No. 02-1624

IN THE
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *ET AL.*,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

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

BRIEF OF AMICUS CURIAE CITIZENS UNITED FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF AMICUS CURIAE

Citizens United Foundation ("CUF") is a nonprofit, nonpartisan, educational organization established to conduct research and to inform and educate the public on a variety of issues of national importance, including issues related to belief in God, the role of traditional families and religious traditions in American society, the original intent of the Framers, and the correct interpretation of the United States Constitution.[1] Thus far, CUF has not participated in this case before this Court or in the lower courts; however, CUF has filed *amicus curiae* briefs in other federal litigation, including matters before this Court, involving issues of constitutional law. CUF believes that relaxed standing rules such as those that prevailed in the appellate court below would jeopardize the federal system by weakening the limits on the role of federal courts set out in the United States Constitution.

Although CUF shares the governmental Petitioners' view that the words "under God" do not render student recitation of the Pledge of Allegiance in public schools unconstitutional under the Establishment Clause of the First Amendment, CUF has limited this brief to the vital threshold constitutional issue, as to whether Respondent, Michael A. Newdow, has standing to challenge the school district policy at issue in this case.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than this *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[2] CUF requested and received the written consents of the parties to the filing of this brief *amicus curiae*. Such written consents, in the form of letters from counsel of record for the parties, have been submitted for filing to the Clerk of Court.

COURSE OF PROCEEDINGS

On March 8, 2000, Respondent, Michael A. Newdow, filed a complaint in the United States District Court for the Eastern District of California against both federal defendants (the United States Congress, the United States, and President Clinton) and local California school district defendants (Elk Grove Unified School District and Sacramento City Unified School District, and their superintendents).

The case was referred to a United States Magistrate Judge who, in response to a motion to dismiss for failure to state a claim under F.R.Civ.P. 12(b)(6), recommended that the complaint be dismissed. Newdow v. U.S. Congress, 2000 U.S. Dist. LEXIS 22367 (E.D. Cal., May 25, 2000). The District Court adopted the recommendation and dismissed Respondent's complaint. Newdow v. U.S. Congress, 2000 U.S. Dist. LEXIS 22366 (E.D. Cal. July 21, 2000). Neither the Magistrate Judge nor the District Court expressly addressed the standing of Mr. Newdow to bring this action.

Respondent appealed the dismissal to the United States Court of Appeals for the Ninth Circuit, which reversed the decision of the District Court. The Ninth Circuit expressly found that Mr. Newdow had standing to challenge the policy and practice of the Elk Grove Unified School District where his daughter attended, but not those of the Sacramento City Unified School District since his daughter was not a student there. Newdow v. U.S. Congress, 292 F.3d 597, 603 (9th Cir. 2002). Subsequent to that reversal, the mother of Respondent's daughter filed a motion challenging Respondent's standing, but the Court of Appeals affirmed its prior ruling that Mr. Newdow had standing to challenge the constitutionality of the Pledge of Allegiance. Newdow v. U.S. Congress, 313 F.3d 500 (9th Cir. 2002).

A Petition for a Writ of Certiorari, filed on April 30, 2003, was granted by this Court on October 14, 2003, limited to the following two issues:

> 1. 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. 2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment. [Order of October 14, 2003.]

SUMMARY OF ARGUMENT

In the District Court and the first decision by the Court of Appeals below, Respondent Newdow litigated on behalf of his unnamed plaintiff minor daughter as next friend and allegedly in his own right as a parent. Apparently, it was not until the matter was brought to the attention of the Ninth Circuit by the intervention of the child's mother that the Court of Appeals became aware that the mother of Mr. Newdow's daughter had sole legal custody of the child, had not consented to filing of this litigation, and indeed objected to the representation of her child by her father, and disagreed with the object of the litigation. The Ninth Circuit recognized that "Newdow **no longer claims to represent his child**, but asserts that he retains standing in **his own right as a parent** to challenge alleged unconstituitonal state action affecting the child...." 313 F.3d at 502 (emphasis added). Insofar as Mr. Newdow sought to act

as a noncustodial parent with no parental right to control the child's education, he was litigating not as a parent, but as little more than a bystander who had unenforceable personal preferences as to how he wanted his child educated, but no legal rights to assert before the Court. Nevertheless, the Ninth Circuit determined that Respondent had standing to challenge the Elk Grove Unified School District's policy regarding voluntary daily recitation of the Pledge of Allegiance in its schools.

Respondent's alleged injury in fact — characterized by the Court of Appeals below as an "expect[ation] to be free from the government's endorsing a particular view of religion, and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view," 313 F.3d at 505 — is too abstract or remote to constitute a "judicially cognizable injury," Allen v. Wright, 468 U.S. 737, 753 (1984), under this Court's case-or-controversy doctrine.

Recognition of standing on the part of Mr. Newdow would open the federal courts to a myriad of lawsuits premised on extremely remote and abstract injuries. Allowing claims such as that of Mr. Newdow would dangerously undermine the Article III limits on the role of the federal courts, because such claims risk "transform[ation of] the federal counts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders." Allen v. Wright, *supra*, 468 U.S. at 756, quoting United States v. SCRAP, 412 U.S. 669, 687 (1973).

ARGUMENT

I. THE NINTH CIRCUIT IMPROPERLY ALLOWED RESPONDENT, AS A NONCUSTODIAL PARENT, TO OVERRIDE THE EDUCATIONAL DECISIONS OF THE CUSTODIAL PARENT, FINDING STANDING BASED ONLY ON A MERE EXPECTATION HIS DAUGHTER WOULD NEVER BE EXPOSED TO FAVORABLE REFERENCES TO GOD DURING HER EDUCATION.

In a dramatic departure from this Court's standing jurisprudence requiring injury in fact to the plaintiff, the U.S. Circuit Court of Appeals for the Ninth Circuit has ruled that the non-custodial parent of a public school student has Article III standing, in his own right, over the objection of the custodial parent, to challenge teacher-led recitation of the Pledge of Allegiance in the school district where the custodial mother has decided to have the student attend school.

A. Respondent Newdow's Allegations of Standing in His Own Right Are Inadequate, as They Cannot Trump the Right of the Custodial Parent.

Respondent Newdow filed this suit below to challenge the constitutionality of the words "under God" in the Pledge of Allegiance to the Flag of the United States of America, the recitation of which his minor daughter's public school teacher led her class in daily.[3] 292 F.3d at 600. While Respondent's

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[3] Mr. Newdow does not allege that his daughter was required or compelled to participate in reciting the Pledge, but rather that his daughter was injured when she was compelled to listen as her teacher led her classmates in reciting the Pledge.

political and religious objectives may be clear, his standing to entitle him to ask a court to help him achieve those objectives is not.

Mr. Newdow was the sole-named plaintiff in this action.[4] In his complaint, Mr Newdow alleged he was "grossly offended by the phrase 'under God' in the Pledge of Allegiance...." (para. 54) and that he was filing the complaint for his unnamed plaintiff minor daughter as next friend (para. 9). The two district opinions and the first Ninth Circuit decision appear to assume without discussion the validity of Newdow's claim that he was authorized to act as next friend for his child and represent his child as an unnamed plaintiff.

However, in the second appellate decision now under review, Newdow's premise for standing changed fundamentally. The Ninth Circuit clearly understood this transition, as it states: "Newdow **no longer claims to represent his child**, but asserts that he retains standing in **his own right as a parent** to challenge alleged unconstitutional state action affecting the child...." 313 F.3d at 502 (emphasis added).

See 292 F.3d at 601.

[4] Although Respondent is a self-proclaimed atheist, he is identified as "Rev. Dr." Michael A. Newdow in the caption of the District Court proceedings. 292 F.3d at 600. These titles were dropped in the caption on appeal. However, apparently, Mr. Newdow was ordained as a Minister in the "Universal Life Church" on February 15, 1977, and holds a "Doctor of the Universe" degree, also from the Universal Life Church, dated January 14, 1998. "In 1997, he started his second religious institution, the First Amendmist Church of True Science (FACTS)." http://www.restorethepledge.com/mike_newdow/.

Mr. Newdow was compelled to retreat from the claim that he represented his child's interests due to the peculiar facts of this suit. He brings this action as a noncustodial parent against the wishes of the custodial parent who enjoys full authority to direct the child's education. 313 F.3d at 501-02. For Newdow to prevail in protecting his daughter from listening to the Pledge, his wife's desire to have her daughter in a public school hearing the Pledge must be compromised.

It is difficult to conceive how the noncustodial parent's wishes on any such issue relating to the "health, education, and welfare" of the child which were committed by the California state court to the "child's mother" (313 F.3d at 502) could trump the interests of the custodial parent. As a matter of state law, the California state court's order of February 6, 2002 would appear by its terms to limit the judicially-protectable interests of the noncustodial father. *Id.*

Moreover, the Ninth Circuit understood fully that a California state court had ruled that the child's mother has "*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]." 313 F.3d at 502 (emphasis original). The Ninth Circuit understood fully that child's mother expressed her views unequivocally as to her child's "education" when she filed a motion for leave to intervene in this proceeding "to, *inter alia*, challenge Newdow's standing to maintain this action." 313 F.3d at 501-02. Nevertheless, the Ninth Circuit affirmed its earlier opinion that Respondent had standing to challenge the statute based on his right as a parent to direct the religious education of his daughter. 313 F.3d at 505.

The Ninth Circuit should have understood this case to be one where two parents have different ideas as to how a child should be educated. For the father's preferences to be upheld, the

mother's preferences must be overridden. This is not a case involving the right of each parent to use the time he or she has with the child to expose the child to different views about religion, with the religious views of both being given vent, as the Ninth Circuit thought. 313 F.3d at 504. Here, a choice must be made as to which parent has the final say over the child's education. This issue was resolved by the California state court when it granted to the mother custodial rights. The Ninth Circuit has no authority to override that state court decision.

The only basis on which its tortured decision can be comprehended is the Ninth Circuit's apparent determination that the mother's custodial rights under state law were somehow constrained by the First Amendment. The Ninth Circuit stated that the mother "has no power, even as sole legal custodian, to insist that her child be subjected to unconstitutional state action." 313 F.3d at 505. The Ninth Circuit stopped short of stating that the U.S. Constitution required the mother, in order to be a fit parent, to agree with its view that allowing her child to observe others say the Pledge of Allegiance, and to take affirmative action to stop her child's victimization. However, it did state that, even as the child's custodial parent, she was powerless to disagree with the Ninth Circuit's peculiar view of the U.S. Constitution, and she must not be allowed to impede the child's noncustodial father from acting to protect their child.

The lack of sound analysis of the standing issue gives rise to the possibility that the Ninth Circuit simply concluded, since it agreed with the father's preferences, that the father's preferences would trump the mother's preferences, and the father would be granted standing. Rather than treating standing as a threshold issue, the Ninth Circuit's analysis of standing is predicated on its substantive agreement with Newdow's

position on the ultimate Establishment Clause issue. This analysis turns the law of standing on its head. If Newdow did not have standing to bring the action, the Ninth Circuit could find no constitutional violation. It cannot find standing where it does not otherwise exist because it believes there is a constitutional violation hiding right behind the annoying threshold issue of standing.

B. The Ninth Circuit's Opinion Impermissibly Based Respondent's Standing on a Mere Expectation that His Daughter Would Be Taught Pursuant to His Wishes.

The Ninth Circuit, in its **initial** opinion, held that Respondent had standing as a parent to challenge state action — the policy and practice, regarding the recitation of the Pledge, of the local school district having jurisdiction over the elementary school in which his daughter was enrolled — interfering with "his **right** to direct the religious education of his daughter." 292 F.3d at 602 (emphasis added). Additionally, the Ninth Circuit found that Respondent had standing even to challenge the constitutionality of the Congressional enactment which inserted "under God" into the Pledge:

> Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with **Newdow's right to direct the religious education of his daughter**.... Accordingly, we hold that Newdow has standing to challenge the 1954 Act. [292 F.3d at 605 (emphasis added).]

In the face of the challenge to Respondent's standing raised by the custodial mother who had full power to direct her child's education (313 F.3d at 502), the Ninth Circuit had to address the standing issue again, but continued to believe that the injury-in-fact requirement for Article III standing was met. However, this time it was no longer founded on Newdow's "**right** to direct the religious education of his daughter" (emphasis added) which had vanished in the face of the California court's custody order, but now, rather, was based on a mere **expectation** predicated wholly on the Ninth Circuit's agreement with the belief that an actual constitutional violation underlies Respondent's Complaint. Indeed, in its second opinion, the Ninth Circuit grounded standing in the fact that Newdow:

> can **expect** to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view. The pledge to a nation "under God," with its imprimatur of governmental sanction, provides the message to Newdow's young daughter not only that non-believers, or believers in non-Judeo-Christian religions, are outsiders, but more specifically that her *father's* beliefs are those of an outsider, and necessarily inferior to what she is exposed in the classroom. [313 F.3d at 505 (italics original, bolding added).]

Having no enforceable parental right to assert, Mr. Newdow is reduced to relying on what the Ninth Circuit accurately described as what "he can expect." However, Respondent cannot successfully demonstrate his standing by virtue of a

mere expectation concerning his daughter's educational instruction.

C. The Requirements for Standing Set Out in this Court's Prior Decisions on Standing Are Not Met by Respondent.

The pending case is not the first time this Court has been called upon to decide whether parents of public school children have standing, in their own right, to sue governmental entities in federal court to determine if a policy affecting their children's education is unconstitutional. The issue of Mr. Newdow's standing is a question that "can be answered chiefly by comparing the allegations of [Mr. Newdow's] particular complaint to those made in prior standing cases." *See* Allen v. Wright, 468 U.S. 737, 751-752 (1984). When Mr. Newdow's expectations are compared with the alleged injuries in analogous cases, it is clear that his alleged injury in fact is too remote or abstract to confer Article III standing on him.

In Allen v. Wright, *supra*, this Court considered and rejected injury-in-fact claims similar to those asserted by the Respondent on grounds that the alleged injuries in fact were too remote to constitute judicially cognizable injuries for purposes of Article III standing. The parents in Allen sued to strike down Internal Revenue Service ("IRS") standards and procedures for denying tax-exempt status to racially-discriminatory private schools. They alleged that the standards and procedures were inadequate because several racially-discriminatory private schools had received tax-exempt status under the IRS guidelines. The district court dismissed the claims on summary judgment for lack of standing. Wright v. Miller, 480 F. Supp. 790 (D.D.C. 1979). But the U.S. Court of Appeals for the District of Columbia Circuit reversed. It held that the parents had standing to sue based on "the denigration

they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth." Wright v. Regan, 656 F.2d 820, 827 (D.C. Cir. 1981).

This Court, however, rejected "denigration" or "stigmatization" as a valid basis for conferring standing on the parents because the parents had not personally been denied equal treatment as a consequence of the challenged discrimination.

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct. [Allen, 468 U.S. at 755 (internal citations omitted).]

In a similar vein, this Court, in Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982), held that Americans United for Separation of Church and State lacked standing to challenge the Government's conveyance of a 77-acre tract of land to Valley Forge Christian College as a violation of the Establishment Clause. In that case, the U.S. Court of Appeals for the Third Circuit had found that the group had standing to sue by virtue of an alleged "'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.'" Americans United v. U.S. Dept. of HEW, 619 F.2d 252, 261 (3d Cir. 1980). In reversing the Third Circuit, this Court explained:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. [Valley Forge, 454 U.S. at 485-486 (emphasis in original).]

Mr. Newdow's alleged injury in fact (*i.e.,* an "expect[ation] to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view," Newdow, 313 F.3d at 505), is similar in substance and form to the injuries claimed by the plaintiffs in Allen and Valley Forge and found inadequate by this Court.

Like the plaintiff in Valley Forge, Mr. Newdow does not allege any direct personal injury as a result of the school board's policy aside from psychological consequence the policy has on his relationship with his daughter. Put another way, the distress he suffers as a consequence of the school district's policy can hardly be characterized as less remote than the stigmatization and denigration suffered by the parents of black school children in Allen. Indeed, Mr. Newdow's claim to standing is considerably weaker than the parents' claim to standing in Allen, because equal protection is the one class of claims where denigration and stigmatization have been held sufficient to confer standing on individuals who are personally subjected to the discriminatory conduct at issue. *See* Heckler v. Mathews, 465 U.S. 728, 739-740 (1984). In short, Mr.

Newdow lacks standing to challenge the school board policy at issue in this case because his alleged injuries in fact are too remote or abstract to constitute a judicially cognizable injury under this Court's case-or-controversy doctrine.

II. IF ALLOWED TO STAND, THE NINTH CIRCUIT'S STANDING DECISION WILL DANGEROUSLY UNDERMINE THE U.S. CONSTITUTION'S ARTICLE III LIMITS ON THE ROLE OF THE FEDERAL COURTS.

In addressing the issue of standing, this Court has consistently emphasized that "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" Valley Forge, 454 U.S. at 471. "As an incident to the elaboration of this bedrock requirement, this Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Id.* "'In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" Allen, 468 U.S. at 750-751, quoting Warth v. Seldin, 422 U.S. 490, 498 (1975).

In addressing the application of Article III standing, this Court's overarching concern has been its duty to confine the jurisdiction of the federal courts to actual cases or controversies arising under the Constitution or federal law. "Those who do not possess Art. III standing may not litigate as suitors in the courts of the Untied States." Valley Forge, 454 U.S. at 475-476. This requirement is not imposed merely as "a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated" (*id*. at 476); rather:

> it is a part of the basic charter promulgated by the Framers of the Constitution in Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals. [*Id*.]

In short, the standing doctrine "embraces several judicially self-imposed limits on the exercise of federal jurisdiction." Allen, 468 U.S. at 751. Thus, in Valley Forge, the Court explained:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to redressed by a favorable decision," Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S., at 97. [Valley Forge, 454 U.S. at 472.]

Typically, the determination of a party's standing "requires careful judicial examination of a complaint's allegations to

ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen, 468 U.S. at 752. Critical questions include the following:

> • Is the injury too abstract, or otherwise not appropriate, to be considered judicially cognizable?
>
> • Is the line of causation between the illegal conduct and injury too attenuated?
>
> • Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative? [*See id*.]

Furthermore, these and other relevant questions "must be answered by reference to the Art. III notion that federal courts may exercise power only in the last resort, and as a necessity, and only when adjudication is consistent with a system of separated powers and the dispute is one traditionally thought to be capable of resolution through the judicial process." *Id.* (internal citations and punctuation omitted).

It was with these Article III considerations in mind that the Court, in Allen, rejected the denigration and stigmatization injury claims of the parents of public school children. "If the abstract stigmatic injury were cognizable," the Court opined, "standing would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating by its grant of a tax exemption to a racially discriminatory school, regardless of the location of that school." *Id.* at 755-756. This Court's principal concern was that recognition of standing on the part of the parents would violate Article III by transforming the federal courts into "'a vehicle for the vindication of the value interests of

concerned bystanders,'" *id.*, quoting United States v. SCRAP, 412 U.S. 669, 687 (1973).

The pending case raises even more profound Article III concerns. If Mr. Newdow were granted standing to challenge teacher-led recitation of the Pledge of Allegiance based solely on his expectations as to his daughter, the precedent will eviscerate decades of Article III standing jurisprudence by opening the federal courts to a myriad of lawsuits premised on equally remote or abstract injuries. Such a ruling would effectively overrule the holdings of Allen and Valley Forge, since the non-custodial parent — as well as any relative, neighbor or friend — of any student enrolled in a public school anywhere in the nation will have standing, in his or her own right, to challenge a governmental policy affecting the child's schooling based solely on the perceived effects the challenged policy has on the parent's, relative's, neighbor's, or friend's relationship with the child.

Mr. Newdow's first concern appears to be the eradication of any reference to God in government, as if he were the national ombudsman for the Establishment Clause. In addition to the instant litigtion, he has instituted a lawsuit challenging prayer at the presidental inaugurations, and challenging Congressional chaplains. *See* http://www.restorethepledge.com/litigation/pledge/. Mr. Newdow even sells for $14.92 a CD of "the music he has composed, played, and sung about church-state separation." http://www.restorethepledge.com/store/. He apparently wants to strike the national motto, "In God We Trust," from U.S. currency and coins. *See, e.g.,* "Atheist Seeks End to Hill Chaplaincies," The Washington Post, Aug. 30, 2002 at A5. The fervor of his beliefs does not give him standing to challenge the constitutionality of these laws. Traditional rules of standing must be followed irrespective of

the merits of the argument on the substantive, constitutional issue involved.

Conferring standing on Mr. Newdow in the instant case would undermine the Constitution's Article III limits on the role of the federal courts. Indeed, the risk of transforming the federal courts "into a vehicle for the vindication of the value interests of concerned bystanders" is far greater in the pending matter than it was in Allen. As in Allen, the claim of standing should be rejected.

CONCLUSION

For the reasons stated herein, the Ninth Circuit's holding that Respondent Newdow has standing, in his own right, to challenge the Elk Grove Unified School District's policy regarding recitation of the Pledge of Allegiance should be reversed.

Respectfully Submitted,

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