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 REPLY BRIEF

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I.

INTRODUCTION

The District Court erred because it was not bound by the Ninth Circuit's opinion in a prior case that was reversed by the Supreme Court. Only at the very end of Appellees' Answering Brief ("AB") do Plaintiffs advance any suggestion that the District Court was actually bound by this Court's ruling on the merits in *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003) ("Newdow III"). (AB 68-71) Plaintiffs' arguments are incorrect. The Ninth Circuit opinion should not serve as binding authority.

If reviewed independently, any determination that the Pledge of Allegiance recited in public schools violates the Establishment Clause of the First Amendment is contrary to the vast preponderance of Supreme Court authority. The constitutional question is simply whether the practice of having children voluntarily recite the Pledge in public schools is compatible with the Establishment Clause of the First Amendment. The answer is yes.

Although many contemporary politicians, like those in office when the phrase was inserted into the Pledge during the Cold War, find it impossible to resist the temptation to proclaim great theological profundity or sanctity in reciting the Pledge, the specifically religious impact of the phrase "under God" is necessarily quite

limited. It does not specify or otherwise invoke "Yahweh" or "Jesus Christ," the major historical forms for Americans. From the time of the Framers to the present, however, there has been a consistent acceptance of certain, albeit limited, ways in which the government has facilitated and recognized religious belief.

All told, Plaintiffs arguments are incorrect for a number of reasons. First, Plaintiffs err in trying to separate out the phrase "under God" and label it a pure religious activity. The phrase at issue encompasses only two words within a longer set of political aspirations for the republic. In this regard, Plaintiffs fail to distinguish the Establishment Clause analysis applied to the particular context of the creche or Ten Commandment displays from the instant case. Second, Plaintiffs mistakenly characterize the Constitution as a rigidly secularist document. The Pledge does not violate any of the many tests applied under the Establishment Clause, nor does Supreme Court precedent otherwise compel a finding of unconstitutionality. Finally, the Pledge does not deprive anyone of equal protection under the law.

II.

THE NINTH CIRCUIT OPINION IN *NEWDOW III* IS NO LONGER BINDING ON THE DISTRICT COURT OR THIS COURT

Plaintiffs set forth a relatively short argument in support of the District Court's determination that it was bound by the determination of the Ninth Circuit in *Newdow*

III. They fail to address at all many of the contentions and authorities set forth by RLUSD in its Opening Brief ("OB"). For example, RLUSD carefully explained (OB 23-24) why *Environmental Protection Information Center, Inc. v. Pacific Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001), one of the few authorities cited by the District Court (ER 220-221), did not support deference to the *Newdow III* opinion following the Supreme Court's remand for lack of prudential standing. Plaintiffs do not even bother mentioning the case. Likewise, Plaintiffs decline to address *Durning v. Citibank N.A.*, 950 F.2d 1419 (9th Cir. 1991), which was cited by the District Court (ER 219) and analyzed by RJUSD. (OB 25-26)

Plaintiffs, meanwhile, do cite (AB 70) *American Iron and Steel Institute v. Occupational Safety and Health Admin.*, 182 F.3d 1261, 1274 (11th Cir. 1999), which the District Court had cited (ER 220). Plaintiffs, however, merely reiterate *American Iron*'s dubious paraphrase (OB 19-20 & fn. 1) of *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998), to the effect that courts cannot pretermit Article III standing issues, but can pretermit prudential standing issues. Assuming arguendo that *American Iron* did not misconstrue the holding of *Steel Co.,* Plaintiffs still conspicuously decline to address a crucial factor. Specifically, Plaintiffs omit any mention of *American Iron*'s qualification that lack of prudential standing can only be overlooked where resolution on the merits was "relatively easy." (ER 220) Plaintiffs

fail to explain how an unprecedented constitutional ruling that the Pledge violates the Establishment Clause could possibly be seen as relatively easy. The Ninth Circuit opinion in *Newdow III* was accompanied by a dissent on the merits. (328 F.3d at 490.) The Supreme Court itself suggested that "matters of great national significance are at stake." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 11 (2004).

The thrust of Plaintiffs argument centers on their assertion that any jurisdictional concerns about Newdow's prior standing are irrelevant. Plaintiffs simply presume the briefing and result in *Newdow III* would have been the same had no jurisdictional issues arisen from Newdow's reduction in custodial authority in 2002. (AB 71) Plaintiffs, however, cite no authority for the position that jurisdictional concerns regarding standing may be overlooked based upon conjecture that the briefing and decision would have been identical had there been valid prudential standing. The contours of the legal landscape continue to shift over time; a frozen moment cannot be captured and preserved. Similarly, Plaintiffs pragmatically urge that judicial economy militates against relitigation of the constitutional issues that had already been decided previously. (AB 68)

Plaintiffs' citation to *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 191-92 (2000), is inapposite because the concern in that case was regarding abandonment of a case for mootness after years of

litigation, in contrast to standing, which is designed to preserve resources at the outset. *Id.* In the instant case, standing was the key issue and there was no abandonment contemplated in any event. Constitutional jurisprudence has continued to develop in the meantime, including several Unites States Supreme Court decisions regarding the Ten Commandments, which must be considered in resolving the instant dispute.

Moreover, reconsidering the prior Ninth Circuit opinion in *Newdow III* may actually save judicial resources if the correct result can be reached at this juncture, perhaps avoiding the necessity of repeated Supreme Court review, which is, of course, discretionary. Although Plaintiffs do not address the related concern separately, this Court should likewise not deem itself bound by the panel's previous ruling in *Newdow III*, reached in the absence of prudential standing. It now has a blank slate with unimpeded jurisdiction.

Plaintiffs quote (AB 69) from *Spears v. Stewart*, 283 F.3d 992, 1006 (9th Cir. 2002), in which one justice explains why he believes an issue addressed in the opinion of a three-judge review panel, but labeled merely "advisory" by other justices dissenting from denial of en banc review, is still binding precedent. This complicated and indefinite jurisprudential scenario, however, has little if any relevance to the instant situation in which the United States Supreme Court expressly determined that

federal courts had lost prudential standing even before *Newdow III* was decided.

Plaintiffs summarily dismiss the potential impact of *U.S. v. Munsingwear,* 340 U.S. 36 (1950) and *Hearn v. R.J. Reynolds*, 279 F.Supp.2d 1096, 1111 (D. Ariz. 2003), solely because they do not address reversals "on other grounds." (AB 70) Plaintiffs, however, fail to demonstrate why the instant facts should permit them to avoid this usual equation of a appellate reversal by a higher court with vacation of a decision. The "other grounds" in the instant case were the crucial jurisdictional limitations stemming from the lack of prudential standing, which precluded federal courts from deciding the merits at all. There were not separate and independent bases for deciding the dispute, of which only one happened to be invalidated. The standing issue necessarily encompassed the entire *Newdow III* opinion. Regarding *INS v. Ventura*, 537 U.S. 12 (2002), Plaintiffs concede that the Supreme Court "reversal" prohibited the Ninth Circuit's opinion from being binding in any way upon the merits. To distinguish the case, Plaintiffs resort again to the pragmatic concern about whether the Ninth Circuit in *Ventura* had possessed all the pertinent factual information and agency expertise at the time it ruled on the merits (AB 70), whereas particularized factual information was not critical in the instant dispute. Prudential standing concerns, however, are important precisely because they also determine the institutions best able to handle certain disputes under unique circumstances:

> Without such limitations closely related to Art. 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.

Warth v. Seldin, 422 U.S. 490, 500 (1975); *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 12. There was no basis for federal courts to determine the fate of Newdow's daughter based entirely upon Newdow's interpretation of what was important to her, when he lacked primary decisional control. Thus, the mistaken result should not constitute binding precedent.

Finally, Plaintiffs rely on *Central Pines Land Co. v. United States*, 274 F.3d 881, 894 (5th Cir. 2001), to suggest that a decision of another panel of the same circuit is binding as a matter of law even though a different part of that prior decision had been reversed on other grounds by the United States Supreme Court. The crucial difference between *Central Pines* and the instant case, however, is that the procedural reversal preventing a ruling on the merits in Central Pines was attributable entirely to a discrete error by the trial court in answering ex parte a juror's question, *Rogers v. United States*, 422 U.S. 35, 36 (1975), not a question of standing which necessarily affects the entire decision, as here. The lack of prudential standing negated *Newdow*

III in its entirety.

III.

SUPREME COURT JURISPRUDENCE SUPPORTS THE CONSTITUTIONALITY OF THE PLEDGE IN PUBLIC SCHOOLS

A. Reciting the Pledge of Allegiance is Not Primarily a Religious Activity

Even with the words "under God" inserted into the Pledge in 1954, students are not being led in a prayer or some other primarily religious activity. It is crucial to note that the simple phrase does not purport to beseech a deity or quote scripture. Plaintiffs therefore endeavor to isolate and magnify the religious aspects of the phrase. Plaintiffs' entire approach is premised on the notion that the two words can be analyzed as a prayer or affirmation of religious faith completely separate from the rest of the Pledge. (AB 5) Plaintiffs are incorrect. Context is crucial. Although it is true that the two words were added to a preexisting Pledge more than half a century ago, over the course of many decades they have become thoroughly interwoven into the fabric of the patriotic exercise. That is not to say that the phrase "under God" cannot be examined for its particular meaning, but it cannot be completely severed from the surrounding words and ideas during the constitutional inquiry.

Plaintiffs suggest the form of the phrase "under God" in the Pledge might be deemed superficially to resemble the religious oaths for federal positions that are

prohibited by the text of the Constitution itself. (AB 20-21) The crucial distinction, however, is that no student is required to pledge to God in order to stay in school or obtain any benefit. Under no circumstances may a student be penalized for refusing to say the Pledge, let alone the two words, "under God," when requested to recite it with his or her class.

Plaintiffs assert that if a court is permitted to artificially expand the scope of the activity under examination, virtually nothing could be found to constitute a primarily religious activity. (AB 5-6) As examples, Plaintiffs posit that if school prayer or Bible readings were viewed as merely a small portion of larger morning exercises as a whole, they could be insulated from constitutional review. Besides the fact that Plaintiffs cite no authority demonstrating judicial success for such an approach, their position begs the question regarding the characterization of the expressly religious portion of the activity. The term "under God" in the Pledge has obvious religious qualities, but it does not approach in extent, or specificity of doctrinal belief, those prayers or Bible readings held unconstitutional. In *Engel v. Vitale,* 370 U.S. 421, 422 (1962), the prayer in question stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." This 22-word prayer directly addressed the particular deity in a manner that would make it impossible to characterize as merely

part of a patriotic exercise, despite the mention of "our Country." Likewise, *School Dist. Of Abington County v. Schempp*, 374 U.S. 203, 207 (1963), involved a class exercise consisting of the reading at the opening of each school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These are both steeped in specific Judeo-Christian images and beliefs. Their combination with the Pledge of Allegiance could not conceivably transform such a morning exercise, in its totality, from a religious to a patriotic one. The sole abstract reference to a nation "under God" in the Pledge itself does not compare in a meaningful way to organized prayers and Bible readings.

Regarding the Pledge, Justice O'Connor in a concurring opinion, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004), recently posited the following definition of impermissible government-endorsed prayer:

> Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history. *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 309, 147 L. Ed. 2d 295, 120 S. Ct. 2266 (2000) ("[T]he use of an invocation to foster . . . solemnity is impermissible when, in actuality, it constitutes [state-sponsored] prayer").

As Justice O'Connor noted, the ceremonial deism embedded in the term "under God" as applied to the Pledge does not constitute an impermissible endorsement of religion. *Id.* at 43. The Pledge nowhere endeavors to place the speaker or listener in a penitent state of mind, create spiritual communion or invoke divine aid.

Moreover, Plaintiffs' contention that the school prayer in *Schempp* would be constitutional in the context of a morning's worth of activities takes the very distinct act of prayer out of the context in which it is stated. Specifically, a prayer could both be viewed in the context of an entire series of morning exercises because it is a distinct and specific event. On the other hand, recitation of the phrase "under God" in the Pledge is not a distinct and specific event, but is instead just one piece of the distinct and specific event that is recitation of the Pledge.

Plaintiffs' references to the Ten Commandments and creche cases (AB 6-7) effectively negate their opening salvo that the phrase "under God" should be analyzed in isolation. Regardless of where the Supreme Court has ultimately come out on such cases, it is manifest that the particular context has always been of paramount importance. Certainly, in *McCreary County v. ACLU*, 125 S.Ct. 2722, 2737-38 (2005), the Ten Commandments display was not analyzed exclusively for its obvious and undeniable religious content:

> But *Stone* did not purport to decide the constitutionality of every possible way the Commandments might be set out by the government, and under the Establishment Clause detail is key. *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 595, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (opinion of Blackmun, J.) ("The question is what viewers may fairly understand to be the purpose of the display. That inquiry, of necessity, turns upon the context in which the contested object appears.")

Moreover, in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), the context of the Ten Commandments display amidst other Texas historical monuments was sufficient to insulate it from being struck down. This was so even though the Supreme Court acknowledged:

> Of course, the Ten Commandments are religious -- they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai.

Id. at 2863.

Regarding holiday creche displays, Plaintiffs are required to acknowledge that the particular context in which the undeniably religious Christian exhibit is displayed is determinative. (AB 7) The city-owned creche display in *Lynch v. Donnelly*, 465

U.S. 668, 671 (1984) "consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'." Despite the fact that proclaiming angels are not easily confused with Santa's elves, the Supreme Court found an adequate secular purpose in the creche within the overall display to find constitutional validity. *Id.* at 681. Likewise, the menorah in *County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 618 (1989), was a religious symbol saved from striking only by being paired with a Christmas tree.

Plaintiffs endeavor to distinguish the instant case by asserting that context does not matter where there is exclusive governmental control rather than a marketplace of ideas. (AB 8) Eschewing any logical link, Plaintiffs rhetorically ask why "under Jesus" and performing a "sign of the cross" would not be just as constitutionally acceptable as "under God" within the patriotic context of the Pledge. (AB 8) Plaintiffs' apparent failure to recognize the qualitative differences betrays the mistaken nature of their approach. That is to say, their forced equation of all words or actions embracing any religious component whatsoever illustrates the source of their error regarding God. While there might be some fragment of historical truth in that many of the nation's founders and citizens have been Christian, the reference to Jesus would introduce an excessive particularity of belief enhancing the doctrinal

religious aspect of the pledge. It would also raise the specter of impermissible sectarianism. In contrast, the term "God" is completely amorphous within the text of the Pledge.

B. The Term "God" Has Been Interpreted to Encompass a Broad Range of Beliefs

The religious reference to God has little "dogmatic" value, contrary to Plaintiffs' assertion. (AB 9) The term God, for example, is comfortably used by those who refer to an exclusively inner guiding light, such as some among the Religious Society of Friends (Quakers) who do not look to the dictates of an external deity. Nor is the use of the singular term "God" necessarily anathema to those Hindus who may focus attention upon any one from among a large number of potential personal gods. Buddhists are considered religious believers, but do not worship any God per se. In the English language, "God" has taken myriad forms, encompassing even "believers" who accept the existence of a moral order to the universe without a personal God. In short, the level of abstraction of the religious term "God" is sufficient to acknowledge and welcome a wide range of people seeking a spiritual dimension to civic life, not the monotheist alone.[1] The term "under" God, as set forth

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[1]Plaintiffs' focus on monotheism, as purportedly favored by the singular term "God,"appears to be an effort to hedge bets, emphasizing the purportedly sectarian nature of the Pledge. (AB 15-16) The Pledge on its face does not choose favorites among churches, despite Plaintiffs' strange lumping of

in the Pledge, cannot be fairly read to assume the nation's subservience to the dictates of such a God, since no content of such laws or lawgiver are provided in the Pledge. It merely tracks the traditional vision of an external being inhabiting the heavens "above and beyond" our natural world. *See United States v. Seeger*, 380 U.S. 163, 181 (1965).

In the context of conscientious objection to war, the Supreme Court has long accepted an extremely broad view of religious belief. In determining whether religious belief that war was morally wrong derived from belief in a "Supreme Being" within the meaning of the pertinent statute, the Court has rejected the necessity that the draftee have accepted monotheism. *Seeger*, *supra*, 380 U.S. at 173-174. Indeed, the Court credited, and quoted at length, the understanding of prominent theologian Paul Tillich: "'The source of this affirmation of meaning within meaninglessness, of certitude within doubt, is not the God of traditional theism but the "God above God,"

"polytheists, pantheists and those with no religion" together with atheists. (AB 30, fn. 41) To the extent the Ninth Circuit in *Newdow III* accepted a focus on monotheism without explanation, 328 F.3d at 487, it appears to derive from what the court deemed a reasonable person might believe the Pledge sought to inculcate. *Id.* at 488. Although many of the politicians who have over the decades used the Pledge as a religious cudgel might have assumed that "God" was their own monotheistic deity, it is difficult to understand why most reasonable people, even children, would necessarily think they were required to believe in a particular form of God.

the power of being, which works through those who have no name for it, not even the name God.'" *Id.* at 180.

C. Plaintiffs Misconstrue the Constitution as a Strictly Secularist Document

A major source of Plaintiff's error stems from confusion regarding the intent of the Framers, who enacted the Bill of Rights shortly after the Constitution was itself ratified. While not containing significant mentions of a deity, the Constitution did not envision a nation rejecting all public connections to religion. "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch, supra,* 465 U.S. at 674.

Contradictions abound in Plaintiffs' characterization of the writings of James Madison, one of the principal architects of the constitutional framework. It is not necessary to launch into an exhaustive exegesis of Madison's corpus of writings on the subject, because the very document Plaintiffs rely upon belies their central thesis. (AB 24) Specifically, in the Memorial and Remonstrance against Religious Assessments, Madison warned of the dangers from inequality resulting from the government's role in exacting and distributing payments for different religious sects. For numerous reasons, the government should not be involved in taxing citizens to provide for a favored list of churches. While decrying the wrongs perpetrated

historically by organized churches, however, Madison at the same time clearly premised his understanding on the religious underpinning of the nation:

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Everson v. Board of Education, 330 U.S. 1, 64 (1947)(app. to Rutledge dissent).

Madison in no manner suggests that the government must avoid all acknowledgment of belief by its citizens of a transcendent being as providing moral authority. Nor does he decry inequality between those who believe in a transcendent authority and those who do not. Plaintiffs are certainly free to disregard Madison's understanding of a Universal Sovereign as mere archaic superstition, unnecessary to justify the government's legal authority, but they cannot simultaneously rely upon only a part of the same writing to claim that the Framers rejected all public recognition of the idea of God.

D. The Pledge Has No Role in Fostering or Eliminating Remaining Discrimination Against Atheists

Plaintiffs maintain that atheists are an oppressed minority deprived of legal rights, and that the recitation of the Pledge in school perpetuates their second-class citizenship. (AB 33-35) Plaintiffs point to perceived discrimination faced in some states by atheists (AB 24, fn. 31), as well as other minorities such as gays, in custody and adoption matters. See 62 A.L.R.5th 591; Fla. Stat. § 63.042 (2)(c)(3). Nevertheless, it is difficult to fathom the putative role of the Pledge in causing or exacerbating this situation.[2] Plaintiffs engage in hyperbolic rhetoric while claiming that the plight of atheist children is in some respects more harsh under the law (AB 45-46) than that of black children under *Plessy v. Ferguson*, 163 U.S. 537 (1896). The crux of Plaintiffs' contention is that atheists are not even provided putatively equal, albeit separate, rights. This is nonsensical. Atheists face exceedingly few remaining legal obstacles to full equality. Indeed, the California Supreme Court recently held that a city was entitled to deny the use of city facilities to a group that could not assure it would never discriminate against atheists or gays. *Evans v. City*

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[2]While it may surprise some that almost half of Americans polled in 1999 stated that they could not vote for an atheist for President (AB 46), it is germane to note that the percentage has decreased substantially since 1958, which was after the Pledge was changed to include the phrase "under God." Plaintiffs' argument would suggest that the percentage would, if anything, have increased in the meantime because of the Pledge.

of Berkeley, 38 Cal. 4th 1, 5-6 (2006). Under federal civil rights law, likewise, atheists are protected from discrimination just like religious believers in a God. *Reed v. Great Lakes Cos.*, 330 F.3d 931, 933-934 (7th Cir. 2003), held that an atheist cannot be fired simply because his employer dislikes atheists. The Pledge simply does not enhance the subjugation of atheists.

E. The Pledge Does Not Fail any of the Establishment Clause Tests

The Pledge does not fail the *Lemon* test. The Pledge as a whole clearly has a secular purpose to reaffirm patriotism. Indeed, even the addition of the two new words "under God" had a secular purpose. There is no doubt that there were religious motives among those who legislated the 1954 change to the Pledge. There is also, however, no significant question that the 1954 addition of "under God" had the secular purpose of emphasizing American history and civil institution, and specifically freedom of worship, which was severely restricted in the Soviet Union. (EOR 64-73) While this patriotic effort was concededly executed awkwardly, the clumsiness does not detract from a bona fide secular objective purpose of the statutory amendment. Even Plaintiffs admit that Congress's secular goal in highlighting contrasts between American and Soviet forms of government was a valid and worthy one, but Plaintiffs believe the effort strayed by focusing excessively on the perceived perils of chosen atheism, rather than extolling the very freedom to

choose. (AB 31) A mixture of religious and secular motivations does not suffice to render a practice unconstitutional. *Lynch, supra,* 465 U.S. at 680.

Next, under the *Lemon* test, or the consolidated endorsement test, the key question is whether the recitation of the Pledge as a whole has the effect of endorsing religion. The tiny portion of the Pledge mentioning God does not itself support such an interpretation. Recitation of the Pledge by rote means that children in school will be familiar with the words, but will not necessarily appreciate the values extolled within (including liberty and justice), whether secular or religious. The full text of the Pledge is obviously devoted primarily to advancing secular patriotic values. Plaintiffs thus resort to relying upon the "myriad other governmental endorsements of (Christian) Monotheism" in contending that the Pledge allegedly keeps atheists in political outsider status. (AB 33) Plaintiffs posit that public school districts have an "affirmative duty to remedy –not promote– such situations." (AB 34) There is, however, no evidence that atheists are legally prevented in any way from participating in political activities. The whims of voters electing like-minded candidates cannot be remedied by the Pledge.

Plaintiffs cite *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000), for the proposition that governmental sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders and not full members of the community. (AB 35) In *Santa Fe*, however, the religious message was being delivered by an elected "student council chaplain" in the form of a student-composed prayer broadcast over the public address system right before high school sporting events. *Id.* at 294. The outsider status of dissenters from this athletic prayer-regime is elucidated by the fact that the District Court has to go to great lengths to assure anonymity for the plaintiffs, lest they face intimidation or harassment. *Id.* at 294, fn. 1. In the instant case, the words "under God" in the Pledge do not have the same religious impact as a full prayer beseeching the deity.

Similarly, the Pledge does not fail the imprimatur test. (AB 35-36) Again, *Lee v. Weisman, supra,* 505 U.S. at 581, involved a middle school graduation prayer delivered by a local rabbi. It set forth a detailed invocation and benediction. The two words "under God" within the Pledge do not provide the same sort of governmental imprimatur for a religious message. *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 251 (1990), does not assist Plaintiffs because that case found the Equal Access Act to be constitutional within the Establishment Clause even to the extent it

authorized high school faculty members to be present, though not participating, at student Christian club meetings held at the school. Likewise, the fact that the Supreme Court in *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) did not find any governmental imprimatur even where the state was giving parents of mostly religious schools (about 96%) tuition vouchers worth thousands of dollars per student does not assist Plaintiffs in finding an imprimatur solely from recitation of the term "under God." (AB 36).

Finally, Plaintiffs contend that the Pledge fails the coercion test for Establishment Clause purposes. (AB 36-37) They might be correct if the Pledge constituted a prayer, but it does not. Under *West Virginia State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), of course, the students do not have to recite the Pledge at all. The social pressure for students to remain present and recite the Pledge does not coerce them to accept religious faith.

Plaintiffs' boast that the Supreme Court has found Establishment Clause violations in 9 out of 9 cases involving religion in the public schools it has decided is a meaningless statistic. Contrary to Plaintiffs' assertion, this stilted description of a "remarkable streak" does not erect any particular jurisprudential burden RLUSD must overcome. (AB 38-39) First, this case is presently before the Ninth Circuit Court of Appeals, not the Supreme Court. The Supreme Court has no decision yet to

consider hearing. Of course, the Supreme Court historically has decided to hear appeals usually where it was likely to end a school practice under the Establishment Clause. Otherwise, it would simply allow the appellate decision upholding the status quo to stand. *See, e.g., Sherman v. Community Consolidated Schools,* 980 F.2d 437, 444 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993). Plaintiffs' brief descriptions of cases in which the Supreme Court has found violations of the Establishment Clause are skewed to diminish the strong religious component in most of them. (AB 39) For example, *McCollum v. Board of Education*, 333 U.S. 203 (1948), involved explicit religious instruction of public school students in public school classrooms during the normal school day, not simply, as here, the recitation of two words. The permission of parents for the arrangement could be withheld in both situations.

Contrary to Plaintiffs' portrayal (AB 39), the teacher-led Bible readings in *Abington, supra*, 374 U.S. at 208, were followed directly by the recitation of the Lord's Prayer in unison, and then the Pledge of Allegiance. Obviously, such an arrangement has much more explicit religious content than merely reciting the Pledge alone.

Epperson v. Arkansas, 393 U.S. 97 (1968), and *Edwards v. Aguillard*, 482 U.S. 578 (1987), both involved public schools blatantly enforcing the teaching of creationism. In *Epperson*, teachers faced criminal prosecution simply for using

science textbooks setting forth the theory of evolution. 393 U.S. at 100. In *Edwards*, the approach was only slightly more subtle, mandating that religiously based "creation science" be taught if evolution theory was taught. 482 U.S. at 581. The unambiguous endorsement by the state of religion in the core curriculum is much more severe an effort at establishment of religion than the two words of the Pledge.

In *Stone v. Graham*, 449 U.S. 39 (1980), the state itself mandated that a copy of the Ten Commandments be prominently displayed in each classroom. Even without recitation by students, the explicitly religious message from the school was much more clear and specific than the inclusion of "under God" in the Pledge.

The seven ways (EOR 97) in which the Pledge recitations are supposedly more coercive than the graduation prayer in *Lee, supra,* 505 U.S. at 581-82, again miss the mark, because the Pledge is not a prayer. Even with the phrase "under God," its religious content pales in comparison to the invocation and benediction given at graduation by a rabbi. The same is true of *Santa Fe, supra,* 530 U.S. at 297-98. While the graduation prayers are heard less frequently than the daily rote recitation of the Pledge, it is the very rarity and solemnity of the graduation ceremonies that engender their potential endorsement power.

As noted previously, *Engel v. Vitale*, *supra,* 370 U.S. at 422, involved the recitation of an explicit 22-word prayer directed to God, expressly acknowledging our "dependence" upon the deity and beseeching his "blessings." While Plaintiffs label as a "straw man" the distinction between the recitation in *Engel* and the Pledge on the basis that the latter does not constitute a prayer, they resort to yanking several words out of their proper context in the Pledge. (AB 40-41) Plaintiffs also disingenuously alter the actual words of the Pledge to devise a hypothetical prayer that significantly shifts the meaning of the Pledge. Whereas the existing Pledge expresses fealty to the ideal aspirations of the republic represented by the flag, see *Barnette*, *supra*, 319 U.S. at 633, including a desire to build a more moral and just nation, as envisioned by various American religious traditions, the disembodied six-word statement assembled by Plaintiffs simply establishes a static creed declaring as a fixed matter of belief that "We are a Nation under God." Again, context is critical. The latter creed, unlike the current Pledge, lacks any content other than a religious belief. There is no secular purpose. Moreover, it has eradicated much of the ambiguity that diffuses any religious authority of the current Pledge.

Wallace v. Jaffree, 472 U.S. 38, 43-44 (1985), struck down a new state statute that was deemed to endorse religious prayer and have no secular purpose whatsoever. Alabama had already protected the students' right to engage in private voluntary

prayer at appropriate times during the school day. *Id.* at 45. In stark contrast, the text added to the Pledge in 1954 had several secular purposes. The addition of "under God" in the Pledge acknowledged the historical concern of the American people for religious expression and aspiration. It also served to highlight the differences with the Soviet Union, a Cold War adversary that had extinguished religion altogether from the public life of its citizens. Thus, the governmental purpose in the text of the Pledge is not exclusively religious.

County of Allegheny, supra, 492 U.S. at 598, concerned a courthouse creche nativity scene that prominently included angels proclaiming the words "Glory to God in the Highest!" The creche thus constituted a religious, and indeed sectarian Christian, display endorsed by the county. It is thus difficult to fathom Plaintiffs' contention that *Allegheny* involved no more serious a threat to the Establishment Clause than the Pledge of Allegiance.

Plaintiffs' effort to handicap the Supreme Court's potential outcome down the road, based upon cherry-picking the rulings and dicta of its individual justices in various permutations (AB 48-54), is misplaced on several levels. While it is tempting to extrapolate votes of Supreme Court justices from their comments on other Establishment Clause cases, Plaintiffs are unable to counter the central fact that no Supreme Court justice has ever formally opined that the Pledge is unconstitutional.

Myers v. Loudon County Public Schools, 418 F.3d 395, 406 (4th Cir. 2005). Moreover, Plaintiffs fail to come to grips with the truth that Justice O'Connor, who is credited with deriving the "endorsement test" from the pre-existing *Lemon* test, *Van Orden, supra*, 125 S.Ct. at 2869, concluded that the Pledge does not impermissibly endorse religion. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 40 (2004).

While Plaintiffs purport to extol the Supreme Court's dicta regarding tests rather than results and place great weight on those dissenting justices who have opined that the Pledge would not survive under one or another constitutional test (AB 50-52), such an approach is again highly artificial. Justices who deem potential results as being too harsh toward religion under various Establishment Clause tests have a strong incentive to point out other "untouchable" interactions with religion that would also fail under the given test.

Consequently, the outcomes of the three circuit appeals court cases that have reviewed the Pledge are of great significance. Plaintiffs focus on the Ninth Circuit's determination in *Newdow III*, 328 F.3d at 487, that the phrase "under God" should be treated no differently from the hypothetical insertion of "under Jesus" in the same location within the Pledge. (AB 59) This is the crux of the distinction between an endorsement of religion and the ceremonial deism approved by Justice O'Connor. *Elk Grove, supra*, 542 U.S. at 42 (O'Connor, J., concurring). Looking at this same

hypothetical, Justice O'Connor concluded that the reference to "God" in the Pledge is "generic" and "highly circumscribed;" it simply "acknowledges religion in a general way." *Id.* The same could not be said for reference to Jesus, a particular historical figure believed by most Christians to be divine. There is clearly a much greater degree of specificity and depth of doctrinal orthodoxy attached to the latter.

The Ninth Circuit's reliance upon *Barnette, supra,* 319 U.S. at 633-634, although decided before 1954, illustrates why the reference to "under God" should not be viewed as a requirement of dogmatic orthodoxy. Because the abstract terms "indivisible," "liberty" and "justice for all" are concededly aspirational and normative, rather than descriptive of present reality, they do not set forth requisite elements for orthodox belief. A person who recites fealty to a republic "with justice for all" is not attesting that liberty for all presently exists. To the extent such a person is affirming a belief, it is that the republic should strive toward that ideal. In the same way, after the addition of "under God," a person reciting the Pledge cannot be said to expressly affirm that there is indeed an existing God ruling over the nation. Instead, the text of the Pledge should properly be seen as constituting an aspiration that the nation will continue to strive toward the expressed ideals, including its longstanding religious or spiritual ones as they overlap with "liberty and justice."

Plaintiffs criticize the Seventh Circuit opinion in *Sherman v. Community Consolidated Schools, supra*, 980 F.2d at 444, for failing to properly apply the coercion test to the Pledge. (AB 60) *Sherman* assumed that students were not actually compelled to say the Pledge within the meaning of *Barnette*, but acknowledged there might be significant social pressure. *Id.* The question of coercion, however, was rendered irrelevant, however, by *Sherman's* determination that the reference to God in the Pledge is not primarily a religious act being endorsed by the government. *Id.* at 447. It is certainly not akin to the explicit prayers struck down in prior cases by the Supreme Court. The reduced threshold of coercion has only been applied to explicit religious acts such as prayers.

Plaintiffs also dismiss the Fourth Circuit opinion in *Myers, supra*, 418 F.3d at 403, as imbued with "folly" because it purportedly deemed "paradigmatic" the legislative chaplaincy upheld as constitutional. (AB 61) In actuality, *Myers* only deemed *Marsh v. Chambers,* 463 U.S. 783 (1983), paradigmatic insofar as it elucidated the strong role of particularized history in determining whether a religious practice is deemed an improper establishment of religion. *Myers* makes the point that the practices accepted by the Framers are important to at least consider unless we are to presume that they were "unable to understand their own handiwork." 418 F.3d at 404. There are marked differences between a chaplain's prayer directed at adults and

a school exercise for children, but *Marsh* negates altogether Plaintiffs' contention that the Founders of the Republic would tolerate no religious reference mixed with civic obligation.

Finally, *Chaplaincy of Full Gospel Churches v. England*, 2006 U.S. App. LEXIS 16952 (D.C. Cir. 2006), cited by Plaintiffs as a supporting recent decision (AB 56-57), is wholly inapposite. *Chaplaincy* obviously did not suggest that there could be no religious references connected to government, since a chaplain is a governmental employee charged with assisting the religious and spiritual aspirations of soldiers. The decision merely held that the U.S. military could not engage in sectarian favoritism by allowing Catholic Naval Reserve chaplains, and only Catholic chaplains, to remain on active duty beyond mandatory separation age limits. *Id.* at 11.

IV.

CONCLUSION

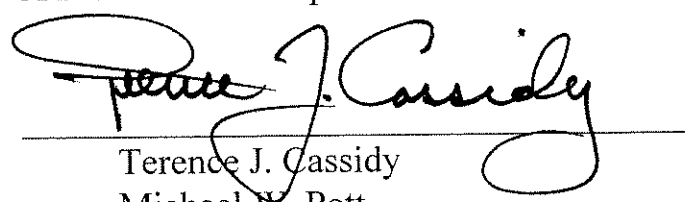
As the District Court was not bound by this Court's decision in *Newdow III*, the District Court erred in so finding. Nevertheless, it is appropriate for this Court to reach the merits of the matter at this time and Defendant RLUSD respectfully submits that the a review of the merits results in a finding that its Pledge recitation policy does not violate the Establishment Clause. Because of this, Defendant submits

that the District Court's injunction should be overturned and the District Court instructed to dismiss the case in favor of Defendant RLUSD.

Date: September 5, 2006

Respectfully submitted,

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By 

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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 Reply Brief of Appellant/Defendant RIO LINDA UNION SCHOOL DISTRICT is proportionately spaced, has a typeface of 14 points or more, and contains less than 7,000 words.

Dated: September 5, 2006

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By _____
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JAN ROE; AND ROECHILD-2 V. RIO LINDA UNION SCHOOL DISTRICT, ET AL.
United States Court of Appeals, Ninth Circuit No. 05-17344
United States District Court Eastern District Case No. Civ 05-0017 LKK DAD

DECLARATION OF SERVICE

I am a citizen of the United States and employed in Sacramento County, California; I am over the age of 18 years and not a party to the within action; my business address is 350 University Avenue, Suite 200, Sacramento, California 95825.

On the date below I served the attached

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

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Susie Schiele