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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN ROE AND ROECHILD-2,

Plaintiffs-Appellees,

v.

RIO LINDA UNION SCHOOL DISTRICT,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellant,

and

JOHN CAREY, et al.,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT THE UNITED STATES

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Introduction

As our opening brief demonstrated, the district court erred by concluding that it is bound by this Court's decision in Newdow III. As we explained, the Supreme Court reversed Newdow III for lack of prudential standing, and opined that it was "improper" for this Court to have reached the merits of Newdow's challenge to the Pledge. See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 17 (2004). Prudential standing is jurisdictional, and courts have no power to declare the law without jurisdiction. See DaimlerChrysler v. Cuno, 126 S. Ct. 1854, 1860-61 (2006). Thus a decision rendered by a court that lacked prudential standing does not have precedential effect.

Plaintiffs address this critical issue only in passing in their appeal brief, and offer no case law or logic to defend the district court's errant belief that it was bound by Newdow III. Rather than defend the district court's rationale, they devote almost their entire brief to arguing the merits of their Establishment Clause claim. They do not, however, nor can they, dispute the fact that the Supreme Court, in two majority opinions, has specifically said that the Pledge of Allegiance is consistent with the Establishment Clause. Those decisions are what is binding on this Court. Plaintiffs' other merits-related arguments also fail, for the reasons we discuss below.

I. THIS COURT'S REVERSED DECISION IN NEWDOW III IS NOT A BINDING ESTABLISHMENT CLAUSE PRECEDENT.

A. As our opening brief demonstrates, the district court erred by holding that this Court's prior decision in Newdow III is binding precedent. The district court reasoned that because the Supreme Court reversed Newdow III for lack of prudential standing and did not reach the merits of Newdow's Establishment Clause challenge to the Pledge, this Court's prior merits ruling remains binding precedent. The district court was wrong to so rule. Prudential standing is jurisdictional. A decision reversed for want of jurisdiction cannot establish a binding precedent, and a court may not assume jurisdiction and then rule for the party who is attempting to invoke the court's jurisdiction. See U.S. Appellant Brief at 13.

The district court's contrary ruling, as our opening brief explained, lacks any logical or doctrinal basis, and would flout the fundamental proposition that "'[w]ithout jurisdiction the court cannot proceed at all in any cause." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1994), quoting Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868). To accord precedential effect to a decision that was reversed because the court that issued it lacked jurisdiction would lock future courts into a legal holding that was improperly reached, which is how the Supreme Court described Newdow III, see Elk Grove, 542 U.S. at 17, on behalf of a party whose interests were not "best suited to

assert a particular claim." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979).

Plaintiffs' abbreviated discussion of this issue fails to demonstrate that Newdow III is binding precedent. For example, plaintiffs' principal submission on this point is merely to note that courts can "pretermit prudential standing issues." Appellee Brief at 70 (citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998)). Plaintiffs cite no case, however, in which a court has assumed prudential standing in order to rule for the party that seeks to invoke the court's jurisdiction. There is no such case. See U.S. Appellant Brief at 18-20.[1]

A court cannot assume jurisdiction and then rule on the merits in favor of the party for whom it has assumed jurisdiction. See U.S. Appellant Br. at 19. That kind of rule would relieve a party of its obligation to prove that the court has jurisdiction to grant relief in its favor, see, e.g., DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1861 (2006) (parties asserting federal jurisdiction "must carry the burden of establishing their standing"), and would authorize a court to "declare the law" when it lacks the power to do so. See Steel Co., 523 U.S. at 94 (noting that jurisdiction is the "power to declare the law").

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[1] For example, as we explained in our opening brief, Am. Iron & Steel Inst. v. OSHA, 182 F.3d 1261 (11th Cir. 1999), which the district court cited and plaintiffs also cite, is not such case. See U.S. Appellant Br. at 19.

Central Pines Land Co. v. United States, 274 F.3d 881 (5th Cir. 2001), cert. denied, 537 U.S. 822 (2002), upon which plaintiffs also rely, see Appellee Br. at 71, is inapposite. There, the Fifth Circuit held that it was bound by a prior decision of that Court because the judgment in that prior decision had been reversed on other grounds. See 274 F.3d at 894. Unlike Newdow III, however, the prior ruling to which the Fifth Circuit in Central Pines deferred had been not been reversed for lack of jurisdiction. See United States v. Little Lake Misere Land Co., 453 F.2d 360 (5th Cir. 1971), rev'd, 412 U.S. 580 (1973).[2] Thus, Central Pines does not establish, or in any way suggest, that a decision that has been reversed for lack of prudential standing has binding precedential effect.

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[2] In Little Lake, the Fifth Circuit held that the United States could not quiet title to certain lands because a state law (Act 315) forbade the prescription of mineral reservations associated with the land that were held by certain private parties. In support of that ruling, the Fifth Circuit held that state and not federal law governed, and that the state law in question did not unlawfully discriminate against the United States. See 453 F.2d at 362. See also 412 U.S. at 591-92 (describing the Fifth Circuit's decision in a previous case, Leiter Materials, which the Fifth Circuit had relied upon in Little Lake in holding that state law governed the quiet title dispute in Little Lake). The Supreme Court reversed, holding that federal common law governed the controversy. See 412 U.S. at 604. Because the Supreme Court did not address the discrimination issue, the Fifth Circuit in Central Pines held that the prior holding in Little Lake remained good law on that issue, and was binding precedent. See 274 F.3d at 894. Central Pines is inapposite here, therefore, because the Supreme Court's reversal in Little Lake was not on jurisdictional grounds, like the Supreme Court's reversal of Newdow III in Elk Grove.

Plaintiffs also note that the plaintiff in Newdow III (Michael Newdow, who is the attorney for plaintiffs in this action) had full legal custody of his daughter in that case while the case was in the district court and "beyond the completion of briefing during the appeal." Appellee Br. at 68. Plaintiffs rely on this point to argue that the proceedings in the Newdow litigation "were in no way different than they otherwise would have been (had the plaintiff's legal custody never been taken)." Ibid. In Elk Grove, however, the Supreme Court held that Newdow lacked the right to make the final decisions regarding his daughter's psychological and educational needs at the time this Court issued each of its decisions in the Newdow litigation. See 542 U.S. at 13-14. Thus, this Court clearly lacked jurisdiction to address the merits of the claims in the Newdow litigation. See, e.g., Burke v. Barnes, 479 U.S. 361 (1987) (a live case or controversy must exist at the time a federal court decides a case).

Moreover, the Newdow proceedings were decidedly not "the same as they would have been had the plaintiff's legal custody never been taken)." As the Supreme Court held in Elk Grove, it was "improper" for this Court to entertain Newdow's Establishment Clause claim on the merits in that litigation. 542 U.S. at 17. Thus, had this Court acted "properly" in that litigation, it would have dismissed the claim for lack of jurisdiction.

Plaintiffs also contend that "judicial economy would certainly be served by considering Newdow III as binding." Appellee Br. at 67. Considerations of judicial economy do not justify treating a decision that was improperly reached as having binding precedential effect, however, and there is no case holding otherwise. Moreover, contrary to what plaintiffs suggest, to hold that Newdow III lacks binding effect because it was reversed on jurisdictional grounds would not constitute "abandoning" that decision in some legally improper way. Appellee Br. at 68. There is no judicial value to be gained from treating a decision that was improperly reached as having binding precedential effect.

Plaintiffs rely on Friends of the Earth, Inc. v. Laidlaw, 528 U.S. 167 (2000), in this regard, but that decision actually conflicts with the notion that this Court should consider Newdow III binding in order to serve judicial economy. In Laidlaw, the Supreme Court noted that judicial economy can be relevant in determining whether a case that has been brought and litigated has become moot. See id. at 192. The Court was careful to observe, however, that judicial economy "does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest . . .." Ibid. (citation omitted). This case fits that category, since Newdow lacked prudential standing in Newdow III at the time this Court issued each of its rulings in that litigation.

Finally, plaintiffs cite Craig v. Boren, 429 U.S. 190 (1976), for the proposition that the judiciary "ought not 'foster repetitive and time-consuming litigation under the guise of caution and prudence.'" Appellee Br. at 71, citing Craig, 429 U.S. at 194. Craig, however, is not pertinent. There, the Supreme Court concluded that a licensed vendor of 3.2% beer had Article III standing to challenge a state law forbidding the sale of such beer to males under the age of 21 and females under the age of 18. The Supreme Court held that the vendor's action should not be dismissed for lack of jus tertii standing (which is one of several prudential standing requirements) because the courts below had already reached the merits and the defendants had never contested standing.

Here, by contrast, the Supreme Court reversed Newdow III even though the district court and this Court had already invested substantial judicial resources in addressing the merits of the case. By so ruling, therefore, the Supreme Court decided that the needs of judicial economy do not justify treating the merits decision in Newdow III as having binding effect. That disposition defeats plaintiffs' attempt to invoke principles of judicial economy in this litigation. There is no indication whatsoever in the Elk Grove opinion that the Supreme Court intended Newdow III to retain precedential effect, and to so rule would, as we have explained, directly contravene settled Article III jurisprudence.

B. As our opening brief explains (pp. 20-22), the district court also erred in holding that Newdow III is binding precedent because the Supreme Court rejected Newdow III's central premise: that reciting the Pledge of Allegiance is a religious act. See Newdow III, 328 F.3d at 487. In Elk Grove, the Supreme Court concluded that reciting the Pledge "is a patriotic exercise designed to foster national unity and pride in those principles" on which the Nation was founded, including its "proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.'" See 542 U.S. at 6 (emphasis added) (citation omitted). That conclusion is irreconcilable with Newdow III's holding that voluntary recitation of the Pledge is an unconstitutional religious act. See U.S. Appellant Br. at 21.

Plaintiffs argue that Elk Grove's statement that reciting the Pledge is a patriotic act was merely background. Appellee Br. at 10. The Supreme Court, however, based its conclusion in that regard on a careful review of the Pledge's history, including how it was "initially conceived," codified into federal law, and amended to include the phrase "under God." 542 U.S. at 6-7. Plaintiffs are wrong to suggest that this Court may freely ignore the Supreme Court's specific and direct pronouncements regarding the nature of reciting the Pledge of allegiance in school.

Finally, plaintiffs' citation of Washington v. Confederated Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979), completely misses the mark. That case merely recited that while a summary dismissal by the Supreme Court is a ruling on the merits, it does not have "the same precedential value . . . as does an opinion of this Court after briefing and oral argument on the merits . . .." Id. at 478 n.20 (citations omitted). Elk Grove was an opinion by the Supreme Court rendered after full briefing and oral argument on the merits. Thus, there is no reason why the Supreme Court's carefully crafted conclusions regarding the Pledge in that case should not have precedential value.

II. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT PUBLIC SCHOOL TEACHERS FROM LEADING WILLING STUDENTS IN VOLUNTARILY RECITING THE PLEDGE OF ALLEGIANCE.

As our opening brief demonstrates, the Supreme Court, in two majority opinions, has definitively resolved that the Pledge of Allegiance is consistent with the Establishment Clause. As those decisions and numerous other opinions of individual justices explain, the Pledge is a permissible acknowledgment of this Nation's heritage and character, and is thus perfectly appropriate for children to recite in public schools, similar to the Gettysburg Address and the National Anthem, both of which contain references to God. Plaintiffs have no answer for these points, and, as we demonstrate below, the arguments they offer in their appeal brief completely lack merit.

A. The Supreme Court Definitively Resolved the Constitutionality of Reciting the Pledge of Allegiance in Lynch v. Donnelly and County of Allegheny.

In Lynch v. Donnelly, 465 U.S. 668 (1984), and County of Allegheny v. ACLU, 492 U.S. 573 (1989), the Supreme Court, in majority opinions, expressly approved the Pledge of Allegiance without qualification. See Lynch, 465 U.S. at 675, 677 (the words "under God" in the Pledge are an "acknowledgment of our religious heritage," similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers," which are "replete" in our Nation's history); County of Allegheny, 492 U.S. at 602-03 (reaffirming Lynch's approval of the reference to God in the Pledge, and noting that all of the Justices in Lynch viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief") (citations omitted).

Plaintiffs argue that Lynch and County of Allegheny merely referred to the Pledge "in passing." Appellee Br. at 49. To the contrary, as our opening brief explained (pp. 34-35), both Lynch and County of Allegheny used the Pledge as a benchmark for evaluating the constitutionality of religious displays at issue in those cases.[3] Thus, both Lynch and County of Allegheny constitute

[3] See Lynch, 465 U.S. at 676, 680 (upholding a holiday creche display because it "depicts the historical origins of this traditional event long recognized as a National Holiday," similar to other "examples of reference to our religious heritage," such as

controlling Supreme Court precedents regarding the Pledge's constitutionality. See Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996) ("When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound").

Moreover, the fact that the Pledge is a permissible acknowledgment of religion, as Lynch and County of Allegheny both noted, is the legal basis for the Pledge's constitutionality, similar to how the Supreme Court has viewed other acknowledgments of religion, such as such as the National Anthem, the fourth verse of which includes the phrase "[a]nd this be our motto, in God is our Trust;" the inscription of "in God we Trust" on U.S. coins; the National Motto; Congress's declaration of Christmas Day and Thanksgiving Day as national holidays; displays of religious items in federal buildings and in art galleries; and the conclusion of the Supreme Court clerk's opening announcement ("God save the United States and this honorable Court"). See, e.g., Lynch, 465 U.S. at 675; Elk Grove, 542 U.S. at 29 (Rehnquist, J., concurring).

"in the language 'One nation under God,' as part of the Pledge of Allegiance to the American Flag," which the Court noted "is recited by many thousands of public school children – and adults – every year"); County of Allegheny, 492 U.S. at 598, 603 (holding that a different holiday creche display violated the Constitution because, unlike the Pledge or the Lynch display, it gave "praise to God in [sectarian] Christian terms").

As Justice O'Connor explained in her concurring opinion in Elk Grove, the use of religious language in all these official contexts is "properly understood as employing the idiom for essentially secular purposes," such as "to commemorate the role of religion in our history." 542 U.S. at 35. As she went on to note, "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." Id. at 35-36.[4]

Plaintiffs note that in three cases, individual Supreme Court justices criticized the Court's Establishment Clause jurisprudence because certain aspects of that jurisprudence, with which those Justices disagreed, would call into question the Pledge's constitutionality if applied to the Pledge. See Appellee Br. at 50, citing Wallace v. Jaffree, 473 U.S. 38, 88 (1985) (Burger, C.J., dissenting); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 29-30 (1969) (Scalia, J., dissenting); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., dissenting). Each of those opinions, however, took the position that the Pledge of Allegiance is constitutional. Thus, each of those opinions actually falls into line with Lynch and County of Allegheny, which approved the Pledge,

[4] See also id. at 36 (noting that religious references can "'serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society'" (citation omitted).

and those opinions in no way suggest that their authors thought the Pledge is anything but fully constitutional.[5]

Plaintiffs contend that this case is controlled by hundreds of "principled dicta" from various Supreme Court decisions that plaintiffs believe would call the Pledge's constitutionality into question if applied to the Pledge. See Appellee Br. at 48-49. The dicta on which plaintiffs rely do not specifically refer to the Pledge, however, and constitute nothing more than general observations about how the Establishment Clause applies in other, unrelated contexts. That dicta, therefore, do not countermand the Supreme Court's specific conclusion in Elk Grove that the Pledge is a "patriotic exercise designed to foster national unity," 542 U.S. at 6, and the Court's direct approval of the Pledge in Lynch and County of Allegheny. See, e.g., Newdow v. Eagen, 309 F. Supp. 2d 29, 40-41 (D.D.C.)(rejecting similar reliance on general dicta to urge overruling of Marsh v. Chambers), appeal dismissed, 2004 WL 1701043 (D.C. Cir. 2004). See also Agostini v. Felton, 521 U.S. 203, 217 (1997) (lower court may not assume the Supreme Court will overrule existing precedent that is directly on point).

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[5] Plaintiffs also ignore the fact that numerous other opinions of individual Justices support the Pledge's constitutionality. See, e.g., Lee v. Weisman, 505 U.S. 577, 638-39 (1992) (Scalia, J., dissenting); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985)(O'Connor, J., concurring); id. at 88 (Burger, C.J., dissenting); Abington Sch Dist. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

It is especially important for lower courts to observe this rule in Establishment Clause cases. As the Supreme Court has frequently emphasized, Establishment Clause jurisprudence is highly context-specific. See, e.g., Lynch, 465 U.S. at 679 (noting that the focus of the Court's inquiry "must be on the creche in the context of the Christmas season"); Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) (O'Connor, J., concurring) (noting that "there are different categories of Establishment Clause cases, which may call for different approaches"). Thus, it is grave error for plaintiffs to assume that general pronouncements regarding what the Establishment Clause requires in other contexts have any application at all to the Pledge's constitutionality. The most reliable guide to resolving any Establishment Clause issue is to ascertain what the Supreme Court has said about that particular issue. Here, as we have explained, the Supreme Court's specific statements about the Pledge of Allegiance all point to the same conclusion: that the Pledge, similar to numerous other official acknowledgments of religion, is fully constitutional.

Plaintiffs also rely heavily on what they contend are four "on-point" Supreme Court decisions. Appellee Br. at 40. Those decisions are certainly on-point regarding some issue, but not the constitutionality of reciting the Pledge of Allegiance. For example, Engel v. Vitale, 370 U.S. 421 (1962), held that schools

may not compose official prayers and lead students in reciting them during the school day. Plaintiffs concede that Engel "can be distinguished from the instant case because the verbiage in Engel was a 'prayer'" and the Pledge of Allegiance is not. They contend that this distinction is a "straw man" because teachers could not invite willing students to stand and recite the words "one Nation under God" by themselves (i.e., without reciting the remainder of the Pledge). Appellee Br. at 40.

It is this hypothetical, however, that is flawed. Rio Linda invites students to recite the Pledge in its entirety, and not just the words "under God," and, as we have demonstrated, the constitutionality of religious language must be evaluated in context. Indeed, the Supreme Court recently reiterated this point by holding a Ten Commandments display unconstitutional in one setting, see McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722 (2005), while holding another such display constitutional in a different context. See Van Orden v. Perry, 125 S. Ct. 2854 (2005).

Wallace v. Jaffree, 472 U.S. 38 (1985), the second case plaintiffs maintain is "directly on point," Appellee Br. at 43, never actually mentions the Pledge. Moreover, that case is distinguishable for the same reasons Engel is distinguishable – it involves the context of school prayer, as opposed to what the Supreme Court in Elk Grove described as "patriotic" speech.

Plaintiffs' third "on-point" case, County of Allegheny, involved a Christmas display, and the Court's majority opinion, as we have explained, took pains to note that all of the Justices in Lynch v. Donnelly viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03.

Plaintiffs' fourth "on-point" case is Brown v. Board of Education, 347 U.S. 483 (1954). See Appellee Br. at 45 (arguing that "animus toward Atheists is greater than toward any other minority, racial or otherwise"). Plaintiffs' citation of Brown requires no response, other than to note that Brown did not involve the Pledge of Allegiance and was not even an Establishment Clause case. Acknowledging the religious heritage of our Nation in official documents such as the Pledge, the National Anthem, and the National Motto, is perfectly constitutional, and does not unlawfully discriminate against anyone or restrict anyone's freedom. See generally West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (Constitution allows students or other persons who object on religious or other grounds to reciting the Pledge of Allegiance to refrain from doing so). See also Elk Grove, 542 U.S. at 8 (noting that the Elk Grove School District's Pledge-recitation policy, which is materially the same as Rio Linda School District's policy, ensures the same freedoms guaranteed by Barnette).

Finally, plaintiffs argue that "in nine of the nine previous cases involving government-sponsored religion in the public education arena – often of a degree far less than is occurring here – the [Supreme] Court has ruled the challenged practice invalid." Appellee Br. at 38 (emphasis and citations omitted). This argument begs the question, however, by assuming that inviting students to recite the Pledge of Allegiance is "government-sponsored religion." It is most decidedly not, as we have shown, and as the Supreme Court noted in Elk Grove by stating that the Pledge is a "patriotic act." 542 U.S. at 6. Moreover, none of the nine cases plaintiffs cite involved the Pledge or any other form of official acknowledgment of this Nation's religious heritage and character.

Plaintiffs also ignore the fact that many Supreme Court opinions which address religion in the public schools, including two majority opinions for the Court, contain language that support voluntary recitation of the Pledge in public schools. For example, in Engel, which held that public schools may not require students to recite official prayers, the Supreme Court was careful to note the following:

> 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 that there are many manifestations in our public life of belief in God. Such

> patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

370 U.S. at 435 n.21. See also Schempp, 374 U.S. at 213 (noting, in the course of invalidating Bible reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending with "So Help Me God"). Thus, for all the above reasons, plaintiffs' suggestion that this case is controlled by hundreds of off-point and out-of-context Supreme Court dicta regarding the Establishment Clause, rather than by the Court's specific approval of the Pledge in Lynch, County of Allegheny, and Elk Grove is utterly without merit.

B. Voluntary Recitation of the Pledge in Public Schools Comports With Each of the Tests the Supreme Court has Used in Various Contexts to Evaluate Whether Government Action is Consistent With the Establishment Clause.

In our opening brief, we demonstrated that Rio Linda's voluntary Pledge-recitation policy is consistent with each of the Supreme Court's Establishment Clause tests, including the Lemon test, the endorsement test, and the coercion test. See U.S. Appellant Br. at 35-54. Plaintiffs dispute these points, but, as we explain below, their arguments have no basis. Even if judged apart from the significant, if not dispositive effect of history, see Marsh, voluntary recitation of the Pledge would satisfy each of the Supreme Court's various Establishment Clause tests.

1. Voluntary Recitation of the Pledge in Public Schools Is Consistent with the Lemon test.

The Lemon test focuses on whether government action has the purpose or primary effect of advancing religion. See Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). See also Agostini v. Felton, 521 U.S. 203, 222-23 (1997). Rio Linda's policy of inviting willing students to recite the Pledge easily passes that test.

a. As our opening brief explains, Rio Linda's voluntary Pledge-recitation policy serves the valid, secular purposes of promoting patriotism and instilling shared values in public school children. See U.S. Appellant Br. at 36-37. Plaintiffs concede that Rio Linda's Pledge-recitation policy is designed specifically to further these purposes, see id. at 36, and the Supreme Court in Elk Grove took the same view of the Pledge, concluding, as we have noted, that its recitation is a patriotic exercise, see 542 U.S. at 6. All 50 states share the same view, and have filed an amicus brief with this Court to underscore the importance their voluntary Pledge-recitation policies have to their secular mission of promoting patriotism and shared values. See Brief of 50 States as Amicus Curiae in Support of Defendants-Appellants at 2 (noting that "daily, voluntary recitation of the Pledge of Allegiance furthers the high, and nonreligious, purpose of nurturing active citizens who grasp the virtues of patriotic life and appreciate our Nation's distinctive heritage").

Plaintiffs argue that the Pledge lacks a secular purpose because Congress allegedly was motivated by religious concerns when it added the words "under God" to the Pledge in 1954. Plaintiffs do not purport to be raising a facial challenge to the Pledge itself, however, and plaintiffs' attack on Congress's purpose for amending the Pledge in 1954, if accepted, would preclude the Pledge from being recited at any public event associated with the government. Plaintiffs do not seek that result, and such a ruling would clearly be overbroad, and broader even than the result reached in Newdow III. See 328 F.3d at 490.

Thus, because plaintiffs are only challenging Rio Linda's contemporary Pledge-recitation policy, the Establishment Clause purpose inquiry must focus on Rio Linda's reasons for leading willing students in reciting the Pledge. See U.S. Appellant Br. at 39-40 (citing McGowan v. Maryland, 366 U.S. 420, 434 (1961)). Rio Linda's reasons for its policy, as we have demonstrated, are purely secular and permissible, and coincide precisely with what the Supreme Court itself recently concluded about the Pledge in Elk Grove. See 542 U.S. at 6 (noting that reciting the Pledge is a "patriotic exercise designed to foster national unity").

Even if the Court were to scrutinize the purpose Congress's 1954 amendment of the federal Pledge statute (4 U.S.C. 4), however, it would find no constitutional excess. As our opening brief explains, that amendment's legislative history shows that

Congress's intent was to highlight a foundational difference between the United States and communist nations: that "[o]ur American Government is founded on the concept of the individuality and the dignity of the human being," and that "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." U.S. Appellant Br. at 38 (citation omitted). Thus, as we explained, Congress added "under God" to the Pledge to emphasize the Framers' political philosophy concerning the sovereignty of the individual. Ibid. That is obviously a secular purpose. Moreover, as Justice O'Connor concluded in Elk Grove, "our continued repetition of the reference to 'under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context." 542 U.S. at 41. Thus, she explained, "the subsequent social and cultural history of the Pledge shows that its original secular character was not transformed by its amendment [to include the words 'under God].'" Ibid. (emphasis in original).

b. The primary effect of Rio Linda's Pledge-recitation policy reflects its secular purposes: to promote patriotism and national unity. See U.S. Appellant Br. at 40. See Elk Grove, 542 U.S. at 6 (concluding that reciting the Pledge "is a patriotic exercise designed to foster national unity and pride in [the ideals that our flag symbolizes]").

Plaintiffs contend the Pledge is "not patriotic" because it "tramples upon key ideals that our flag symbolizes – i.e., governmental neutrality in matters religious . . .." Appellee Br. at 10, 11. The Supreme Court concluded otherwise in Elk Grove, however, see 542 U.S. at 6 (reciting the Pledge is a "patriotic exercise"), and plaintiffs' objection to the Pledge is plainly baseless in any event. The Pledge of Allegiance is not a prayer or a religious tract of any type, and it takes no position on any religious question. Rather, as the Supreme Court definitively announced in Lynch and County of Allegheny, supra, the words "under God" are a permissible acknowledgment of our Nation's heritage - a heritage that all Americans jointly share. Similar references to God are found in other foundational American texts, such as the Declaration of Independence, the National Anthem, the Gettysburg Address, and the Supreme Court's own opening of its sessions with the statement "God save the United States and this Honorable Court." Engel v. Vitale, 370 U.S. 421, 466 (Stewart, J., dissenting). Those texts are part of our common national heritage, and, properly understood in light of their history and context, they serve to promote patriotic, not religious, ideals. See Brief of Amicus Curiae County of Los Angeles at 8 (recitation of the Pledge "serves to unite the [diverse] residents of the County of Los Angeles by highlighting their shared status of American citizens").

Relying on "social science data" presented in an amicus brief that was filed in the Supreme Court in Elk Grove, plaintiffs contend that the Pledge's primary effect is to "inculcate . . . children with the belief that God exists." Appellee Br. at 33 (citation omitted). As the United States advised the Supreme Court in Elk Grove, however, that amicus brief provided a seriously misleading account of the data in question. See Reply Brief for the United States as Respondent Supporting Petitioners, Elk Grove, 2005 WL 522593 *13 (noting that what the data actually show is that "[w]hile some children perceived the Pledge as a prayer, others in amicus studies' did not," and that "the overall curricular context – in which the Pledge is recited in conjunction with the study of civics and national history – leads students to view the Pledge and its text in purely patriotic terms").

Moreover, "if any student were to misperceive the words 'under God' as endorsing religion, the remedy would be to instruct students about the Pledge's true meaning, not to strike the words 'under God.'" Reply Brief for United States, Elk Grove,*14 (quoting Board of Educ. v. Mergens, 496 U.S. 226, 251 (1990)). See also id. *13-14 (noting that the Supreme Court has refused "to employ Establishment Clause jurisprudence using a modified heckler's veto,' in which governmental action 'can be proscribed on the basis of what the youngest members of the audience might misperceive'") (citation omitted).

2. Voluntary Recitation of the Pledge in Public Schools Is Consistent with the Endorsement Test.

Our opening brief explains why voluntary recitation of the Pledge of Allegiance is not an endorsement of religion. See U.S. Appellant Br. at 40-44. Plaintiffs challenge that conclusion, but they acknowledge that in Elk Grove, Justice O'Connor, who "introduced the endorsement test," Appellee Br. at 25, adjudged reciting the Pledge to be consistent with that test. Ibid. The reasonable observer, Justice O'Connor concluded, "fully aware of our national history and the origins of . . . practices [such as the National Motto, the National Anthem, and the Pledge], would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non-religion." 542 U.S. at 36. Plaintiffs suggest that other Justices might not adopt Justice O'Connor's position. They offer nothing to support this supposition, however, other than to reiterate their view that the Pledge is a religious homily rather than patriotic exercise that recognizes the nation's heritage and founding principles, which is incorrect. See Appellee Br. at 26-28.

Plaintiffs argue that the phrase "under God" in the Pledge unlawfully "endorse[s] monotheism, while disapproving of Atheism." Appellee Br. at 3. The Supreme Court, however, has repeatedly emphasized the constitutional difference between acknowledgment of the role that belief in "God" has played in the Nation's history

and endorsement of "God" or monotheism." See Lynch, 465 U.S. at 674-78. See also id. at 686 (noting that the Supreme Court has been "unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government"). As we have noted, references to God are found in numerous other official texts that are foundational to our Republic, including the Declaration of Independence, the National Anthem, and the Gettysburg Address. Given the "unbroken history," Lynch, 465 U.S. at 674, of those other texts, no observer could reasonably conclude that the Pledge of Allegiance is an endorsement of religion.

Moreover, whether the Pledge endorses monotheism turns upon the perceptions of an objective, reasonable observer, not on the reaction of "isolated nonadherents," or even whether "some people may be offended by the display, or whether "some reasonable person might think [the State] endorses religion." Capitol Square Review & Advisory Bd. v. Pinnette, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring). Otherwise, the Establishment Clause would "'entirely sweep[] away all government recognition and acknowledgment of religion in the lives of our citizens.'" Ibid. (citation omitted). Thus, plaintiffs' own personal objections to the Pledge, however presumably sincere, are not constitutionally determinative.

Finally, plaintiffs wrongly suggest that reviewing religious language in context would "always" justify the religious component. Appellee Br. at 5. That is not so. For example, in each of the cases plaintiffs cite in this regard, the Supreme Court, after reviewing a religious reference in context, held the government's action unconstitutional. See Appellee Br. at 5-6. Thus, those decisions stand for the proposition that the context in which a religious reference exists will not always render it permissible – precisely the opposite conclusion from what plaintiffs suggest.

3. Voluntary Recitation of the Pledge in Public Schools Is Consistent with the Coercion Test.

As our opening brief demonstrates, voluntary recitation of the Pledge of Allegiance in school is not unconstitutionally coercive because reciting the Pledge is not a religious exercise. See U.S. Appellant Br. at 48-54 (citing Elk Grove, 542 U.S. at 6 (recitation of the Pledge is a "patriotic exercise")). Thus, as we explained, this case is unlike Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School Dist. v. Doe, 530 U.S. 290 (2000), upon which plaintiffs rely. The Supreme Court's finding of unconstitutional coercion in both cases was dependent on the fact that students were pressured to engage in a quintessentially religious act – prayer. Thus, as we pointed out, the governing case regarding coercion principles here is West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

Barnette recognizes that where students are permitted to opt out of reciting the Pledge, there is no unconstitutional coercion. See U.S. Appellant Br. at 49-50. Plaintiffs concede that Rio Linda students have that "opt out" right, and that Rio Linda's policy does not involve any coercion that would violate Barnette. See U.S. Appellant Br. at 48 (citation omitted).

Plaintiffs have no response to these points, other than to exaggerate the Pledge's effects on students who do not believe in God. See Appellee Br. at 31 (referring to the Pledge as an act of "religious oppression"); id. at 37 (referring to "'brutal compulsion'") (citation omitted).[6] Under Rio Linda's Pledge-recitation policy, "[i]ndividuals may choose not to participate in the flag salute for personal reasons." ER 191. Moreover, "[s]tudents who wish to avoid saying the words "under God" still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge." Elk Grove, 542 U.S. at 43 (O'Connor, J., concurring in the judgment).

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[6] The "brutal compulsion" quote from above is pulled out of context from the Supreme Court's opinion in Barnette, 319 U.S. at 635 n.15 (1943). Pursuant to the state laws at issue in Barnette, a student's refusal to salute the flag and recite the Pledge constituted "insubordination" dealt with by expulsion from school. Readmission was denied by statute until compliance, and, meanwhile, the expelled child was considered "unlawfully absent" and could be proceeded against as a delinquent. His parents or guardians were liable to prosecution, and if convicted could be subjected to a fine not exceeding $50 and a jail term not exceeding thirty days. Id. at 629. This case involves no such penalties. By contrast, as we have said, Rio Linda students are allowed to freely opt out of reciting the Pledge. That is precisely what Barnette requires.

Moreover, the fact that some students may object to reciting the words "under God" in the Pledge does not give them a constitutional right to prevent other students who do not share that objection from doing so. As Chief Justice Rehnquist observed in Elk Grove, "[t]here may be others who disagree, not with the phrase 'under God,' but with the phrase 'with liberty and justice for all,'" but that "surely that would not give such objectors the right to [recite the Pledge] by those willing to participate." 542 U.S. at 32 (Rehnquist, C.J., concurring in the judgment). Thus, Rio Linda's policy treats students who object to the words "under God" in the Pledge in precisely the same manner as students who object to other language in the Pledge, or to the idea of reciting any Pledge at all. Cf. Myers v. Loudoun County Public Schools, 418 F.3d 395, 397-98 (4th Cir. 2005).

Finally, plaintiffs suggest it should be irrelevant that the Pledge is not a religious act because the Ten Commandments displays the Supreme Court struck down in Stone v. Graham, 449 U.S. 39 (1980), and McCreary County were not religious exercises. See Appellee Br. at 12. The Supreme Court did not rely on the coercion test at all, however, in either Stone or McCreary County. Rather, it held that the religious displays in both cases lacked a valid secular purpose. Thus, neither case is relevant in any way to the issue of whether recitation of the Pledge in public school is unlawfully coercive.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the United States' Brief as Appellant, this Court should vacate the permanent injunction and remand the case with instructions to dismiss the complaint in its entirety.

Respectfully submitted,

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