Appeal Nos. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROECHILD-2 and JAN ROE,

Plaintiff-Appellees,

- against -

JOHN CAREY, ADRIENNE CAREY, BRENDEN CAREY,
THE KNIGHTS OF COLUMBUS, ET AL.

Defendant-Intervenor-Appellants,

- and -

RIO LINDA UNION SCHOOL DISTRICT,

Defendant-Appellant,

- and -

THE UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Case No. 05-cv-00017

BRIEF OF AMICUS CURIAE THOMAS MORE LAW CENTER IN SUPPORT OF DEFENDANT-INTERVENOR-APPELLANTS

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CORPORATE DISCLOUSRE STATEMENT
PURSUANT TO FED.R.APP.P 26.1

Pursuant to Fed.R.App.P. 26.1, amicus curiae Thomas More Law Center states the following: Thomas More Law Center is a not-for-profit corporation and does not have any parent corporation. The Law Center has no stock, thus no publicly held corporation owns 10% or more of its stock.

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SUMMARY OF THE ARGUMENT

The district court's notion that this Circuit's prior decision in Newdow's first challenge to the Pledge of Allegiance has binding effect is plainly wrong. The court's myopic focus on the general distinction between "vacate" and "remand" caused it to miss the forest for the trees. As a result, the district court failed to realize that a decision rendered without prudential standing is a decision rendered without subject-matter jurisdiction–and a decision rendered without subject matter jurisdiction has no binding effect.

Worse still, the district court's decision failed to realize that the Supreme Court's reversal of this Circuit's prior opinion in *Elk Grove v. Newdow*, 124 S.Ct. 2301, dictates that this Circuit's prior decision on the merits can be given no precedential effect. It also wholly undermines the authority of the Supreme Court which has the final say on whether federal courts should decide a claim on the merits. If the Supreme Court determines that federal courts should not decide a claim on the merits for prudential reasons, and reverses a decision that did rule on the merits, then the reversed decision must, of necessity, be without binding effect.

The district court's effort to ground the precedential effect of this Circuit's prior decisions on the notion that federal courts are free to assume prudential standing for the purpose of rendering a decision on the merits is insupportable.

The result of the district court's decision is to give binding effect to a decision based on the very exercise of hypothetical jurisdiction rejected by the Supreme Court. Federal courts are not free to assume subject-matter jurisdiction, including standing, for the purpose of rendering a decision on the merits; they can only assume subject-matter jurisdiction for the purpose of a non-merits disposition.

Finally, the district court's error perpetuates a deplorable decision on the merits at odds with the history and traditions as our nation as well as the more enduring and cogent principles used to interpret and apply the Establishment Clause. For the reasons set forth herein, this Court is free to consider the challenge to the Pledge of Allegiance on a blank slate and reverse the district court's decision on the merits. It should do so, finding that a policy which results in the voluntary recitation of the Pledge of Allegiance does not violate the Establishment Clause simply because the Pledge acknowledges the widely held conviction that this nation exists under God.

I. According Precedential Authority To A Merits Decision Reversed By The Supreme Court For Lack Of Standing Is Error Because The Supreme Court Determines Whether It Is Proper For The Federal Courts To Decide The Merits.

The district court's decision to give precedential effect to this Circuit's prior opinion in *Newdow I* rests on a notion that a decision reversed by the Supreme Court on prudential standing grounds is still good law. That notion is plainly wrong because a decision rendered without prudential standing is a decision rendered without jurisdiction. The law treats a decision rendered in support of a judgment that has been reversed on jurisdictional grounds as if it had never been made; such a decision can be given no precedential effect. It is a nullity.

The district court's decision is wrong for another reason. The Supreme Court's reversal of this Circuit's prior opinion in *Elk Grove v. Newdow*, 124 S.Ct. 2301, which held that Newdow lacked the prudential standing needed to secure a decision on the merits from a federal court, dictates that this Circuit's prior decision on the merits can be given no precedential effect. The reason is simple: allowing this Circuit's prior opinion to have binding effect wholly undermines the authority of the Supreme Court to determine when the exercise of the judicial power is proper. Indeed, the result of the district court's reasoning flies in the face of any number of longstanding principles used to interpret the effect of Supreme

Court decisions on lower court dispositions.

The district court's effort to ground the precedential effect of this Circuit's prior decisions on the notion that federal courts are free to assume prudential standing for the purpose of rendering a decision on the merits is insupportable. As the Supreme Court and this Circuit have recognized, subject-matter jurisdiction, which includes prudential standing, can only be assumed in cases where resolution of a non-merits issue results in a non-merits dismissal of the case. The district court's notion that this Circuit's prior decision is entitled to precedential effect because federal courts are free to assume prudential standing for the purpose of rendering a decision on the merits results in the very exercise of hypothetical jurisdiction rejected by the Supreme Court.

A. A Decision Reversed For Lack Of Standing Has No Binding Effect Because Standing Is An Element Of Subject-Matter Jurisdiction.

Standing is an element of subject matter jurisdiction because it is fundamental that "[i]n every federal case, the party bringing suit must establish standing to prosecute the action." *Elk Grove Unified School District v. Newdow*, 124 S.Ct. 2301, 2309 (2004). One doctrine which assures the proper exercise of this "power to declare the law" is standing and, "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute...." *Warth v. Seldin*, 95 S.Ct. 2197, 2205 (1975)(emphasis added). The Supreme Court has also explained that "[t]his [standing] inquiry involves both constitutional limitations on federal court jurisdiction and prudential limits on its exercise. *Kowalski v. Tesmer*, 125 S.Ct. 564 567 (2004). "In both dimensions it is founded in concern about the proper–and properly limited–role of courts in a democratic society." *Warth*, 95 S.Ct. at 2205 (emphasis added).

The Supreme Court has observed, "[t]he standing requirement is born partly of an idea...about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Newdow*, 124 S.Ct. at 2308. And referencing "[t]he command to guard jealously and exercise rarely...power to make constitutional pronouncements...," the Supreme Court has

observed that, "consistent with these principles...standing contains two strands: Article III standing, which enforces the Constitution's case or controversy requirement, and prudential standing which embodies judicially self-imposed limits on the exercise of federal jurisdiction." *Id.* at 2308. The reason that a decision rendered without jurisdiction cannot be given any binding effect is obvious: it is a centuries-old rule that a judgment rendered by a court without jurisdiction is a nullity and, as a result, the law treats the decision as if it were never rendered. *See Burnham v. Superior Court of California*, 110 S.Ct. 2105, 2109-10 (1990)("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books."); *Valley v. Northern Fire & Marine Co.*, 41 S.Ct. 116 (1920)(judgment without jurisdiction void); *Butler v. Eaton,* 11 S.Ct. 985 (1891)(same); *Clerke v. Harwood*, 3 U.S. 342 (1797)(same). Of course, this Circuit has recognized that a judgment without jurisdiction is void. *See e.g. Center Wholesale Inc., v. Owens-Corning*, 759 F.2d 1440, 1448 (9th Cir. 1985)(judgment void if court lacked subject matter jurisdiction or acted in manner inconsistent with due process of law).

Focused narrowly on the terms "reverse" and "vacate" the district court lost sight of the forest for the trees and gave precedential effect to the merits portion of the Circuit opinion reversed by the Supreme Court on jurisdictional grounds.

Truth be told the district court's notion that the merits portion of an opinion reversed on jurisdictional grounds remains good law is so odd that it is difficult to find a case on point. The only case to address the issue found by this amicus quite properly rejects the contention. *See Russell & Co. v. People of Puerto Rico*, 118 F.2d 225 (1st Cir. 1941). In that case, the First Circuit heard for a second time a claim removed to it from Puerto Rico and, during the second appeal, confronted the assertion that its prior decision was law of the case. Recognizing that the first decision had been reversed for lack of jurisdiction, the First Circuit held that the prior decision could have no effect as law of the case and, likewise, could not provide the basis for preclusion. *Id.* at 229-30

The result in *Russell*, *supra*, is called for by this Circuit's precedents as well. This Circuit has recognized that a decision reversed in full provides no basis for any relief in the case in which the reversal takes place. *See e.g. Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1997)(reversed judgment cannot support award of costs). And this Circuit has recognized that a decision that has been reversed in full cannot have any preclusive effect in a subsequent case. *See e.g. State of California v. Thompson*, 321 F.3d 835 (9th Cir. 2002)("Once decision of the district court is reversed, the judgment cannot serve as the basis for a disposition on the grounds of res judicata or collateral estoppel.")(quotations omitted).

Finally, this Circuit has recognized that a court cannot rule on the merits once it determines that it lacks subject matter jurisdiction. *See Wages v. IRS*, 915 F.2d 1230, 1234 (9th Cir. 1990)(once district court determined that it lacked subject matter jurisdiction it could not render a decision on the merits). These decisions rest upon the recognition that a decision reversed for lack of subject matter jurisdiction is void and has no binding effect.

The result in *Russell*, *supra*, is the result required here by longstanding principles relating to judgments rendered without jurisdiction. Departing from these principles, the district court gave effect to a decision that has no binding force. But, again, a court without subject-matter jurisdiction cannot rule on the merits. *See Wages*, 915 F.2d at 1234. As explained further below, neither the district court's reasoning nor result make sense.

B. According Precedential Authority To Prior Panel Decisions Defies The Authority Of The United States Supreme Court.

That the district court erred by according precedential authority to the Circuit opinion reversed by the Supreme Court for lack of standing is further demonstrated by the absurd result the holding produces. In Newdow's first litigation, the Supreme Court "granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the

jurisdiction of the federal courts." *Newdow*, 124 S.Ct. 2305. After a lengthy analysis of the principles governing the Court's prudential standing doctrine, that Supreme Court held that "it is improper for the federal courts to entertain a claim by a plaintiff...[who] lacks prudential standing to bring this suit in federal court," and reversed the prior decision of this Circuit on the merits. *Id.* at 2312.

According precedential authority to the Circuit decision reversed in *Newdow* directly undermines the authority of the United States Supreme Court. The reason is painfully obvious: when the Supreme Court held that "it is improper for the federal courts to entertain [Newdow's] claim," *see Newdow*, 124 S.Ct. at 2305, it so held for all the federal courts, including this Circuit. As this Circuit has recognized, "binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court overrules or modifies it. Judges of the inferior courts may voice their criticism, but follow they must." *MacDonald v. Kahikolu, Ltd.*, 442 F.3d 1199, 1202 (9th Cir. 2006). This is so because "[t]he decision of an inferior court within the Article III hierarchy is not the final word of the department (unless the time for appeal has expired...." *Miller v. French*, 120 S.Ct. 2246, 2257 (2000). In fact, "[w]hen a case is appealed from this Court to the Supreme Court...jurisdiction can be revived only upon the mandate of the Supreme Court

itself, and....the jurisdiction of this Court is rigidly limited to those points, and those points only, specifically consigned...by the Supreme Court." *Hermann v. Brownell*, 274 F.2d 842 (9th Cir. 1960).

Contrary to these principles, the district court's decision to give binding effect to this Circuit's prior decision on the merits of Newdow's claims, although reversed by the Supreme Court, produces an absurd result: a decision reversed on "preliminary" jurisdictional grounds, which led the Supreme Court to eschew a decision on the merits in Newdow's earlier litigation–is used to give the reversed decision (on the merits) effect as "law of the case" in a subsequent case. In terms of issue preclusion, the district court's decision gives this Circuit's prior (reversed) decision an issue preclusive effect although the judgment rendered in the first case has no such preclusive effect as a matter of law (because reversed). But the Supreme Court's decision that it was not proper for federal courts to entertain Newdow's claims necessarily means that this court lacked subject-matter jurisdiction and therefore could not render a decision on the merits in the first place. *See Wages*, 915 F.2d at 1234.

Indeed the result produced by the district court's unreflective reliance on the distinction between "reversal" and "vacate" flies in the face of countless principles governing the effect of Supreme Court dispositions on lower Courts. For example,

it is well-settled that a summary affirmance by the Supreme Court accords precedential authority to the opinion of the lower courts. *See e.g. Mandell v. Bradley*, 97 S.Ct. 2238 (1977). But the precedential effect turns on the facts of the case and issues presented. *See e.g. Demarest v. U.S.*, 718 F.2d 964, 967 (9th Cir. 1977) . In this case, the district court treats a reversal which prohibits a decision on the merits (based on standing, the "preliminary question" on which the Supreme Court granted *certiorari*), as if it affirmed the prior opinion of this Circuit on the merits. In fact the district court's error is even more egregious because the result of its reasoning is to treat this Circuit's prior decision as binding on the merits–as if the Supreme Court had never granted *certiorari* on the merits at all and, as a result, this Circuit's prior opinion was left as precedent. In a similar way the district court's analysis utterly disregards the distinction between a Supreme Court decision that affirms in part, and reverses in part, a lower court disposition. Although the Supreme Court reversed on jurisdictional grounds and did not reach the merits, the district court's reasoning produces the result that would obtain if the Supreme Court had reversed this Circuit in part (on jurisdictional grounds) but affirmed, in part, on the merits. Such a result defies the holding of the Supreme Court's decision, i.e., that federal courts should not entertain the merits of Newdow's claims.

All these incongruous (and incoherent) results follow directly from the district court's failure to see that when the Supreme Court held that "it is improper for the federal courts to entertain a claim by a plaintiff...[who] lacks prudential standing to bring this suit in federal court," *Newdow*, 124 S.Ct. at 2312, the Supreme Court necessarily found that this Circuit lacked the subject matter jurisdiction needed to render a decision on the merits. *See Wages*, 915 F.2d at 1234 (court without subject-matter jurisdiction cannot render a decision on the merits). The district court simply failed to realize that the Supreme Court consigned no issues to this Circuit upon reversal because its opinion made clear the result required by its reversal, i.e., no federal court would entertain Newdow's claim on the merits. *See In re: Sanford Fork & Tool Co.*, 16 S.Ct. 291, 293 (1895)(Circuit Court should apply mandate in light of opinion); *Hermann*, 274 F.2d at 842 (jurisdiction on remand limited to issues left open by Supreme Court). This state of affairs on remand means, quite obviously, that the merits disposition reversed by the Supreme Court in Newdow's first case could have no binding effect in Newdow's first case or, for that matter, any other.

C. The Distinction Between Prudential And Article III Standing Does Not Support The District Court's Decision To Accord Precedential Effect To A Decision Reversed By The Supreme Court.

The district court's assertion that this Circuit's prior decision could be accorded precedential authority because a federal court is free to assume prudential standing in order to rule on the merits is wholly mistaken. The Supreme Court has repeatedly recognized that both the Article III and prudential standing limitations spring from the same root and, for this reason, it has held that a lack of either Article III or prudential standing prevents the exercise of judicial power to render a decision on the merits. Addressing Article III standing, the Supreme Court has emphasized that "[m]uch more than legal niceties are at stake here. The...constitutional elements of jurisdiction are an essential ingredient of separation and equilibrium of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects." *Steel Co. v. Citizens For A Better Environment*, 118 S.Ct. 1003, 1016 (1998). Likewise, in discussing the self-imposed limits on the exercise of judicial power treated under the rubric "prudential standing" the Court has noted "[w]ithout such limitations–closely related to Article III concerns but essentially matters of judicial self-governance–the courts would be called upon to decide abstract questions of wide public significance even though other governmental

institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Newdow*, 124 S.Ct. at 2309. In fact, the Supreme Court has explicitly stated that the standing inquiry "[i]n both dimensions...is founded in concern about the proper–and properly limited–role of courts in a democratic society." *Warth*, 95 S.Ct. at 2205 (emphasis added). And as *Newdow*, *supra*, demonstrates, a plaintiff must possess both Article III and prudential standing in order for a federal court to "entertain a claim" precisely because "[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute...." *Warth*, 95 S.Ct. 2205.

The district court's reliance on *Steel Co.*, *supra*, to support its claim that prudential standing can be assumed for the purpose of rendering a decision on the merits is untenable. The district court misunderstands *Steel Co.*, entirely–using a decision which foreswears an exercise of hypothetical jurisdiction to render an opinion on the merits, to achieve the exact result condemned by *Steel Co.*, i.e., the assumption of hypothetical jurisdiction for the purpose of providing a disposition on the merits.

The district court's error follows from its failure to see that it is the distinction between a merits/non-merits disposition that undergirds the decision in

Steel Co. Thus on the one hand, the Supreme Court condemns the practice of "assuming' jurisdiction for the purpose of deciding the merits..." *See Steel Co.*, 118 S.Ct. at 1012 ("The Ninth Circuit has denominated this practice–which it characterizes as 'assuming' jurisdiction for the purpose of deciding the merits–the "doctrine of hypothetical jurisdiction."). On the other hand, it distinguishes cases prescinding from the jurisdictional inquiry on the grounds that in those cases no decision on the merits was premised on the assumption of jurisdiction. *See Steel Co.*, 118 S.Ct. at 1009–1016 (surveying cases supposed to justify the exercise of "hypothetical jurisdiction" and noting that "none of them even approaches approval of a doctrine of 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt."). Put another way, it is the distinction between a merits/non-merits disposition, not whether Article III standing or prudential standing is assumed (for the purpose of hypothetical subject-matter jurisdiction), which differentiates the assumption of jurisdiction countenanced by *Steel Co.* from the assumption of jurisdiction it condemns.

Both the Supreme Court and this Circuit have recognized that the assumption of jurisdiction countenanced by *Steel Co* is circumscribed by the requirement that any assumption of jurisdiction result in a non-merits disposition. For example, in *Ruhrgas*, the Supreme Court held that *Steel Co.*, did not require

federal courts to address subject-matter jurisdiction prior to personal jurisdiction in a case resulting in dismissal based on the lack of personal jurisdiction. It so held because "a court that dismisses on...non-merits grounds..before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers...." and "[i]t is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." *See Rhurgas AG v. Marathon Oil Co.*, 119 S.Ct. 1563, 1570 (1999)(citing cases *declining* to exercise federal *jurisdiction* on abstention or discretionary grounds).

Likewise, in *Tenet v. Doe*, 125 S.Ct. 1230 (2005), the Supreme Court dismissed claims advanced by spies against the United States government based on the *Totten* rule prohibiting suits against the government based on covert espionage. In so doing, the Court held that *Steel Co.*, did not require a ruling on subject-matter jurisdiction because "application of the Totten rule of dismissal, like the abstention doctrine...or the prudential standing doctrine, represents the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction." *Id* at 1235 n.4 (*citing Rhurgas*, *supra*, for the proposition that "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits.")(underline added). Significantly, the Court assumed that the a related jurisdictional inquiry concerning the Tucker Act was

"the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim." *Id.* Of course, the very reason the Court did not need to address the subject-matter issue presented by the Tucker Act was that application of the *Totten* rule called for a non-merits dismissal.

Tenet, *supra*, acknowledged the assumption of Article III standing where prudential standing provided grounds for a non-merits dismissal with reference to *Kowalski v. Tesmer*, 125 S.Ct. 564 (2004). In that case, the Supreme Court did assume Article III jurisdiction, despite *Steel Co.*, but it did so to dismiss the plaintiffs' claims for lack of prudential standing. And in *Kowalski*, as in *Newdow I*, the Supreme Court reversed the Court of Appeals' decision rendered in a case where prudential standing was lacking.

This Circuit has already recognized that the ability to assume jurisdiction turns on whether the assumption of jurisdiction results in a dismissal from a non-merits disposition. In *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037 (9th Cir. 1999), the Court assumed jurisdiction to affirm a dismissal based on lack of

standing. In doing so it noted:

> "[b]y assuming the existence of Article III standing and resolving the case based on the plaintiffs' failure to establish a prerequisite for equitable relief we do not violate the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. We affirm summary judgment for defendants not based on the merits of plaintiffs' claims but based on the scope of our equitable power to grant injunctive relief. A court that dismisses on non-merits grounds...before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying....*Steel Co.*

Hodgers-Durgin, 199 F.3d at 1042 n. 3(underline added). *See also Legal Aid Soc. of Hawaii v. Legal Services Corporation*, 145 F.3d 10171029-30 (1998) (recognizing that *Steel Co.* required Court to determine plaintiffs' standing before ruling on the merits of plaintiffs' Equal Protection and Due Process claims); *Wilbur v. Locke*, 423 F.3d 1101 (9th Cir. 2005)(Court must make standing and other jurisdictional inquires before rendering a decision on Rule 19).

Taken together these cases demonstrate that the district court erred when it reasoned that a court can render a decision on the merits in a case where the plaintiffs lack prudential standing, an element of subject-matter jurisdiction. Contrary to the district court's reasoning, *Tenet*, *supra*, recognizes that Article III standing can be assumed but, significantly, only in a case where prudential standing is used as a "threshold grounds for denying audience to the case on the merits." *Id.* at 1235. *Kowalski*, *supra*, is a case in point: the Supreme Court did

assume Article III standing–precisely because prudential standing required dismissal based on a non-merits disposition. And *Ruhrgas*, explains the rationale that unites the cases , i.e. the assumption of jurisdiction is proper in cases where the result is a non-merits dismissal because "[a] court that dismisses...on non-merits grounds....makes no assumption of law-declaring power that violates the separation of powers principles...." *Ruhrgas*, 119 S.Ct. at 1570; see also *Hodgers-Durgin*, 199 F.3d at 1042 n. 3("A court that dismisses on non-merits grounds...before finding subject-matter jurisdiction, makes no assumption of law-declaring power that violates the separation of powers principles underlying....*Steel Co.*"). The reason is plain: it is a decision on the merits that represents an exercise of the judicial power, and it is this exercise of judicial power which implicates the separation of powers. In fact, the Supreme Court's decision in *Newdow I* and *Kowalski* demonstrate that a federal court is not free to assume prudential standing to render a decision on the merits.

In sum, the district court erred when it failed to recognize that the only hypothetical jurisdiction allowed by Article III is an assumption of jurisdiction that results in a dismissal based upon a non-merits disposition. By according precedential effect to the panel decision rendered in *Newdow I*, the district court acts as if this Court were entitled to engage in the very assumption of jurisdiction

barred by *Steel Co.*, i.e., assumption of a "'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt." *See Steel Co.*, 118 S.Ct. at 1016.

Moreover, the district court's effort to justify this absurd result with reference to the Supreme Court's decision in *Steel Co.* is directly contrary to Circuit precedent. This Circuit has already disregarded an earlier Circuit opinion rendered based upon "hypothetical jurisdiction" recognizing that *Steel Co.* stands for the proposition that a decision rendered without jurisdiction is void and, as a result, is not binding precedent. *See Brookes v. IRS*, 163 F.3d 1124, 1128-29 (9th Cir. 1998). The decision in *Brookes*, *supra*, sits well with the longstanding law of this Circuit: long ago this Court noted that courts should decline to exercise jurisdiction where the effect is to render an advisory opinion or create precedent for future litigation. *See Wialua Agr. Co. v. Maneja*, 178 F.2d 603, 613 (9th Cir. 1949)(refusing to affirm district court's declaratory judgment and noting court should avoid decision that amounts to nothing more than advisory opinion or precedent for future litigation).

In any event, the district court's analysis has a more egregious (because more fundamental) flaw. Even if the Ninth Circuit could have assumed prudential standing in the first place for the purpose of rendering a decision on the merits

(which it could not for the reasons explained earlier), the district court failed to recognize the painfully obvious: there can be no more improper exercise of "hypothetical jurisdiction" than one which is subsequently reversed by the Supreme Court based on a finding that "it is improper for the federal courts to entertain a claim by a plaintiff...[who] lacks prudential standing to bring this suit in federal court." *See Newdow*, 124 S.Ct. at 2312. Such a view of the matter fails to come to grips with the unavoidable fact that when the Supreme Court holds that the a decision is rendered based on an erroneous finding of standing, an element of subject-matter jurisdiction, that reversal vitiates any the merits because "[f]or a court to pronounce upon [the merits] when it has no jurisdiction to do so...is for a court to act ultra vires." *Ruhrgas*, 119 S.Ct. at 1569.

For these reasons, the prior opinions of this Circuit rendered in the lead up to the decision of the United States Supreme Court in Newdow's first run at the Pledge of Allegiance did not bind the district court and does not bind this panel as it considers Newdow's claims on the merits.

II. A Policy Allowing Voluntary Recitation Of The Pledge Of Allegiance Does Not Violate The Establishment Clause Because The Pledge Contains A Reference To God.

For the reasons given above, this Court is free to consider Newdow's claims without regard for any prior panel decisions. Amicus Curiae, the Thomas More Law Center ("TMLC"), respectfully submits that this Court must reverse the district court and order that the plaintiffs' claims be dismissed with prejudice. Given its role as amicus and its duty to avoid redundant argument the TMLC adopts the merits arguments advanced by the United States and the Defendant Interveners and urges this Court to reverse the district court for the reasons these parties have stated at length.

Briefly stated, this amicus respectfully submits that a policy which results in the voluntary recitation of the Pledge of Allegiance does not violate the Establishment Clause because it contains an acknowledgment of the common conviction that this nation exists under God. Our history shows that the conviction that this nation exits under God engendered the protection for religious liberty that the plaintiffs enjoy. Regardless of the plaintiffs misguided zeal, this Court must take great care to respect that common conviction that this nation exists under God. As this Court would take no part in any effort to undermine the religious liberty which has made our great nation a light to the world, so too it

must not use its power to undermine the shared conviction which made that liberty possible.

CONCLUSION

For the reasons given above, this Court is free to consider Newdow's claims without regard for any prior panel decisions. Amicus Curiae, the Thomas More Law Center, respectfully submits that this Court must reverse the district court and order that the plaintiffs' claims be dismissed with prejudice. This Court must take great care to respect that common conviction that this nation exists under God, recognizing the role this conviction plays in fostering religious liberty, and realizing that things which grow together, die together

Respectfully submitted,

June 13, 2006

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