No. 02-1624

In the

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT
and DAVID W. GORDON, Superintendent,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF UNITED FATHERS OF AMERICA, AND ALLIANCE FOR NON-CUSTODIAL PARENTS RIGHTS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance

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I. INTEREST OF AMICUS PARTIES UNITED FATHERS OF AMERICA, AND ALLIANCE FOR NON-CUSTODIAL PARENTS RIGHTS[1]

United Fathers of America ("UFA") is a California non-profit public interest corporation established in the mid-1970s which has served over 20,000 members. UFA's mission is to enhance the quality of life for children in divided families – children who are often ignored during and after the breakdown of their parents' relationship. UFA believes the Family Courts and those who find themselves there must affirm children's need for the continued physical and emotional involvement of both parents. UFA seeks to enhance such parental involvement by providing education, information and empowerment to responsible mothers and fathers. UFA focuses particularly on assisting fathers through divorce, including child custody hearings. UFA operates on a "shoe-string" budget and thus is not typically involved with lobbying or public advocacy.

The Alliance for Non-Custodial Parents Rights ("ANCPR") is a Nevada corporation dedicated to the promotion and protection of the civil rights of "non-custodial" parents ("NCPs"). As of February 10, 2004 it has 5,147 active members. ANCPR's stated mission is to support and encourage a Family Law system that will provide greater security and benefit for the children of divorced parents by fostering the active

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[1] Pursuant to Rule 37, letters from all parties to this case consenting to the filing of this brief have been lodged with the Clerk. No party to this case nor any counsel for any party in this case has authored this brief in whole or in part, and no person or entity other than amicus UFA and ANCPR and its members or its counsel made any monetary contribution to the preparation or submission of this brief.

participation and essential roles of both parents in their children's upbringing.

UFA and ANCPR are composed of religiously diverse members. Demographic studies confirm that divorced, separated and single parents come from every religious persuasion. See Exhibits 8 and 9 to the ARIS materials attached as an appendix to the amicus curiae brief submitted herein on behalf of the Church of Freethought, at pp. 37a to 41a thereof. For this reason these amicus parties prefer not to become embroiled in theological controversies for fear of seeing healthy religious diversity converted into unhealthy religious divisiveness. Therefore UFA and ANCPR take no position on whether the words "under God" belong in the nation's Pledge of Allegiance.

The instant amici believe that it would be a monumental travesty of justice if this Court were to rule that Respondent Michael A. Newdow ("Newdow") lacks standing, or that he in any way has rights inferior to the mother with regard to seeking the aid of the courts in protecting his child from harm. Even a non-custodial parent or whose parental rights are, or are seen as being, legally diminished or impaired must be allowed to protect both his children's interests and his or her own interests in participating in the child's religious upbringing and education. Even Petitioner Elk Grove Unified School District ("EGUSD") recognizes the paramount importance of such involvement by parents. See attached Appendix ("Appx.") at pp.3a-5a.[2]

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[2] As is discussed in greater detail in Respondent's brief, Newdow is not a "non-custodial parent." His parental rights are essentially equal to that of the mother. But since the attack upon his standing assumes that he supposedly lacks certain custody or

Indeed, if this Court were to decide this case adversely to Newdow based upon standing, this Court might just as well strike the words "under God" from the Pledge and insert the words "under Family Court judges." Children in divided families and the rights of their parents in raising those children are of far greater importance to the instant amici than are the substantive issues which this case presents, or which virtually any other case brought by a father or non-custodial parent could conceivably present.

II. SUMMARY OF ARGUMENT

Petitioners and their amici are so hell-bent on prevailing in this appeal that they do not care whose rights are trampled upon in order to defeat Newdow's case against the phrase "under God" in the Pledge of Allegiance. 4 U.S.C. § 4 (the "Pledge"). They would enthusiastically sacrifice the rights of children and parents in maintaining their relationships of love and care, even when the challenges and obstacles experienced by divided families make it most difficult to do so – all to win a battle over a two-word, belated revision inserted by Congress into a document which was, previous to such revision, recited millions of times without those words.

The Pledge has demonstrated its ability to serve its purpose without the words "under God" – it did so for more than 60 years. If Petitioners and their amici have their way, divorced fathers and mothers and the families of which they are a part will not be able to say the same thing of this Court's ruling. Noncustodial

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decisional rights (as many "garden variety" non-custodial parents do), the instant brief assumes for the sake of discussion that Newdow is or might be found to have legal characteristics similar to that of a garden-variety "non-custodial parent."

parents will be irretrievably hobbled in their ability to participate in the rearing of their children, in derogation of their fundamental rights as parents.

Petitioners and their amici actively seek to destroy Newdow's interest and involvement – and indeed the interests of every similarly situated non-custodial father – in the religious upbringing of his child. Their *ad hominem* attack on Newdow is totally without regard for the disastrous results which such a precedent would set.

The incredible irony in this is that by attacking Newdow's standing, Petitioners and their amici do not advance the merits of their cause, but instead seek to avoid the merits of their side of the argument with respect to the law and government policies that Newdow is challenging. This kind of cynical, myopic and misguided litigation strategy is as shameful as it is specious.

Newdow has standing to challenge the law and government policies that he sees as unjust and injurious to his daughter and to his relationship with her. Nothing the California Family Court decided or could possibly decide, consistent with the dictates of the Constitution, affects his standing.

III. ARGUMENT

In their unbridled zeal to seek to avoid what they perceive as an adverse determination on the merits of the Constitutional issue which this case presents, Petitioners and their amici have embarked upon an unconscionable attack upon the substantial rights of fathers and other "non-custodial parents" to seek the aid of the courts in protecting their children from the wrongful or unlawful acts of third parties whenever the mother or the "custodial" parent fails to so act to protect the child.

The rights of NCPs (who more often than not tend to be fathers) and particularly their substantial rights of standing in the federal courts are of far greater importance and concern than the particular substantive issue presented in this case. The injustice which Petitioners and their amici request be suffered by fathers and other NCPs across the land, all merely so that Petitioners can avoid this Court's reaching and determining the substantive issue in this case, is mind boggling.

The suggestion that the California Family Court should determine whether Newdow has standing to maintain this action in federal court is to suggest that Mr. Newdow, for all intents and purposes, be considered to be the legal ward of the Family Court of the State of California for purposes of his raising his daughter, as her father, and protect her from what he in good conscience determines, as her loving father, to be the harmful conduct of third parties directed toward her. In bringing the instant action, there is no evidence whatsoever to suggest that Newdow is acting in anything other than good conscience as a loving father to his daughter. He is simply doing what any loving father would do to protect his child from things that he determines in his good conscience as her father to be harmful for his daughter and his relationship with her.

Newdow has the right and the duty to seek the assistance of the federal court to prevent his daughter from being exposed to what he sees as harmful. Whether he determines in his good conscience, as he has determined in the instant case, that her being led in a Pledge of Allegiance to a nation "under God" is harmful – or whether the issue instead might have been that he had decided in his good conscience as her father that she should not be participating in "sleep-overs" at

Michael Jackson's Neverland Ranch – is quite beside the point. The point in this case is the unbridled and thoughtless attack by Petitioners and their amici – including the United States itself – upon fathers' and NCPs' rights as such to protect their children by means of legal redress in the courts of this country.

Thus, the instant amici take no position as to whether "under God" belongs in the Pledge or not. However, the instant amici do quite vehemently contend that Newdow has every right to bring and maintain this action. He clearly has standing under Article III of the United States Constitution. He clearly has standing pursuant to every applicable legal precedent of the federal courts concerning the "standing" of parents in similar cases. And he clearly has standing under California State law as a parent to challenge the unlawful conduct of a California State agency and its officers.

A. NEWDOW HAS STANDING BECAUSE NO COURT – NOT EVEN FAMILY LAW COURTS – CAN DECIDE DIFFERENCES OF RELIGIOUS OPINION AS BETWEEN PARENTS UNLESS SUBSTANTIAL HARM IS CLEARLY THREATENED AGAINST THEIR CHILD.

Despite a spirited dissent on the Constitutional issue, the Ninth Circuit panel carefully considered[3] and unanimously ruled that Respondent has standing. Newdow v. United States Cong., 313 F.3d 500, 505 (9th Cir. 2002). In so doing, the panel relied on unequivocal California case law: "[A] court will not enjoin the

[3] The Court issued two opinions which, although markedly different in their analyses on the issue of Newdow's standing, nevertheless uniformly reached but one conclusion. Compare 292 F.3d 597, 602-605 with 328 F.3d 466, 484-485.

noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." In re Marriage of Murga, 103 Cal.App.3d 498, 505 (1980). See also In re Marriage of Mentry, 142 Cal.App.3d 260, 264-265 (1983).[4]

In Murga, the court noted that its rationale and result were consistent with the majority of other States. 103 Cal.App.3d at pp. 504-505, citing, as examples, Munoz v. Munoz, 79 Wash.2d 810, 489 P.2d 1133 (1971); Paolella v. Phillips, 27 Misc.2d 763, 209 N.Y.S.2d 165 (1960); Wojnarowicz v. Wojnarowicz, 48 N.J.Super. 349, 137 A.2d 618 (1958); Boerger v. Boerger, 26 N.J.Super. 90, 97 A.2d 419 (1953); see Annot., *Divorce – Visitation Rights*, 88 A.L.R.2d 148, 217-219 (1963); Annot., *Custody of Child – Religion as Factor*, 66 A.L.R.2d 1410 (1959). See, e.g., In re Marriage of Urband, 68 Cal.App.3d 796, 797-798, 137 Cal.Rptr. 433 (1977); and Cory v. Cory, 70 Cal.App.2d 563, 571, 161 P.2d 385 (1945); see also, Note, *The Religious Upbringing of Children After Divorce*, 56 Notre Dame Law 160 (1980).

Mentry expanded upon the wisdom and logic of this rule in detail (see Appx. at p.9a-11a), including that:

> "[T]here may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experiences is itself a sound

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[4] EGUSD's citation to Miller v. Hedrick, 158 Cal.App.2d 281 (1958) for a contrary holding is unavailing. Miller did not consider the Constitutional issue and appears to have been overruled by the court in Mentry. 142 Cal.App.3d at 265, n.2.

stimulant for a child."

142 Cal.App.3d at 265-266; emphasis added. Thus, under California law, as is the rule in the majority of the States, the Family Court must be sensitive "to the best interests of the child as well as the First Amendment rights of both parents." In re Marriage of Weiss (1996) 42 Cal.App.4th 106, 111, 49 Cal.Rptr. 2d 339, 342; emphasis added.

In the instant case, the argument of Petitioners and their amici that Newdow supposedly lacks standing to bring this case because he is a "non-custodial parent," is thus directly contrary to the well-reasoned Family Law rule followed in California and in the majority of the States of the Union. Furthermore, in no case of which the instant amicus parties are aware (and Petitioners and their amici have not cited any), in which any court has followed a contrary rule, has such a holding been used to eviscerate a parent's right to challenge a government policy denigrating the religious views of the "non-custodial parent" in a child's public school education. In other words, even if the California Family Court had ruled, and could constitutionally rule (and it neither has nor could it lawfully do so), that Newdow cannot teach his child his religious beliefs, that would neither give authority to the government to teach the child negative views of her father's religious views, nor impair Newdow's rights to stop that wrong.

Murga and Mentry, like the cases in so many other States, are typical cases applying the fundamental and long-settled rule of American law under the First Amendment that no branch of government may lend its power to one or the other side in private controversies over religious authority or dogma. See, e.g., Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440, 445, 452

(1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976).[5]

Civil courts cannot, consistently with the First Amendment, determine ecclesiastical questions or weigh the significance and meaning of religious doctrine. In Presbyterian Church, supra, at 443-446, this Court held "[I]n this country the *full and free right to entertain any religious belief, to practice any religious principle*, and to *teach any religious doctrine* which does not violate the laws of morality and property, and which does not infringe personal rights,

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[5] In his amicus brief submitted in this matter, Professor Richard Grodin asserts that it is up to the California Supreme Court to decide whether Newdow has Article III standing, and that the question would be one of "first impression" in California.

With all due respect to Professor Grodin, the reason such a question would be one of "first impression" in California is that "[f]ederal law determines standing to sue in federal courts." See Redish, M.H., Moore's Federal Practice, § 101.33, (3d ed. 2003) pp. 101-27 to 101-28, and cases cited therein. Therefore the question is and always has been a question exclusively for the federal.

Indeed, in his amicus brief Professor Grodin fails to cite a single one of the seminal cases on "standing" in federal courts--and as explained in section III.C., *infra*, this is in part because he confuses "standing" with the requirement of Rule 17 of the Federal Rules of Civil Procedure that actions be brought by the "real party in interest."

Professor Grodin's suggestion that this Court certify to the California Supreme Court the question of Newdow's standing in the instant case would amount to the same as suggesting that this Court should have certified questions of the litigants' standing to the Georgia Supreme Court in Presbyterian Church, to the New York Court of Appeals in Kedroff, or to the Illinois Supreme Court in Serbian. None of the States' courts have any constitutional power to entertain, let alone abrogate, any person's standing to sue in federal court to enforce his or her parental rights or First Amendment religious freedoms.

is conceded to all. The law knows no heresy, and *is committed to the support of no dogma*, the establishment of no sect. . . ." Id. at 446 *quoting* Watson v. Jones, 13 Wall. 679 (1872) (emphases added).

"Ours is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion." Kedroff, supra, 344 U.S. at 120. Consistently with the First and Fourteenth Amendments "civil courts do not inquire … [into] religious law" because such a determination "frequently necessitates the interpretation of ambiguous religious law and usage." Serbian, supra, 426 U.S. at 708.

For any court to be called upon to decide, in practical effect in the instant case, which of the parents' religious beliefs shall be taught to the child – whether the religious beliefs of Newdow or, instead, those of the mother and asserted "custodial" parent, Ms. Sandra Banning – would embroil such court in an absurdly unconstitutional exercise. For would the court not need to decide that what the child shall be taught shall be the truth? Would the court not need to ensure that the deity chosen for the child to worship be "the one true God?" Would the court not need to decide whether the tenets of the child's religion were accurate? Or should the court consider factors other than the truth and correctness of the religion chosen? Should the court perhaps choose the most prevalent religion, or the religion that will present the least opportunity for social ostracism or the most opportunity for social success? Should the court choose the religion that imposes the fewest inconveniences upon the child socially, psychologically, medically, or in matters of dietary choice? To ask these kinds of questions of course is to answer them. No court may constitutionally engage in such an exercise – yet that is

what Petitioners and their amici request that this Court do, or request that this Court assume the California Family Court has done.

This Court has specifically held that parental authority in matters of religious upbringing may be encroached upon only upon a showing of a "substantial threat" of harm to the "physical or mental health of the child or to the public safety, peace, order, or welfare." Wisconsin v. Yoder, 406 U.S. 205, 230 (1972); see Zummo v. Zummo, 394 Pa.Super. 30, 574 A.2d 1130, 1132, 1138 (1990). No such showing has ever been made, nor could the same be made in this case, to the California Family Court.

"[A]n intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom …" because it would "call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions." Wisconsin v. Yoder, supra, 406 U.S. at 231.

These religious freedoms do not evaporate with divorce decrees or custody awards, as explained in detail in Zummo (see Appx. at pp.11a-14a), holding that "The suggestion that parental authority is diminished *vis-a-vis* the government as the result of the dissolution of the parents' spousal relationship, however, would seem inconsistent with constitutional recognition of parental authority even where a spousal relationship between the parents never existed. Zummo, supra, 394 Pa. Super. at 48 (italics in original; underlining emphasis added).

Newdow thus has standing in this matter because no family court – high and lofty though some fancy themselves – can constitutionally deprive him of his religious freedoms in the context of his relationship

with his daughter, or "award" his separate and independent religious freedoms to the "custodial" parent.

B. NEWDOW HAS STANDING BECAUSE HE SUFFERS INJURY IRRESPECTIVE OF HIS CUSTODY RIGHTS.

Standing requires a "concrete and particularized," "actual" "injury in fact," caused by the defendants, which can be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992) (citations omitted). Newdow meets these requirements. Among Newdow's injuries[6] are those articulated by the Ninth Circuit panel, that his child will be taught "that her father's beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom." 313 F.3d at 505. Newdow suffers that injury regardless of his custody rights.

This Court has noted that "standing has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," and that "the concept cannot be reduced to a one-sentence or one-paragraph definition." Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). Justice O'Connor has pointed out that in many cases, the standing question can be answered chiefly by comparing the case at bar with prior similar cases. Allen v. Wright, 468 U.S. 737, 752 (1984), reh'g den., 468

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[6] Amici UFA and ANCPR express no argument or opinion regarding whether recitation of the Pledge in the public schools with the words "under God" in it "injures" anyone. Their sole and only point is their vehement objection to the assertions of Petitioners and their amici that because Newdow is a "non-custodial parent" (assuming *arguendo* that such appellation was accurate to describe him), he would supposedly have no "injury."

U.S. 1250 (1984). However, "[w]ithin the First Amendment context, courts properly apply an expanded notion of standing to determine who may institute the asserted claim for relief." O'Connor v. City and County of Denver, 894 F.2d 1210, 1214 (10th Cir. 1990). Petitioners' attack upon Newdow's standing has no merit; to the contrary, their basis for attack proves his standing because he is demonstrably the only interested party who cares about what his daughter is taught about his religious beliefs.

1. Newdow Has Standing As Shown By Comparing This Case With Prior Similar Cases.

The federal courts have long held that parents have standing to challenge unconstitutional practices in the public schools their children attend. "[T]hese parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication." Sch. District of Abington Twp. v. Schempp, 374 U.S. 203, 267, n.30 (1963) (Brennan, J., concurring). "As this Court has repeatedly held, parents have standing to challenge conditions in public schools that their children attend." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 551 (1986) (Burger, C.J., dissenting) (citations omitted); Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 467 (5th Cir. 2001) (parents alleged sufficient threatened harm to establish standing to challenge the school district's "clergy in schools" volunteer counseling program as unconstitutionally favoring religion); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 408-409 n.1 (1977) (parents had standing to raise equal protection and First Amendment claims in school

desegregation and school prayer cases).[7] Newdow thus has standing because his child attends school in the district whose policy is under challenge here.

Parents have successfully sued to redress various other religious establishments in the public schools their children attend. See, e.g., Engel v. Vitale, 370 U.S. 421 (1962); Abington, supra, 374 U.S. at 203 (1963); Altman v. Bedford Cent. Sch. Dist. 45 F.Supp.2d 368 (S.D.N.Y. 1999). Although these cases did not include a legal analysis of the litigant parents' standing, the Court necessarily found that the parents had standing because "every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower court's in a cause under review,' even though the parties are prepared to concede it." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (citation omitted).

2. Newdow Has Standing Because Of His Close Relationship To A Third Person Non-Party (His Daughter), Who, As A Minor, Cannot Assert Her Own Rights.

Federal courts also recognize the standing of such litigants in part because of their close relationship to third person non-parties who are prevented or

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[7] The holdings of these cases are simply an application of the more basic federal rule of law that the parent-child relationship is sufficiently close to establish standing because the nature of the relationship ensures that the parent is an effective advocate for the minor's interests. See Mussington v. St. Luke's-Roosevelt Hosp. Ctr., 824 F.Supp. 427, 430-431 (S.D.N.Y. 1993), aff'd, 18 F.3d 1033 (2d Cir. 1994) (parents of minor children had standing to challenge hospital's elimination of pediatric healthcare resources available to them); and Johnson v. City of Opelousas, 658 F.2d 1065, 1069 (5th Cir. 1981) (mother of children subject to juvenile curfew could raise children's claims even though one son's claim became moot on reaching age 17).

hindered to also assert their own rights. Powers v. Ohio, 499 U.S. 400, 414 (1991); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 459 (1958). Newdow's daughter's predicament is a perfect illustration of why Newdow – and he alone – has standing in this matter under these well-settled rules.

Newdow's child is unable to sue in her own right, and her mother is not only disinclined to assert any claim on behalf of the child (that the government be neutral in the religious differences between her parents), but, indeed, the mother is enthusiastic to have the government lend its authority, "power, prestige and financial support . . . behind [the mother's] particular religious belief." Engel v. Vitale, 370 U.S. 421, 431 (1962). She is eager to have the government teach the child that Newdow's religious beliefs are unAmerican. There is no serious doubt that children and their parents are both clearly harmed in such circumstances. See, e.g., Zummo, supra, 394 Pa. Super. at 50, n.16, and child psychology authorities cited therein. Indeed, in the instant case, Ms. Banning is so indifferent to the harm caused when her daughter is taught that her father is unpatriotic, that Ms. Banning has even sought to intervene in this case on the side of the government and has filed an amicus brief on the side of the government. Adversaries in Family Court cases of course may be expected to simply take an adverse position to the ex-spouse to "get even" and that sort of thing is completely inappropriate.

3. To Determine "Standing" In Weighty Litigation Such As The Instant Case Based Upon The "Custodial" Or "Non-Custodial" Rights Of The Litigant Opens A Litigation Pandora's Box.

Were this Court to decide that Newdow lacks standing, based on the record of this case, the abject mischief that would be wrought in all kinds of important civil litigation matters involving children nationwide is mindboggling.

First of all, it would infect the very Family Court system which is already broken, as interlopers descend upon parents in the system as the Petitioner and its amici have done in the instant case, seeking to reap procedural advantage by enlisting the aid of the other parent against the parent litigant.

The lesson from a ruling of this Court that Newdow lacks standing would be that henceforth in virtually any and every case involving large sums of money or important political or constitutional issues involving the rights of, or interests of children – class actions, product liability litigation, mass tort litigation, toxic exposure cases, and all manner of other kinds of cases – defendants should seek out the ex-wife, the custodial parent (or as in this case, the other parent) and seek to enlist their support to vex the other parent with procedural defenses to meritorious claims.

This very case illustrates precisely this mischievous strategy. It would be an insult to this Court's intelligence to suggest that Ms. Banning would be before this Court represented by Kenneth Starr were it not for Newdow's success in the Ninth Circuit in the instant case and the publicity thereby generated in this landmark case. How it is that Ms. Banning happens to be represented by former Judge Kenneth Starr is no

mystery to anyone. She was sought out by the Religious Right wing to aid them in opposing Newdow in this case. That strategy, were it to be countenanced and allowed to succeed in the instant case, would set a terrible precedent whose dimensions and repercussions defy the imagination.

Ironically, once again, such tactics, are just the opposite of what is in the child's interests. See, e.g., Zummo, supra, 394 Pa.Super. at 50, n.16 (Appx. at pp.11a-14a). Ms. Banning's apparent indifference to what the effect upon her daughter may be by Ms. Banning's involving herself in this litigation adversely to Newdow (despite that Ms. Banning knew about this case since its inception but only first became involved after conservative activists sought her out after Newdow prevailed in the Ninth Circuit and the matter received nationwide publicity) is not only telling of what priority she places upon her child's psychological well-being, but as a matter of law it also supports Newdow's standing. Powers v Ohio, 499 U.S. 400, 414 (1991); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 623 n.3 (1989). This is because, as these cases hold, if Newdow is not allowed to sue to protect his daughter and to protect his relationship with her, no one will act to protect her or her relationship with her father from the harm Newdow in the exercise of his good conscience, has perceived herein.

4. The *Navin* Case Supports *Respondent's* Position That He Has Standing, Not Petitioners' Contrary Assertion.

Petitioners cite Navin v. Park Ridge Sch. Dist. 64, 270 F.3d 1147 (7th Cir. 2001) for the assertion that Respondent lacks standing. In Navin, a non-custodial father sued complaining of the quality of his child's special education for dyslexia. The District Court

dismissed the case, saying the non-custodial father, Patrick, lacked standing because the divorce and custody decree supposedly gave the custodial mother, Margaret, the right to make educational decisions. The Seventh Circuit vacated and remanded, ruling that (1) the District Court had not understood the nature of what the divorce decree had in fact provided, [8] and directing that the District Court (2) "must decide whether Patrick's claims are incompatible, not with the divorce decree itself, but with Margaret's use of her rights under the decree." Id.; emphasis added.

In his Respondent's Brief, Newdow sufficiently demonstrates that he is a custodial parent, that he has an equal say with the mother in their daughter's education, that the Court (not Ms. Banning) decides disputes between them when the parents cannot agree, and that indeed, the record shows that the Family Court has in fact overridden the mother's wishes on occasion. Thus, there is no basis for even getting to the second issue posed by the court in Navin.

But doing so nevertheless lends further support to Newdow's position in this matter, because there is absolutely nothing inconsistent between, on the one hand, Newdow's goals in the instant litigation and, on the other hand, Ms. Banning's exercise of her rights under the joint custody arrangement ordered by the Family Court. To the contrary, if it is true that the Family Court awarded Ms. Banning all control over the child's education, then it is undisputed that she chose for the child to attend public school – where religious indoctrination is clearly and emphatically prohibited by

[8] "Patrick retains some important rights, including the opportunity to be informed about and remain involved in the education of his son." 270 F.3d at 1149.

law. Indeed, the Solicitor General points out that Ms. Banning could conceivably decide to enroll the child in a parochial school. But the undisputed fact that Ms. Banning has not done so shows either that she has no such power to so choose or that she and Newdow are of the same mind that their daughter receive a secular education in the public school. In any event, however, unlike the situation in Navin, the issue herein is one of religious freedom under the First Amendment, not the adequacy of special education programs. Thus, as explained in section III.A., supra, absent a clear showing of harm to the child, no custody order can deprive one parent or the other of the right to fully participate in his or her child's religious upbringing. Moreover, no court can invest Ms. Banning with the "right" to have the government endorse her religious beliefs. But even assuming arguendo that the facts were otherwise and Ms. Banning had the power to and did enroll the child in a Christian school over Newdow's objections, parochial schools are private enterprises and thus its religious curriculum would not have the authority and sanction of the government.[9]

The ruling Petitioners want concerning standing in this case would be unwise (to say the least). It would allow, for example, a custodial parent who approved of a public school's use of corporal punishment – even corporal punishment which was clearly illegal and severe enough to cause bruising or lead to hospitalization – to block a non-custodial parent's right to seek redress of any kind, including an injunction. It

[9] Under such circumstances, Newdow, would, of course, have his even more powerful arguments that such a ruling of the Family Court, favoring the other parent's religious beliefs over his, infringes upon his First Amendment rights.

would allow a custodial parent who did not want her church to be sued to block a non-custodial parent from seeking an injunction to stop a priest from sexually abusing their child. The unintended consequences conceivable from the kind of draconian procedural ruling invited by Petitioners and their amici are as endless as they are heartbreaking.

C. RESPONDENT IS THE "REAL PARTY IN INTEREST" PURSUANT TO RULE 17 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The instant amicus parties submit that "standing" is not, technically speaking, the real procedural issue with which Petitioners and their amici concern themselves in their briefs, when they attack Newdow's right to bring and maintain this case grounded upon the nature and extent of Newdow's parental rights. Professor Grodin's amicus brief probably most directly illustrates this, for although he purports to submit a brief solely on the issue of "standing," he fails to cite a single one of the seminal cases on standing (e.g., Lujan, supra, or Valley Forge, supra), and he not altogether correctly asserts that standing "depends on state law." In his brief, Professor Grodin asserts that: "[I]f California law does not recognize Newdow's right to challenge EGUSD's Pledge policy, Newdow would have standing to do so only if this Court were to decide that he has a federal constitutional right to challenge the policy that California's allocation of rights between him and Banning cannot negate." (Grodin Brf., at p.14.) He goes on to posit that Article III standing would permit an "end run" past the Family Court for every dissatisfied Family Court litigant. The fallacy of this syllogism is at least three-fold.

First, California law clearly does recognize Newdow's right to challenge EGUSD's Pledge policy –

indeed, under California law, Newdow need not even be a parent (let alone a parent of a child enrolled in the Petitioner School District) to bring and maintain this action. See California Code of Civil Procedure ("CCP") § 526a in Appx. at pp.1a-2a. Newdow's standing to bring this lawsuit under California law is far, far broader than it is under federal law. See Greenburger v. S.F. Police Dept. 2001 U.S. Dist. Lexis 12838 (N.D. Ca. 2001) (remanding CCP § 526a case that had been removed on federal question grounds, because California law conferred taxpayer standing).

Second, the assertion that a California Family Court "could" abrogate Newdow's religious freedoms is an argument reductio ad absurdum. By the same logic, the California Criminal Court "could" theoretically impose the death penalty upon Newdow – just as it could upon Professor Grodin or anyone else for that matter, but the facts are light years away from such remotely hypothetical, theoretical possibilities as that (even though State courts of course do have such powers in appropriate factual circumstances). All of these hypothetical theoretical possibilities are meaningless because the fact of the matter is that the California Family Court has never made any such order extinguishing Newdow's parental rights or abrogating his religious freedoms in respect to his child. To say that the State courts "decide" standing based upon such theoretical powers to decide underlying property and other interests of the litigants is meaningless.

Third, while paying "lip service" to the Murga and Mentry cases, Professor Grodin fails to acknowledge or discuss the well-reasoned rationale for those decisions, or that these California cases are in keeping with the majority rule which clearly shows that Newdow has standing.

He similarly both mentions but at the same time totally ignores Troxel v. Granville, 530 U.S. 57 (2000), which, like Mentry and Zummo examined these issues in detail, and thus the instant amicus parties include relevant excerpts therefrom; see Appx. at pp.14a-16a). The gravity of the religious and parental rights involved here thus lends perspective to the "standing" arguments of Petitioners and their amici.

The legal issue that Petitioners and their amici are really addressing here (without saying so and using, instead, inapposite nomenclature) is that on account of the operation of the State family law, Newdow somehow lacks a sufficient legal "stake" or legal interest in raising his daughter in order to bring and maintain this action. Such argument is absurd.

Federal and California law both provide that actions must be brought by one who is a "real party in interest," grounded upon the nature and extent of Newdow's parental rights the "meaning and object" of which is a two-part concept:

> (i) "that the action must be brought by a person who possesses the right to enforce the claim . . ." and
>
> (ii) "the action must be brought by a person . . . who has a significant interest in the litigation."

Virginia Elec. & Power Co. v Westinghouse Elec. Corp., 485 F.2d 78, 83 (4th Cir. 1973), *cert. den.* 415 U.S. 935 (1974). Newdow clearly meets both of these aspects of the rule.

With respect to the first, the "possession and right to enforce" the parental and religious freedoms at issue in this case are determined by the substantive law creating such rights. It is beyond peradventure that the source of Newdow's rights asserted in this case is

federal Constitutional law. [10] U.S.Const. Ams. 1, 14. Newdow clearly possesses the right to enforce his parental and religious freedoms under the Establishment and Free Exercise Clauses of the First Amendment.

With respect to the second part of the "real party in interest" concept – whether Newdow has a "significant interest" in the Constitutional validity of the school policy – depends upon the "significance" of his interpersonal relationship with his daughter. But as her father, the "significance" of that relationship cannot reasonably be disputed in the instant case, nor can it be reasonably disputed in almost any case other than one where parental rights have been wholly forfeited.

Even in a case where a parent may have no custody rights at all, that would still not mean that a sufficient legal interest to sue would necessarily be lacking, because whether and to the extent that a parent in a divided family has "custody" is not necessarily the "be-all-and-end-all" measure of the "significance" of any given parent-child relationship. Many non-custodial parents spend more time and have more contact with their children and therefore have a more "significant" relationship with their children than custodial parents in intact families. There is no legal authority of which the instant amici are aware (and neither Petitioners nor their amici have cited any) in which standing to enforce federally-protected constitutional rights in the course of one's interpersonal relationship with one's children

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[10] Newdow has also asserted his religious rights under the California Constitution, but of course the sum total of his rights under the federal and California State constitutions can as a matter of law only be greater, not less than, those afforded him under the federal Constitution. See, e.g., Aguilar v. Avis Rent A Car Sys., 21 Cal.4th 121, 166-167, 980 P.2d 846, 875-876 (1999).

has ever turned upon any possible measurement of the "significance" of the parent litigant's particular relationship with his or her child. Such an inquiry, even if it were possible (and assuming, arguendo, that it would be constitutionally permissible) would be unwise.

Religious beliefs are an intrinsic and inalienable part of individuals' identities. This is unavoidably a part of Newdow's relationship with his daughter. Even if he were deprived of any say in the "religious upbringing" of his daughter – something which the Family Court never ordered and which no Court in this nation in fact could Constitutionally order unless clearly shown to be necessary to protect the child from harm – to ask or expect that Newdow could somehow suppress so integral a part of his personal identity is to suppose that he could assume a false sense of himself on command. If today it is considered acceptable to expect an atheist to do so, then tomorrow such expectations could be applied to those of other religions. Newdow's particular religious beliefs are immaterial. Non-custodial parents enjoy the same religious freedoms in respect to their right to parent their children as enjoyed by custodial parents.

D. PETITIONER EGUSD'S POLICIES AND PROCEDURES ADMIT THE WEIGHTY SIGNIFICANCE OF RESPONDENT'S INTEREST IN HIS DAUGHTER'S EDUCATION.

The School District's own duly enacted and published policies and procedures confer standing upon Newdow. A State agency's policies and procedures have the force of law in California. Baca v. Moreno Valley Unified Sch. Dist., 936 F.Supp. 719 (C.D. Cal. 1996); Royer v. Steinberg, 90 Cal.App.3d 490, 153 Cal.Rptr. 499 (1979).

Petitioner EGUSD's specific policies concerning its relationships with parents, staff and even ordinary citizens in the communities it serves establishes the admitted significance of Newdow's legal interests and thus his standing in this case. EGUSD's duly enacted policies and procedures published on its Internet web site call for "the direct partnerships of our parents" (Appx. at p.3a), stating that "You are your child's first and most important teacher … [and] we want to help you in that important mission." Id. Petitioner solicits "parents and community members [i.e., any and all other interested adults who need not even be parents]" to "volunteer as mentors to students to provide academic and social guidance." Id., at p.5a. EGUSD will "insist that children treat school staff members with respect and obey school rules." Id. In fact, EGUSD has an official policy that "highlights our emphasis on civic values and ethics … [and] will not tolerate behavior by students, staff or visitors which insults, degrades or stereotypes … [anyone on the basis of their] religion." Id., at p.7a. EGUSD material goes on to state that it is its "goal … to ensure compliance with applicable state and federal laws … [including those prohibiting] discrimination on the basis of actual or perceived … religion," that such is, in fact, the policy of the EGUSD itself, (Id.) and that "any individual [emphasis added] alleging [such] a violation … may file a complaint with the District" (Id., at p.8a) or pursue other legal means of redress. Id., at p.9a.

But all these laudable words about respect and commitment to principle are undone by the Petitioners' seeking to deprive Newdow even of the right to challenge a practice that he considers harmful to his child as well as unconstitutional. Indeed, any individual who shares Newdow's religious beliefs ought to have

standing to challenge Petitioners' policies based on Petitioners' own assurances of a commitment to respect and tolerance for all religious persuasions.

In summary, Newdow's standing in this matter cannot reasonably be controverted. This Court should not permit parental rights to be destroyed as a perceived "easy way out" of resolving thorny Constitutional issues relating to the Establishment and Free Exercise Clauses of the First Amendment. Deciding that Newdow does not have standing would set a far more dangerous precedent than any conceivable decision on whether "under God" belongs in the Pledge of Allegiance.

E. NEWDOW HAS STANDING TO PROTECT HIS PARENTAL RIGHTS.

This Court has emphatically ruled repeatedly that parental rights are fundamental, basic rights. See Troxel v. Granville, 530 U.S. 57 (2000), and cases cited therein. "The ideal of a supportive family so pervades our culture that it may seem incongruous to examine 'burdens' imposed by a statute requiring parental notice of a minor daughter's decision to terminate her pregnancy. This Court has long deferred to the bonds which join family members for mutual sustenance." L. v. Matheson, 450 U.S. 398, 436 (1981) (Marshall, J., joined by Brennan and Blackmun, dissenting; emphases added; footnotes and citations omitted). When some fifty percent of marriages in this country end in divorce, it is more important than ever that these values be promoted and protected.

In considering how Native Americans pass along their wisdom to future generations, this Court has noted that "[c]eremonies are communal efforts undertaken for specific purposes in accordance with instructions handed down from generation to

generation." Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 460 (1988). The instant amicus parties believe that this part of the Court's analysis in Lyng is also true for people of all walks of life. Parents' interact with their children not as babysitters, as a way to pass time, or as a hobby. The essence of a person is the sum of his or her life's efforts; raising a child is at the very center of most parents' lives.

IV. EXPERTISE AND CIVIC INVOLVEMENT OF UFA AND ANCPR IN PARENTAL RIGHTS AND FAMILY LAW

Among other things, amici advocate for repairing the broken, mismanaged, abused, antiquated, counterproductive, and self-destructive child support system. Current child support guidelines do not properly ensure the health and well being of children from divided families. Instead, amici advocate the use of an order of responsibility, which begins with the presumption of a fifty-fifty custody and responsibility. Although fifty years ago the child was often considered to be a burden to the father at divorce (or, at least such was the stereotypical bias), today most fathers and NCPs place great value upon their time with their children. Parents who are involved with their children do not have a natural tendency to seek monetary gain for that love. However, Family Courts and interlopers often convince and encourage them to seek financial gain. Although some custodial parents have no choice but to seek child support, in today's world most divorcees do not need more money – they need more time with the child (from the NCP's vantage point, they have not only lost time with the child, but, to add insult to injury, the NCP must pay the ex-spouse for the "burden" of that precious opportunity). What parent

wants to pay for seeing his/her child less?

As a stopgap measure, amici believe it is axiomatic that whenever child support awards are made they must be such as to assure the financial well being of the non-custodial parent. Amici advocate for equitable treatment for each person in the splintered family unit and for a Family Court system that does not abuse criminal penalties for alleged civil contempt in child support cases. Amici believe that indiscriminately labeling every non-custodial parent who is in arrears in child support as a "deadbeat," and doing so without regard to the circumstances or facts of the particular case, is unnecessary, inappropriate, usually misinformed, often sexist, and counter-productive. See, e.g., Braver, S., "Divorced Dads - Shattering the Myths" (September 1998).

Though demonized like atheists and others who, like Respondent Newdow, seek relief on the merits of the instant case, ANCPR and UFA do not discriminate based on religious beliefs, and its members have extremely diverse religious affiliations and beliefs. Thus, ANCPR and UFA will not address herein, and they take no position upon, the second question posited in this Court's order granting certiorari. The standing question is of more far-reaching importance to all Americans regardless of their religious beliefs than the Pledge.

Kevin Sullivan is a spokesman for both UFA and ANCPR. He has worked with both organizations over the past 10 years as a member, consultant, spokesman and paralegal. As an example of the kinds of activities with which ANCPR and UFA are involved, Mr. Suillivan has appeared and given testimony before the California State Senate Judiciary. See AB 2539, as introduced on 1/18/1994, by California Assemblyman

Larry Bowler (named after the Robin Williams movie "Mrs. Doubtfire"). This Bill would have directed the Family Courts to prioritize utilizing the NCP as "the day care of choice" or "Parent Care" before custodial parents resort to paid day care providers.

These amici further contend that the parental right and duty to raise a child is akin to, and falls within the penumbra of the rights of free speech. If the government denies a father his right to be involved with his child, the father is denied his voice to expose and inculcate his child to his culture and beliefs, and therefore, future generations.

V. CONCLUSION

The Ninth Circuit decision that Newdow has standing should be affirmed. The Court should decide this case upon its merits.

Respectfully submitted,

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CALIFORNIA STATUTES

§ 367. Real party in interest requirement

Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute.

HISTORY:
Enacted 1872. Amended Code Amdts 1880 ch 68 § 1; Stats 1976 ch 595 § 1.
Amended Stats 1992 ch 178 § 10 (SB 1496).

NOTES:
AMENDMENTS:
1880 Amendment:
Added "of this code."
1976 Amendment:
Substituted "Sections 369 and 374" for "section three hundred and sixty-nine".
1992 Amendment:
Substituted "otherwise provided by statute" for "provided in Sections 369 and 374 of this code".

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§ 526a. Actions against officers; scope of section; municipal bonds

An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen

resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities.

An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.

HISTORY:

Added Stats 1909 ch 348 § 1. Amended Stats 1911 ch 71 § 1; Stats 1967 ch 706 § 1.

NOTES:

AMENDMENTS:

1911 Amendment:

Added the proviso at the end of the section.

1967 Amendment:

Added the second paragraph.

ELK GROVE UNIFIED SCHOOL DISTRICT PUBLISHED POLICIES AND PROCEDURES

Parents In Action

Your student's academic success is important to us! Our goal is to provide quality education by personalizing achievement for all of our students. "Parents in Action" is a newly developed and direct way for our school district to benefit from the direct partnerships of our parents. We have established several new ways for you to become involved both from your child's school level and/or from the district at large.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, Action.
http://www.egusd.k12.ca.us/parents/action.htm

Welcome from Superintendent Dave Gordon

Welcome to the Elk Grove Unified School District's parent section of our website. You are your child's first and most important teacher, and we value and encourage your involvement in your child's education. Study after study have shown that children do better in school when their parents are involved in their education, and we want to help you in that important mission. In this section you will find information to help you support your child's education in the "Resources for Parents" section, and information on how you can be involved in your child's school in the "Parents in Action" section.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, Welcome. http://www.egusd.k12.ca.us/parents/welcome.htm

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Parent involvement is critical to success

The district recognizes that parents are the most important educators in their children's lives. Studies have proven that children whose parents are involved in their education perform better in school than children whose parents are not. That is why we encourage parents to be active with their children at all grade levels — even high school when parent participation drops off dramatically.

We encourage parents to work with their school PTA/PTSA, volunteer in the classroom, and to be active with their children's learning at home. We also offer classes for parents of children from preschool through teenage years through our Always Learning program with Adult Education.

Parents can also find ways to be involved by asking their local school or by checking the section for parents on the district's website. In addition to a section offering resources for parents, the "Parents in Action" section lists ways that parents can help their school and the district in the areas of academic success, safe schools, mentoring opportunities, and the student housing challenge.

Many parents and community members also volunteer as mentors to students to provide academic and social guidance. For more information on mentoring, call 686-7797, ext. 7130.

To help you as the parent, you may also ask for progress reports on how well your child is doing in school instead of waiting for progress reports every quarter. If you are concerned about your child's progress, please call your child's teacher or principal.

Following are some tips to help your child succeed in school:

- Visit your child's school. You are always welcome!

* * * * *

- ! Insist that children treat school staff members with respect and obey school rules.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, p.4.
http://www.egusd.k12.ca.us/parents/hand0304_4.htm

Child custody
Schools in the Elk Grove Unified School District follow child custody decisions made by the courts. Principals cannot modify a judge's ruling regarding the custody of a child. If a child custody arrangement has changed, a

parent or guardian must provide complete legal documents to the school stating this.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, p.5.
http://www.egusd.k12.ca.us/parents/hand0304_5.htm

Our schools emphasize community service
The Elk Grove Unified School District recognizes that the role of the parent/guardian is paramount in developing civic values and ethical behavior in their children.

The district is committed to providing a strong instructional program to support and assist parents in helping students develop the civic values and ethical behaviors that will allow them to become responsible citizens, family members, and workers.

* * * * *

We teach students respect and civility
We believe everyone — students and district employees— should be treated with respect, so the Board of Education has adopted a Human Dignity/Civic Discourse Policy.

There is a great deal of diversity in the families we serve, and we strive to ensure that everyone feels welcome in our schools. This policy highlights our

emphasis on civic values and ethics. We want our students to be good citizens as well as progressive thinkers, and this is part of that emphasis.

The school district will not tolerate behavior by students, staff or visitors which insults, degrades or stereotypes any race, gender, disability, physical characteristics, ethnic group, sexual preference, age, national origin or religion.

* * * * *

Prohibition from discrimination/harassment
Sex discrimination/harassment

The District does not discriminate on the basis of a person's actual or perceived ancestry, color, ethnic group identification, national origin, race, religion, sex, gender (including sexual harassment), sexual orientation, or physical and/or mental disability in any of it's policies, practices, procedures, programs or activities. The District's Nondiscrimination Policy complies with the requirements of Titles VI and VII of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Individuals with Disabilities Education Act of 1990, and other related state and federal laws.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, p.8.
http://www.egusd.k12.ca.us/parents/hand0304_8.htm

Uniform Complaint Procedure

It is the goal of the Elk Grove Unified School District to ensure compliance with applicable state and federal laws and regulations governing educational programs. The District shall investigate and seek to resolve complaints at the local level. The District shall follow the Uniform Complaint Procedures (UCP) when addressing complaints alleging:

Unlawful discrimination on the basis of actual or perceived ancestry, color, ethnic group identification, national origin, race, religion, sex, gender (including sexual harassment), sexual orientation, or physical and/or mental disability in any program or activity that receives or benefits from state financial assistance; or

Failure to comply with state or federal law when addressing complaints regarding adult basic education, consolidated categorical aid programs, migrant education, vocational education, child care and development programs, child nutrition programs and special education programs.

Procedure: The following Uniform Complaint Procedure shall be used to address all complaints that allege that the District has violated federal and state laws or regulations governing educational programs:

Any individual, public agency or organization alleging a violation of state or federal statutes may file a complaint with the District. The written complaint is to be submitted to: Elk Grove Unified School District, 9510 Elk Grove-Florin Road, Elk Grove, CA 95624. Discrimination complaints must be filed no later than

six months from the occurrence or when the complainant first had knowledge of the facts of the alleged discrimination.

* * * * *

Civil Law Remedies: Nothing in this procedure precludes a complainant from pursuing available civil law remedies outside the District's complaint procedures. Such remedies include but are not limited to injunctions, restraining orders, etc. For discrimination complaints, however, a complainant must wait until 60 days have elapsed from the filing of an appeal with the California Department of Education before pursuing civil law remedies other than injunctive relief.

* * * * *

Source: Elk Grove Unified School District, 2003-2004 Parent and Student Handbook, p.14.
http://www.egusd.k12.ca.us/parents/hand0304_14.htm

Excerpt from In re Marriage of Mentry, 142 Cal.App.3d 260, 265-266 (1983):

The best recent synopsis of the case law of the jurisdictions in which the courts have addressed the question whether or how to accommodate diverse religious practices of parents, living apart, in the upbringing of minor children is set forth in Felton v. Felton (1981) 383 Mass. 232 [418 N.E.2d 606, 22 A.L.R. 4th 961]. In that case, as here, a trial court entered an order prohibiting a father with visitation rights from instructing the children in his religion. In a notable

opinion by Justice Kaplan, the Supreme Judicial Court reversed, holding that the evidence was insufficient to support such a disposition. Relying upon Murga and numerous cases from other states, the court summarized the law as follows: "The parents together have freedom of religious expression and practice which enters into their liberty to manage the familial relationships. [Citations.] But the 'best interests' of the child are to be promoted, and when the parents are at odds, the attainment of that purpose may involve some limitation of the liberties of one or other of the parents. [Citations.] However, harm to the child from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail. [Citations.] [para.] If the dominating goal of the enterprise is to serve a child's best interests . . . then it might be thought to follow that a policy of stability or repose should be adopted by which the child would be exposed to but one religion (presumably that of the custodial parent) at whatever cost to the 'liberties' of the other parent. The law, however, tolerates and even encourages up to a point the child's exposure to the religious influences of both parents although they are divided in their faiths. This, we think, is because the law sees a value in 'frequent and continuing contact' of the child with both its parents [citation] and thus contact with the parents' separate religious preferences. There may also be a value in letting the child see, even at an early age, the religious models between which it is likely to be led to choose in later life. And it is suggested, sometimes, that a diversity of religious experiences is itself a sound stimulant for a child. [Citation.] In all events, the question that comes to the courts is whether, in particular circumstances,

such exposures are disturbing a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future [Citation.] The critical literature warns against perverting a quest for the child's best interests into one for the psychic comfort of the parents -- a warning against overvaluing the parents' constitutional liberties [Citation.] A warning is equally in order against depriving a parent of all connection with the child, or connection on the religious plane, out of an exaggerated fear of injury to the child. [Citations.] It is often said that if accommodation appears necessary, that form should be sought which intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child." (Felton v. Felton, *supra*, 418 N.E.2d at pp. 607-608, italics added, fns. omitted.)

Excerpt from Zummo v. Zummo (1990) 394 Pa.Super. 30, 574 A.2d 1130, 1132, 1138:

In intact families, parents are left to decide their children's "best interests" on an ad hoc basis. Significantly, "a marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals with a separate intellectual and emotional makeup." **n15** One parent may be a Republican the other a Democrat, one may be a Capitalist the other a Communist, or one may be a Christian and the other a Jew. Parents in healthy marriages may disagree about important matters; and, despite serious, even irreconcilable, differences on important matters, the government could certainly not

step in, choose sides, and impose an orthodox uniformity in such matters to protect judicially or bureaucratically determined "best interests" of the children of such parents. *See* Parham v. J.R., *supra*. Rather, intervention is permitted only upon a showing of a substantial risk of harm to the child in absence of intervention, and that the intervention proposed is the least intrusive means adequate to prevent the harm. Wisconsin v. Yoder, *supra*.

We find no reason to treat such disagreements between divorced parents differently. As harm to the children is the basis of the governmental justification for intervention, we cannot see how the marital status of the parents should affect the degree of harm to the child required to justify governmental intervention.

Under Pennsylvania law, each parent has parental authority during lawful periods of custody or visitation. Consequently, such a parent may pursue whatever course of religious indoctrination which that parent sees fit, at that time, during periods of lawful custody or visitation. Cf. In re Constance W., *supra*; Fatemi v. Fatemi, *supra*. If the other parent objects and seeks restrictions, the objecting parent must establish a substantial risk of harm in absence of the restriction proposed. Cf. Wisconsin v. Yoder, *supra*; In re Constance W., *supra*; Fatemi v. Fatemi, *supra*.

Significantly, while divorce does not change the standard for legitimate government intervention in such matters, it may nonetheless lead to increased legitimate governmental intervention. Some divorced parents may conduct such religious upbringing disputes in a more acrimonious and injurious manner than

parents who remain married, and thereby create greater risk of harm to their children in more such cases. **n16**

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n15 Eisenstadt v. Baird, 405 U.S. 438, 453, 92 S.Ct. 1029, 1038, 31 L.Ed.2d 349, 362 (1972).

n16 Parents who fail to develop appropriate conflict resolution skills for their post-spousal co-parenting responsibilities may exacerbate problems associated with parental conflict. See generally Forehand & McCombs, The Nature of Interparental Conflict of Married and Divorced Parents, 17 J. *Abnormal Child Psych.* 235, 235-49 (1989); Camera & Resnick, *Styles of Conflict Resolution and Cooperation Between Divorced Parents* , 59 *Am.J. Orthopsych* 560, 560-75 (1989). In cases where children have suffered serious negative consequences following their parents' divorce, high levels of pre-and post-divorce conflict have been identified as a significant causative factor. See generally Tchann, Johnston, & Wallerstein, *supra* at n. 12, *51 Journal of Marriage & The Family* at 431-44; Webster-Stratton, *The Relationship of Marital Support, Conflict and Divorce to Parent Perceptions, Behaviors, and Child Conduct Problems*, 51 Journal of Marriage & The Family 417, 417-30 (1989); Forehand & McCombs, supra, 17 Journal of Abnormal Child Psychology at 235-49; Masten, et al., *Competence and Stress in School Children: The Moderating Effects of Individual and Family Qualities*, 29 Journal of Child Psychology and Psychiatry 745, 745-64 (1988); Long, et al., *Continued High or Reduced Interparental Conflict Following Divorce*, 56 Journal of Consulting and Clinical Psychology 467, 467-69 (1988); Johnston,

Gonzalez, & Campbell, *Ongoing Postdivorce Conflict and Child Disturbance*, 15 Journal of Abnormal Child Psychology 493, 493-509 (1987); Shaw & Emery, *Parental Conflict and Other Correlates of Adjustment of School-Age Children Whose Parents Have Separated*, 15 Journal of Abnormal Child Psychology 269, 269-81 (1987); Long & Forehand, *The Effects of Parental Divorce and Parental Conflict on Children: An Overview*, 8 Developmental and Behavioral Pediatrics 292, 292-96 (1987); Woody, et al., *Child Adjustment to Parental Stress Following Divorce*, 65 Social Casework 405, 405-12 (1984); Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 Psychological Bulletin 310, 310-30 (1982).

Excerpt from Troxel v. Granville, 530 U.S. 57, 65-66 (2000):

"The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401, 67 L.Ed. 1042, 43 S.Ct. 625 (1923), we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.' Two years later, in Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-535, 69 L.Ed. 1070, 45 S.Ct. 571 (1925), we again held that the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.' We

explained in Pierce that 'the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.' 268 U.S. at 535. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158, 88 L.Ed. 645, 64 SCt. 438 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' 321 U.S. at 166.

In subsequent cases also, we have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children. See, e.g., Stanley v. Illinois, 405 U.S. 645, 651, 31 L.Ed.2d 551, 92 S.Ct. 1208 (1972) ('It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements"' (citation omitted)); Wisconsin v. Yoder, 406 U.S. 205, 232, 32 L.Ed.2d 15, 92 S.Ct. 1526 (1972) ('The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition'); Quilloin v. Walcott, 434 U.S. 246, 255, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978) ('We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected'); Parham v. J. R., 442 U.S.

584, 602, 61 L.Ed.2d 101, 99 S.Ct. 2493 (1979) ('Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course'); Santosky v. Kramer, 455 U.S. 745, 753, 71 L.Ed.2d 599, 102 S.Ct. 1388 (1982) (discussing 'the fundamental liberty interest of natural parents in the care, custody, and management of their child'); Glucksberg, *supra*, [521 U.S. 702, 719, 138 L.Ed.2d 772, 117 S.Ct. 2258 (1997)] at 720 ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children' (citing Meyer and Pierce)). In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."