

**Michael Newdow, JD
PO Box 233345
Sacramento, CA 95823**

Phone: (916) 427-6669; 916-273-3798

e-mail: NewdowLaw@gmail.com

September 15, 2007

Office of the Clerk
U.S. Court of Appeals
Post Office Box 193939
San Francisco, CA 94119-3939

Re: *Newdow v. Carey*, Nos. 05-17257, 05-17344, 06-15093

Dear Sir or Madam:

Pursuant to Fed. R. App. P. 28(j) and Circuit Rule 28-6, Plaintiff-Appellant submits this supplemental authority regarding *Inouye v. Kemna*, ___ F.3d ___, No. 06-15474 (9th Cir. September 7, 2007).

Inouye involved a plaintiff whose parole officer coerced him “to attend Alcoholics Anonymous/Narcotics Anonymous (‘AA/NA’) meetings as a condition of his parole.” Slip op. at 11881. Of note is that the 9th Circuit specifically wrote that, “We do not hold that AA/NA is itself a religion,” slip op. at 11889 (n.9), spoke of its “fine work,” *id.*, and repeatedly referred to it as a “drug treatment program.” *See, e.g.*, slip op. at 11881-83, 11885, 11887. This is analogous to the arguments that “the Pledge is not a religious act,” Brief for Appellant RLUSD at 46, that it works “to better prepare [students] for citizenship,” *id.* at 47, and that it is a “patriotic exercise.” Briefs for both Appellant the United States and Appellant RLUSD, *passim*. *Inouye* teaches that those arguments are inconsequential when there is a religious underpinning to the challenged activity.

Like AA/NA being “rooted ... in a regard for a ‘higher power,’” slip op. at 11883, the Pledge is made to “one Nation under God.” *Inouye* found this supernatural basis to be of key importance, especially as it pertains to the related issues of coercion and alternative choices. Regarding the former, the Ninth Circuit referenced the psychological coercion of *Lee v. Weisman*, 505 U.S. 577 (1992), slip op. at 11888 (n.8), which, as Plaintiffs have noted, was far less severe than that involved in the Pledge. Plaintiffs’ Answering Brief at 38. *See also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46 (Thomas, J., concurring) (“Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*.”).

Regarding the alternative choices, students wishing to join with their classmates to pledge allegiance to the nation’s flag have none. Either they participate in a recitation where the government claims that God exists or they don’t participate at all. Even if they personally withhold the words, “under God,” the dilemma is not resolved. As *Inouye* makes clear, “a constitutional violation occurs when [participation in an activity that is based on a religious idea one denies] is simply required, without alternatives.” Slip op. at 11894.

Respectfully submitted,

Michael Newdow, Counsel for Plaintiffs
CA State Bar No. 220444

CERTIFICATE OF SERVICE

CASE NOS. 05-17257, 05-17344, 06-15093

I HEREBY CERTIFY that on this 15th day of September, 2007, true and correct copies of Plaintiff's letter of Supplemental Authority regarding *Inouye v. Kemna*, ___ F.3d ___, No. 06-15474 (9th Cir. September 7, 2007) were delivered by e-mail to the following individuals:

Terence John Cassidy (tcassidy@pswdlaw.com)

Michael William Pott (mpott@pswdlaw.com)

Lowell Sturgill (lowell.sturgill@usdoj.gov)

Theodore Charles Hirt (theodore.hirt@usdoj.gov)

Anthony R. Picarello (apicarello@becketfund.org)

Eric C. Rassbach (erassbach@becketfund.org)

Autumn Owens (autumn.owens@doj.ca.gov)

Pursuant to Ninth Circuit Rule 25-3.3, the undersigned has received a completed and signed Form 13 (Consent to Electronic Service) from counsel for each of the parties.

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Michael Newdow, Counsel for Plaintiffs
CA SBN: 220444
PO Box 233345
Sacramento, CA 95823

Phone: (916) 427-6669
(916) 273-3798

E-mail: NewdowLaw@gmail.com