Nos. 05-17344, 06-15093, 05-17257

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAN ROE AND ROECHILD-2,

Plaintiffs-Appellees,

v.

RIO LINDA UNION SCHOOL DISTRICT,

Defendant-Appellee,

and

UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellant,

and

JOHN CAREY, et al.,

Defendant-Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT THE UNITED STATES

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STATEMENT OF JURISDICTION

Plaintiffs in this case raised Establishment Clause challenges to the policy of various public schools of leading willing students in voluntarily reciting the Pledge of Allegiance. The United States intervened to defend the constitutionality of the challenged Pledge-recitation policies. See Joint Excerpts of Record ("JER") 268-69 (docket entry no. 79). The district court had subject-matter jurisdiction under 28 U.S.C. 1331.

On November 18, 2005, the district court issued an order permanently enjoining defendant Rio Linda School District from leading willing students in voluntarily reciting the Pledge. Newdow v. Congress of the United States, 2005 WL 3144086 (E.D. Cal. Nov. 18, 2005). That order, together with the court's earlier order of September 14, 2005, resolved all claims of all parties. See id.; Newdow v. Congress of the United States, 383 F. Supp. 2d 1229 (E.D. Cal. 2005). This Court has appellate jurisdiction under 28 U.S.C. 1291.

The United States filed a timely notice of appeal from both orders on January 13, 2006. See JER 251.

QUESTIONS PRESENTED

1. Whether Newdow v. Congress of the United States, 328 F.3d 466 (9th Cir. 2003), which the Supreme Court reversed for lack of prudential standing, remains a binding Establishment Clause precedent.

2. Whether the Establishment Clause bars public school

teachers from leading willing students in voluntarily reciting the Pledge of Allegiance.

STATEMENT OF THE CASE

The district court in this case held that the Establishment Clause prohibits public school teachers from leading willing students in voluntarily reciting the Pledge of Allegiance. In reaching that conclusion, the district court thought itself bound by Newdow v. Congress of the United States, 328 F.3d 466 (9th Cir. 2003), which the Supreme Court had reversed for lack of prudential standing, see Elk Grove School Dist. v. Newdow, 542 U.S. 1 (2004). The questions presented in this appeal are (1) whether the reversed Newdow decision remains a binding Establishment Clause precedent, and (2) whether the Establishment Clause prohibits voluntary recitation of the Pledge in public schools.

A. Statutory Background

1. In 1942, as part of an overall effort "to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a Pledge of Allegiance to the United States. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). It read: "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." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.

In 1954, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge now reads: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4. Both the Senate and House Reports expressed the view that, under Supreme Court case law, the amendment "is not an act establishing a religion." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954); see S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954).

In 2002, Congress enacted further legislation that (i) made extensive findings about the historic role of religion in the political development of the Nation, (ii) reaffirmed the text of the Pledge as it has "appeared * * * for decades," and (iii) repeated Congress's judgment that the Pledge is constitutional both facially and as applied by public schools that lead willing students in its voluntary recitation. Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-2, 116 Stat. 2057-2060.

2. California law requires each public elementary school in the State to conduct "appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720. The governing statute further provides that the "giving of the Pledge of Allegiance * * * shall satisfy the requirements of this section." Ibid. As expressly contemplated by that provision,

various public schools in California satisfy the "patriotic exercises" requirement by having teachers lead willing students in voluntarily reciting the Pledge.

B. Prior Newdow Litigation

In March 2000, plaintiff Michael Newdow filed an action nearly identical to the one under review here. In that action, Newdow raised Establishment Clause challenges to 4 U.S.C. 4, to Cal. Educ. Code § 52720, and to the voluntary Pledge-recitation policy of the Elk Grove Unified School District. The district court rejected those challenges and dismissed Newdow's complaint.

1. A divided panel of this Court reversed. In its initial opinion, the panel held that Newdow had standing as a parent to challenge Elk Grove's Pledge-recitation practices and that Newdow himself had standing to challenge 4 U.S.C. 4. See Newdow v. Congress of the United States, 292 F.3d 597, 602-05 (9th Cir. 2002) ("Newdow I"). On the merits, over the dissent of Judge Fernandez, the panel held that both Elk Grove's Pledge practices and 4 U.S.C. 4 violate the Establishment Clause. See id. at 605-12.

After the panel's original decision, the mother of Newdow's child intervened in order to contest his standing. The mother explained that she had sole legal custody over their child and that the California Superior Court had enjoined Newdow from including his child as an unnamed party in his case or from suing as her next friend. Despite those new facts, the panel reaffirmed Newdow's

standing to challenge the Elk Grove Pledge-recitation practices "as a noncustodial parent." Newdow v. Congress of the United States, 313 F.3d 500 (9th Cir. 2002) ("Newdow II").

After various defendants sought rehearing, the panel issued a third order, which denied panel rehearing and amended the opinion in Newdow I. Newdow v. Congress of the Untited States, 328 F.3d 466 (9th Cir. 2003) ("Newdow III"). The amended opinion once again held that Elk Grove's Pledge-recitation practices violate the Establishment Clause, but it deleted Newdow I's further holding that 4 U.S.C. 4 violates the Establishment Clause on its face. See id. at 485-90. Nine judges dissented from the denial of rehearing en banc. See id. at 471-82.

2. The Supreme Court reversed this Court's judgment. Elk Grove School Dist. v. Newdow, 542 U.S. 1 (2004). The Supreme Court reasoned that Newdow, as a noncustodial parent with interests potentially adverse to those of his daughter, failed to satisfy applicable requirements of "prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" Id. at 11 (quoting Allen v. Wright, 468 U.S. 737, 751 (1984)). As a result, the Court concluded, it was "improper for the federal courts to entertain" Newdow's claim. Id. at 17; see also ibid. ("When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty

question of federal constitutional law.").

Three concurring Justices would have upheld the challenged Pledge-recitation policy on the merits. Chief Justice Rehnquist, after demonstrating that "[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," id. at 26 (opinion concurring in the judgment), concluded that "our national culture allows public recognition of our Nation's religious history and character," id. at 30. He further reasoned that the phrase "under God" in the Pledge "is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: 'From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.'" Id. at 31. And because reciting the Pledge "is a patriotic exercise, not a religious one," the Chief Justice concluded, the Pledge's use "of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it." See id. at 31-32.

Justice O'Connor concluded that Elk Grove's Pledge policy is constitutional because a reasonable observer would not view it as a governmental endorsement of religion. She reasoned that "some references to religion in public life and government are the inevitable consequences of our Nation's origins," which a reasonable observer would not perceive as "signifying a government

endorsement of any specific religion, or even of religion over non-religion." 542 U.S. at 35-36 (opinion concurring in the judgment). She stressed that the Pledge for decades could "fairly be called ubiquitous" in American public life; that reciting the Pledge is not an act of worship or prayer; that the Pledge does not refer to any particular religion; and that the Pledge contains only "minimal religious content." See id. at 37-44.

Justice Thomas concluded that Elk Grove's Pledge policy is constitutional because it "has not created or maintained any religious establishment," has not "granted government authority to an existing religion," and "does not expose anyone to the legal coercion associated with an established religion." 542 U.S. at 54 (opinion concurring in the judgment).

The majority did not definitively decide the constitutionality of the challenged Pledge practices. Nonetheless, it began by noting that "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes," and that its "recitation is a patriotic exercise designed to foster national unity and pride in those principles." See 542 U.S. at 6.

C. Proceedings in this Case

After the Supreme Court rejected his initial challenge to the Pledge of Allegiance, Newdow filed a new action on his own behalf and as counsel for several other plaintiffs: Jan and Pat Doe and their minor child, and Jan Roe and her two minor children. JER 11-

12. As in his prior lawsuit, Newdow raised Establishment Clause challenges to 4 U.S.C. 4, to the California "patriotic exercises" statute, and to the Pledge-recitation practices of certain California school districts. JER 40. The United States, named as a defendant only with respect to the facial challenge to 4 U.S.C. 4, intervened to defend the constitutionality of the challenged Pledge practices. JER 268-69 (docket entry no. 79).

On September 14, 2005, the district court granted in part and denied in part the defendants' motions to dismiss. The district court dismissed Newdow's claims for lack of standing. See Newdow v. Congress of the United States, 383 F. Supp. 2d 122, 1237-39 (E.D. Cal. 2005). The court also dismissed the facial challenges to 4 U.S.C. 4 on mootness grounds, see id. at 1242, and it rejected on the merits plaintiffs' challenges to voluntary recitation of the Pledge at school board and other governmental meetings, see id. at 1242-44. However, the court declined to dismiss the challenges of the Roe and Doe parents to the Pledge-recitation practices at their children's respective schools. See id. at 1245.

As to those claims, the district court held that this Court's reversed decision in Newdow III constitutes a "binding" Establishment Clause precedent. 383 F. Supp. 2d at 1240-41. The district court reasoned that because the Supreme Court reversed Newdow III on prudential standing grounds, but did not formally vacate this Court's decision, the merits portion of Newdow III

retains "precedential value" within the Ninth Circuit. See id. at 1240. The court appeared to recognize that, had the Supreme Court reversed Newdow III on Article III standing grounds, this Court would have lacked jurisdiction to decide the case, and its merits holding would thus lose any "precedential value." See id. But the Court reasoned that "[p]rudential standing and Article III standing are distinct" because, under Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), a court "may reach the merits when only prudential standing is in dispute," but may not reach the merits before resolving Article III standing. See 383 F. Supp. 2d at 1241. The district court concluded that, "because a court may reach the merits despite a lack of prudential standing, it follows that where an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court's decision binds the district courts below." Ibid.

On November 18, 2005, the district court resolved all outstanding claims and entered a permanent injunction. The court dismissed with consent the claims of Jan Roe as to one of her children. See 2005 WL 3144086 *1. In addition, the court dismissed the claims of the Doe plaintiffs for lack of standing. See ibid. As a result of these various rulings, the only remaining claim was the challenge of the Roe plaintiffs to the Pledge-recitation policy of defendant Rio Linda School District. As to that claim, the district court enjoined Rio Linda and its teachers

"from leading students in reciting the Pledge of Allegiance for the purpose of satisfying the patriotic exercise requirement of California Education Code 52720." Ibid. The court stayed its injunction pending appeal. See id. at *2.

SUMMARY OF ARGUMENT

I. The district court erred in concluding that this Court's opinion in Newdow III, which the Supreme Court reversed for lack of prudential standing, is a binding Establishment Clause precedent. It is hornbook law that both Article III standing and prudential standing are jurisdictional requirements. Thus, as the Supreme Court specifically held in Elk Grove, "it was improper for the federal courts to entertain" Newdow III, because Newdow lacked prudential standing to bring that action. See 542 U.S. at 17. Such a jurisdictionally-defective decision, rendered without the benefit of a plaintiff whose interests are "best suited to assert a particular claim," Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1975), cannot constitute a binding precedent. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1996), and its progeny fully support these conclusions.

In any event, Elk Grove critically undermined the merits reasoning of this Court in Newdow III. In Newdow III, this Court held that reciting the Pledge in public schools "impermissibly coerces a religious act." See 328 F.3d at 486-87. In Elk Grove, however, the Supreme court, while not definitively resolving the

Establishment Clause question on the merits, made clear its view that reciting the Pledge "is a patriotic exercise." See 542 U.S. at 6. Under governing coercion precedents, the distinction between "religious" and "patriotic" activities is critical. Because Elk Grove thus significantly undercut Newdow III, this Court should re-consider that decision in any event.

II. The Supreme Court has repeatedly stated that official, ceremonial references to God, such as in the National Motto and on our coins and currency, are consistent with the Establishment Clause. Employing the same rationale, the Supreme Court, in two majority opinions and numerous separate opinions of individual Justices, has recognized that the Pledge of Allegiance, as amended to include the phrase "under God," is a permissible acknowledgment of this Nation's religious history and character.

The Pledge may therefore be voluntarily recited by willing students in the Nation's public school classrooms. Recitation of the Pledge in public schools has the secular purpose and effect of promoting patriotism and national unity; does not involve religious exercise (such as prayer, Bible reading, or other devotional acts); and is not unconstitutionally coercive where, as here, the government permits students to refrain from saying the Pledge.

STATEMENT OF THE STANDARD OF REVIEW

This case raises solely legal issues, which are reviewable de

novo. See, e.g., Arakaki v. Lingle, 423 F.3d 954, 962 (9th Cir. 2005).

ARGUMENT

I. THIS COURT'S REVERSED DECISION IN NEWDOW III IS NOT A BINDING ESTABLISHMENT CLAUSE PRECEDENT

A. The Supreme Court Reversed Newdow III For Lack of Prudential Standing

"Standing involves two distinct inquiries." Cetacean Community v. Bush, 386 F.3d 1169, 1174 (9th Cir. 2004). "First, an Article III federal court must ask whether a plaintiff has suffered sufficient injury to satisfy the 'case or controversy' requirement of Article III." Ibid. To satisfy Article III, a plaintiff "'must show that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant, and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" Ibid. (citation omitted).

The doctrine of standing also involves prudential rules. For example, "prudential standing" has long encompassed "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." Allen v. Wright, 469 U.S.

738, 751 (1984). In Elk Grove, the Supreme Court held that prudential standing also precludes a court from entertaining "a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." 542 U.S. at 17.

The district court concluded that a decision reversed but not vacated retains precedential force with respect to points not addressed by the reversal. See 383 F. Supp. 2d at 1240. Whatever the general merit of that proposition, it is wrong in circumstances where, as in Newdow III and Elk Grove, the lower court ruled for the party invoking the jurisdiction of the federal courts, and the reversal was on grounds of prudential standing.

1. Significantly, both Article III standing and prudential standing are jurisdictional doctrines. As the Supreme Court repeatedly has explained, prudential standing principles are "judicially-imposed limits on the exercise of federal jurisdiction" and, like Article III standing principles, are "'founded in concern about the proper – and properly limited – role of the courts in a democratic society.'" Allen v. Wright, 468 U.S. at 751 (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)); see also Bennett v. Spear, 520 U.S. 154, 162 (1997).[1] "'"Together, the constitutional

[1] Accord Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1108 (9th Cir. 2003) ("prudential component of standing precludes the exercise of federal jurisdiction even where the Constitution's

and prudential components of standing ensure that plaintiffs possess 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions."'" Thinket Ink Information Resources, Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1057 (9th Cir. 2004) (quoting Oregon Advocacy Center v. Mink, 322 F.3d 1101, 1109 (9th Cir. 2003) (in turn quoting Baker v. Carr, 369 U.S. 186, 204 (1962))).

As the Supreme Court has explained, prudential standing "preclude[s] the courts from deciding questions of broad social import where no individual rights would be vindicated," and "limit[s] access to the federal courts to those litigants best suited to assert a particular claim." Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99-100 (1979) (citations omitted). See also Warth, 422 U.S. at 500 (without prudential standing, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights").

'irreducible minimum' requirements have been met"); Scott v. Pasadena Unified School Dist., 306 F.3d 646, 654 (9th Cir. 2002) ("our jurisdiction is circumscribed by the 'case or controversy requirement of Article III standing and by prudential considerations"), cert. denied, 583 U.S. 1031 (2003).

Given these principles, a decision reversed for lack of prudential standing cannot be considered binding precedent. As the Supreme Court has long recognized, "'[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1996) (quoting Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)). See also DaimlerChrysler v. Cuno, 2006 WL 1310731 *6 (May 15, 2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so"). Giving precedential effect to a decision reversed for lack of Article III or prudential standing would flout these bedrock principles, by treating as legally binding a judgment rendered only through an improper exercise of federal-court jurisdiction, at the behest of an improper plaintiff with interests not "best suited to assert a particular claim." Gladstone Realtors, 441 U.S. at 99.

Elk Grove itself confirms this point. There the Supreme Court, upon concluding that Newdow lacked prudential standing to pursue his prior Establishment Clause claims, stressed that it was therefore "improper for the federal courts to entertain" those claims in the various litigation culminating in Newdow III. See 542 U.S. at 17. Because prudential standing bears directly on the

proper "exercise of federal jurisdiction," Allen v. Wright, 468 U.S. at 751, this Court in Newdow III lacked the power to do anything but order dismissal of the case. Its jurisdictionally-defective ruling for Newdow cannot be deemed a binding precedent.

2. The district court appeared to recognize that if the Supreme Court had reversed Newdow III for lack of Article III standing, this Court would have lacked jurisdiction, and its Establishment Clause holding would therefore lose any "precedential value." See 383 F. Supp. 2d at 1240. However, the district court reasoned that Article III and prudential standing are "distinct" because, under the sequencing rules established in Steel Co., a court may "reach the merits when only prudential standing is in dispute." See id. at 1241. Accordingly, the court concluded, an opinion "reversed on prudential standing grounds" remains a binding merits precedent. See ibid. This reasoning is fundamentally unsound.

To begin, the district court erred in conflating the question whether standing rules are jurisdictional with the question when (if ever) a court may decide other issues first. In Steel Co., the Supreme Court held that courts generally must decide Article III standing questions before merits ones. See 523 U.S. at 93-102. In so doing, it rejected a doctrine of "hypothetical jurisdiction" under which courts previously could have decided merits questions before Article III standing questions if the merits question were

"more readily resolved" and "the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." See id. at 93 (emphasis added). The prior sequencing rules obviously did not render the Article III inquiry any less jurisdictional. See, e.g., Allen v. Wright, 468 U.S. at 750 ("The case-or-controversy doctrines state fundamental limits on federal judicial power in our system of government."). And a merits decision reversed for lack of Article III standing, either under Steel Co. or the prior rules of "hypothetical jurisdiction," would obviously be entitled to no precedential effect, as even the district court seemed to recognize.

Nothing in Steel Co. undermines the settled rule that prudential standing bears on the proper exercise of federal-court jurisdiction. To be sure, the Court did suggest that courts may sometimes decide merits questions before prudential standing questions. See 523 U.S. at 97 & n.2. But the Court nowhere suggested that courts have unfettered discretion to do so, and it explained its suggestion by reference to the "overlap" between one specific prudential standing inquiry (regarding whether a plaintiff falls within the relevant "zone of interests") and one specific merits inquiry (regarding the existence of a private right of action). See ibid. Moreover, the Court also suggested that courts may decide prudential standing issues before Article III standing issues, see ibid.; Grand Council of the Crees v. FERC, 198 F.3d

950, 959 (D.C. Cir. 2000) – which itself confirms the jurisdictional nature of prudential standing. See Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584 (1999) (Steel Co. "does not dictate a sequencing of jurisdictional issues").

After Steel Co., the courts of appeals have recognized a limited ability to decide merits questions before prudential standing questions. But in every one of these decisions, the court bypassed a prudential standing inquiry in order to rule against the party invoking federal-court jurisdiction, consistent with rules governing the exercise of "hypothetical jurisdiction" before Steel Co. was decided. See, e.g., In re Erie Forge & Steel, Inc., 418 F.3d 270, 275 n.8 (3d Cir. 2005); Lerner v. Fleet Bank, 318 F.3d 113, 126-27 (2d Cir. 2003); American Iron & Steel Inst. v. OSHA, 182 F.3d 1261, 1274-75 n.10 (11th Cir. 1999); McNamara v. City of Chicago, 138 F.3d 1219, 1222 (7th Cir. 1998). Indeed, many of these decisions expressly reaffirm the jurisdictional nature of the prudential standing inquiry. See, e.g., Erie Forge & Steel, 418 F.3d at 275 n.8 (prudential standing is "jurisdictional issue"); Lerner, 318 F.3d at 127 ("prudential standing issues are also generally treated as jurisdictional"); McNamara, 138 F.3d at 1222 (Posner, J.) ("The latter type of jurisdictional issue ('prudential standing' as it is sometimes called) may be bypassed in favor of deciding the merits when the outcome is unaffected and the merits issue is easier than the jurisdictional issue.").

The district court cited no case even remotely suggesting that courts may assume prudential standing in order to rule on the merits for the party invoking federal-court jurisdiction. The court cited only two cases purportedly supporting the proposition that a federal court "may reach the merits when only prudential standing is in dispute." See 383 F. Supp. 2d at 1241. In one of them, the Eleventh Circuit assumed prudential standing in order to rule against the party invoking federal jurisdiction. See American Iron, 182 F.3d at 1274 n.10, 1279. The other cited decision, Environmental Protection Information Center, Inc. v. Pacific Lumber Co., 257 F.3d 1071 (9th Cir. 2001), is even less apposite. In that case, the district court granted a preliminary injunction and, after the case had become moot, issued an opinion explaining its reasons for so doing. See id. at 1073-76. On appeal, this Court held that the defendant could seek vacatur of the opinion because, although the defendant did not satisfy the "most used" prudential standing rules for determining when a prevailing party may appeal, it was nonetheless "aggrieved" for other reasons particular to the case. See id. at 1076. That decision in no conceivable way suggests what the district court effectively held here – that a court may assume prudential standing in order to rule in favor of a plaintiff on the merits.

Prudential standing is a jurisdictional doctrine governing when the federal courts may properly adjudicate cases or

controversies. No federal court may assume prudential standing to rule for a plaintiff on the merits. Even more clearly, no federal court may rule for a plaintiff on the merits in a case where the Supreme Court has definitively held that the plaintiff lacks prudential standing. Because Elk Grove reversed Newdow III on prudential standing grounds, the latter decision cannot conceivably constitute a binding Establishment Clause precedent in favor of plaintiff Newdow.

B. Newdow III Conflicts With The Supreme Court's Later Decision In Elk Grove

Wholly apart from its reversal of Newdow III on prudential standing grounds, Elk Grove also undercuts the precedential force of Newdow III in a second way, by undermining the key analytical premise of its Establishment Clause reasoning. In Newdow III, this Court, citing school prayer cases such as Lee v. Weisman, 505 U.S. 577 (1992), and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000), held that the challenged Pledge-recitation policy "impermissibly coerces a religious act." See 328 F.3d at 486-87 (emphasis added). In Elk Grove, however, the Supreme Court, while not definitively resolving the Establishment Clause question on the merits, made clear its view that reciting the Pledge "is a patriotic exercise designed to foster national unity and pride in those principles" on which the Nation was founded, including its "proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our

aspirations.'" See 542 U.S. at 6 (quoting Texas v. Johnson, 491 U.S. 397, 405 (1989) (Stevens, J., dissenting)) (emphasis added). As explained in detail below, because the Pledge involves "patriotic" act rather than a "religious" act, the governing coercion precedent is not Lee but rather West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943). Elk Grove thus specifically rejected the critical premise of Newdow III.

This Court has not hesitated to re-examine precedents undermined by intervening Supreme Court decisions. Such re-examination is appropriate if an intervening Supreme Court decision is "closely on point," despite the absence of any express overruling of circuit precedent, see Galbraith v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002); if the intervening decision "undermines an existing precedent" of this Court, see United States v. Lancellotti, 761 F.2d 1363, 1366 (9th Cir. 1985); or even if the intervening decision "'undercut the * * * theory' of the Ninth Circuit decision," see Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 495 (9th Cir. 1979). See generally Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003).

These standards are readily satisfied here. Given the Supreme Court's express characterization of the Pledge as "patriotic" as opposed to "religious," this Court should re-examine its prior contrary conclusion. For this additional reason, the district court erred in holding that Newdow III remains binding precedent on

the constitutionality of public school teachers leading willing students in voluntarily reciting the Pledge.

II. THE ESTABLISHMENT CLAUSE DOES NOT PROHIBIT PUBLIC SCHOOL TEACHERS FROM LEADING WILLING STUDENTS IN VOLUNTARILY RECITING THE PLEDGE OF ALLEGIANCE

The district court's injunction cannot be defended on alternative grounds independent of the asserted binding effect of Newdow III. As explained below, plaintiffs' contention that the Establishment Clause prohibits voluntary recitation of the Pledge of Allegiance in public schools is squarely foreclosed by Supreme Court precedent.

A. Religious Faith Has Played A Defining Role In The History Of The United States

1. Religious beliefs inspired settlement of the colonies and influenced the formation of the government.

"[R]eligion has been closely identified with our history and government." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963). Many of the Country's earliest settlers came to these shores seeking a haven from religious persecution and a home where their faith could flourish. In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact in which they announced that their voyage was undertaken "for the Glory of God." Mayflower Compact, Nov. 11, 1620, reproduced in 1 B. Schwartz, The Roots of the Bill of Rights 2 (1980). Settlers established many of the original thirteen colonies, including Massachusetts, Rhode Island,

Connecticut, Pennsylvania, Delaware, and Maryland, for the specific purpose of securing religious liberty for their inhabitants. The Constitutions or Declarations of Rights of almost all of the original States expressly guaranteed the free exercise of religion. See 5 The Founders' Constitution 70-71, 75, 77, 81, 84-85 (P. Kurland & R. Lerner eds., 1987) . It thus was no surprise that the very first rights enshrined in the Bill of Rights included the free exercise of religion and protection against federal laws respecting an establishment of religion. U.S. Const. Amend I.

The Framers' deep-seated faith also laid the philosophical groundwork for the unique governmental structure they adopted. In the Framers' view, government was instituted by individuals for the purpose of protecting and cultivating the exercise of their fundamental rights. Central to that political order was the Framers' conception of the individual as the source (rather than the object) of governmental power. That view of the political sovereignty of the individual, in turn, was a direct outgrowth of their conviction that each individual was entitled to certain fundamental rights, as most famously expressed in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." 1 U.S.C. at XLIII. Thus, "[t]he fact that the Founding Fathers believed devotedly that there

was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Schempp, 374 U.S. at 213.

2. The Framers considered official acknowledgments of religion's role in the formation of the Nation to be appropriate.

Many Framers attributed the survival and success of the new Nation to the providential hand of God. The Continental Congress itself announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by direct imposition of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 Journals of the Continental Congress 477 (W. Ford ed., 1908). Likewise, in his first inaugural address, President Washington proclaimed that "[n]o people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States," because "[e]very step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 10, 101st Cong., 1st Sess. 2 (1989).

Against that backdrop, from the Nation's earliest days, the Framers considered references to God in official documents and official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of

religious autonomy embodied in the First Amendment. Indeed, two documents that the Supreme Court has looked to in its Establishment Clause cases – James Madison's Memorial and Remonstrance Against Religious Assessments (1785) and Thomas Jefferson's Bill for Establishing Religious Freedom (1779) – repeatedly acknowledge the Creator. See 5 The Founders' Constitution, supra, at 77, 82. Moreover, the Constitution itself refers to the "Year of our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. U.S. Const. Art. I, § 7; id. Art. VII.

The First Congress – the same Congress that drafted the Establishment Clause – adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See Marsh v. Chambers, 463 U.S. 783, 787 (1983). That same Congress, one day after the Establishment Clause was proposed, also urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." Lynch v. Donnelly, 465 U.S. 668, 675 n.2 (1984) (citation omitted). President Washington responded by proclaiming November 26, 1789, a day of thanksgiving to "offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." Ibid. (citation omitted). President Washington also included a reference to God in his first inaugural address: "[I]t 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 council 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." S. Doc. No. 10, supra, at 2.

Later generations have followed suit. Since the time of Chief Justice Marshall, the Supreme Court has opened its sessions with "God save the United States and this Honorable Court." See Engel v. Vitale, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). President Abraham Lincoln referred to a "Nation[] under God" in the historic Gettysburg Address (1863): "That we here highly resolve that these dead shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, and for the people shall not perish from the earth." Every President who has delivered an inaugural address has referred to God or a Higher Power,[2] and every President, except Thomas Jefferson, has declared a Thanksgiving Day holiday.[3] In 1865, Congress authorized the inscription of "In God

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[2] See Inaugural Addresses of the Presidents of the United States, supra; First Inaugural Address of William J. Clinton, 29 Weekly Comp. Pres. Doc. 77 (Jan. 20, 1993); Second Inaugural Address of William J. Clinton, 33 Weekly Comp. Pres. Doc. 63 (Jan. 20, 1997); First Inaugural Address of George W. Bush, 37 Weekly Comp. Pres. Doc. 209 (Jan. 20, 2001).

[3] See S. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2113 & nn. 174-182 (1996)

we Trust" on United States coins. Act of Mar. 3, 1865, ch. 102, § 5, 13 Stat. 518. In 1931, Congress adopted as the National Anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause is just, And this be our motto "'In God is our Trust.'" See Engel, 370 U.S. at 449 (Stewart, J., dissenting). In 1956, Congress passed legislation to make "In God we trust" the National Motto, see 36 U.S.C. 302, and provided that it be inscribed on all United States currency, 31 U.S.C. 5112(d)(1), above the main door of the Senate, and behind the Chair of the Speaker of the House of Representatives. See Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-2, 116 Stat. 2057-2060. There thus "is an unbroken history of official acknowledgment by all three branches of government," as well as the States, "of the role of religion in American life from at least 1789." Lynch, 465 U.S. at 674.

B. The Establishment Clause Permits Official Acknowledgment Of The Nation's Religious Heritage And Character

That uninterrupted pattern of official acknowledgment of the role that religion has played in the foundation of the Country, the formation of its governmental institutions, and the cultural heritage of its people, counsels strongly against construing the

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(listing Thanksgiving proclamations).

Establishment Clause to forbid such practices. "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). Moreover, in the Establishment Clause context in particular, the Supreme Court has recognized that actions of the First Congress are "'contemporaneous and weighty evidence'" of the Constitution's "'true meaning,'" Marsh, 463 U.S. at 790 (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)), and that "an unbroken practice * * * is not something to be lightly cast aside," Walz v. Tax Comm'n, 397 U.S. 664, 678, 1416 (1970). See also The Pocket Veto Case, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions * * * ."); United States v. Curtis-Wright Export Corp., 299 U.S. 304, 328 (1936) (construction "'placed upon the Constitution * * * by the men who were contemporary with its formation'" is "'almost conclusive'" (citation omitted)).

In light of these principles, the Supreme Court has stated time and again that official acknowledgments of the Nation's religious history and enduring religious character do not violate the Establishment Clause. For example, the Court has long refused to construe the Establishment Clause so as to "press the concept of separation of Church and State to * * * extremes" by invalidating "references to the Almighty that run through our laws, our public

rituals, [and] our ceremonies." Zorach v. Clauson, 343 U.S. 306, 313 (1952). That is because "the purpose" of the Establishment Clause was not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring), or to compel official disregard or of stilted indifference to the Nation's religious heritage and enduring religious character. "It is far too late in the day to impose [that] crabbed reading of the Clause on the country." Lynch, 465 U.S. at 687. Indeed, the Supreme Court has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." Lynch, 465 U.S. at 675; Marsh, 463 U.S. at 792; Walz, 397 U.S. at 672; Schempp, 374 U.S. at 213; Zorach, 343 U.S. at 313. The Establishment Clause thus does not deny government actors the ability to acknowledge officially both the religious character of the people of the United States and the pivotal role that religion has played in developing the Nation's governmental institutions.

Neither does it compel government actors to ignore that tradition. In Marsh v. Chambers, the Supreme Court upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. In so doing, the Court discussed numerous other examples of constitutionally permissible religious

references in official life "that form 'part of the fabric of our society,'" ibid., such as "God save the United States and this Honorable Court," id. at 786. Similarly, in Schempp, the Court explained, in the course of invalidating laws requiring Bible-reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending with "So Help Me God." 374 U.S. at 213; see Lynch, 465 U.S. at 676 (referring favorably to the National Motto, "In God we trust").

Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678. Indeed, "[a]ny notion" that such measures "pose a real danger of establishment of a state church" would be "farfetched." Id. at 686. Instead, such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," ibid., simply takes note of the historical facts that "religion permeates our history," Edwards v. Aguillard, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of this Nation and in the founding of its government.

Indeed, even the stalwart separationist Thomas Jefferson found no constitutional impediment to such official acknowledgments of

religion. Jefferson and Benjamin Franklin proposed, in a "transparent allegory for America's ordeal," that the Great Seal of the United States depict the scene of God intervening to save the people of Israel by drowning Pharaoh and his armies in the Red Sea, ringed by the motto, "Rebellion to Tyrants is Obedience to God." See J. Huston, Religion and the Founding of the American Republic 51 & fig. (1998).

C. The Pledge of Allegiance Permissibly Acknowledges The Nation's Religious History and Character

The Supreme Court repeatedly has recognized that the Pledge of Allegiance, in referring to a Nation "under God," does not violate the Establishment Clause. In Lynch v. Donnelly, the Supreme Court held that the Establishment Clause permits a city to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," 465 U.S. at 680, and noted that similar "examples of reference to our religious heritage are found," among other places, "in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which the Court said "is recited by many thousands of public school children – and adults – every year." Id. at 676. The words "under God" in the Pledge, the Court explained, are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding

Fathers," which are "replete" in our Nation's history. Id. at 675, 677.

Likewise, in County of Allegheny, the Supreme Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed Lynch's approval of the reference to God in the Pledge, noting that all of the Justices in Lynch viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603 (citations omitted). The Court then used the Pledge and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, ibid., and concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." Id. at 598; see id. at 603.

Most recently, in Elk Grove, while the Supreme Court resolved the case based on Newdow's lack of standing, it described recitation of the Pledge as "a patriotic exercise designed to foster national unity and pride." 542 U.S. at 6. Moreover, three concurring Justices wrote separately to explain, in more detailed terms, why recitation of the Pledge by willing students in public schools does not contravene any conceivably applicable Establishment Clause standards. See id. at 26-32 (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of

God and official acknowledgments of religion's role in our Nation's history abound," and the Pledge is "a simple recognition of the fact * * * [that] 'our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God'" (citation omitted)); id. at 40 (O'Connor, J., concurring in the judgment) ("an observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an act of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive * * * * "); id. at 54 (Thomas, J., concurring in the judgment) (voluntary recitation of Pledge "does not expose anyone to the legal coercion associated with an established religion").[4]

As these decisions illustrate, the reference to God in the Pledge is not reasonably understood as endorsing, or coercing individuals into silent assent to, any particular religious doctrine. Rather, the Pledge is "consistent with the proposition that government may not communicate an endorsement of a religious

[4] In other cases as well, various individual Justices have specifically and repeatedly stated that the Pledge is consistent with the Establishment Clause. See, e.g., Lee, 505 U.S. at 638-39 (Scalia, J., dissenting); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985)(O'Connor, J., concurring); id. at 88 (Burger, C.J., dissenting); Schempp, 374 U.S. at 304 (Brennan, J., concurring); Engel, 370 U.S. at 449 (Stewart, J., dissenting).

belief," County of Allegheny, 492 U.S. at 602-603, because the reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation continues as a matter of demographic and cultural fact to be "a religious people whose institutions presuppose a Supreme Being." Zorach, 343 U.S. at 313.

Although County of Allegheny and Lynch did not involve direct challenges to the Pledge, they are controlling precedent on the Pledge's constitutionality. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). The Supreme Court's analysis of the Pledge in Lynch and County of Allegheny was an integral part of the rationale of each decision. Specifically, that analysis provided the constitutional baseline for permissible official acknowledgments of religion, against which the practices at issue in Lynch and County of Allegheny were then measured. For decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," ibid., that the Pledge of Allegiance, and similar references, are constitutional. As the Fourth and Seventh Circuits have held, the lower courts cannot ignore those consistent and emphatic statements. See Myers

v. Loudoun County Public Schools, 418 F.3d 395, 405 (4th Cir. 2005) (Supreme Court has "made clear that the Establishment Clause, regardless of the test to be used, does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school"); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437 448 (7th Cir. 1992) ("If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so"), cert. denied, 508 U.S. 950 (1993).

D. The Pledge of Allegiance May Be Recited In Public School Classrooms

In determining whether reciting of the Pledge in public school classrooms violates the Establishment Clause, the question is "whether government acted with the purpose of advancing or inhibiting religion" and whether reciting the Pledge has the "'effect' of advancing or inhibiting religion." Agostini v. Felton, 521 U.S. 203, 22-223 (1997); see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-08 (2000). Voluntary recitation of the Pledge in schools has no such impermissible purpose or effect.

1. The purpose of reciting the Pledge is to promote patriotism and national unity.

A practice violates the Establishment Clause's purpose inquiry only if it is "entirely motivated by a purpose to advance religion." Wallace, 472 U.S. at 56; see Lynch, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated

wholly by religious considerations"). See also McCreary County v. ACLU of Kentucky, 125 S. Ct. 2722, 2735 (2005) (law invalid if it has a "predominant purpose of advancing religion"); Van Orden v. Perry, 125 S. Ct. 2854, 2870 (2005) (Breyer, J., concurring in the judgment) (same).

Rio Linda's Pledge-recitation policy easily satisfies these Establishment Clause standards. As plaintiffs themselves acknowledge, see Amended Complaint ¶¶ 54, 55 & n.4 (JER 15), Rio Linda's Pledge policy implements a state statute requiring "appropriate patriotic exercises" in public schools. Cal. Educ. Code § 52720. As explained above, the Supreme Court in Elk Grove made clear that reciting the Pledge is a "patriotic exercise" that is "designed to foster national unity and pride in those principles" symbolized by our flag. 542 U.S. at 6. More generally, the Court also has held that the promotion of patriotism and the instillation of shared values in children attending public schools is a "clearly secular purpose." Wallace, 472 U.S. at 56. See also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681, 683 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order.").

Relying on certain statements from the 1954 legislative history of 4 U.S.C. 4, plaintiffs contend that Congress inserted the phrase "under God" into the Pledge "for the purposes of

endorsing (Christian) Monotheism and disapproving of Atheism." Amended Complaint ¶ 41 (JER 13). But the 1954 amendment hardly had any such single-minded purpose. The Committee Reports viewed the amendment as a permissible acknowledgment that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to the Gettysburg Address. H.R. Rep. No. 1693, supra, at 2; S. Rep. No. 1287, supra, at 2.

The Reports further identified a political purpose for the amendment – to highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being," and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may

usurp." H.R. Rep. No. 1693, supra, at 1-2; see S. Rep. No. 1287, supra, at 2. Congress thus added "under God" to highlight the Framers' political philosophy concerning the sovereignty of the individual - a philosophy with roots in 1954, as in 1787, in religious belief - to serve the political end of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, supra, at 2; see S. Rep. No. 1287, supra, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon").

No doubt some Members of Congress may have been motivated, in part, to amend the Pledge because of their religious beliefs. Such intentions would not undermine the constitutionality of the Pledge, however, because "those legislators also had permissible secular objectives in mind - they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and dignity of the human being.'"). Elk Grove, 542 U.S. at 41 (O'Connor, J., concurring in the judgment)(citation omitted). Moreover, "[w]hatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context." Ibid. And, more broadly, the Establishment Clause focuses on "the

legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990); see McGowan v. Maryland, 366 U.S. 420, 469 (1961) (opinion of Frankfurter, J.). That is because, among other reasons, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384 (1968).

Moreover, because this suit challenges contemporary Pledge-recitation practices, the purpose inquiry must focus on defendants' current reasons for leading willing students in voluntarily reciting the Pledge. In McGowan, the Supreme Court acknowledged that Sunday closing laws originally "were motivated by religious forces," 366 U.S. at 431, but nevertheless sustained those laws against Establishment Clause challenge because modern-day retention of the laws advanced secular purposes, id. at 434. The Court reasoned that, to proscribe laws that advanced valid secular goals solely because they "had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." Id. at 445; see also Freethought Soc'y v. Chester County, 334 F.3d 247, 261-262 (3d Cir. 2003). As we have shown, the modern-day purposes of Rio Linda's Pledge-recitation practice are secular.

2. The Pledge has the valid secular effect of promoting patriotism and national unity.

Rio Linda's Pledge-recitation policy has the permissible secular effects of promoting national unity, patriotism, and an appreciation for the values that define the Nation. Plaintiffs acknowledge, as they must, that a public school "certainly has the right to foster patriotism." Amended Complaint ¶ 134 (JER 28). "National unity as an end which officials may foster by persuasion and example is not in question." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); see Sherman, 980 F.2d at 444 ("Patriotism is an effort by the state to promote its own survival, and along the way teach those virtues that justify its survival. Public schools help to transmit those virtues and values.").

Nor does reciting the Pledge constitute an "endorsement" of religion or prayer to the kind of "objective observer" described in some of the Court's cases, see Santa Fe, 530 U.S. at 308. There is no reasonable basis for perceiving such religious endorsement in the Pledge. The Pledge is not a profession of religious belief, but a statement of allegiance to the Republic itself. By common understanding, a "pledge" of "allegiance" is a "promise or agreement" of "devotion or loyalty" "owed by a subject or citizen to his sovereign or government." Webster's Third New Int'l Dictionary 55, 1739 (1993); see American Heritage Dictionary of the English Language 47, 1390 (3d ed. 1992). See generally Van Orden, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment) (display of Ten Commandments monument on grounds of Texas state

capitol permissibly "communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed").

a. The Pledge must be considered as a whole.

In Lynch, the Supreme Court emphasized that Establishment Clause analysis looks at religious symbols and references in their overall setting, rather than "focusing almost exclusively on the" religious symbol alone. 465 U.S. at 680. The Court in Lynch accordingly did not ask whether the government's display of a creche – a clearly sectarian symbol – was permissible. Instead, the Court analyzed whether an overall display that included both religious and other secular symbols of the winter holiday season conveyed a message of endorsement, and held that it did not. See id. at 680-86.

Likewise, in County of Allegheny, the Supreme Court analyzed and upheld the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and Menorah. 492 U.S. at 616. The Court looked at the content of the display as a whole, rather than focusing on the presence of the Menorah and the religious message that it would convey in isolation. Id. at 661-20. The fact that Congress added the phrase "under God" to a preexisting Pledge does not change this analysis. The city government in County of Allegheny had likewise added the Menorah, after the fact,

to a preexisting holiday display. See id. at 581-82. Yet the Court focused its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. See id. at 616-20 & n.64.[5]

Read as a whole, the Pledge is not an endorsement of religion. Congress did not enact a pledge to a religious symbol or a pledge to God. Individuals pledge allegiance to "the Flag of the United States of America," and to "the Republic for which it stands." 4 U.S.C. 4. The remainder of the Pledge is descriptive – delineating the culture and character of that Republic as a unified Country, composed of individual States yet indivisible as a Nation, established for the purposes of promoting liberty and justice for all, and founded by individuals whose belief in God gave rise to the governmental institutions and political order they adopted, which continue to inspire the quest for "liberty and justice" for each individual. See J. Baer, The Pledge of Allegiance: A Centennial History; 1892-1992, at 48-49 (1992) (discussing the "national doctrines or ideals" that inspired the text of the Pledge). The Pledge's reference to a "Nation under God," in short,

[5] See also Zelman v. Simmons-Harris, 526 U.S. 639, 656-57 (2002) (Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged); Wallace, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (later addition of "under God" to the Pledge does not run afoul of the Establishment Clause because it "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future").

is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing demographic character – a statement that itself is simply one component of a larger, more comprehensive patriotic message. See Elk Grove, 542 U.S. at 6 ("[a]s its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles"); id. at 31 (Rehnquist, C.J., concurring in the judgment) ("The phrase 'under God' is in no sense a prayer, nor an endorsement of any religion," and "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our nation, not to any particular God, faith, or church")(footnote omitted); Myers, 418 F.3d at 407.

b. Reciting the Pledge is not a religious exercise.

The Supreme Court repeatedly has made clear that not every reference to God amounts to an impermissible government-endorsed religious exercise. As explained above, it repeatedly has cited the Pledge as a quintessential example of permissible references to God. And it repeatedly has distinguished descriptive or ceremonial references to God, like that contained in the Pledge, from formal religious exercises like prayer and Bible reading.

In Engel, for example, the Supreme Court struck down the New

York public school system's practice of reciting a nondenominational Regents prayer because that formal "invocation of God's blessings" was a religious activity – "a solemn avowal of divine faith and supplication for the blessings of the Almighty." 370 U.S. at 424. The Court contrasted the Regents prayer with the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity," concluding that "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored." Id. at 435 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York's practice of preceding the prayer with recitation of the Pledge. See id. at 440 n.5 (Douglas, J., concurring).

Likewise, in striking down school prayer in Schempp, the Court noted, without a hint of disapproval, that the students also recited the Pledge of Allegiance immediately after the invalidated prayer. Schempp, 374 U.S. at 207. That is because, as Justice Brennan explained in his extended concurrence, "daily recitation of the Pledge of Allegiance * * * serve[s] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." Id. at 281 (Brennan, J., concurring). "The reference

to divinity in the revised pledge of allegiance," Justice Brennan continued, "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'" Id. at 304. Its recitation thus is "no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." Ibid., see Lee, 505 U.S. at 583 (striking down graduation prayer, without suggesting that the Pledge, which preceded the Prayer, was at all constitutionally questionable).

As those cases recognize, describing the Republic as a Nation "under God" is not the functional equivalent of prayer, or any other performative religious act. No communication with or call upon the Divine is attempted. The phrase is not addressed to God or a call for His presence, guidance, or intervention. Nor can it plausibly be argued that reciting the Pledge is comparable to reading sacred text, like the Bible, or engaging in an act of religious worship. The phrase "Nation under God" has no such established religious usage as a matter of history, culture, or practice.

It is true that the Pledge is a "declar[ation] [of] a belief," Barnette, 319 U.S. at 631, but the belief declared is not monotheism; it is a belief in allegiance and loyalty to the United States Flag and the Republic that it represents. That is a politically performative statement, not a religious one. A

reasonable observer, reading the text of the Pledge as a whole, cognizant of its purpose, and familiar with (even if not personally subscribing to) the Nation's religious heritage, would understand that the reference to God is not an approbation of monotheism, but a patriotic and unifying acknowledgment of the role of religious faith in forming and defining the unique political and social character of the Nation. See Elk Grove, 542 U.S. at 42 (O'Connor, J., concurring in the judgment) (Pledge does not officially prefer one religion over another, because it "does not refer to a nation 'under Jesus' or 'under Vishnu,' but instead acknowledges religion in a general way: a simple reference to a generic 'God'").

As Justice O'Connor further observed in Elk Grove, "one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation." 542 U.S. at 42. Thus, ceremonial references to a generic "God" do not violate the Establishment Clause even though "some religions – Buddhism, for instance – are not based upon a belief in a Supreme Being." Ibid. Thus, "[t]he phrase 'under God,' conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system." Ibid.

Beyond that, it is impossible to distinguish the Pledge from

other permissible acknowledgments of religion in public life. Even with respect to school children, for example, there is no coherent or discernible difference between inviting them to say the Pledge, rather than sing the "officially espoused" National Anthem ("And this be our motto 'In God is our Trust.'"), Engel, 370 U.S. at 435 n.21, or having them memorize and recite the National Motto ("In God we trust"), 36 U.S.C. 302 (emphasis added), the Declaration of Independence, 1 U.S.C. at XLIII ("We hold these truths to be self evident, that all men * * * are endowed by their Creator with certain unalienable Rights.") (emphasis added), or the Gettysburg Address.

Moreover, a reasonable observer surely would view the compelled omission of the familiar words "under God" from the Pledge, at this point in our Nation's history, as reflecting hostility toward religion – which itself is constitutionally impermissible. See, e.g., County of Allegheny, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment) (Court "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion."); Lynch, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any");

Schempp, 374 U.S. at 225 ("the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, 'preferring those who believe in no religion over those who do believe.'") (citing Zorach 343 U.S., at 314);

c. Rio Linda's Pledge-recitation policy is not unconstitutionally coercive.

Plaintiffs acknowledge that the Pledge policies at issue do not involve the level of compulsion that would render them unconstitutional under West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943). See Amended Compl. ¶ 163 (JER 36). Although plaintiffs claim that the Pledge practices nevertheless are unlawfully "coercive" under, Lee v. Weisman, 505 U.S. 577 (1992), it is Barnette, not Lee, that establishes the relevant standard for analyzing whether a school's Pledge practice safeguards the "opt-out" rights of students.

Barnette involved a challenge by Jehovah's Witnesses to a policy that compelled public school students to salute the flag and recite the pre-1954 version of the Pledge. See 319 U.S. at 629 ("[f]ailure to conform is 'insubordination' dealt with by expulsion"). The Jehovah's Witnesses claimed the Pledge ceremony violated their religious beliefs by forcing them to salute a "graven image." Id. The Court agreed, and held that the Jehovah's Witnesses could not be compelled to salute the flag and recite the Pledge: "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of

opinion or force citizens to confess by word or act their faith therein." Id. at 642.

Barnette thus makes perfectly clear, with specific reference to the Pledge, that it is only compelled recitation without the possibility of opting out — the coerced "confess[ion] by word or act" (319 U.S. at 642) — that transgresses constitutional bounds. Mere exposure to classmates reciting the Pledge does not rise to the level of unconstitutional coercion. The Elk Grove majority recognized this point: "The Elk Grove Unified School District has implemented the state law by requiring that "[e]ach elementary school class recite the pledge of allegiance to the flag once each day. Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation." 542 U.S. at 8 (citing Barnette) (emphasis added). Barnette thus forecloses plaintiffs' claim of unconstitutional coercion.[6]

Plaintiffs contend (see Amd. Compl. ¶ 163, JER 36) that Rio

[6] Although the claim in Barnette was discussed in free speech terms, the Jehovah's Witnesses' objected to reciting the Pledge based on their religious views. See Barnette, 319 U.S. at 629, 633 & n.13. Thus, while plaintiffs here raise Establishment Clause claims, Barnette provides the controlling standard. See Elk Grove, 542 U.S. at 8 (citing Barnette). Indeed, the government would have no greater right to coerce political orthodoxy (the issue in Barnette) than it would to coerce religious orthodoxy (the issue here). See Barnette, 319 U.S. at 642 ("no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein") (emphasis added).

Linda's Pledge-recitation policy violates the coercion principles applied in Lee v. Weisman. Lee is inapposite, however, because reeciting the Pledge is not a religious exercise.

In Lee, the Supreme Court held that the Establishment Clause proscribes prayer at public secondary school graduation ceremonies. See 505 U.S. at 599. What made those prayers unconstitutionally coercive, however, was their character as a pure "religious exercise" and the government's "pervasive" involvement in institutionalizing the prayer, to the point of making it a "state-sponsored and state-directed religious exercise." Id. at 587. Coercion thus arose because (1) the exercise was so profoundly religious that even quiet acquiescence in the practice would exact a toll on conscience, id. at 588 ("the student had no real alternative which would have allowed her to avoid the fact or appearance of participation"); and (2) the force with which the government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well, id. at 592-94.

Those concerns have little relevance here. As the Supreme Court made clear in Elk Grove, reciting the Pledge "is a patriotic exercise designed to foster national unity and pride" in the principles the flag symbolizes. 542 U.S. at 6. It is not a religious exercise at all, let along a core component of worship like prayer. See id. at 31 & n.4 (Rehnquist, C.J., concurring in

the judgment) (phrase "under God" in the Pledge does not "convert[] its recital into a 'religious exercise' of the sort described in Lee"); id. at 2327 (O'Connor, J., concurring in the judgment) ("Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as reciting or listening to the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character").

Plaintiffs allege that "opting out" of the Pledge recital would make students feel like "'political outsider[s].'" Amd. Compl. ¶ 164 (JER 36). But the government does not make "religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Whatever "incidental" benefit might befall religion from the government's acknowledgment of the Nation's religious heritage does not implicate the Establishment Clause. 515 U.S. at 768 (Opinion of Scalia, J.). Put another way, the Establishment Clause is not violated just because a governmental practice "happens to coincide or harmonize with the tenets of some or all religions." McGowan, 366 U.S. at 442; see also Lynch, 465 U.S. at 683.[7]

[7] See also Capitol Square, 515 U.S. at 779 (O'Connor, J., concurring) (endorsement inquiry "is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe"; otherwise, the Establishment Clause would "'entirely

Second, any analysis of the coercive effect of voluntary recital of the Pledge must take into account the Supreme Court's repeated assurances that the "many manifestations in our public life of belief in God," Engel, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," Marsh, 463 U.S. at 792, including in public school classrooms. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, "has become embedded" in the American consciousness and "become part of our national culture." Dickerson v. United States, 530 U.S. 428, 443 (2000). Public familiarity with the Pledge's use as a patriotic exercise and a solemnizing ceremony for public events ensures both that the reasonable observer, familiar with the context and historic use of the Pledge, will not perceive governmental endorsement of religion at the mere utterance of the phrase "under God," and that voluntary recitation of the Pledge has no more coercive effect than does use of currency that bears the National Motto "In God we trust." See Elk Grove, 542 U.S. at 38 (O'Connor, J., concurring in the judgment) (in the fifty years since Congress added the words "under God" to the Pledge, "the Pledge has become,

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sweep[] away all government recognition and acknowledgment of religion in the lives of our citizens'") (citation omitted); Zorach, 343 U.S. at 313, 314 (a "fastidious atheist or agnostic could even object to the supplication with which the [Supreme] Court opens each session: 'God save the United States and this Honorable Court,'" and other similar ceremonial references to God).

alongside the singing of the Star-Spangled Banner, our most routine ceremonial act of patriotism").

Finally, as discussed in detail above, the Pledge's brief reference to God represents a historical fact: that our Nation was founded on the principle that individuals have inalienable rights given by God that no government may take away. This Nation's history has religious content, and it is wholly proper to teach that history and to recognize its import through the Pledge. "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235 (1948).

Thus, public schools may teach not just that the Pilgrims came to this country, but also why they came. They may teach not just that the Framers conceived of a governmental system in which power and inalienable rights resided in the individual, but also why they thought that way. They may teach not just that abolitionists opposed slavery, but also why they did. See Edwards, 482 U.S. at 606-607 (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."). The

reference to a "Nation under God" in the Pledge of Allegiance is an official and patriotic acknowledgment of what all students – Christian, Jewish, Muslim, Hindu, Buddhist, or atheist – may properly be taught in the public schools. Voluntary recitation of the Pledge by willing students thus fully comports with the Establishment Clause.

CONCLUSION

For the foregoing reasons, this Court should vacate the permanent injunction and remand the case with instructions to dismiss the complaint in its entirety.

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STATEMENT OF RELATED CASES

As we explain later in more detail, Michael Newdow, who is acting as counsel for plaintiffs in this action, previously filed a similar suit on his own behalf challenging the constitutionality of a California school district's policy of leading students in the voluntary recitation of the Pledge of Allegiance. The district court dismissed that action on the merits. A panel of this Court reversed, Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), but the Supreme Court reversed this Court's ruling for lack of prudential standing. See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004). Counsel for Intervenor the United States are aware of no other related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel Wordperfect 7, the foregoing brief contains 12,772 words. The text of the brief is composed in monospaced, 12-point Courier typeface, which has 10 characters per inch.

_____
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2006, I served an original and 15 copies of the foregoing Brief for Appellant the United States to the Clerk, United States Court of Appeals for the Ninth Circuit by causing a copy to be delivered to Federal Express for next-day delivery. I also served the foregoing Brief upon the following counsel by causing two copies of the Brief to be delivered to Federal Express for next-day delivery:

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