-44 (O'Connor, J., concurring). Defendant respectfully submits that this variation of the endorsement test provides a workable solution to addressing whether patriotic exercises, such as the Pledge, are violative of the Establishment Clause. Based on the opinion of Justice O'Connor, the Pledge does not violate the Establishment Clause because its history and character allow for it to fall within ceremonial deism.

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

The coercion test was set forth and applied in *Lee*, in ruling on the constitutionality of prayers at graduation ceremonies. 505 U.S. 577. Throughout the opinion, Justice Kennedy of the majority refers to "prayers" and "religious exercises" or "religious acts," thereby limiting the Court's holding to those circumstances. Prayer has been defined by the U.S. Supreme Court as "a solemn avowal of faith and supplication for the blessing of the almighty." *Engel*, 370 U.S. at 424. Prayer is also defined as "a humble communication in thought or speech to God or to an object of worship expressing supplication, thanksgiving, praise, confession, etc." THE NEW WEBSTER'S DICTIONARY 315 (1990). The Pledge with the phrase "under God" is nothing like the clearly religious act of prayer. In no way can the Pledge be construed to be a supplication for blessings from God nor can it be reasonably argued that it is a communication with God. The Pledge is, quite simply, a patriotic act – not a religious act.

A review of the Supreme Court's Establishment Clause jurisprudence reveals that at no time has the Court considered the Pledge to be tantamount to a religious act such as a prayer. In fact, the Supreme Court affirmed that the pledge is a "patriotic exercise" in *EGUSD*. 542 U.S. at 6-8; See *Id.* at 40-41. (O'Connor, J., concurring) (noting that no reasonable observer would believe the Pledge is a prayer). "I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious

exercise' of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents." *EGUSD*, 542 U.S. at 31. (Rehnquist, C.J., concurring).

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

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

Id. at 435 n. 21. Further, in his concurrence, Justice Douglas looked to the House Report recommending the addition of the words "under God" and found that the

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

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

Overall, considering the overwhelming support of the Pledge by the U.S. Supreme Court, as well as the legislative history of the Pledge and the role it has played in our nation's history, the Pledge is constitutional no matter which (if any) test is applied. As a result, the RLUSD's patriotic exercise policy is also constitutional.

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

In *Marsh*, the Supreme Court recognized that common sense and historical analysis were better suited to address Establishment Clause issues than were any

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

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

Since "under God" was introduced into the Pledge, the population of the United

States has increased by over 130 million citizens.[5] A substantial number of those citizens have been raised and attended school where they recite the Pledge. Those same persons have grown up only knowing the Pledge with the phrase "under God" and have passed this version of the Pledge on to their children. Thus, the Pledge with the phrase "under God" has become a part of the fabric of our society through constant repetition by schoolchildren and adults across the country during the past fifty years.

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

---

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

1st Sess. (2003) (each proposing amendment to Constitution to protect the Pledge of Allegiance); S. Res. 71, 108th Cong., 1st Sess. (2003), S. Res. 292, 107th Cong. 2nd Sess. Such immediate uproar by Congress is indicative of how the Pledge has become woven into the fabric of our society.

Furthermore, the length of time that it took for anyone to challenge the constitutionality of the Pledge with the words "under God" suggests "more strongly than can any set of formulaic tests, that few individuals, whatever their system of beliefs, are likely to have understood the [Pledge] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect." *Van Orden*, 125 S.Ct. at 2870 (Breyer, J., concurring). The words "under God" were added to the Pledge in 1954. *EGUSD*, 542 U.S. at 7. Prior to Newdow bringing his case against the EGUSD in 2000, there were only two published decisions wherein someone challenged the constitutionality of the Pledge. See *Smith v. Denny*, 280 F.Supp. 651 (E.D. Cal. 1968); *Sherman*, 980 F.2d at 447-48. Thus, the fact that only two published cases existed prior to 2000 in the forty-six years that the Pledge contained the words "under God" suggests that few persons, of the hundreds of millions who have learned and recited the Pledge, likely understood the Pledge to promote religion over nonreligion, or to cause them to engage in a religious practice. These facts weigh heavily in favor of finding that the Pledge is constitutional.

As a result, the Pledge in its current form, as well as the RLUSD policy, is constitutional as a matter of law.

E. VOLUNTARY RECITATION OF THE PLEDGE IN PUBLIC SCHOOLS IS CONSTITUTIONAL PURSUANT TO *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE*

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[6] The purpose of the Establishment Clause is to prevent the intrusion of either the church or the state upon the other. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The First Amendment does not require that in every respect there should be separation of church and state. *Zorach v. Clauson*, 343 U.S. 306 (1952). In fact, "[s]ome relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614. This is because we are "a religious nation," *(Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892)) and "a religious people whose institutions presuppose a supreme being." *Zorach*, 343 U.S. at 313.

---

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

The Supreme Court has previously addressed First Amendment freedom of religion issues in the context of the Pledge and upheld policies which provided for its voluntary recitation. In *Barnette*, 319 U.S. at 642, the Supreme Court held that a West Virginia regulation that required school children in the state to recite the Pledge[7] or be considered insubordinate was unconstitutional. The plaintiffs in *Barnette* were Jehovah's Witness students who, in accordance with their religious beliefs, refused to salute the flag. *Id.* at 629. In deciding the case, the Supreme Court noted that compulsory recitation of the Pledge "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks," as well as " . . . affirmation of a belief and an attitude of mind." *Id.* at 633. Ultimately, the Supreme Court summarized its finding as follows:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

Despite concerns that compelling students to recite the Pledge violated students'

---

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

free speech rights under the First Amendment by compelling political ideology, the Supreme Court did not banish recitation of the Pledge in public schools. Instead, the Court determined that states (and school districts) cannot compel students to recite the Pledge. Since that time, the clear import of *Barnette* has been that the voluntary recitation of the Pledge by public school children throughout this country, which inspires patriotism and love of country, is constitutionally permissible.

In *EGUSD*, the U.S. Supreme Court majority reiterated this sentiment by stating that "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." 542 U.S. at 6. Chief Justice Rehnquist restated this sentiment in his concurrence wherein he noted that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church." *Id.* at 31 (Rehnquist, C.J., concurring). A review of these statements clearly reveals a close alignment between the Pledge and the RLUSD policy; both seek to promote patriotism and national unity.

The Supreme Court in *Barnette* refused to abolish voluntary recitation of the Pledge in schools. In doing so, it implicitly authorized continuation of the Pledge, so long as participation was voluntary. The result is that an objecting student's First

Amendment rights are not violated when he or she is exposed to willing students reciting the Pledge. There is simply no logical reason to differentiate between the rights at stake in this case and those in *Barnette*. Both cases involve the question of whether students are compelled to declare a belief in violation of the First Amendment. In either case, the content of the Pledge is arguably inconsistent with or contrary to one's religious belief. The balance achieved by the Court in *Barnette* between the district's interest in impressing upon the minds of students principles of patriotism and the individual student's right of conscience is applicable to children of atheists just as it is to Jehovah's Witnesses. See California Education Code § 233.5(a). Because RLUSD's Board Policy 6115 is consistent with the holding in *Barnette* and allows for voluntary recitation of the Pledge, it is constitutionally permissible.

IX.

CONCLUSION

Defendant RLUSD respectfully submits that the District Court erred in holding that it is bound by this Court's decision on the merits in *Newdow III*. The District Court's error in this regard resulted in the denial of Defendant's Motion to Dismiss and a permanent injunction being issued against the RLUSD prohibiting it from applying it s Board Policy requiring the daily, voluntary recitation of the Pledge of

Allegiance so as to fulfill the patriotic exercise requirement of California Education Code Section 52720. Because the District Court erred, Defendant RLUSD respectfully requests that the injunction should be vacated and Defendant RLUSD's Motion to Dismiss granted.

Respectfully submitted,

Dated: June 1, 2006

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By _____
Terence J. Cassidy
Michael W. Pott
Attorneys for Appellant/Defendant RIO LINDA UNION SCHOOL DISTRICT

STATEMENT OF RELATED CASES

The related cases that Appellant is aware of that are pending in this Court have been consolidated with this case for purposes of appeal. Those cases are Case Nos. 05-17257 and 06-15093.

Dated: June 1, 2006

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By _____
Terence J. Cassidy
Michael W. Pott
Attorneys for Appellant/Defendant RIO LINDA UNION SCHOOL DISTRICT

CERTIFICATE OF COMPLIANCE

I CERTIFY THAT, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Opening Brief of Appellant/Defendant RIO LINDA UNION SCHOOL DISTRICT is proportionately spaced, has a typeface of 14 points or more, and contains less than 14,000 words.

Dated: June 1, 2006

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By _____
Terence J. Cassidy
Michael W. Pott
Attorneys for Appellant/Defendant RIO LINDA UNION SCHOOL DISTRICT