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, ET AL., *Respondents.*

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

**Brief Amici Curiae of United States Senators George Allen, Sam Brownback, James Inhofe, Trent Lott, Zell Miller, and Ted Stevens, and United States Representatives Robert Aderholt, Todd Akin, Rodney Alexander, Case Ballenger, J. Gresham Barrett, Roscoe Bartlett, Bob Beauprez, Sanford Bishop, Marsha Blackburn, Roy Blunt, Ken Calvert, Chris Cannon, Tom Cole, Michael Collins, Philip Crane, John Culberson, Jo Ann Davis, Mario Diaz-Balart, John Doolittle, Jeff Flake, Randy Forbes, Trent Franks, Scott Garrett, Phil Gingrey, Virgil Goode, Gil Gutknecht, Melissa Hart, Jeb Hensarling, Wally Herger, Peter Hoekstra, Duncan Hunter, Johnny Isakson, Ernest Istook, Walter Jones, Ric Keller, Steve King, Jack Kingston, John Kline, Frank Lucas, Donald Manzullo, Jim Marshall, John McHugh, Gary Miller, Jeff Miller, Sue Myrick, Bob Ney, Doug Ose, C.L. Otter, Steve Pearce, Charles Pickering, Joseph Pitts, Jim Ryun, Edward Schrock, Pete Sessions, John Shadegg, John Shimkus, Mark Souder, John Sullivan, Lee Terry, Dave Weldon, M.D., Roger Wicker, and Joe Wilson, and The Committee to Protect the Pledge Supporting Petitioners**


**STUART J. ROTH**
**WALTER M. WEBER**
**COLBY M. MAY**
**JAMES M. HENDERSON**
**JOEL H. THORNTON**
**JOHN P. TUSKEY**
**LAURA B. HERNANDEZ**

**JAY ALAN SEKULOW**
*Counsel of Record*
**AMERICAN CENTER FOR LAW & JUSTICE**
201 Maryland Ave NE
Washington, D.C. 20002
(202) 546-8890

*Attorneys for Amicus Curiae*


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## INTEREST OF AMICI[1]

Amici, United States Senators George Allen, Sam Brownback, James M. Inhofe, Trent Lott, Zell B. Miller, and

[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, amicus ACLJ discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, or its counsel, made a monetary contribution to the preparation of submission of this brief.

Ted Stevens, and United States Representatives Robert B. Aderholt, Todd Akin, Rodney Alexander, Cass Ballenger, J. Gresham Barrett, Roscoe Bartlett, Bob Beauprez, Sanford Bishop, Marsha Blackburn, Roy Blunt, Ken Calvert, Chris Cannon, Tom Cole, Michael Collins, Philip M. Crane, John A. Culberson, Jo Ann Davis, Mario Diaz-Balart, John Doolittle, Jeff Flake, Randy Forbes, Trent Franks, Scott Garrett, Phil Gingrey, Virgil H. Goode, Gil Gutknecht, Melissa Hart, Jeb Hensarling, Wally Herger, Peter Hoekstra, Duncan Hunter, Johnny Isakson, Ernest Istook, Jr., Walter Jones, Jr., Ric Keller, Steve King, Jack Kingston, John Kline, Frank Lucas, Donald Manzullo, Jim Marshall, John McHugh, Gary G. Miller, Jeff Miller, Sue Myrick, Bob Ney, Doug Ose, C.L. Otter, Steve Pearce, Charles Pickering, Jr., Joseph Pitts, Jim Ryun, Edward L. Schrock, Pete Sessions, John B. Shadegg, John M. Shimkus, Mark Souder, John Sullivan, Lee Terry, Dave Weldon, M.D., Roger Wicker, and Joe Wilson are members of the United States House of Representatives currently serving in the One Hundred Eighth Congress.

Amicus, the Committee to Protect the Pledge, consists of over 260,300 Americans representing all fifty states. The Committee includes school-age children, many of whom attend public schools, and desire to recite the Pledge of Allegiance in its entirety. As this Court recently held in *McConnell v. Federal Election,* 2003 U.S. LEXIS 9195, at 245-246 (December 10, 2003), "minors enjoy the protection of the First Amendment."

Amici urge this Court to reverse the Court of Appeals for the Ninth Circuit in this case because they are convinced that the Ninth Circuit's decision holding the phrase "under God" in the Pledge of Allegiance unconstitutional is profoundly wrong. The First Amendment affords atheists complete freedom to disbelieve; it does not compel the

federal judiciary to redact religious references in patriotic exercises in order to suit atheistic sensibilities.

## SUMMARY OF THE ARGUMENT

The Ninth Circuit's judgment should be vacated, and the matter remanded with instructions to return it to the district court for dismissal because the court lacked jurisdiction over Newdow's claims. As a noncustodial parent with no decision-making authority over his daughter's education, Newdow had no Article III standing to be in federal court. Newdow's alleged injury was not "distinct" and "palpable," as required by this Court's precedents, and he suffered no invasion of any legally protectable interest. Upon learning of Newdow's legal relationship with his daughter, the only right the Ninth Circuit could identify was Newdow's supposed right to have his child shielded in public school from religious views that differ from his own. A right of such magnitude has stunning implications for the future relationship between the federal judiciary and public education. The Ninth Circuit's ruling encourages disenchanted parents whose religious feelings are similarly offended by what their children are taught in public schools to clog federal court dockets with litigation.

In fact, Newdow's alleged injury is nothing more than psychological offense at the historical fact that this Nation was founded upon a belief in monotheism, and that the Pledge of Allegiance reflects that fact. Psychological offense alone does not suffice to confer Article III standing.

In addition to Newdow's lack of Article III standing, the merits of his case are nonexistent. Recitation of the Pledge of Allegiance in public schools is fully consistent with the Establishment Clause of the First Amendment to the United States Constitution. The words of the Pledge echo

the conviction held by the Founders of this Nation that our freedoms come from God. Congress inserted the phrase "One Nation Under God" in the Pledge of Allegiance for the express purpose of reaffirming America's unique understanding of this truth, and to distinguish America from atheistic nations who recognize no higher authority than the State.

The Ninth Circuit's decision conflicts with this Court's Establishment Clause jurisprudence. First, the court ignored the distinction this Court historically has drawn between religious exercises in public schools and patriotic exercises with religious references. This Court repeatedly has said that the latter are consistent with the Establishment Clause. The voluntary recitation of the Pledge of Allegiance is not a coerced religious act, and the Ninth Circuit's conclusion to the contrary is insupportable. Second, the Ninth Circuit ignored the numerous pronouncements by past and present Members of this Court that the phrase "under God" in the Pledge of Allegiance poses no Establishment Clause problems. It is one thing to identify isolated dicta with no precedential weight; it is something quite different to ignore, as the Ninth Circuit did, consistent and numerous statements from this Court's opinions all pointing to a single conclusion. The Ninth Circuit's refusal to heed this Court's previous statements about the Pledge is indefensible.

A decision to affirm the Ninth Circuit would have ramifications extending far beyond the recitation of the Pledge of Allegiance in public schools. There is no principled means of distinguishing between recitation of the Pledge, and recitation of passages from other historical documents reflecting the same truth. The Declaration of Independence and the Gettysburg Address contain the same recognition that the nation was founded upon a belief in God. The Ninth Circuit's decision casts substantial doubt about

whether a public school teacher could require students to memorize portions of either one.

Additionally, much in the world of choral music would become constitutionally suspect, if it is performed by public school students. If the *optional* recitation of the Pledge of Allegiance violates the Establishment Clause, upon what basis can music teachers have students perform any classical choral pieces with a religious message? The phrase "under God" in the Pledge of Allegiance is descriptive only. Much in classical choral music is explicitly religious.

## ARGUMENT

### I. THE NINTH CIRCUIT ERRED IN HOLDING THAT NEWDOW HAD STANDING TO SUE.

The Ninth Circuit erred in holding that Newdow had Article III standing, despite the fact that he had no custodial rights over his child, and no right to control her education. Over the course of this litigation, Newdow's legal relationship to his daughter has varied. When Newdow brought the suit, his legal relationship to his child was not revealed to the district court. *Newdow v. United States Congress*, 313 F.3d 500, 502 (9th Cir. 2002). Newdow and the child's mother, Sandra Banning, never married, so Newdow's relationship to the child was not the subject of any custody order. *Id.* While the case was pending before the Ninth Circuit, however, Ms. Banning obtained a judicial order awarding her sole custody of the child, with the corresponding right to make all educational decisions for her. Although the custody order required Banning to consult with Newdow on educational matters, Banning retained exclusive control over the child in the event there was disagreement between Newdow and Banning. *Id.* This state of affairs

continued throughout the case, until this past summer when Newdow obtained joint custody with Banning of his child.

This Court held in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980), that standing must exist throughout the entirety of a proceeding. "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *See also* *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990) (case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate). Thus, subsequent ripening of the issue while the matter is under the court's consideration is not enough. 15 James Wm. Moore et al., *Moore's Federal Practice* Para. 101.74 (3rd ed. 1999).

### A. The Ninth Circuit Muddled Its Standing Analysis with Conclusory Statements On the Merits of Newdow's Claim.

In evaluating a plaintiff's standing to be in federal court, the inquiry must focus on the party bringing the suit, and not on the substantive merits of the claim. *See Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976) ("standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated'" (quoting *Flast* v. *Cohen*, 392 U.S. 83, 99 (1968)); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

The Ninth Circuit conflated its consideration of the merits of this case with its resolution of the question of Newdow's standing. The court characterized Newdow's alleged injury as a right not to have his daughter "subjected to unconstitutional state action," and held that Ms. Banning

may not choose to subject Newdow's daughter to "official state indoctrination." *Newdow v. United States Congress*, 313 F.3d 500, 505 (9th Cir. 2002). The Ninth Circuit's failure to focus on Newdow's standing apart from the merits of his claim tainted the entirety of its opinion.

### B. Newdow Suffered No Invasion of a Legally Protectable Interest Because He Lacks Primary Authority for the Upbringing of His Daughter.

A plaintiff invoking the jurisdiction of a federal court must prove that he has suffered an "injury in fact." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-76 (1982). His injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The complainant must allege an injury to himself that is "distinct and palpable," as opposed to merely "abstract," *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974), and the alleged harm must be actual or imminent, not "conjectural" or "hypothetical." *Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). In other words, unless Newdow has suffered a distinct, palpable injury apart from the "merits" of his case, he has not satisfied the most basic requirement to have standing to sue in federal court. Finally, Newdow must prove that his injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Newdow failed to meet his burden of establishing standing.

The Ninth Circuit held that Newdow sustained injury to his right to expose his child to his religious views. *Newdow v. United States Congress*, 313 F.3d 500, 504 (9th Cir. 2002). The Ninth Circuit failed to explain how exposure

to the daily recitation of the Pledge of Allegiance could infringe that right. Moreover, that "right" must yield to the competing right of Sandra Banning, the child's mother, to expose their child to her views. And since Banning has authority over *religious* educational decisions, her right—at least for now—has precedence. In short, Newdow's complaint is not with the public schools but rather with Ms. Banning.

Children are exposed in countless other ways to religious ideas, courtesy of the government. The Nation's currency is inscribed with the National Motto "In God We Trust." Thus, every child who handles American money is exposed to the idea of reliance upon God. Children who listen to Presidential addresses will usually hear the leader of the Nation invoke Divine blessing and, occasionally Divine guidance. A trip to the Nation's Capitol exposes children to religious imagery and thought. For example, in the Rotunda of the Capitol Building, there are paintings with religious themes, such as the *Apotheosis of Washington*, depicting the ascent of George Washington into Heaven, and the *Baptism of Pocahontas*, portraying Pocahontas being baptized by an Anglican minister. A wall in the Cox Corridor of the Capitol is inscribed with this line from Katharyn Lee Bates' Hymn, America the Beautiful, "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the prayer room of the House chamber, is inscribed the following prayer "preserve me, O God – for in thee do I put my trust."

If atheistic parents have a right to have their children shielded from every governmental mention of God, the federal courts will be very busy indeed. According to the Ninth Circuit's reasoning, atheist parents would have standing to challenge numerous governmental acknowledgements of religion solely on the grounds that

they interfere with their right to expose their children to their religious views. Conversely, religious parents of all faiths would have standing to complain in federal court when public schools, or other governmental entities, endorse secular humanism or other philosophies which attempt to explain the meaning of life without reference to God. Contrary to Article III principles, the federal courts would be converted into "vehicle[s] for the vindication of the value interests of concerned bystanders." *Valley Forge*, 454 U.S. at 473. As this Court explained further in *Valley Forge*:

> Were the federal courts merely publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding, the concept of "standing" would be quite unnecessary. But the "cases and controversies" language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

*Id.*

In reality, *Newdow's* alleged injury is merely a disagreement with this Court's precedents about how the Establishment Clause should be interpreted. It is therefore nothing more than the sort of psychological offense that this Court held insufficient in *Valley Forge*:

> [Respondents] 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. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. "[That] concrete adverseness which sharpens the presentation of issues," is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

454 U.S. at 485-86 (citations omitted).

### C. Because Newdow Lacked Ultimate Control Over His Daughter's Education, His Alleged "Injury" Is Not Redressable in Federal Court.

The Ninth Circuit also failed to recognize that, because Newdow, as a noncustodial parent, lacked control over his daughter's education, his alleged injury was not redressable in federal court. Indeed, the Ninth Circuit did not even discuss Article III's redressability requirement. Redressability cannot rest on the assumption that a nonparty to the action will act in a certain way on the basis of a decision in plaintiff's favor, and that such action would ultimately redress plaintiff's injury. *Linda R. S. v. Richard D.*, 410 U.S. 614, 618 (1972) (unwed mother lacked standing to sue to force prosecution of the child's father for failure to pay child support, because there was no guarantee that judgment in her favor would cause the father to make child support payments). *See also* 15 James Wm. Moore et al., *Moore's Federal Practice* Para. 101.42 (3rd ed. 1999).

The Ninth Circuit and Mr. Newdow assumed that a decision in his favor would redress his injury, but this is so only if it is also assumed that Ms. Banning would keep her daughter enrolled in the Elk Grove Unified School District. Because Ms. Banning had sole control over her daughter's health, education, and welfare, this assumption was wholly unwarranted, especially since Ms. Banning and her daughter are practicing Christians and desire the phrase "under God" to remain in the Pledge of Allegiance.[2] Ms. Banning remains free to nullify the effect of the Ninth Circuit's ruling by enrolling her child in a Christian school, or by moving to a state within the jurisdiction of the Seventh Circuit, which has upheld the constitutionality of the Pledge of Allegiance. *Sherman v. Community Consolidated Sch. Dist*., 980 F.2d 437 (7th Cir. 1992). Thus, Ms. Banning could easily render the Ninth Circuit's exercise of jurisdiction over Mr. Newdow's claim an exercise in futility. Of course, it is conceivable that Ms. Banning would choose to keep her daughter enrolled in the Elk Grove School District, but "standing is not 'an … academic exercise in the conceivable.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992) (quoting *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973).

In another context, the vast majority of lower courts have held that when custodial parents have ultimate control over decisions relating to their children's education, the noncustodial parent lacks standing to challenge a school district's decisions relating to the child's education. In *Taylor v. Vermont Dep't of Educ*., 313 F.3d 768, 782 (2d Cir.

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[2] *See* Bob Egelgo, *'Pledge' Dad Lashes Back in Court*, THE SAN FRANCISCO CHRONICLE, Sept. 28, 2002, at A.15; National Briefing West: *California: No Problem With Pledge*, THE NEW YORK TIMES, July 13 2002, at A8, col. 1.

2002), a case involving the Individuals with Disabilities Education Act (IDEA), the Second Circuit held that because a state custody decree had stripped a mother of the authority to make educational decisions on behalf of her natural child, she lacked standing to pursue claims under IDEA challenging educational decisions made with respect to the child.

Similarly, in *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001), relied upon by the Ninth Circuit, the court held that the noncustodial father's standing *vel non* to challenge a school district's decision relating to his son hinged upon the mother's right of ultimate control over the boy's education, and whether the mother and father were in agreement. The court remanded the case to determine whether the father and mother agreed. Contrary to the Ninth Circuit's reading of *Navin*, *see* 313 F.3d at 503, the clear import of the Seventh Circuit's opinion was that if the noncustodial father and mother did not agree, then the father lacked standing to sue. "If the … parents are at loggerheads, [then the father] cannot use the IDEA to upset choices committed to [the mother] by the state court." *Id*. at 1149. State administrative agency decisions in IDEA proceedings are in accord with *Taylor* and *Navin*. *See, e.g., Randolph School District*, EHLR 509:183 (SEA, VT 1987) (where student's father had been awarded sole legal and physical responsibility for the child under state law, the mother had no standing to request a due process hearing to challenge the child's Individualized Education Program (IEP).[3]

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[3] *See also North Allegheny School District*, 26 IDELR 774 (SEA, PA 1997) (father who lacked primary legal custody of his son did not have standing to pursue a due process challenge to an IEP approved by the boy's mother, although the custody order provided that the mother "shall give Father an opportunity to participate in educational assignments, IEP conferences, ...," shall have an "affirmative duty" to inform the boy's father of all significant developments in the child's education, and must

Ms. Banning and Mr. Newdow disagree over whether their daughter should be exposed to religious ideas. Ms. Banning had ultimate control over her daughter's education. Accordingly, Mr. Newdow lacked standing, and the Ninth Circuit was without jurisdiction to enter judgment in this case.

## II. THE PHRASE "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE ACCURATELY REFLECTS THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

The Founders of this Nation based a national philosophy on a belief in Deity. The Declaration of

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consult with him before making decisions about their son's education); *Lincoln-Sudbury Regional School District*, EHLR 401:285 (SEA, MA 1989) (mother lacked standing to appeal ex-husband's revocation of special education services for son because, notwithstanding their joint custody agreement, the divorce decree gave sole education decision-making authority to the father); *Andalusia City Bd. of Educ*., 22 IDELR 666 (SEA, AL 1995) (hearing officer denied mother's due process hearing request where she had been divested of her legal authority over the child by order of a juvenile court and individual with custody agreed with the proposed program); *Capistrano Unified Sch. Dist*., 32 IDELR 53 (SEA, CA 1999); *Tustin Unified School District*, EHLR 507:120 (SEA, CA 1985) (hearing officer dismissed a noncustodial father's request for a due process hearing where divorce agreement gave mother sole custody); *South Orange Maplewood Bd. of Educ*., 16 EHLR 1383 (SEA, NJ 1990) (only custodial parent has right to make educational decisions for child); *In Appeal of Vincent Carubia*, EHLR DEC. 507:468 (SEA, NY 1986) (dismissing noncustodial father's request for a due process hearing where, according to the divorce agreement, the mother was responsible for decisions regarding the child's welfare, including education decisions, even though the father had actively participated in meetings.

Independence[4] and the Bill of Rights locate inalienable rights in a Creator rather than in government, precisely so that such rights cannot be stripped away by government. In 1782, Thomas Jefferson wrote, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782).

The Father of the Country, George Washington, acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address is replete with references to God, including thanksgivings and supplications.[5] In Washington's

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[4] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776). Jefferson wrote further that the right to "dissolve the political bands" connecting the Colonies to England derives from Natural Law and "*Nature's God*." *Id.* para. 1. The founders also believed that God holds man accountable for his actions as the signers of the Declaration "appeal[] to the *Supreme Judge of the world* to rectify their intentions." *Id.* para. 32. In 1774, Jefferson wrote that "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." Thomas Jefferson, *Rights of British America*, 1774. ME 1:211, Papers 1:135

[5] "Such being the impressions under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and

Proclamation of a Day of National Thanksgiving, he wrote that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." Jared Sparks, *The Writings of George Washington*, Vol. XII, p. T19 (1833-1837). George Washington used the phrase "under God" in several of his orders to the Continental Army. On one occasion he wrote that "The fate of unborn millions will now depend, under God, on the courage and conduct of this army."[6] The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between the two." Philip Hamburger, *Separation of Church and State* 480 (2002).

Thus, the phrase, "one nation under God" in the Pledge of Allegiance simply describes an indisputable historical fact. As one commentator has observed,

> The Pledge [of Allegiance] accurately reflects how the founding generation viewed the

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private good, I assure myself that it expresses your sentiments not less than my own, nor those of my fellow- citizens at large less than either. No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States." George Washington's First Inaugural Address, *available at* http://www.archives.gov/exhibit_hall/american_originals/inaugtxt.html .

[6] Kerby Anderson, *Pledge of Allegiance*, *available at* http://www.pointofview.net/ar_pledge1111.htm. On another occasion, Washington encouraged his army, declaring that "the peace and safety of this country depends, under God, solely on the success of our arms." Edwin S. Davis, *The Religion of George Washington: A Bicentennial Report*, AIR UNIV. REV. July-Aug. 1976, *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1976/jul-aug/edavis.html (quoting 3 *The Writings of George Washington* 301 (John C. Fitzpatrick ed., 1931-1944)).

> separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god. This was well known to Rousseau and Marx who both complained that acknowledging God creates a competition or check upon the secular state.

Douglas W. Kmiec, *Symposium on Religion in the Public Square: Oh God! Can I say that in Public?*, 17 Notre Dame J.L. Ethics & Public Pol'y 307, 313 (2003).

This Court recognized the primacy of religion in the Nation's heritage in *Zorach v. Clauson*, 343 U.S. 306 (1952), when it stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

> *That would be preferring those who believe in no religion over those who do believe.*

*Id*. at 313-14 (emphasis added).

The Ninth Circuit's decision does exactly what this Court warned against in *Zorach*. It prefers atheism over religion even to the extent of censoring the historical fact that the United States was founded upon a belief in God.

In *Zorach*, this Court rejected reasoning strikingly similar to that used by the Ninth Circuit. Upholding the constitutionality of New York's released time program permitting children who so desired to be released from school grounds for religious instruction, this Court rejected the argument that those children not choosing to attend such religious instruction would nevertheless feel coerced by the fact that other children attended. 343 U.S. at 311.

The Ninth Circuit ignored *Zorach*, as well as many other decisions from this Court addressing the constitutionality of religious acknowledgments in public life. Most egregiously, the Ninth Circuit's principal reliance on *Lee v. Weisman* for the proposition that Newdow's child is coerced into performing a religious act when she recites the Pledge of Allegiance betrays a selective reading of that decision, as discussed in the following section.

## III. THE NINTH CIRCUIT'S DECISION CONTRADICTS THIS COURT'S MANY PRONOUNCEMENTS THAT PATRIOTIC EXERCISES WITH RELIGIOUS REFERENCES ARE CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

Although purporting to give "due deference," *United States v. Newdow*, 328 F.3d 466, 489 (9th Cir. 2003), to this Court's numerous statements about the constitutionality of the Pledge of Allegiance, the Ninth Circuit's decision is patently inconsistent with those statements. In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge of Allegiance, they have concluded unequivocally that those references pose no Establishment Clause problems. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

### A. The Ninth Circuit Misconstrued the Court's School Prayer Cases, Including *Lee v. Weisman*, When it Lumped Together for Constitutional Analysis Religious Exercises and Patriotic Exercises.

The Ninth Circuit's analysis was flawed from the start. Claiming reliance on this Court's school prayer cases, including *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit conflated religious exercises and patriotic exercises. In every school prayer case, however, this Court consistently has distinguished between religious exercises, such as prayer and Bible reading, and patriotic exercises with religious references. In *Engel v. Vitale*, 370 U.S. 421 (1962), which struck down New York State's law requiring school officials to open the school day with prayer, this Court explained:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially

> encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned *religious exercise* that the State of New York has sponsored in this instance.

*Id.* at 435, n.21.

Just one year later, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

*Id*. at 308 (Goldberg, J., concurring).

Justice Brennan expressly opined in *Schempp* that "reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." *Id*. at 304 (Brennan, J., concurring).

In *Lee v. Weisman*, 505 U.S. 577 (1992), a decision built in large part on *Engel*, *see* 505 U.S. at 590, 592, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

*Id*. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and *throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.*

*Id*. (citations omitted) (emphasis added).

As in *Engel* and *Schempp,* the deciding factor in *Lee* was that school officials sponsored a religious exercise – prayer. *Lee* gives no support to the Ninth Circuit's conclusion that the voluntary recitation of the Pledge of Allegiance violates the Establishment Clause because it contains the phrase "One Nation Under God." The Ninth Circuit's ruling that voluntary patriotic exercises are converted into religious exercises if they contain religious references flatly contradicts the Court's assurances to the contrary in *Engel*, *Schempp*, and *Lee*. By ignoring the Court's consistent distinction between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not, the Ninth Circuit misapplied *Lee*. An accurate reading of this Court's decision in *Lee* dispels completely the Ninth

Circuit's conclusion that the voluntary recitation of the Pledge of Allegiance in public schools violates the coercion test adopted in *Lee*.

### B. Every Member of the Court Who Has Addressed the Constitutionality of Patriotic Exercises With Religious References, Including the Pledge of Allegiance, Has Concluded That Those References Are Constitutional Acknowledgements of the Nation's Religious Heritage.

In addition to misreading the Court's school prayer cases, the Ninth Circuit also refused to heed the unequivocal import of Supreme Court statements addressing the Pledge of Allegiance in other contexts. Every time the Court or an individual Justice has mentioned the Pledge of Allegiance, whether in majority, concurring, or dissenting opinions, the conclusion has been that it poses no Establishment Clause problems.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." 465 U.S. at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "government's acknowledgment of our religious heritage," and included among those examples Congress' addition of the words "under God" in the Pledge of Allegiance in 1954. *Id.* at 676-77.

> [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U.S.C. § 186, which Congress and the President mandated for our currency, see 31 U.S.C. § 5112(d)(1) (1982 ed.), and in the language "one nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year.

*Id.* at 676-77.

In a concurring opinion, Justice O'Connor stated that governmental acknowledgements of religion such as the National Motto "In God We Trust" "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Id*. at 693 (O'Connor, J., concurring).

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated explicitly that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purpose of solemnizing public occasions, and expressing confidence in the future.'" 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693) (O'Connor, J., concurring)).

In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), Justices Blackmun, Marshall, Brennan and Stevens stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of 'ceremonial deism,'. . . because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

492 U.S. at 602-603.

The three dissenting Justices in *Allegheny*, Chief Justice Rehnquist, and Justices Kennedy and Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. The dissent pointed out that the Establishment Clause does not

> require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . "[W]e must be careful to avoid the hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

*Id.* at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

In sum, every Member of the current Court that has expressed any opinion about the constitutionality of the Pledge of Allegiance has stated that it poses no Establishment Clause problems. The Ninth Circuit's insistence, therefore, that the Pledge of Allegiance becomes unconstitutional when school children recite it is insupportable.

## IV. THE FIRST AMENDMENT DOES NOT COMPEL THE REDACTION OF ALL REFERENCES TO GOD IN THE PLEDGE OF ALLEGIANCE, PATRIOTIC MUSIC, AND FOUNDATIONAL DOCUMENTS JUST TO SUIT ATHEISTIC PREFERENCES, EVEN WHEN SUCH MATERIALS ARE TAUGHT IN THE PUBLIC SCHOOLS.

Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in the voluntary recitation of the Pledge of Allegiance, far more is at stake in this case. A decision affirming the Ninth Circuit would render constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

The first casualty of such a holding would be the practice of requiring students to learn and recite passages from many historical documents reflecting the Nation's religious heritage and character. If a public school district violates the Establishment Clause by requiring teachers to lead students in the voluntary recitation of the Pledge of Allegiance, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The

Mayflower Compact[7] and the Declaration of Independence contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). *See also Newdow v. United States Congress*, 321 F.3d 772, 778 (9th Cir. 2003) (O'Scannlain, J., Kleinfeld, J., Gould, J., Tallman, J., Rawlinson, J., and Clifton, J., dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a founding document, contains religious language and, historically, has been the subject of required recitations in public schools. President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom--and that Government of the people, by the people, for the people, shall not perish from the earth." President Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863).[8]

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[7] The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James, by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these presents solemnly and mutually *in the presence of God*, and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought most meet and convenient for the general good of the colony, unto which we promise all due submission and obedience.

Mayflower Compact, *available at* http://www.project21.org/MayflowerCompact.html (emphasis added).

[8] Transcriptions of the address, as given, include the phrase "under God," while earlier written drafts omit the phrase. *See* Allan Nevins, *Lincoln*

Indeed, the references to deity in these historical documents are presumably even more problematic according to the Ninth Circuit's reasoning because they proclaim not only God's existence but specific dogma about God – He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge of Allegiance, *see Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that a decision affirming the Ninth Circuit will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Students might learn about the Nation's founding documents without being required to recite them. Public school music programs cannot exist, however, without student performance. Thus, patriotic anthems, such as "*America the Beautiful*" and "*God Bless America*," will become taboo because they cannot realistically be learned unless they are sung. Such musical treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally suspect, at least as a part of public school music curricula.[9]

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*and the Gettysburg Address* (1964); William E. Barton & Edward Everett, *Lincoln at Gettysburg* (reprint 1971) (1930). Lincoln's inclusion of the phrase in his address is thoroughly consistent with his conviction, shared with Washington and Jefferson, that Divine Providence played an essential role in the rise of the Nation.

[9] Two federal appellate courts have upheld the constitutionality of religious choral music in public schools. Significantly, both courts found

According to the Ninth Circuit's logic, if a group of students sings "*God Bless America,*" the Establishment Clause is violated because an atheistic student might *feel coerced* to sing along (and indeed may well be coerced inasmuch as music teachers are not constitutionally compelled to exempt students from singing with the class).

The Ninth Circuit's effort to distinguish the Pledge of Allegiance from religious references in historical documents and music fails. The court reasoned that the Pledge of Allegiance is "performative," whereas the Declaration of Independence and patriotic music are not. *Newdow*, 328 F.3d at 489. But, the court's logic ignores completely the fact that students may refuse to "perform" the Pledge of Allegiance. Moreover, students do not have the same constitutional right to refuse to sing "*America the Beautiful*" in music class.

An affirmance of the Ninth Circuit's decision will threaten a sort of Orwellian reformation of public school curricula by censoring American history and excluding much that is valuable in the world of choral music. Additionally, an affirmance would call into question the continued validity of two federal appellate court decisions upholding the constitutionality of the performance of religious choral music in public schools. *See Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995) (Establishment Clause did not forbid school choir from using a religious piece as its theme song).

## CONCLUSION

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that a substantial percentage of serious choral music is based on religious themes or text. *See Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402, 407-08 (5th Cir. 1995).

For the foregoing reasons, and those expressed in Appellants' brief, this Court should reverse the judgment below.

Respectfully submitted,

JAY ALAN SEKULOW
*Counsel of Record*

**STUART J. ROTH**
**COLBY M. MAY**
**JAMES M. HENDERSON**
**WALTER M. WEBER**
**JOEL H. THORNTON**
**JOHN P. TUSKEY**
**LAURA B. HERNANDEZ**

AMERICAN CENTER FOR
LAW & JUSTICE
201 Maryland Ave NE
Washington, DC 20002
(202) 546-8890

*Attorneys for Amici Curiae*