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.

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

AMICUS CURIAE BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION, AND AMERICANS FOR RELIGIOUS LIBERTY IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI[1]

Americans United for Separation of Church and State is a 75,000-member non-profit organization dedicated to defending separation of church and state and religious liberty. The American Civil Liberties Union is a non-profit organization with 400,000 members and affiliates nationwide, including California, dedicated to liberty and equality under the Constitution. Americans for Religious Liberty is a non-profit organization dedicated to defending religious freedom and separation of church and state. All have appeared before the Court as counsel or amicus in Establishment Clause cases.

SUMMARY

In 1943, in the darkest hours of World War II, the Court took the wrenching step of striking down a school board policy compelling schoolchildren to salute the Flag, a step the Court had decisively rejected only three years earlier. The Court took this step because it concluded that the First Amendment forbids the government to compel individuals to proclaim allegiance to the political beliefs expressed in the Pledge.

The school district policy now under review is also constitutionally flawed, though in a different way than the policy invalidated in 1943. Since 1954 the Pledge has expressed allegiance to religious as well as political beliefs. Although the First Amendment allows the government to promote patriotism as long as participation is

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

not compelled, the Establishment Clause forbids the government to endorse religion or pressure schoolchildren, even indirectly, to proclaim religious belief. The policy under review does both and is therefore unconstitutional.

1. Newdow has standing to challenge EGUSD's Pledge policy. His standing is based on his retained parental rights under California law, as interpreted by the Ninth Circuit. The Ninth Circuit held, as a matter of California law, that (a) Newdow retains a right to influence his daughter's religious development; (b) this retained parental right includes the right to object on constitutional grounds to government action that interferes with his ability to influence his daughter's religious development; and (c) the Superior Court's orders granting the child's mother final decision-making authority with respect to the child did not vitiate this retained parental right.

If the Ninth Circuit correctly interpreted California law, Newdow has standing: He has a legally protected interest (the retained parental right); EGUSD's Pledge policy threatens that interest (by communicating a message of government endorsement of religion to his daughter and indirectly coercing her, within the meaning of *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000), to declare religious belief and affirm religion); and invalidating EGUSD's Pledge policy would redress that injury. The arguments against Newdow's standing misperceive his claims, miscalculate a court's power to redress his injury, and ultimately ignore the Ninth Circuit's reliance on California law.

2. EGUSD's Pledge policy violates the Establishment Clause. Unlike other historical and cultural texts, the Pledge is an expression of personal belief and commitment. Its recitation, as the Court has recognized, is a

"ceremony of assent." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The qualities ascribed to the Republic for which the flag stands are not descriptive but aspirational, and to recite the Pledge is to subscribe to those aspirations. *Id. Barnette* rejected the contention that the qualities the Pledge ascribes to the Republic are simply "acknowledgements" of historical fact.

Since 1954, the "ceremony of assent" has included an expression of belief in "God" and devotion to a nation "under God." This is how schoolchildren would naturally understand the Pledge, how social science research indicates schoolchildren actually understand the Pledge, and how Congress meant schoolchildren to understand the Pledge. In adding "under God" to the Pledge, Congress *intended* to make its recitation an affirmation of religious belief. The 1954 law adding "under God" to the Pledge made affirmation of religious belief an official element of patriotism and religiosity an official element of national identity. Reciting the Pledge thus became a religious exercise— not because it refers to "God," but because it is a *pledge*.

EGUSD's Pledge policy violates the Establishment Clause both because it communicates to schoolchildren a forbidden message of government endorsement of religion and because, like the school-prayer policies invalidated by the Court beginning with *Engel*, EGUSD's policy pressures schoolchildren to profess religious belief and affirm religious ideals. Indeed, the policy pressures schoolchildren to profess a *particular* religious doctrine, monotheism, thereby violating the Clause's command of neutrality among religions. And by yoking patriotism to religion, EGUSD's policy exerts an even greater coercive pressure than the school-prayer policies, forcing schoolchildren to choose between declaring religious belief and being branded religious *and* political outsiders.

ARGUMENT

I. NEWDOW HAS STANDING IF THE NINTH CIRCUIT CORRECTLY INTERPRETED CALIFORNIA LAW.

A. Newdow has standing to challenge EGUSD's Pledge policy based on his retained parental rights under California law.

Under Article III, a plaintiff has standing to invoke federal court jurisdiction if three conditions are satisfied: (1) the plaintiff must have suffered "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent"; (2) "the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted); see also *McConnell* v. *FEC*, 124 S. Ct. 619, 707 (2003) (citations omitted).

If the Ninth Circuit correctly interpreted California law, Newdow satisfies each of these conditions. First, he is suffering a concrete and particularized invasion of a legally protected interest—his retained parental right under California law to influence his daughter's religious development. The Ninth Circuit held that a parent in Newdow's position has such a right as a matter of California law; that this right includes the right to influence his daughter's religious development free from unconstitutional government interference; and that California law does not permit a state court to impose custody terms that vitiate this right. J.A. 144-56 (discussing *Murga* v. *Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980), and *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App.

1983)).[2] Second, Newdow's injury is "fairly traceable" to EGUSD's policy because it is the policy that interferes with his retained parental right. Third, invalidation of EGUSD's policy would redress Newdow's injury.

B. The arguments against standing lack merit.

1. The United States misperceives the right that the Ninth Circuit found Newdow entitled to assert.

The United States and EGUSD dispute Newdow's standing by attacking a series of straw men—claims that they ascribe to Newdow but that did not form the basis of the Ninth Circuit's holding that Newdow has standing.

Contrary to the United States, the issue here is not whether Newdow may "su[e] to enforce [his daughter's] rights," US Br. 11, or has a general right to shield her from "other influences," *id.* at 7, "other viewpoints," *id.* at 13, or "messages" with which he disagrees, *id.* at 14. Nor is the issue whether Newdow has a right to avoid having his message "countered by governmental speech with which he disagrees," *id.* at 8, or "diluted by the government's educational practices," *id.* at 14, or has a right to "direct the education of his daughter," *id.* at 11, to "dictate the curriculum" in her school, *id.* at 14, or to decide "whether the child should salute the flag of the United States," *id.* at 12. The issue also is not whether he may challenge a "playground tort." *Id.* at 16. And contrary to EGUSD, the issue is not whether he may "prevent[ ] his

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[2] The state-law basis of the Ninth Circuit's conclusion that Newdow has standing is discussed in the Amicus Curiae Br. of Justice Joseph R. Grodin in Supp. of Neither Party (Vacatur) ["Grodin Vacatur Br."] at 6-8, 10-14, 17, 18-24.

daughter from both hearing and reciting the Pledge." EGUSD Br. 20.

These are all straw men.[3] The Ninth Circuit held that Newdow had standing to challenge EGUSD's Pledge policy on the ground that, by pressuring his daughter to participate in a religious exercise, EGUSD's policy unconstitutionally interferes with *Newdow*'s right under California law to influence his daughter's religious development. Unlike the fictional rights addressed by the United States, the right the Ninth Circuit held Newdow entitled to assert is a parental right, not a "generalized interest that could be asserted by a grandparent, nanny, or proselytizing friend," US Br. 14, or by any other "concerned individual," *id.* at 15.

2. The United States miscalculates a court's ability to redress the asserted injury.

The injury claimed by Newdow is EGUSD's interference with his retained parental right by pressuring his daughter, unconstitutionally, to participate in a religious exercise. This claimed injury is "concrete and particularized" and "actual," *Lujan*, 504 U.S. at 560, not "diffuse," US Br. 14. A court can redress this injury by invalidating EGUSD's Pledge policy.

Because it is the *government's* sponsorship of the exercise that causes Newdow's injury, it is irrelevant that the child's mother could send the child to a private school where recitation of the Pledge or even prayer is required. See *id.* at 14, 17. And because it is the *government's* in-

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[3] The United States does not explain its characterization of the Pledge as "governmental speech." US Br. 8. To recite the Pledge is to declare personal belief and commitment, not to serve as a mouthpiece for the government.

culcation of religion in his daughter that injures Newdow, it is irrelevant that, even if he prevails, the child might still be exposed to "the daily Christian influence of the mother and . . . church activities." *Id.* at 16-17.

Nor does the fact that the mother has not chosen to enroll the child in private school make the mother an "independent" cause of Newdow's injury. See *id.* at 16. In our system, public education is the default, especially for those of limited means. Newdow's injury results not from the fact that the mother has enrolled the child in a public school but from the fact that the public school district coerces its schoolchildren to participate in a religious exercise. A court cannot "control or predict" whether the mother will enroll the child in public or private school. See *id.* at 17. But a court can prevent the injury to Newdow that results when the child *is* enrolled in a public school that coerces her to participate in a religious exercise. Newdow's injury is therefore redressable.

Noting that the Ninth Circuit stated that Newdow has a right not to have his daughter "subjected to *unconstitutional* state action," *id.* at 14 (citing Pet. App. 95 (emphasis added)), the United States asserts that the Ninth Circuit erroneously "conflated" the standing inquiry with the merits of Newdow's claim. See *id.* at 14-15. The Ninth Circuit, however, was simply saying that Newdow has a right to challenge government action that is alleged to be unconstitutional. Here, the injury that Newdow has alleged is government interference with his right to influence his daughter's religious development; the merits issue he seeks to have decided is the constitutionality of that interference.

3. The United States and EGUSD ignore the Ninth Circuit's conclusion that California law does not permit a state court to vitiate Newdow's retained parental rights.

To the extent that the United States and EGUSD do focus on Newdow's rights as a parent, they ignore the Ninth Circuit's reliance on California law as the basis of its finding that Newdow has standing to challenge EGUSD's Pledge policy despite the rights awarded to the child's mother by the Superior Court.

The United States and EGUSD argue that Newdow does not have standing to challenge the Pledge policy because the Superior Court awarded the mother sole legal custody of the child; they assert that the court's holding that Newdow may challenge the policy is "flatly inconsistent with the custody determination." US Br. 13-14; EGUSD Br. 8, 16-17. Their *Rooker-Feldman* argument rests on the same premise: that the Ninth Circuit's holding that Newdow has standing contradicts the custody orders delimiting his rights. *Id.* at 17-20; *id.* at 21-22.

The Ninth Circuit's conclusion that Newdow could challenge the Pledge policy did not contradict the custody orders but construed their reach in light of background state law. Specifically, the Ninth Circuit held that, as a matter of California law (as set forth in *Murga* and *Mentry*), the Superior Court could not empower the mother to prevent Newdow from challenging EGUSD's policy as an unconstitutional interference with his right to influence their child's religious development. See J.A. 146-47; Grodin Vacatur Br., *supra* note 2, at 7-8, 18-19, 21-22.

Neither the United States nor the school district confronts the Ninth Circuit's analysis of *Murga* and *Mentry*. The United States does not mention the two cases at all; it asserts, incorrectly, that the Ninth Circuit "cited no

state law authority" for its conclusion that Newdow has standing. US Br. 13. EGUSD cites *Murga* and *Mentry*, but in a manner that it claims supports its argument. EGUSD Br. 19. Neither the United States nor EGUSD acknowledges that Newdow has standing if the Ninth Circuit correctly concluded that California law constrains the Superior Court's authority to limit Newdow's rights.

C. If the Court is uncertain about the Ninth Circuit's reading of California law, it should vacate and remand with a direction to certify.

Amici express no view on whether the Ninth Circuit's interpretation of California law is correct. If the Court is uncertain about whether the Ninth Circuit's interpretation of California law is correct, the Court should vacate and remand to the Ninth Circuit with a direction to certify to the California Supreme Court the state-law questions on which the Ninth Circuit rested its holding that Newdow has standing. See Grodin Vacatur Br., *supra* note 2, at 27-30; *id.* at 14-17.

II. EGUSD'S PLEDGE POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

A. Children are uniquely susceptible to coercive pressure in school settings.

Elementary school in Elk Grove Unified School District begins at kindergarten. Those subject to EGUSD's policy are children, some as young as five years old.

The Court has long recognized that schoolchildren are subject to a "pronounced" and "particular risk" of indirect religious coercion in school settings. *Lee*, 505 U.S. at 592; see also, *e.g.*, *Santa Fe*, 530 U.S. at 315-17; *Edwards* v. *Aguillard*, 482 U.S. 578, 583-84 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in judgment); *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 290 (1963) (Brennan, J., concurring); *Illinois ex rel.*

McCollum v. *Bd. of Educ.*, 333 U.S. 203, 227 (1949) (Frankfurter, J., concurring). The Court accordingly has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in [the primary and secondary school] context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting from denial of certiorari) (quoting *Aguillard*, 482 U.S. at 583-84). "When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause." *Lee*, 505 U.S. at 631 (Souter, J., joined by Stevens & O'Connor, JJ., concurring).

The Court has further recognized that, even if students are not formally required to participate in a religious exercise in school, their susceptibility to peer pressure and their desire to please adult school officials in a setting where attendance is mandatory produce an "improper" coercive effect, *Santa Fe*, 530 U.S. at 312, placing students in an "untenable position" of choosing between participation and protest, *Lee*, 505 U.S. at 590. For primary and secondary schoolchildren, the Court has stated that such a choice is no choice at all. *Id.* at 593-94. Contrast *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (Establishment Clause concerns diminish when those claiming injury are adults "not readily susceptible to 'religious indoctrination' . . . or peer pressure"); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971) (plurality opinion) ("college students are less impressionable and less susceptible to religious indoctrination" than elementary and secondary school-age children).

B. Ritual classroom recitation of the Pledge coerces children to affirm religious belief.

1. The Pledge affirms belief, including religious belief.

The Pledge is a "ceremony of assent." *Barnette*, 319 U.S. at 634. It is a "ritual," *id.*, accompanied by "gestures of acceptance or respect." *Id.* at 632. To recite the Pledge is "to declare a belief," *id.* at 631, to affirm "a belief and an attitude of mind," *id.* at 633. In this "prescribed ceremony," *id.* at 633, students stand at attention, facing the flag, right hand on heart, and in unison with each other and adult authorities proclaim their "allegiance to the flag of the United States of America and to the Republic for which it stands." As codified in 1942, the Pledge defined that Republic by the qualities of unity and indivisibility ("one Nation indivisible") and universal "liberty and justice." Since 1954, the Pledge has also defined the Republic by the quality of national subordination to a "God" whose existence and authority are presupposed.

The United States and EGUSD argue that these qualities are "descriptive, not 'normative.'" US Br. 40; EGUSD Br. 32. In *Barnette*, however, the Court recognized that the Pledge is *not* "descriptive of the present order" or "political history," but is instead a "statement of belief" in an "ideal" vision. 319 U.S. at 634 & n.14. The purpose of ritual classroom recitation of the Pledge is to inculcate children with this ideal vision, through a ritual communicating "by word and sign" their "acceptance of the political ideas [the flag] bespeaks," *id.* at 633, and, since 1954, a religious "idea" as well. Schoolchildren would reasonably so perceive the meaning of this ritual.

Although the United States suggests otherwise, the "reasonable observer" in this case is not an adult but a child; and the Establishment Clause analysis here must

therefore consider "how the students understand the [school district's] policy." *Santa Fe*, 530 U.S. at 307. Compare US Br. 32, 43, 46 (invoking adult "reasonable observer," including members of the Court). In considering whether a school policy violates the Establishment Clause, "a child's perception that the school has endorsed a particular religion or religion in general may . . . prove critically important." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring). Thus, what is relevant here is how the Pledge is likely to be perceived by "impressionable" schoolchildren, for whom "government endorsement is much more likely to result in coerced religious beliefs." *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in judgment).

Schoolchildren would reasonably perceive the Pledge as expressing religious belief and affirming a religious ideal. They are unlikely to perceive "under God" as merely descriptive of historical or cultural fact. First, the phrase is one in a series of other phrases that the Court in *Barnette* recognized are *not* "descriptive" of such fact but express ideals in which the Pledge affirms belief. See *supra* p. 11. Applying traditional rules of construction, a court would presume that "under God," like its neighbors, also expresses an ideal. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (applying *noscitur a sociis*); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). There is no reason to suppose that a schoolchild would presume otherwise.

Moreover, it would take a very subtle six-year-old to view the averment that ours is "one Nation under God" —when proclaimed as part of a daily classroom ritual, and beginning with the words "I pledge"—as simply an "acknowledgment" of beliefs that *other people* hold or once held and that might or might not be true. Although the United States and EGUSD propose various ways of

interpreting "under God" as something other than an affirmation of religion and religious belief, their proposals do not even pretend to reflect the likely perception of a child reciting the Pledge.[4]

This attempt to shift the constitutional focus away from children only highlights the constitutional problem. Social science research has indeed found that, insofar as young schoolchildren ascribe any meaning to the Pledge, they perceive "under God" as expressing religious belief:

> A typical first-grader does not understand the meaning of many words in the pledge of allegiance or the "Star-Spangled Banner." The questionnaire responses showed that a number of second-grade children believed the pledge of allegiance was a prayer to God.

Robert D. Hess & Judith V. Torney, *The Development of Political Attitudes in Children* 105 (1967); see also Carol Seefeldt, *"I Pledge . . ."*, Childhood Educ. 308 (May/June 1982) ("Children reveal [various] misconceptions about the Pledge. 'Well, I think it's like a prayer to God,' explains one girl."). Hess & Torney reported that children

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[4] *E.g.*, US Br. 41 ("The Pledge's reference to a 'Nation under God,' in short, is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing democratic character); *id.* at 36 ("under God" signifies "the Framers' *political philosophy* concerning the sovereignty of the individual—a philosophy with roots . . . in religious beliefs"); *id.* at 33 ("under God" signifies that "the Constitution's protection of individual rights and autonomy" reflects the Framers' religious convictions); NEA Amicus Br. 12 ("by reciting the Pledge, students declare their commitment to the principles of freedom and human dignity that have traditionally been conveyed by characterizing our nation as one that exists 'under God'").

are often confused about the meaning of the Pledge but that, insofar as they form an understanding of its meaning, they focus on terms that are recognizable and meaningful to them, such as "God." Hess & Torney at 16, 29-30.[5]

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[5] Hess & Torney (p. 16) quote this Q&A with "Billy, age 7":

Q. *What do you do here at school when you see the flag*?

A. Oh, we say the pledge.

Q. *The pledge. Do you know what a pledge is?*

A. Well, it's a kind of prayer.

Q. *A prayer. And who are you speaking to when you say the pledge?*

A. To God.

Q. *To God. I see. And what are you asking Him to do?*

A. Take care of people.

Freund & Givner similarly reported that some younger children solve "the meaning problem" by finding a familiar word and building their interpretations around it. "Most noticeable," the researchers found, "was the mention of God, thus the Pledge had a prayer-like quality for some children":

Kdg. pupil: "It means to help God to love us."

Kdg. pupil: "The most important part is . . . talking about God.

1st grader: "We better be good cause God is watching over us even if He is invisible."

1st grader: "I think it's about God. He's glad to see you went to school."

Eugene H. Freund and Donna Givner, *Schooling, The Pledge Phenomenon and Social Control* 12 (paper prepared for Annual Meeting of Am. Educ. Research Ass'n, Session on Adult Roles in Schools (Wash., D.C., 1975)), available at http://www.edrs.com/Webstore/AddToCart.cfm?ProductID=ED106186.

For public school teachers to lead schoolchildren in ritual recital of the Pledge impermissibly communicates, as far as the children are concerned, a message of government endorsement of religion; and, as an exercise in which religious belief is declared and affirmed, the ritual also is forbidden, even if participation is not formally required, because of the risk of indirect religious coercion.

That the exercise does not take the form of a prayer (see US Br. 41-43; EGUSD Br. 30-31) is irrelevant, for "[t]he government may not compel affirmation of religious belief." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990). The Court has "previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no *'relevance'* to the constitutional issue." *Good News Club*, 533 U.S. at 126 (Scalia, J., concurring)) (emphasis in original) (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) and citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943)); cf. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 709 (1994) ("the First Amendment reaches more than classic, 18th-century establishments"). The Establishment Clause, moreover, bars government endorsement of religion, not just government-sponsored prayer. The Clause "prohibits government from appearing to take a position on questions of religious belief." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 593-94 (1989). "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

The fact that "under God" is included in a patriotic text (see US Br. 34-38) does not diminish but compounds the constitutional violation. Far from imbuing the phrase with redeeming "secular purposes," *Allegheny*, 492 U.S.

at 625 (O'Connor, J., concurring in part and concurring in judgment), the phrase impermissibly conditions an expression of patriotism on affirmation of religion and religious belief. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state may not require declaration of belief in God as condition of public office). As the Court has emphasized, the Establishment Clause prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). The pressure on a child to affirm religion and religious belief by reciting the Pledge is only magnified by the fact that refraining from reciting it can be construed by teacher and classmates as lack of patriotism.[6]

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[6] The United States asserts that the coercion test "has no basis in Establishment Clause jurisprudence and is unworkable in the public school environment." US Br. 44. The United States, however, does not support this assertion but instead argues against the application of the test to the Pledge, a tacit concession that applying the test would be fatal. Its arguments, however, are unpersuasive.

First, the United States asserts that ritual classroom recitation of the Pledge does not amount to a religious exercise akin to prayer. *Id.* at 41-44. As discussed *supra* at p. 15, however, the Establishment Clause does not forbid only sponsorship of formal prayer, and the religious character of the Pledge is one of the central issues in the case. Inevitably, therefore, the United States is forced into making a far broader argument—that the Pledge should be treated as exempt from traditional Establishment Clause analysis because it is "so engrained in the national psyche." *Id.* at 46; see also EGUSD Br. 42-43.

The Court has emphasized, however, that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire na-

(continued)

Nor can the Establishment Clause violation be ignored by considering the Pledge "as a whole." US Br. 39; EGUSD Br. 33. Analogizing "under God" to the crèche in *Lynch* and the Menorah in *Allegheny*, and "indivisibility," "liberty," and "justice" to Santa Claus, his reindeer, and a Christmas tree, the United States and EGUSD argue that, as in those cases, the "overall message" of the Pledge is not religious. *Id.* The analogy fails, however,

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tional existence and indeed predates it." *Allegheny*, 492 U.S. at 630 (O'Connor, J., joined by Brennan & Stevens, JJ., concurring in part and concurring in judgment) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970)). Recognizing that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress," *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2484 (2003), the Court has invalidated many other practices that were "engrained in the national psyche" far longer than the 1954 version of the Pledge. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954).

Finally, the United States argues that, if applied to the Pledge, the coercion test would logically apply to any subject of instruction that has religious content. US Br. 46-48; see also EGUSD Br. 31. This *ad absurdum* argument ignores the fact that the Pledge is unique. Unlike other historical and cultural texts, it declares the personal belief and commitment of whoever recites it, and its ritual classroom recitation is intended to be inculcative. That EGUSD's policy violates the Establishment Clause does not imply that schoolchildren may not learn, study, or recite historical documents containing religious references. To the contrary, "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government." *Barnette*, 319 U.S. at 631 (internal quotation marks omitted); see also *Stone* v. *Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225; *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962).

because the Pledge is no mere passive display of objects but an active profession of personal belief. The Establishment Clause does not permit the government to pressure schoolchildren to profess religious belief even as one element of a broader affirmation of patriotism.

2. Children are likely to perceive the Pledge as affirming monotheism.

Minutes after President Eisenhower signed the 1954 legislation adding "under God" to the Pledge, members of Congress, including the sponsors of the legislation and members of the Congressional leadership, gathered on the Capitol steps to commemorate the occasion. As the flag was raised to the top of the Capitol dome, the sponsors recited the revised Pledge and a bugler played "Onward Christian Soldiers." See Religious Scholars and Theologians Amicus Br. 3-4.

The recital of a militant Christian hymn at the ceremony highlights a further flaw in the revised Pledge: not only does it favor religion over irreligion; it favors monotheistic religions over others. See *Torcaso*, 367 U.S. at 495 n.11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); Buddhist Amicus Br. 19-26. Cf. *Lee*, 505 U.S. at 588-90.

By its very terms the Pledge embraces and celebrates monotheism as the defining religious feature of American national identity. But "[o]urs is a Nation of enormous heterogeneity in respect of . . . religious persuasions," *Gillette* v. *United States*, 401 U.S. 437, 457 (1971), and "the central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590; accord *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the Pledge fa-

vors monotheistic religions, EGUSD's policy violates the Establishment Clause for this reason as well.

C. Congress added "under God" to the Pledge so that schoolchildren would daily declare religious belief and affirm religion.

Although the way in which schoolchildren would reasonably perceive the Pledge ritual is dispositive, Congress's purpose in adding "under God" to the Pledge is also relevant. See, *e.g.*, *Jaffree*, 472 U.S. at 56-61; *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). The meaning that schoolchildren would reasonably ascribe to "under God" is not accidental; it is precisely what Congress intended. To make schoolchildren daily proclaim faith in "God," and to make religious devotion an official element of national identity, were the "preeminent" and "predominant" purposes of Congress, *Aguillard*, 482 U.S. at 590, in revising the Pledge.

1. Congress enacted the Pledge in 1942 as part of legislation "[t]o codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America." Pub. L. No. 77-623, 56 Stat. 377 (1942). Although bills to codify a flag protocol began to be introduced in 1925,[7] it was not until wartime—"this

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[7] Composed in 1892 to celebrate the four hundredth anniversary of Columbus's first voyage to the Americas, the Pledge was incorporated into a "Flag Code" endorsed by a broad spectrum of philanthropic and patriotic organizations at Flag Conferences in 1923 and 1924. See John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892-1992* 46-48, 57 (1992). In 1925, the first bill was introduced in Congress to define the official salute to the flag, S. 80, 69th Cong. (1925), and in 1927, the first bills were introduced to recognize the Flag Code as the "official flag code of the United States," *e.g.*, H.R.J. Res. 349, 69th Cong. (1927). These bills, however, did not include

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hour of our nation's crisis"[8]—that legislation was enacted. As enacted in 1942, the Pledge included no reference to "God" or any other religious reference.[9]

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the Pledge. See *id.*; H.R.J. Res. 378, 69th Cong. (1927). Over the next 15 years, other bills were introduced defining the flag salute or setting forth the Flag Code, but these bills similarly omitted the Pledge. *E.g.*, S. 1499, 72d Cong. (1931); S. 3381, 75th Cong. (1938); S. 1166, 76th Cong. (1939); S. 481, 77th Cong. (1941).

[8] *Resolutions to Codify the Pledge of Allegiance to the Flag of the United States: Hearing before the House Comm. on the Judiciary*, 77th Cong. 1 (March 5, 1942) (Rep. Hobbs).

[9] As enacted, the Pledge provision read:

> That the pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all", be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words "to the flag" and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

Pub. L. No. 77-623, § 7, 56 Stat. 377, 380 (1942) (originally codified at 36 U.S.C. 172; codified as amended at 4 U.S.C. 4).

As introduced in and passed by the House, the legislation did not set forth the text of the Pledge. See H.R.J. Res. 303, 77th Cong. (1942). The Pledge was added and made part of the official flag ceremony by the Senate Judiciary Committee. See S. Rep. No. 77-1477, at 2 (1942). The legislative history reveals no discussion of the Pledge, and Rep. Hobbs, the House sponsor, did not mention the Pledge when he described "[t]he only amendments of any consequence" made in the Senate. 88 Cong. Rec. 5245 (1942). The measure was signed by President

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