CASE NOS. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW; et al.,

Plaintiffs-Appellees,

v.

JOHN CAREY; et al.,

Defendant-Intervenors-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
(District Court No. CV-05-00017-LKK)

MOTION OF PLAINTIFFS-APPELLEES TO EXCEED THE TYPE-VOLUME LIMITATION FOR THEIR ANSWERING BRIEF

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Pursuant to *Circuit Rule* 32-2, *Circuit Rule* 28-4, and *FRAP* 27, Plaintiffs-Appellees respectfully move for leave to file an Answering Brief in excess of the type-volume limitation provided in *FRAP* 32(a)(7)(B)(i).

Counsel for Plaintiffs-Appellees has contacted opposing counsel. Defendants-Intervenors United States and John Carey *et al* graciously provided their "consent" to this Motion. Similarly, Defendant Rio Linda Union School District (also graciously) stated that it "has no objection." All three agreed to an enlargement to 21,000 words. Plaintiffs-Appellees have been able to edit their Answering Brief to 17437 words.

A Declaration of Michael Newdow, attorney for Plaintiffs-Appellees, in support of this Motion is attached.

Respectfully submitted,

July 17, 2006 _____

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DECLARATION OF MICHAEL NEWDOW IN SUPPORT OF MOTION OF PLAINTIFFS-APPELLEES TO EXCEED THE TYPE-VOLUME LIMITATION FOR THEIR ANSWERING BRIEF

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I, Michael Newdow, declare as follows:

(1) I am counsel for the Plaintiffs-Appellees in the case at bar.

(2) This case involves an Establishment Clause challenge to the two words, "under God," in the nation's Pledge of Allegiance.

(3) Establishment Clause jurisprudence has been described as a "geometry of crooked lines and wavering shapes,"[1] that leaves the lower courts with the "sisyphean task"[2] of making sense of its "hopeless disarray."[3]

(4) Accordingly, there are numerous aspects of this case that require explanations for this Court's full consideration.

(5) Each of those aspects – even when repeatedly edited – requires prose that (when all assembled) significantly exceeds the 14,000 word limit imposed by *FRAP* 32(a)(7)(B)(i).

(6) This is especially true since the Court has so many options as to what criteria and/or tests it will use to reach its decision.

(7) In other words, it is impossible to predict if the Court will look to:

    a. the neutrality principle (recently declared to be the "touchstone" of the analysis, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005));

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[1] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (Scalia, J., concurring)
[2] *Comm. for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).
[3] *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

b. the "purpose prong" of the *Lemon* test (reaffirmed – but deemed to be "seldom dispositive" in *McCreary*, 125 S. Ct. at 2732);

c. *Lemon*'s "effects prong" (the other key portion of *Lemon*, but discussed only secondarily in *McCreary*);

d. the endorsement test (which appears to be so clearly violated, yet was used to uphold the "under God" verbiage by its author. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) (O'Connor, J., concurring));

e. the "coercion" test (used previously by this Circuit to uphold Plaintiffs-Appellees' position, *Newdow v. United States Cong.*, 328 F.3d 466, 487 (9th Cir. 2003), but cited (without application) by two sister circuits to conclude the "under God" phrase does not violate the Establishment Clause); or

f. any of the other tests suggested by the Supreme Court, such as the "outsider test," the "imprimatur test," and so on.

(8) Furthermore, for each criterion and/or test, it is impossible to know how much material will be needed to make the given point. For instance, in regard to *Lemon*'s "purpose prong," the entire 14,000 words could easily be used in making Plaintiffs-Appellees' case. But – were the Court so inclined – that case could also be made with one or two citations.

(9) Additionally, there are the many prior Supreme Court holdings that have direct applicability. Which of these will the Court choose to examine? And what of the myriad dicta that can be assembled to manufacture whichever opinion a panel desires?

(10) With the Supreme Court having never ruled on the constitutionality of the Pledge, the case law in the Courts of Appeals takes on greater significance. Thus, each of the three Circuit Court Pledge cases – one from this Circuit, and two from sister Circuits – need analysis. That, too, could (on its own) consume the entire 14,000 word allotment.

(11) In addition to the foregoing, there is an issue of basic fairness. In cases such as these – where the reviewing court's analysis is *de novo* – the Appellants always have a significant advantage, inasmuch as they not only get the first and last word, *FRAP* 31(a)(1), *FRAP* 28(c), but they get an extra 7,000 words as well. *Rule* 32(a)(7)(B)(i).

(12) Plaintiffs-Appellees understand that "that's the breaks." However, in the instant litigation, that advantage is compounded by the fact that there are three Appellants. Thus, they have a total of 63,000 words to make their points. Contrasted with the 14,000 word limitation imposed upon Plaintiffs-Appellees, this certainly seems one-sided.

(13) It also seems that the Ninth Circuit has a mechanism in place to deal with this precise situation. *Circuit Rule* 28-4 states (in pertinent part): "[T]he court will grant a reasonable … enlargement of size … for filing a brief responding … to multiple briefs."

(14) Plaintiffs-Appellees ask only to be given 17437 words – less than the number provided to each Appellant. Thus, should the Court grant this Motion, Appellants will still have a greater than three to one advantage in words. Additionally, they will still have both the first and last word as the arguments are made.

(15) Plaintiffs-Appellees also will note that – even as their Brief now stands – they have cut a large amount of material in order to pare down its length.

(16) For instance, their arguments on (i) "ceremonial deism," (ii) "acknowledgments" as opposed to "endorsements," (iii) the current inequities suffered by Atheists, (iv) the "political philosophy" claims of certain *amici*, (v) an assortment of relevant historical events, and (vi) the *Brief for amicus curiae The United States* submitted in *Brown v. Board of Education*, 347 U.S. 483 (1954) (which reveals the marked disparity between how the federal government has supported racial as opposed to religious equality), have been either markedly whittled away, or eliminated altogether.

(17) Also worthy of mention is that the Court granted the Motion of *amicus curiae Pacific Justice Institute* to file a brief that was 67% longer than allowed under the relevant Rule for *amici curiae*. *FRAP* 29(d). Plaintiffs-Appellees here are requesting only a 25% enlargement.

(18) Finally, Plaintiffs believe that granting this Motion will truly provide the Court with a more thorough review of the "issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

(19) In view of the foregoing, Plaintiffs-Appellees respectfully seek leave of the Court to file the accompanying Answering (Respondent's) Brief, consisting of 17437 words.

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

Executed this 17th day of July, 2006, at El Paso, Texas.

_____

Michael Newdow
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

Case #05-17257, 05-17344, 06-15093

I HEREBY CERTIFY that on this 17th day of July, 2006, true and correct copies of:

(1) MOTION OF PLAINTIFFS-APPELLEES TO EXCEED THE TYPE-VOLUME LIMITATION FOR THEIR ANSWERING BRIEF, and
(2) DECLARATION OF MICHAEL NEWDOW IN SUPPORT OF MOTION

were delivered by e-mail to the following individuals:

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Pursuant to Ninth Circuit *Rule* 25-3.3, the undersigned has received a completed and signed Form 13 (Consent to Electronic Service) from counsel for each of the parties.

July 17, 2006 _____

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Final spellcheck
“Record Excerpts”
Final “ and ‘ change
Final “fonting” of footnotes
Bold the TOC