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

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW; et al.,

Plaintiffs-Appellees,

v.

JOHN CAREY; et al.,

Defendant-Intervenors-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
(District Court No. CV-05-00017-LKK)

ANSWERING BRIEF FOR THE PLAINTIFFS-APPELLEES

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SUMMARY OF THE ARGUMENT

Every morning in each of the public schools of Defendant Rio Linda Union School District,[1] tax-paid teachers lead impressionable children in joint recitations claiming that the United States is "one Nation under God." Because the overwhelming majority of Americans believe in God, they strongly approve of this phrase, exactly as the Establishment Clause predicts. But the government's promotion of that phrase – especially in a public school setting – "violates the equality which ought to be the basis of every law."[2] And, as strongly as they believe in God, that majority (plus all other Americans) believes more strongly in equality. Thus, the American people will eventually come to embrace a ruling holding the words, "under God," unconstitutional.

The phrase, "one Nation under God," is religious. Its use in the Pledge of Allegiance resulted from a bill conceived by a religious organization. The congressmen who worked on the bill spoke of it in exclusively religious terms. President Eisenhower, signing the bill into law, announced that "millions of our school children will daily proclaim … the dedication of our Nation and our people to the Almighty,"[3] and the law, since passed, has had that religious effect.

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[1] Hereinafter, "RLUSD."
[2] Madison J. *Memorial and Remonstrance* (1785) as cited in *Everson v. Board of Education*, 330 U.S. 1, 66 (1947) (Appendix of Rutledge, J., dissenting).
[3] 100 Cong. Rec. 7, 8618 (June 22, 1954).

In fact, some now consider the Pledge to be a prayer. "One Nation under God" was the theme of President Bush's first National Day of Prayer, and he (as President of the United States) has described recitation of the now-religious Pledge as "humbly seeking the wisdom and blessing of Divine Providence"[4] … a definition of "prayer" that would be difficult to improve. But even for those who would not go that far in characterizing the pious nature of the "under God" verbiage, the phrase is still religious.

Many individuals do not share the majority's belief that there exists a God, and therefore disagree, often strongly, with the religious message which a pledge "under God" sends. For those who are parents wishing to instill non-Monotheistic values in their children – and for their children who have the right to attend public school without the "power, prestige and financial support of government"[5] influencing their religious views – each recitation intrudes upon basic rights of religious liberty. Each is also a facial First Amendment violation. That the religious proclamation is part of a **pledge of allegiance** heightens the constitutional infirmity. Moreover, its occurrence in the public education environment runs contrary to Supreme Court precedent, for – in that milieu – the Justices have struck down government-sponsored religion, however slight, in nine of nine cases.

[4] *Appendix*, at 2.
[5] Engel v. Vitale, 370 U.S. 421, 431 (1962).

When, in 1892, the Pledge of Allegiance was first created, it was purely secular. It remained secular for sixty-two years, embracing every citizen, regardless of religious belief. It unified our country, serving its patriotic purposes perfectly through two world wars and a great depression. Not until the McCarthy era, did the Congress – mistakenly associating communism with a religious system (Atheism), instead of with a political system (totalitarianism) – intrude the two purely religious words, "under God," into the preexisting prose. In so doing, the Defendant-Intervenor United States' legislators (unaware that the Supreme Court would later gauge Establishment Clause violations on the basis of religious endorsement and/or disapproval) freely admitted that their goal was to endorse Monotheism, while disapproving of Atheism. The result has been as planned: Monotheism has been endorsed, and a disenfranchised religious minority (i.e., Atheists) has been relegated to second-class status.

That "under God" in the Pledge violates the Establishment Clause can be appreciated by applying any of the Supreme Court's numerous tests. **In the public school setting**, one-sided religious dogma is injected into the nation's official Pledge of Allegiance, with governmental agents leading small children in repeating that dogma every day. This violates religious neutrality/equality, endorses a disputed religious claim, was instituted for a religious purpose, has religious effects, turns citizens into "outsiders" on the basis of their religious beliefs, and –

especially in the school environment – is coercive. The Court has never permitted **any** of these infractions. Here, **all** are in existence.

Defendants contend that the 1954 law was promulgated for "historical" purposes, allegedly reflecting the founders' religious beliefs. Congress's own words, plus the broadcast of President Eisenhower, demonstrate that Defendants' "historical" claim is false. And even if the 83rd Congress had intended to pay homage to the majority faith during the founding era, such a purpose would, itself, be constitutionally prohibited. To single out that one aspect of the Nation's origins, and to extol its virtues within the Pledge of Allegiance, is an endorsement contrary to Establishment Clause principles. This is best realized by considering the constitutionally equivalent phrases, "one Nation under Jesus" or "one Nation under Protestantism." Every justification given for "under God" can be matched by a similar justification for those other two versions. None of them is permissible.

"Under God" in the Pledge is an example of the majority using the machinery of the state to enforce its preferred religious orthodoxy. In the public schools, the Court has been unyielding in guarding against such conduct. Accordingly, RLUSD's policy requiring its teachers to lead even willing public school students in making the purely religious claim that this nation is "under God" violates the Establishment Clause of the Constitution.

ARGUMENT

I. INCLUDING "UNDER GOD" IN THE NATION'S PLEDGE OF ALLEGIANCE VIOLATES THE ESTABLISHMENT CLAUSE

A. DEFENDANTS HAVE MISCHARACTERIZED THE ISSUE

In presenting this case, Defendants and their *amici* have sought to lay a foundation upon which the Court might reasonably conclude that "under God" is permissible. That foundation, however, has significant flaws that must be corrected before Plaintiffs can proceed.

(1) The issue is <u>not</u> the Pledge as a whole. It is only the phrase, "under God."

Throughout the briefs of the Appellants and their *amici*, one sees continued attempts to excuse the Act of 1954 by claiming that, "the focus of the Court's constitutional inquiry must be on the Pledge as a whole, not just the words 'under God.'" *Brief for Defendant RLUSD* at 42. This is wrong. A purely religious act can always be characterized as part of something larger and non-religious in order to deny an Establishment Clause violation.

In both *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School District v. Schempp*, 374 U.S. 203 (1963), for instance, it could have been argued that "the focus of the Court's constitutional inquiry must be on the morning exercises as a whole, not just the [prayer or Bible reading]." In *Epperson v. Arkansas*, 393 U.S. 97 (1968), "biology class" could have been the Court's focus, not the religious

animus towards evolution. The decorations and aesthetics of buildings and grounds, not the sacred text of the Ten Commandments, could have garnered the Justices' attention in *Stone v. Graham*, 449 U.S. 39 (1980) and *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005). The entire Grand Staircase of the County Courthouse, not just the creche, was certainly a possible center of concern in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), just as the graduation as a whole, not the rabbi's short nondenominational prayer, could have been that center of concern in *Lee v. Weisman*, 505 U.S. 577 (1992).

In fact, the Supreme Court has already rejected this very argument, which was made by the dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985):

> The several preceding opinions conclude that the principal difference between § 16-1-20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase "or voluntary prayer" in § 16-1-20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole.

Id. at 88 (Burger, C.J., dissenting). Yet "focusing exclusively on the religious component" was precisely what the majority deemed proper.

Defendants' references to *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny*, *Brief for RLUSD* at 42-43, reveal confusion in this matter. It was not that *Lynch*'s creche and *Allegheny*'s menorah were not examined individually. It was simply that – in the given settings – inclusion of those individual items was appropriate, and excluding them from those settings would have evidenced

hostility towards their religious representations. *See*, *e.g.*, *Lynch*, 465 U.S. at 677 (addressing "all forms of religious expression" and demanding "hostility toward none."). In fact, it is *Allegheny* that reveals how in some settings (for instance, outside a building where the menorah was situated next to a Christmas tree during the holiday season[6]) an individual religious item is acceptable, whereas in others (such as a Grand Staircase where a creche was given unique access to express its one religious message) it is not.[7] *See* at page 43, *infra*.

Plaintiffs' position, incidentally, is not one of hostility towards religion. It is one only of hostility towards governmental endorsements of particular religious views. Thus, plaintiffs would find a Pledge to "one Nation that disbelieves in God" just as constitutionally infirm as is the present Pledge.[8] Similarly, governmental anti-Monotheism would be just as intolerable as has been the anti-Atheism that the government has been displaying. EOR 53-62. Thus, Plaintiffs have no issue with cases where there is, essentially, a marketplace of ideas, and the "religious," along

[6] Of note is that the Court specifically wrote, "This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations." *Allegheny*, 492 U.S. at 620 n.69. Of course, the instant case involves a public school.

[7] Not surprisingly, RLUSD makes no mention whatsoever of this portion of Allegheny. Br. RLUSD at 42-43.

[8] That this version of the Pledge would never be chosen by Congress shows that the viewpoint neutrality supposedly mandatory in Establishment Clause cases, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), is completely lacking in the case at bar. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views." *Board of Regents v. Southworth*, 529 U.S. 217, 235 (2000).

with the "non-religious" have a right to be heard. *See*, *e.g.*, *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (Ten Commandments permitted as one of 38 monuments and historical markers); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Christian club permitted as one of numerous after-school clubs).; and *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious group permitted as one among "over 100 student groups"). In the instant case, however, there is no such "marketplace." There is a locale under exclusive governmental control, as there was in *Engel, Abington, Stone*, *Wallace, and Lee, supra*. In such situations, government is not allowed to choose and propagate a religious ideology.[9]

Especially when there is such exclusive governmental control, the "as a whole" argument cannot be accepted. Otherwise, what would limit the abuse? Why wouldn't "under Jesus" be permissible? Why not, instead of having the students placing their hands over their hearts, have the students make the sign of the cross? That brief, purely religious act certainly doesn't make the Pledge "as a whole" any more religious than the "under God" phrase does.

The Pledge "as a whole" was doing fine for sixty-two years. An Act of Congress[10] then corrupted its previously unifying words, and divided Americans on the basis of religious belief. This was accomplished by introducing a

[9] The one exception to this is *Marsh v. Chambers*, 463 U.S. 783 (1983), which is completely distinguishable. *See* at page 21, *infra.*
[10] Act of June 14,1954, ch. 297, § 7, 68 Stat. 249.

government-sponsored religious view into a completely inappropriate setting. Defendants' naked attempt to characterize the issue differently – by constantly speaking of the Pledge "as a whole" – does not conceal the constitutional wrong.

(2) A constitutional Pledge of Allegiance to the Flag is patriotic. A pledge that violates the principles for which the flag stands is anything but.

The plaintiffs in this case have never objected to engaging in the patriotic act of pledging their allegiance to the flag. On the contrary, that is precisely what they wish to do: join their fellow citizens and patriotically pledge their allegiance. They are unable to do that, however, because the Act of 1954 infused religious dogma into the previously secular national oath.[11]

According to Defendants, "under God" has lost its religious significance, and is now just part of the patriotism embodied in the Pledge. They apparently arrive at this conclusion by pointing to the majority opinion in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004), where (speaking of the Pledge) Justice

[11] Defendant RLUSD devotes an entire section of its brief to *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Brief for RLUSD*, at 55-58. Although it also involved the Pledge of Allegiance, *Barnette* was decided on free speech grounds, and had essentially nothing to do with the issue here. The Pledge in *Barnette* was secular, and without any religious significance to the governmental agents pressing for its use. Here, the issue is a two-word phrase that – eleven years after *Barnette* was decided – was shoved into that Pledge by the government specifically to espouse a particular religious view. The phrase is purely religious. Thus, whereas religious neutrality, purpose, effects and endorsement had no role in *Barnette*, they are all intimately related to "under God" in the Pledge. And, to the extent that there was coercion, *Barnette* involved coercion of political, as opposed to religious, speech, which "[t]he First Amendment protects … by quite different mechanisms." *Lee v. Weisman*, 505 U.S. 577, 591 (1992).

Stevens stated, "[i]ts recitation is a patriotic exercise."[12] But Justice Stevens was not weighing in on the "under God" issue. He was speaking in the abstract, of the general notion of pledging allegiance to the Nation's flag. It certainly doesn't follow that because pledging allegiance is a patriotic exercise, anything done in conjunction with that act automatically becomes patriotic as well.

This is especially clear when one examines his entire quote:

> As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

The Pledge's "patriotic" nature, therefore, stems from its "acknowledgement of the ideals that our flag symbolizes," and from serving the goal of "foster[ing] national unity." "Under God," does neither. On the contrary, those words trample upon key ideals that our flag symbolizes – i.e., governmental neutrality in matters religious, and treating all religious views with equal respect – and (as *Elk Grove*, itself, made clear) they have fractured national unity.

A Pledge "under Male Dominion" or "under White Superiority" – both of which also reflect the nation's "heritage" – would certainly not be called "patriotic." Nor would one "under Jesus" or "under Protestantism," which reflect our historical beginnings, as well. *See*, *Brief for amicus curiae Madison-Jefferson*

[12] Defendants and their *amici* apparently place great hope in this rather innocuous phrase. In RLUSD's brief, alone, "patriotic exercise" is used thirty-two times!

Society. The same should hold true for "under God," which (according to Congress, itself) are "compelling and meaningful" words.[13] The Act of 1954 was not passed to place a "patriotic" gloss on those two "compelling and meaningful" … and purely religious … words. It was to place a religious gloss on the otherwise patriotic Pledge. That was impermissible.

(3) Pledging "under God" is definitely "religion" as contemplated by the Establishment Clause. In fact, Congress and two Presidents have indicated that the resulting Pledge is a prayer.

According to Defendants, "the Pledge … does [not] convey a religious belief." *Brief for RLUSD* at 46. Yet, somehow the two-word "under God" phrase "encapsulates the idea, longstanding in the Anglo-American legal tradition, that the power of government is limited by universal, inalienable rights," *Brief for Defendant-Intervenor John Carey* at 24, and it also manages to be "a Restatement of the Political Philosophy Underpinning this Nation's Form of Government" (requiring nine full pages to explain, and incorporating the theories and influences of Lincoln, Jefferson, Sydney, Montesquieu, Locke, Filmer, Aristotle, Moses, Saul, David, Solomon, Judah, Madison, Hamilton and Jay). *Brief for amicus curiae Pacific Justice Institute* at 3-12. Obviously, both claims – that "under God" does

[13] "House Joint Resolution 243 … added to the Pledge of Allegiance the compelling and meaningful words 'under God'." 84th Cong., 1st Session, House Doc. No. 225 (printing Irving Caesar's song, *Pledge of Allegiance to the Flag*). In large print on the cover of the document, is provided the words of the Pledge. Only two are italicized: "under God." *Appendix*, page 1.

not convey any religious belief and that it simultaneously has this incredible ability to impart an enormity of information that s found nowhere in the words – are invented. As Justice Thomas explained:

> The declaration that our country is "one Nation under God" necessarily "entails an affirmation that God exists."

Van Orden v. Perry, 125 S. Ct. 2854, 2866-67 (2005) (Thomas, J., concurring) (citation omitted). Therefore, it conveys a religious belief.

Perhaps aware that this is undeniable, Defendant RLUSD attempts to take another tack, maintaining that, "The Pledge with the phrase 'under God' is nothing like the clearly religious act of prayer." *Brief for RLUSD* at 49. Whether or not that is true makes no difference in deciding this case, for nothing in the Establishment Clause limits its violations to activities "like the clearly religious act of prayer." Placing the Ten Commandments in an inappropriate public setting doesn't meet this definition. *Stone*, *McCreary*. Nor does placing a creche on a staircase. *Allegheny*. Nothing like prayer played a part in the laws forbidding the teaching of evolution, *Epperson*, or mandating the teaching of "creation science." *Edwards*. The clause – "respecting an establishment of religion" – reaches far broader than that one particular religious act.

Moreover, many respected individuals find the Pledge to be that one particular religious act. For instance, the only Pledge expert referenced by the Supreme Court, *Elk Grove*, 542 U.S. at 6 n.1, has written:

> In 1954, Congress after a campaign by the Knights of Columbus, added the words, "under God," to the Pledge. The Pledge was now both a patriotic oath and a public prayer.[14]

Similarly, the day after the release of *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow I*"), the usually sparsely populated Senate Chamber was filled with senators as the President *pro tempore* informed his audience that, "The prayer to Almighty God, the supreme Judge of the world, will be led by the Senate Chaplain."[15] The chaplain opened with, "Almighty God, Creator, Sustainer and Providential source of all our blessings," and soon referenced the prior day's Pledge decision:

> It is with reverence that in a moment we will repeat the words of commitment to trust You which are part of our Pledge of Allegiance to our flag: ''One Nation under God, indivisible.''[16]

Repeating words of commitment to trust "Almighty God, Creator, Sustainer and Providential source of all our blessings" certainly sounds like prayer.

After the chaplain's prayer, Senator Daschle stated, "He spoke for all of us. We are one nation under God."[17] Thus, the legislature appears to value the words "like the clearly religious act of prayer." So, too, does the executive branch. President Eisenhower signed the Act of 1954 into law so that "school children will

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[14] Baer JW. *The Pledge of Allegiance: A Short History*.(1992). Accessed on June 29, 2006 at http://history.vineyard.net/pledge.htm.
[15] 148 Cong. Rec. S6177 (June 27, 2002).
[16] *Id*.
[17] *Id*.

daily proclaim … the dedication of our Nation and our people to the Almighty."[18] "Proclaiming dedication to the Almighty" certainly would pass as a definition of prayer. More recently, President Bush – in the aftermath of the Ninth Circuit's Pledge decision – wrote, "In one sentence, we affirm our form of government, our unity as a people, and our reliance on God." *Appendix*, page 2. He continued:

> When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.

That is remarkably similar to the very dictionary definition provided by RLUSD:

> [A] humble communication in thought or speech to God or to an object of worship expressing supplication, thanksgiving, praise, confession, etc."

Brief for RLUSD at 49. Yet RLUSD writes, "In no way can the Pledge be construed to be a supplication for blessings from God nor can it be reasonably argued that it is a communication with God." *Id*. In view of the fact that "One Nation Under God" was also the theme of President Bush's first National Day of Prayer Proclamation,[19] and that he invoked it yet again (in a paragraph that began with scripture, no less) in his "National Day of Prayer and Remembrance" following 9/11,[20] it is rather odd for RLUSD to so unequivocally make this claim.[21]

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[18] 100 Cong. Rec. 7, 8618 (June 22, 1954).
[19] http://www.whitehouse.gov/news/releases/2001/04/print/20010430-2.html.
[20] http://www.whitehouse.gov/news/releases/2001/09/print/20010913-7.html.
[21] It isn't just politicians who have seen "prayer" stemming from the "under God" addition to the Pledge. Society, in general, often sees this as well. See, e.g., the Calvin & Hobbes cartoon from 1989, Appendix, page 3, or Red Skelton's discussion of the Pledge on his television show twenty

As noted, nothing in the Establishment Clause limits its coverage to prayer. But the Clause is limited to "religion," and this deserves some mention as well. When Defendants speak of preserving "the Nation's religious heritage," *Brief for Defendant-Intervenor United States* at 51, or "the role of religion in the history of the United States," *Brief for RLUSD* at 43, they are not referring to "religion" in terms of the religious views of all individuals. Rather, they are referring to "religion" in terms of Monotheism – i.e., **their religion**. Thus, the ardent desire of those wishing to maintain "under God" in the Pledge does not stem from how they value religion generally, but from how they value one specific brand of religion – i.e., Monotheism. And therein lies the offense. When government advocates for any religious view in exclusion of another – especially in the public schools – it runs afoul of the Establishment Clause. That is why the Act of 1954 – which Congress ("The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator."[22]) and President Eisenhower ("From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to

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years earlier ("[T]wo words have been added to the Pledge of Allegiance: 'under God.' Wouldn't it be a pity if someone said that is a prayer …?"), http://66.165.133.65/glurge/skelton.htm.

[22] H.R. Rep. No. 1693, 83rd Cong., 2nd Sess. 2 (1954). The reference to **"<u>the</u> <u>C</u>**reator," not "**<u>a</u> <u>c</u>**reator" should be noted.

the Almighty."[23]) clearly promulgated for impermissible Monotheistic purposes – should be overturned.

That is also why this Circuit, in *Newdow v. United States Cong.*, 328 F.3d 466, 487 (9th Cir. 2003) ("*Newdow III"*), *rev'd on standing grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) stated:

> In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of religious belief, namely, a belief in monotheism,

and why it was ruled that children in the public schools may not be urged[24] "to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism." *Id*. Just as would be the case for "Judaism," "Buddhism," or "Christianity," advocacy for "monotheism" comprises a clear constitutional violation.

(4) This case is not about those who do versus those who don't believe in God. It is about those who do versus those who don't believe in equality.

Statements such as "plaintiffs' ultimate goal appears to be to obliterate all public references to 'God,'" *Brief for amicus curiae County of Los Angeles* at 2-3, demonstrate a lack of understanding of the gravamen of the Complaint. To

[23] 100 Cong. Rec. 7, 8618 (June 22, 1954).
[24] "[T]he question is … whether the Establishment Clause forbids any American government from conceiving of itself as subject to some higher power … and then **urging** that self-concept on its citizens." *Brief for John Carey* at 10 (emphasis added).

Plaintiffs, governmental hostility toward Monotheism is just as wrong as governmental endorsement of that religious view. Thus, true "references" to or "acknowledgments" of our nation's religious heritage or the beliefs held by various constituencies are not only appropriate, they are welcomed. Similarly, assigning students to read the Mayflower Compact, the Declaration of Independence, or the Gettysburg Address (provided the assignments are not being made to serve a Monotheistic agenda) are activities that public schools should encourage.

That, however, is not what a pledge to "one Nation under God" entails. As was just indicated, Defendants and their *amici* aren't litigating to keep those words because of an affection for "history" or because that's what the Framers believed.[25] They're litigating because that's what **they** believe, and the fact that the Framers believed the same thing is simply their ticket to have "the power, prestige and financial support of government"[26] support their own views. As one *amicus* accidentally let slip, it is "an acknowledgment **of the existence of a 'supreme being'**" they seek. *Brief for County of Los Angeles* at 9 (emphasis added). Thus, that the Framers or others believed in God is not the message

[25] With atheism being illegal in virtually every state, *Roth v. United States*, 354 U.S. 476, 482 (1957) ("[O]f the 14 States which by 1792 had ratified the Constitution, … all … made either blasphemy or profanity, or both, statutory crimes."), it is no more surprising to learn that the Framers believed in God than it is to learn that they believed in creationism. Yet in neither *Epperson* nor in *Edwards* did the Supreme Court let that "history" trump the Establishment Clause.

[26] Engel v. Vitale, 370 U.S. 421, 431 (1962).

being sent. The message is that God exists, and that message – of a disputed religious belief – is what may not be "acknowledged" by government.

Disputed religious beliefs, however, most certainly may be espoused by individuals and groups. Thus, those who claim that "[t]he goal of those like Appellees has, and continues to be … to remove any reference to "*God*" from any public discourse," *Brief for Pacific Justice Institute* at 4, are totally confused. Plaintiffs have never even hinted at such a goal, which they find abhorrent. All they seek is equal treatment by government.

Which leads to the real issue in this litigation: why would anyone oppose that goal? Defendants and their *amici* have a Free Exercise right – which Plaintiffs would join them to protect and maintain – to bring God into the public square. What they don't have, however, is the right to have government enter that square in order to help them advocate for that religious view. This is especially so when it is the public **schools**, not the public square, where they want these governmental favors.

That is not equality. Nor is it "an acknowledgment," "ceremonial," or "*de minimis*." *See* EOR 90-96. It is an endorsement of a particular religious view. And it is a violation of the Constitution.

B. AMERICA'S RELEVANT HISTORY IS ONE OF FREEDOM OF CONSCIENCE, NOT BELIEF IN GOD

As a justification for having "under God" in the Pledge, allusions are repeatedly made to the Declaration of Independence, and its four references to a higher power. But those who note these references do not go nearly far enough. They should also reference the 1763 Treaty of Paris, the Articles of Association of 1774, the Declaration of the Causes and Necessity of Taking Up Arms, the Articles of Confederation, the 1783 Treaty of Paris, and myriad other official documents, all of which referenced God and/or Jesus. *Appendix*, page 4. What is noteworthy is not that the Constitution was written within this ocean of Monotheism and Christianity, but that it exists as an island, staggering for its secularity.

In fact, the only reference to religion in the body of the Constitution – the test oath clause of Article VI – is nugatory, declaring that, "no religious test shall ever be required as a qualification to any office or public trust under the United States." This is the case even though not a single state constitution had such a prohibition. In fact, of the eleven state constitutions in effect at the time of the founding, nine had religious tests as qualifications for public office. *Appendix*, page 5. If the Framers intended for belief in God to be part of government, why would they specifically prohibit an oath to "Him." Their Convention was in Pennsylvania. Surely they could have borrowed from its constitution and used, "I do believe in one God, creator and governor of the universe."

Likewise, why – when "so help me God" was specified for the oaths of office in the state constitutions – is that phrase absent in the oath of the President; the only oath provided in the Constitution's text?[27]

This secularity was neither unintentional nor unnoticed. In fact **everyone** who spoke on the power of the federal government to act in a religious manner – even those who wanted an acknowledgment of God – agreed that under this Constitution of enumerated powers, such power did not exist. *Appendix*, page 6.

If the foregoing isn't dispositive, **the very first act of Congress** surely is. The history of that act began on April 6, 1789, when a committee of five individuals was assigned "to bring in a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution." 1 Annals of Cong. 102 (1789). It was resolved:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A.B., a Representative of the United States in the Congress thereof, do solemnly swear (or affirm as the case may be) **in the presence of Almighty GOD**, that I will support the Constitution of the United States. **So help me God**."

[27] The claim that "George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words 'so help me God.'" *McCreary*, 125 S. Ct. at 2748 (Scalia, J., dissenting) is a myth, first alleged sixty-five years after the event. Griswold RW. *The Republican Court: American Society in the Days of Washington* (New York: D. Appleton & Co.; 1954) at 141.

(Emphases added.) The full Congress, however, rejected this oath. The final version they chose – "as required by the third clause of the sixth article of the Constitution" – was, "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." 1 Stat. 23. Thus, it wasn't as if the First Congress – busy with all their duties creating a new nation – simply failed to consider bringing God into the oath. **They affirmatively removed two references to God in their own oath of office.**

It simply not true that "our Nation was founded on a fundamental belief in God," H.R. Rep. No. 83-1693, at 2 (1954). The foundational idea was "freedom of conscience," with religion left entirely to the individual.

C. "UNDER GOD" IN THE NATION'S PLEDGE FAILS EVERY ESTABLISHMENT CLAUSE TEST

Each of the Defendants has claimed that the Supreme Court's Establishment Clause tests work in their favor. *Brief for RLUSD*, at 37; *Brief for John Carey*, at 16; *Brief for United States*, at 35 (citing *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005)). Plaintiffs strongly disagree.

(1) A claim that God exists – placed in the midst of the nation's sole pledge of allegiance – violates neutrality and equality.

When government interlarded the Pledge of Allegiance with "under God," it took one side in the quintessential religious question, "Does God exist?" That alone violates the neutrality that Justice Souter (writing for the majority in *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005) (string citation omitted)) recently deemed "the touchstone" of Establishment Clause jurisprudence.

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

Neutrality has also been seen as essential in majority opinions authored by Justice Ginsburg (requiring laws to "be administered neutrally among different faiths." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); Justice Thomas ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality." *Mitchell v. Helms*, 530 U.S. 793, 809 (2000)); Justice Kennedy (referencing "the guarantee of neutrality" in *Rosenberger v. University of Virginia*, 515 U.S. 819, 839 (1995)); and Justice Stevens ("government must pursue a course of complete neutrality toward religion." *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985)).

Thus, neutrality is the current "touchstone" of the Establishment Clause, as upheld by five of the seven justices who have written majority opinions in this

area of jurisprudence. The government is surely not being "neutral" when it takes the side of those who believe in God, while other individuals – such as Plaintiffs here – hold the completely contrary view.

Intimately related to neutrality is equality, which was key in James Madison's *Memorial and Remonstrance against Religious Assessments* – "the most important document explaining the Founders' conception of religious freedom."[28] Cited in 31 separate Supreme Court cases, by sixteen separate justices, in 33 separate opinions, *Appendix*, pages 7-8, the *Memorial and Remonstrance* was written in 1785 as a response to Patrick Henry's *Bill to Establish a Provision for Teachers of the Christian Religion*. In arguing against Henry's proposal, Madison mentioned equality fourteen times, for he saw that ideal as the founding principle of our government. "[E]quality," he wrote, "ought to be the basis of every law."[29]

In relation to the instant litigation, his statement that Henry's bill "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority,"[30] is exactly on point. As Plaintiffs have shown, EOR at 53-58, Atheists have been degraded from the equal rank of citizens since

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[28] McConnell M. *New Directions in Religious Liberty: "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age.* 1993 B.Y.U.L. Rev. 163, 169 (1993).
[29] *Memorial and Remonstrance against Religious Assessments*, II Writings of Madison 183, at 185-186, as cited in *Everson v. Board of Education*, 330 U.S. 1, 66 (1947) (Appendix of Justice Rutledge in dissent).
[30] *Id*., 330 U.S. at 69.

the nation's founding, and the placement of "under God" in the Pledge has not only reinforced, but it has furthered that degradation.[31]

That the neutrality central to the Religion Clauses of the First Amendment reflects what is essentially the Constitution's first equal protection provision was cogently stated in this Circuit:

> [W]hat the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions.

Newdow v. United States Congress, 328 F.3d 466, 491 (9th Cir. 2002) (Fernandez, J, concurring and dissenting), *rev'd on standing grounds, Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). It clearly serves neither neutrality nor equality when the government of a people – some of whom believe God does exist and some of whom believe God does not exist – incorporates only the former belief into the nation's sole patriotic oath.

[31] In the context of this case – which involves Atheistic parents, it is also worth noting that even appellate courts, in published opinions, have deprived Atheists of their custodial rights merely due to their religious beliefs. Volokh E. *Parent-Child Speech and Child Custody Speech Restrictions*. 81 N.Y.U. L. Rev. 631 (2006). As with most situations where blatant anti-Atheistic bias is ignored by society, one can imagine the uproar were it Judaism or Christianity that led a judge to abridge parents' rights.

(2) "Under God" in the Pledge fails the endorsement test.

In *Lynch v. Donnelly*, Justice O'Connor introduced the "endorsement test:"

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

465 U.S. at 692 (O'Connor, J., concurring). "Under God" fails this test, which also "does preclude government from conveying … a message that … a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherents." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring). The "particular religious belief" that there exists a God – plus the notion that we are "under" Him – is clearly favored and preferred by the current version of the Pledge. Any "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of this Monotheism. *Id*. at 76. Furthermore, the "reasonable observer" would realize that the government only allows that one religious view – i.e., that there is a God – into the Pledge. *Cf*. *Buono v. Norton*, 371 F.3d 543, 550 (2004) (holding that "a reasonable observer … would know … that the [government] has denied similar access for expression by an adherent of [a different] faith."

Of course, Justice O'Connor, herself, subsequently claimed that "under God" passed the endorsement test. *Elk Grove Unified Sch. Dist. v. Newdow*, 542

U.S. 1, 36 (2004) (O'Connor, J., concurring). Plaintiffs will simply lay out the facts for this Court, and ask that the test – not a sole Justice's application of it – be the proper guide. Justice O'Connor's volunteering that "it is a close question," 541 U.S. at 37 (O'Connor, J., concurring), suggests that she anticipated that others might rule differently. If "the text, legislative history, and implementation of the statute" are truly the factors to be used, Plaintiffs submit that many others, indeed, will determine that placing the words "under God" in the midst of the Nation's sole Pledge of Allegiance endorses the purely religious ideas that (a) there is a God, and (b) our nation is under "Him."

(a) The "text" is unquestionably religious.

The relevant text of the Act of 1954[32] was "under God." This is facially, entirely and exclusively religious text. In fact, it would be difficult to imagine a more purely religious two-word phrase.

(b) The "legislative history" is unquestionably religious.

That the legislative history behind the Act of 1954 is categorically religious has been demonstrated in detail. EOR at 59-62. To briefly summarize, "under God" was first placed into the previously secular Pledge by "the largest Catholic laymen's organization." That organization encouraged Louis Charles Rabaut – a congressman from Michigan – to sponsor a bill codifying this religious conversion.

[32] Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249.

Rep. Rabaut proudly noted the purely religious notions and events – including a Sunday church service – that played key roles in the Act's passage. He also placed into the Congressional Record the outrageous statement that "An atheistic American … is a contradiction in terms."[33]

He was not alone among his fellow legislators in expressing so palpably pro-Monotheistic and anti-Atheistic a bias. *See* EOR at 64-73 (providing eight and a half pages of Congressional Record citations). Thus, the House Report accompanying the bill to place the purely religious words, "under God," into the previously secular Pledge not only memorialized the legislature's pro-Monotheism:

> The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator,[34]

but it expressed an explicit anti-Atheistic viewpoint as well:

> At the same time it would serve to deny the atheistic and materialistic concepts of communism …"[35]

As if to reinforce the purely religious emphasis of the bill, the Report also noted that President Eisenhower had recently met with a Catholic Bishop, a

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[33] One might consider how long a congressman who placed "A Jewish American … is a contradiction in terms," "a Catholic American … is a contradiction in terms," or "a Black American … is a contradiction in terms" into the Congressional Record would remain in office. Congressman Rabaut not only served out his term, but he was reelected another three times.
[34] H.R. Rep. No. 1693, 83rd Cong., 2nd Sess. 2 (1954). The reference to **"<u>the</u> <u>C</u>**reator," not "**<u>a</u> <u>c</u>**reator" should be noted.
[35] *Id*.

Protestant minister, and a Jewish Rabbi in a "Back to God appeal."[36] Moreover, the Report's authors claimed, "The phrase 'under God' recognizes … the guidance of God in our national affairs."[37] Obviously, to an Atheist, this is as offensive as recognizing "the guidance of Jesus in our national affairs" might be to a Jew or "the guidance of the Pope in our national affairs" might be to a Protestant.

Any "reasonable observer" has to conclude that the legislative history of the Act of 1954 is unambiguously religious.

(c) The "implementation of the statute" was unquestionably religious.

The implementation of the statute officially took place on Flag Day, June 14, 1954. After being asked by one of the sponsoring legislators to have a photo for the occasion made along with "a Protestant, a Catholic and a Jew,"[38] President Eisenhower announced:

> From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[39]

That, alone surely suffices to demonstrate the intensely religious nature of the statute's implementation. However, in case more evidence is required, that

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[36] *Id*. at 3. *Cf. McCreary County v. ACLU*, 125 S. Ct. 2722, 2738 (2005): "[A]t the ceremony … the county executive was accompanied by his pastor … The reasonable observer could only think that the Counties meant to emphasize ... the … religious message."
[37] *Id*. Incredibly, this was part of an attempt to deny the Establishment Clause transgression. Of course, that Congress felt it necessary to make this denial speaks volumes. "The lady doth protest too much, methinks." Shakespeare W. *Hamlet* (III, ii, 239).
[38] EOR 77.
[39] 100 Cong. Rec. 7, 8618 (June 22, 1954).

"Onward, Christian Soldiers!" was the music played as the flag ran up the flagpole should indubitably clinch the matter. *See*, *also*, EOR 74-76.

This "text, legislative history, and implementation of the statute" demonstrates that there has been an unquestionable violation of the endorsement test. "Under God" was intruded into the Pledge to affirm that Americans, as a people, actively believe in God. Congress, therefore, not only made a law "**respecting** an establishment of religion," it made a law **establishing** religion – namely, Monotheism[40] – in a country with millions of Atheistic[41] citizens.

(3) "Under God" in the Pledge fails the *Lemon* test.[42]

Although it has had numerous critics, the test described in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) was reaffirmed last year by the Supreme Court, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), and endorsed just three months ago in the Ninth Circuit. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1191 (9th Cir. 2006).

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[40] "[T]he deity the Framers had in mind" … is *inescapably* the God of monotheism. *McCreary*, 125 S. Ct. at 2753 (n.3) (Scalia, J., dissenting) (emphasis in original).
[41] Others – such as polytheists, pantheists, and those with "no religion" – are also excluded.
[42] Although it has had numerous critics, the test described in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) was reaffirmed just last year by the Supreme Court, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), and endorsed just three months ago in the Ninth Circuit. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1191 (9th Cir. 2006).

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Both questions are answered affirmatively in this case.[43]

(a) Congress's purpose in promulgating the Act of 1954 was to endorse Monotheism and to disapprove of Atheism.

The Pledge had been serving its patriotic and unifying purposes for sixty-two years when Congress passed its Act of 1954. Thus, neither a desire for patriotism nor for unity was behind the intrusion of "under God" into that previously secular passage. Rather, it was advocacy of Monotheism that underlay the Act. Even if one couches that advocacy in the context of the Cold War, where Congress sought "to distinguish this country from the Soviet Union," *Brief for John Carey* at 40, the Constitution was still violated because of the illicit, purely religious manner in which it engaged in that purported goal.

Highlighting the differences between the American and Soviet societies was certainly a worthy ambition, for the freedoms of our democracy were far superior to the subjugation of Soviet communism. But Congress misidentified the distinguishing feature. The repression of our rival fifty years ago was not due to

[43] *Lemon*'s "entanglement prong" is not at issue.

Atheism any more than that of the Spanish five hundred years ago was due to Catholicism, or that of the Taliban today is due to Islam. Our way of life was superior because we had religious freedom, not because of any one majority religious belief, and the reality is that – in declaring that ours is a land of (Christian) Monotheists – Congress took a step backwards towards the religious oppression it rightfully meant to protest.

"The proper inquiry under the purpose prong of *Lemon* … is whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). As mentioned, Congress, itself, stated its purpose was to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator … [and] to deny the atheistic and materialistic concepts of communism."[44] Thus, even if one accepts that differentiating ourselves from the Soviets was the ultimate goal behind the Act of 1954, the immediate purpose was to both endorse Monotheism and to disapprove of Atheism (which, of course, is facially apparent from a statute that does nothing but intrude the purely religious phrase, "under God," into a Nation's sole Pledge). Accordingly, the purpose prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was violated.

[44] H.R. 1693, 83rd Cong., 2nd Sess. (1954).

(b) "Under God" in the Pledge has the purely religious effects of endorsing Monotheism and disapproving of Atheism.

"Consciously or otherwise, teachers … demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel School Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Accordingly, when teachers – every school day – lead small children in reciting that ours is "one Nation under God," they inculcate those children with the belief that God exists.

Social science data (in addition to explicit Congressional and Presidential intent) confirm this. Children who recite the Pledge interpret the words "under God" in their purely religious sense.[45] To suggest otherwise – claiming that children are learning "the Nation's religious heritage through voluntary recitation of the Pledge," *Brief for RLUSD* at 51 – is ludicrous. As noted by the Secretary of Education, himself, "under God" in the Pledge is an "expression of faith."[46] A group "expression of faith" in "God" obviously has religious effects.

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[45] Such data were provided in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *Brief for amicus Americans United for Separation of Church and State et al.* at 11-15 (citing Hess RD and Torney JV. *The Development of Political Attitudes in Children* 105 (1967); Seefeldt C. "*I Pledge* ...," Childhood Educ. 308 (May/June 1982); Freund EH and Givner D. *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))),.

[46] On June 27, 2002, Secretary of Education Rod Paige issued a statement on the Ninth Circuit's Pledge decision, in which he acknowledged that, "under God" in the Pledge is an "expression of faith." Accessed at http://www.ed.gov/news/pressreleases/2002/06/06272002.html on July 2, 2006.

It should be noted that the Defendants did not even attempt to present evidence to the contrary. Thus, the allegations – *see*, *e.g.*, Complaint ¶¶ 90-92, 95, 101-103, 128 (EOR at pp. 20-26) – remain undisputed in the record. Especially in combination with the myriad other governmental endorsements of (Christian) Monotheism – the untoward effects of "under God" in the Pledge are not only profound, but often severely injurious. Plaintiffs are at risk of suffering in precisely the same manner as those whose personal stories are recounted in the *Brief for amicus curiae Atheists and Other Freethinkers*. They also perpetuate the "political outsider" status of Atheists, thus serving to maintain "the gap between acceptance of atheists and acceptance of other racial and religious minorities [which] is large and persistent."[47]

Public school districts have an affirmative duty to remedy – not promote – such situations. As specified by the United States Department of Education,[48] "teachers and other public school officials may not lead their classes in … religious activities," since such "conduct is 'attributable to the State' and thus violates the Establishment Clause." Having impressionable students face the nation's flag,

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[47] Edgell P, Gerteis J, and Hartmann D. *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*. Amer Sociol Rev (April, 2006) Vol. 71, pages 211-34, at 230. If the Court truly has any question about the profundity of these effects, Plaintiffs respectfully request a remand so that they might have an opportunity to provide the necessary evidence.

[48] *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*. February 7, 2003. Accessed on July 1, 2006 at http://www.ed.gov/policy/gen/guid/religionandschools/index.html. *See also Complaint* ¶¶ 153-155, EOR at 33.

place their hands over their hearts, and voice in unison that ours is "one Nation under God," is clearly a religious activity which is "attributable to the State." Accordingly, Defendant RLUSD may not even allow, much less require, their "teachers and other public school officials" to engage in this practice.

(4) "Under God" in the Pledge fails the "outsider" test.

Mirroring Madison's concern about "degrad[ing] from the equal rank of citizens all those whose opinions in religion do not bend to those of the legislative authority,"[49] the Supreme Court has often used the "outsider" test. Under this test, "[governmental] sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community.'" *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000) (citation omitted). Clearly, Plaintiffs here – like most individuals who do not adhere to Monotheism – have been sent that message. As noted, it is a message that can have truly severe, deeply injurious and lifelong consequences. *See Brief for Atheists and Other Freethinkers*.

[49] *See* at page 21, *supra*.

(5) "Under God" in the Pledge fails the "imprimatur" test.

> When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.

Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring) (footnote omitted). This renders the given activity unconstitutional, even when "nominally 'neutral'" (which the Act of 1954 most definitely is not):

> If public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause.

Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 264 (1990) (Marshall, J., concurring). Accordingly, it was the lack of any "imprimatur of state approval" of any religious ideology that the Supreme Court found important in determining that vouchers were permissible in *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (citation omitted). Because the "imprimatur of state approval" of belief in God is unmistakable in the instant action, the "under God" language must be stricken from the Pledge.

(6) "Voluntary" teacher-led daily recitations that ours is "one Nation under God" fail the coercion test.

The "coercion test" – noted in *Engel v. Vitale* and refined in *Lee v. Weisman* – is also violated. In *Lee*, the Court looked at public and peer pressure, recognizing that "though subtle and indirect, [this pressure] can be as real as any overt

compulsion." *Id*. at 593. This was the case with students on the brink of adulthood, who merely listened twice in their entire school careers as religious dogma was proffered by an invited guest. Here – with younger, more impressionable children being encouraged by government-employed teachers to actively recite religious dogma more than 2000 times[50] – the coercion is obviously far greater. EOR 97. As was categorically stated, "[A]s a matter of our precedent, the Pledge policy is unconstitutional." *Elk Grove*, 541 U.S. at 48 (Thomas, J., concurring).

Couching the constitutional transgression within a patriotic exercise, incidentally, does not lessen the offense. On the contrary, it exacerbates "the real conflict of conscience faced by the young student," *Lee v. Weisman*, 505 U.S. 577, 596 (1992), and increases "'the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public.'" *Barnette*, 319 U.S. at 635 (n. 15) (citation omitted). This is neither hyperbolic hypothetical. There are real effects from the "under God" language of the Pledge, foisted upon real children, which can have severe, lifelong, social and intellectual adverse consequences. *Brief for Atheists and Other Freethinkers*. Defendants have shown no countervailing benefits that outweigh these harms. The comfort the majority feels from governmental displays of its preferred religious dogma should not be paid for with

[50] Schools are in session at least 175 days per year. Cal. Ed. Code § 41420. With thirteen years of attendance, at least 2,275 school days are scheduled for each child.

stigmatization and emotional turmoil inflicted upon a subset – whatever its size – of our youngest citizens.

D. A PRINCIPLED APPLICATION OF SUPREME COURT CASE LAW AND DICTA OVERWHELMINGLY SUPPORTS PLAINTIFFS

(1) The Supreme Court's On-Point Holdings Support Plaintiffs.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Accordingly, **in nine of the nine previous cases** involving government-sponsored religion in the public education arena – often of a degree far less than is occurring here – the Court has ruled the challenged practice invalid. *McCollum v. Board of Education*, 333 U.S. 203 (1948) (public schools provided as setting for religious teachers); *Engel v. Vitale*, 370 U.S. 421 (1962) ("voluntary" teacher-led prayers); *Abington School District v. Schempp*, 374 U.S. 203 (1963) (teacher-led Bible readings); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (teaching evolution); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (reminder of prayer option); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching of "creation science"); *Lee v. Weisman*, 505 U.S. 577 (1992) (graduation prayer); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (prayer at football games). This is a remarkable streak that no lower

court should overturn without a strongly principled basis. Defendants have presented **no** principled basis for ruling that schoolchildren may be daily inculcated with the notion that we are "one Nation under God."

Significantly, none of the aforementioned cases had all the injurious characteristics found in "under God" recitations. In *McCollum*, for instance, all the teachers of religion came from the outside, and no child received the religious instruction without their parents' agreement. In the instant case, public school teachers impose the religious dogma upon all children. In *Abington*, the religion was a separate exercise. Here, it is an unavoidable component of the school's main act of patriotism. The religion involved in *Epperson* and *Edwards* was imposed in only a small portion of the curriculum of classes taken once or twice in a student's career. The Pledge is recited every day, for thirteen years. No student or teacher actively participated in having copies of the Ten Commandments on the classroom walls in *Stone*. In unison, students and teachers stand up, face the nation's flag, place their hands over their hearts and affirmatively state that we are "one Nation under God." Pledge recitations are more coercive than the graduation prayer of *Lee* in at least seven different ways. EOR at 97. In *Santa Fe*, the religious activity was student-led, and occurred in the informal atmosphere of a handful of extra-curricular football games, where few, if any, young children would have been

present. "Under God" is led by teachers, in a classroom environment, every day, in classrooms full of children as young as four or five.

Because *Engel* and *Wallace* (plus one other religion case not involving the public schools, and an additional public school case not involving religion) are so strongly on-point, their holdings will be discussed individually.

(a) *Engel v. Vitale* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

Engel v. Vitale, 370 U.S. 421 (1962), is essentially identical to the instant action. In *Engel*, the Court ruled that a brief morning ritual where public school teachers led "willing students" in making a religious statement is "a practice wholly inconsistent with the Establishment Clause." *Id*. at 424. Here, RLUSD's teachers lead "willing students" in RoeChild-2's class in a daily joint recital that makes the religious statement, "We are one Nation under God."

That *Engel* can be distinguished from the instant case because the religious verbiage in *Engel* was a "prayer" (and "one Nation under God," allegedly, is not) is a straw man. If RLUSD's teachers – like the teachers in *Engel* – had their public school students stand up and recite just those six words alone ("Okay, class. Everybody stand up and join me to say, 'We are one Nation under God.'"), this case would be a slam-dunk. Thus, the verbiage does not distinguish the two cases.

That the religious dogma has been placed within a patriotic pledge also makes no difference. As noted, melding the religion with the patriotism increases,

it doesn't mitigate, the offense. This is especially true where the students all stand in unison, face the flag, and place their hands over their hearts as they join in the teacher-led recitations. To further demonstrate that *Engel* is controlling, the Court might consider the Pledge with the Regent's prayer substituted for "under God." The prayer was:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country,

370 U.S. at 422. Surely, those same words would not suddenly have become constitutional if New York simply moved into the daily patriotic oath:

> I pledge allegiance to … one Nation under Almighty God, upon whom we acknowledge our dependence and whose blessings we seek, indivisible, with liberty and justice for all.

Engel also showed that neither the denominational neutrality nor the voluntary nature of a recitation lessens the constitutional infirmity:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.

Engel, 370 U.S. at 430. Similarly, the harm was not mitigated by the prayer's "brief" nature:

> To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the

> words of James Madison, the author of the First Amendment: "[I]t is proper to take alarm at the first experiment on our liberties. . ."

Engel, 370 U.S. at 436 (*Memorial and Remonstrance* citation omitted). The propriety of that "alarm" is just as appropriate with "under God" in the Pledge.

Engel stands for the proposition that short, denominationally neutral and voluntary religious activities – such as standing in unison to claim that we are "one Nation under God" – are constitutionally infirm when led by teachers in the public schools. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id*. at 431.

(b) *Wallace v. Jaffree* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

In *Wallace v. Jaffree*, "a 1-minute period of silence in all public schools" to be used "for meditation," 472 U.S. at 40, was changed to read "for meditation **or voluntary prayer**." *Id*. (emphasis added). Relying on *Lemon*, the *Wallace* Court wrote:

> In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive.

472 U.S. at 56 (footnote omitted). It made this finding by looking at the statements of the legislators, which showed – nowhere nearly as powerfully as the myriad statements of the 83rd Congress[51] – that an endorsement of religious belief underlay the addition of the "or voluntary prayer" phrase. "Such an endorsement," wrote the Court, "is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id*. at 60.

Wallace, therefore, is directly on point, since a previously secular statute was altered for religious purposes here as well. A finding that Congress did not violate that neutrality (and *Lemon*'s purpose prong) with its Act of 1954 is simply untenable. This is especially true inasmuch as *Wallace* simply notified students of a religious option, was limited to their school environment, and had at issue only a State's "power, prestige and financial support." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). In the instant case, there is no religious option (i.e., "under God" is now prescribed in the nation's pledge[52]), the Pledge reinforces Monotheism outside as well as inside the school environment, and the recitation is backed by the entire federal government's "power, prestige and financial support," not just that of Alabama.

[51] EOR at 64-73. *See*, *also*, EOR 47-63, 74-83.
[52] 4 U.S.C. § 4.

(c) *Allegheny County* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

Although it did not involve a public school setting, *Allegheny County's* creche holding is also controlling. The creche – situated on the Grand Staircase of the County Courthouse – is perfectly analogous to "under God" situated in the midst of the Pledge. In fact, the only significant differences are (i) the *Allegheny* creche was passive (whereas the Pledge invites active, group participation, with vocalization of the religious phrase), (ii) the creche was not in a public school setting (whereas the Pledge is in such a setting[53]), (iii) the creche was present only during the Christmas season (whereas the Pledge is recited throughout the school year), and (iv) the creche was seen by perhaps thousands, only in Pittsburgh (whereas the Pledge is recited by tens of millions throughout the nation (and beyond)).

As was stated in *Allegheny* (speaking of the creche):

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus … the [government] sends an unmistakable message that it supports and promotes the … religious message.

492 U.S. at 599-600 (footnote omitted). This applies precisely to "under God" in the Pledge.

[53] In fact, the Supreme Court specifically noted in *Allegheny* that even the menorah – which was deemed to be permissible – may have been ruled unconstitutional had it been placed within a public school setting. *See* at footnote 6, page 1, *supra*.

(d) *Brown v. Board of Education* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

Perhaps more than any other case ever decided by the Supreme Court, *Brown v. Board of Education*, 347 U.S. 483 (1954) stands as a monument to the Judiciary, to the Constitution, and to the Constitution's magnificent guarantee of equal protection. In fact, *Brown* is one of the events in our history that makes Americans truly want to stand up, face the flag, and pledge our allegiance. Because the Constitution treats religious belief and race identically, *Brown* is almost directly on-point.

The "almost" stems from the fact that the doctrine overturned in *Brown* – i.e., "separate but equal" – at least ostensibly was providing equality to the two races. In the instant case, no one can allege that there is any semblance of equality in the way government treats Monotheists as opposed to Atheists.

Perhaps this acceptance of official "disregard of devout atheists"[54] is what leads Defendants to miss how discriminatory is their quest. Although Plaintiffs recognize that many find it disturbing to hear Plaintiffs making analogies between their plight and that of blacks (who clearly have suffered more egregious abuses), the data consistently show that animus towards Atheists is greater than that towards any other minority, racial or otherwise. *See*, *e.g.*, at page 33, *supra* (footnote 47). When the Gallup organization asked Americans in 1958 if they

would vote for a "negro" candidate for President, 53% said no. The same 1958 poll showed that 75% of Americans wouldn't vote for an Atheist. At the last poll – in 1999, with government having ended its policies whereby it treated blacks as inferiors – the number unwilling to vote for a black dropped to 4%. That year – with government persisting in its endorsements of Monotheism (including having its future electorate start each day by pledging to "one Nation under God") – the number willing to admit that they wouldn't vote for an Atheist still stood at an appalling 48%.[55] Likewise, no state today would dare have a constitutional provision denying to blacks the right to hold public office. Eight states, at this very moment, have such provisions excluding Atheists. *Appendix*, page 9.

Thus, the Court might consider the government's placement of "under God" in the Pledge as might consider separate water fountains, etc., for blacks and whites. Although there is no overt injury from having to drink at one fountain versus another, the stigmatic injury sent – that "those people" are not as good as "we" are – is still significant. In the event that such stigmatic injuries are unseen to Defendants and others, the statement of Senator Robert C. Byrd in the aftermath of *Newdow I*, referring to Atheists, is revealing: "They are not going to have their

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[54] *McCreary County v. ACLU*, 125 S. Ct. 2722, 2753 (2005) (Scalia, J., dissenting).
[55] Polls given July 30-August 4, 1958 and February 19-21, 1999. Copyright: The Gallup Organization, Princeton, NJ. A.I.P.O. See, www.gallup.com and www.gallupjournal.com.

way. The people of the United States are not going to stand for this." 148 Cong. Rec. S6306 (June 28, 2002)).

Certainly, the constitutional differences between:

> 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,[56]

and:

> [The black race] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race.[57]

are trivial. Likewise, justifying a continuation of "under God" in the Pledge by stating:

> Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court."[58]

seems little different from justifying a continuation of segregation with:

> [W]e are now providing and maintaining … separate waiting rooms, separate water fountains, and toilet facilities for members of the white and Negro races.[59]

The Supreme Court in *Brown* realized that equality is far more important than bogus excuses. As Appellant-Intervenor United States wrote a half century ago (maintaining an extraordinarily different posture than it holds today):

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[56] H.R. Rep. No. 1693, at 2.
[57] *Scott v. Sanford*, 60 U.S. 393, 407 (1857).

> In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or **religion**, or color, or land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."

Brief for amicus curiae United States at 2, *Brown v. Board of Education*, 347 U.S. 483 (1954) (citing President Truman's Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2) (emphasis added). Length restrictions prohibit Plaintiffs here from providing the wealth of similar prose to be found in that brief. Suffice it to say that the difference of approach here is startling, and that this case is one where the choice is just as it was in 1954: writing an opinion as the Supreme Court did in *Brown* or one in the mold of its predecessor, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

(2) The Supreme Court's Principled Dicta Support Plaintiffs.

The foregoing on-point holdings – especially in conjunction with an application of the Supreme Court's tests and a desire to follow the Constitution's basic principles – should dispose of this case. "It is to the holdings of our cases,

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[58] *McCreary*, 125 S. Ct. at 2748 (Scalia, J., dissenting).
[59] *United States v. Montgomery*, 201 F. Supp 590, 592 (D. Ala. 1962).

rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994). Nonetheless, Defendants resort to not just *dicta*, but *obiter dicta* "expressed in passing and hav[ing the] le[ast] persuasive value," *Brief for amicus curiae National Legal Foundation* at 4, in the hopes of maintaining their religious preference within the Pledge. Their efforts are unavailing.

To begin with, the Justices of the Supreme Court have proffered an overwhelming number of principled statements which – applied to "under God" in the Pledge – would serve to invalidate those words. *See*, *e.g.*, EOR at 112-116 (providing statements from 29 of thirty justices, all of which would invalidate "under God"), EOR 117-134 (providing 200 principled Supreme Court statements that would invalidate "under God"), and EOR 135-142 (providing 7 ½ pages of dicta just from *Lee* and *Santa Fe*, which would invalidate "under God"). Thus, it is questionable, at best, to rely on the very few instances where a justice – seeking to maintain a consensus against a dissenter who points out that the majority's reasoning would lead to invalidation of the Pledge – suggests that "under God" may be permissible.

The pre-*Elk Grove* dicta cited by Defendants were always "expressed in passing," with no discussion of the Pledge, its history, or its effects.[60] Because it is inappropriate to place significant weight on a statement that "has never received full plenary attention," *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979), this Court is in no way bound by those rare statements. "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citation omitted).

In fact, the judicial *dicta* of those cases – i.e., those which stemmed from "'reasoned consideration and elaboration upon a legal norm' and have much more persuasive authority," *Brief for National Legal Foundation* at 4 – are the statements that came from the dissenting Justices, who concluded that application of the Court's Establishment Clause tests should invalidate the "under God" phrase. Admittedly, rather than invalidating the Pledge, the "personal predilections" of each of these Justices would have resulted in invalidating the test. Nonetheless, each test was approved by the majority, and it is the test that the lower courts are obligated to apply, not a dissenting Justice's complaints about it.

[60] Curiously, while pressing for this reliance (on statements made in cases that had no briefing whatsoever on the "under God" issue), Defendants simultaneously argue that the considered opinion of this Circuit in *Newdow III* – a case that was fully briefed – holds no precedential value (despite that plaintiff having Article III standing).

In *Wallace*, for instance, "the established principle that the government must pursue a course of complete neutrality toward religion" was reiterated. *Id*. at 60. Chief Justice Burger appropriately queried, "Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method."[61] *Id*. at 88 (Burger, C.J., dissenting). Dissenting in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), Justice Scalia provided a list of practices (including the Pledge of Allegiance) which he indicated conflict with the plurality's "assertion … that government may not 'convey a message of endorsement of religion'" *Id*. at 29-30 (Scalia, J., dissenting).

That invalidation of "under God" in the Pledge should follow from the "outsider" test was seen in *Allegheny County*. There, Justice Kennedy noted what is irrefutable:

> [I]t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

492 U.S. at 672-673 (Kennedy, J., dissenting). He continued, "Thanksgiving Proclamations, the reference to God in the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court … constitute practices that the Court

[61] Incidentally, Chief Justice Burger obviously agreed that "under God" is religious, and that Congress inserted the words "under God" to endorse a religious view: "The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that 'our people and our Government [are dependent] upon the moral directions of the Creator.'" 472 U.S. 38 (Burger, C.J., dissenting) (n. 3) (citation omitted).

will not proscribe, but that the Court's reasoning today does not explain." *Id*. at 674 n.10.

Justice Kennedy brought to the fore the very real issue of "coercion" in *Lee v. Weisman*. There is no question that small children have essentially no choice but to join their fellow students when led by their public school teachers in a daily ritual, or that the rare young person with sufficient fortitude to display her disbelief in God would be ostracized in today's society by exempting herself from such a routine. *See Brief for Atheists and Other Freethinkers.* In consequence, Justice Scalia appropriately pointed out that "[i]f students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge." 505 U.S. at 639 (Scalia, J., dissenting).

Thus, Justices of the Supreme Court have acknowledged that the neutrality, endorsement, outsider and coercion tests all demand removal of "under God" from the Pledge. Especially in view of the **holdings** previously discussed, plus "the Court's assertion that governmental affirmations of the society's belief in God is unconstitutional," *McCreary*, 125 S. Ct. at 2750 (Scalia, J., dissenting), **these** are the dicta – where "under God" has been measured against the accepted Establishment Clause tests – that the lower courts should be following. Defendants' reliance upon scattered, shallow statements (made without any

discussion of the events or effects related to the Pledge, and uttered in the hopes of garnering the support of a judicial or popular majority) is misplaced.

(3) *Elk Grove v. Newdow* is of little value in assessing "under God" in the Pledge of Allegiance

Of the eight justices who heard *Elk Grove*, five expressed no opinion at all regarding the constitutionality of "under God." Additionally, two of the three who did express opinions are no longer on the bench, and the third gave conflicting signals. Thus, little guidance is provided by the Supreme Court in that case.

To be sure, the three concurring Justices concluded that "under God" is permissible. However, three does not make a majority. Furthermore, their approaches were questionable. Chief Justice Rehnquist, for example, relied on historical facts, all of which could have been easily countered. "[T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition." *Abington School District v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).[62] Additionally, he (i) emphasized that the Pledge

[62] Not only did Chief Justice Rehnquist selectively cite the Framers, but he selectively cited the 1954 Congress, as well. For instance, he provides only one statement from Rep. Louis C. Rabaut, the chief sponsor of the Act of 1954, in which it was claimed that the purpose of the act was "to contrast this country's belief in God with the Soviet Union's embrace of atheism. *Elk Grove*, 542 U.S. at 25 (Rehnquist, C.J., concurring). Ignoring the fact that this, in and of itself, shows an improper religious purpose, the myriad other statements of Rep. Rabaut – including his placement in the Congressional Record of "An atheistic American … is a contradiction in terms," EOR 64, and "the American way of life is … 'a way of life that sees man as a sentient being created by God and seeking to know His will, whose soul is restless till he rests in God,'" *id*. – surely reveals an invalid purpose and forbidden endorsement.

was "not to any particular God," 542 U.S. at 31 (which is irrelevant); (ii) compared "under God" to "with liberty and justice for all," *Id*. at 32 (which fails to recognize the basis of the Establishment Clause, i.e., that government is to treat religious ideas differently from all others); and (iii) spoke pejoratively of a "'heckler's veto'" (thereby failing to recognize "the very purpose of a Bill of Rights." *Barnette*, 319 U.S. at 638).

Justice O'Connor's attempt to show that "under God" in the Pledge passes her endorsement test has already been discussed. Again, she admitted that "it is a close question," 542 U.S. at 37 (O'Connor, J., concurring). *See* at pages 26-29, *supra*.

Finally, there is Justice Thomas, whose main argument was based on a position (i.e., that the Establishment Clause does not protect any individual right and that it, therefore, "resists incorporation," 542 U.S. at 45-53 (Thomas, J., concurring)) that is not only directly contrary to what was stated by the majority ("The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment," *Elk Grove*, 542 U.S. at 8), but that no other Justice has embraced in more than sixty years. His opinion in this regard, therefore, is hardly binding on this Court. What is binding, though, is Supreme Court's precedent, and – as noted

– Justice Thomas found that "as a matter of our precedent, the Pledge policy is unconstitutional." *Id*. at 49.

E. ONLY ONE CIRCUIT – THIS CIRCUIT – HAS CORRECTLY ASSESSED "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE

Almost immediately after Congress intruded "under God" into its midst, the Pledge was challenged. *Lewis v. Allen*, 159 N.Y.S.2d 807 (1957), aff'd 207 N.Y.S.2d 862 (1960). This was obviously a futile act in the anti-Atheist environment of America in the Cold War. EOR 53-58, 64-73. Because that case and *Smith v. Denny*, 280 F. Supp. 651 (E.D. Cal., 1968), *dismissed as moot*, 417 F.2d 614 (9th Cir. 1969) were decided before the Supreme Court's current Establishment Clause tests were developed, they will be disregarded here.

The appellate level cases that merit discussion are *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow III"*), *rev'd on standing grounds, Elk Grove Unified Sch. Dist.* v. *Newdow*, 527 U.S. 1 (2004) – which ruled that the Pledge was unconstitutional in the public schools – and two sister circuit cases (*Sherman v. Community Consolidated School Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) and *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005)) – which decided the Pledge was constitutional.

In reviewing these cases, one might first consider the statement of Justice Alito, made during his confirmation hearings earlier this year. Responding to a query regarding *Elk Grove*, he stated, "Often, there are conflicting freedoms and that makes the case difficult."[63] Surely that is true. But in this litigation, there is no "conflicting freedom" at issue. There is only "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*," *McCreary County*, 125 S. Ct. at 2756 (Scalia, J., dissenting) (emphasis in original), which is not a freedom at all when instigated by government. On the contrary, that is precisely what the Establishment Clause exists to prevent. As Justice Douglas pointed out in an obviously ineffectual attempt to end the misuse of his *Zorach* quotation (*see*, *e.g.*, *Brief for RLUSD* at 55, *Brief for United States* at 29 & 34, *Brief for John Carey* at 42):

> [W]e stated in *Zorach* v. *Clauson*, 343 U.S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being."
>
> But … if a religious leaven is to be worked into the affairs of our people, **it is to be done by individuals and groups, not by the Government**. … The idea, as I understand it, was to limit the power of government to act in religious matters, not to limit the freedom of religious men to act religiously **nor to restrict the freedom of atheists or agnostics.**

[63] Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, before the Senate Comm. on the Judiciary, 109th Cong., 2nd Sess., S. Hrg. 109-277 (January 9-13, 2006).

McGowan v. Maryland, 366 U.S. 420, 563-564 (1961) (Douglas, J., dissenting) (emphases added). In other words, "The First Amendment commands government to have no interest in theology." *Id*. at 564.

Only one freedom is involved: the freedom to have a government that does not "lend its power to one or the other side in controversies over religious … dogma." *See* at page 1, *supra*. Or, as was just enunciated by a sister circuit a week and a half ago, "the pertinent liberty here is protection against government imposition of a … religious preference." *Chaplaincy of Full Gospel Churches v. England*, No. 05-5143 (D.C. Cir. July 7, 2006), 2006 U.S. App. LEXIS 16952 at 29. Having a national pledge that states we are "one Nation under God," therefore – especially to be recited in the public schools – is prohibited.

The Ninth Circuit (unlike the Fourth and the Seventh) adhered to these ideals in *Newdow III*. Applying the Supreme Court's Establishment Clause tests (to which the *Sherman* and *Myers* Courts barely gave lip service), it ruled – as was later unequivocally confirmed by Justice Thomas ("[A]s a matter of [Supreme Court] precedent, the Pledge policy is unconstitutional." *Elk Grove*, 541 U.S. at 48 (Thomas, J., concurring)) – that "All in all, there can be little doubt that under the controlling Supreme Court cases the school district's policy fails the coercion test." *Newdow III*, 328 F.3d. at 488.

This was done by proceeding methodically, as Judge Goodwin – writing for the panel majority – first focused on determining the appropriate Establishment Clause test to use. To make this determination, he looked to *Lee v. Weisman*:

> [T]he Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so."

Newdow III, 328 F.3d at 486 (citations omitted). Looking to the *Lemon*, endorsement and coercion tests, he continued:

> We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test.

Id. at 487. It might be noted, however that – in regard to the endorsement and *Lemon* inquiries – Judge Goodwin had earlier applied those two tests, finding that they, too, led to the conclusion that it is unconstitutional to have "under God" in the Pledge. *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow I*").[64]

[64] *Newdow I* was the panel's original decision, amended by *Newdow III* upon the denial of a rehearing *en banc*, and subsequently reversed on standing grounds in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004).

In addition to the foregoing, Judge Goodwin dealt with the issue that no other panel (nor any Supreme Court Justice) has ever addressed: how is "under God" in any way different from "under" any other religious entity?

> A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.

Id. Defendants and their *amici* never address this either. Perhaps they will argue that the Supreme Court's clear pronouncement that "governmental neutrality" is "[t]he touchstone" of Establishment Clause jurisprudence, *see* at page 22, *supra*, can be superseded by "our history." Even if that contention (which would also allow "under Male Superiority" and "under White Dominion" into the Pledge) were correct, it would only apply to the "Vishnu," "Zeus," and "no god" examples in the *Newdow III* prose. "Under Jesus" would still be permissible under this rationale. *See Brief for Madison-Jefferson Society.* In fact, "under Jesus" would have a **greater** claim than "under God," since only Jesus – not God – is specifically referenced in the definitive document. United States Constitution, Article VII ("Done … in the year of our Lord one thousand seven hundred and eighty seven"). Therefore, unless the Court is willing to declare that the Framers intended to allow Christianity to be the national religion of a nation whose government "shall make no law respecting an establishment of religion," this "history" argument fails.

This Circuit's *Newdow III* opinion considered the relevant facts, formed its conclusion by applying the Supreme Court's tests, and followed constitutional principles. Whether or not it is binding precedent, *see* at page 66, *infra*, its logic is impeccable, and its conclusion correct.

Sherman and *Myers*, on the other hand, employed virtually no logic whatsoever, and neither case relied on fact, applied test, or principle. For instance, even though five of the six judges on the *Sherman* and *Myers* panels wrote opinions, not one mention was made of President Eisenhower's signing statement (admitting that the effect of the Act of 1954 would be that "millions of our school children will daily proclaim … the dedication of our Nation and our people to the Almighty"). And whereas "the Creator" in the Declaration of Independence – a document written more than a decade before the Constitutional Convention was even called to assemble – was highlighted in both cases, Congress's reference to "the Creator" in the Report accompanying the Act of 1954 (admitting to its clearly religious purpose of showing "dependence … upon the moral directions of the Creator") was ignored as well.

Looking first at *Sherman*, one is rapidly lost in its illogic. For instance, the opinion begins with Justice Jackson's inspiring words – that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *West Virginia Board of Education v. Barnette*, 319 U.S.

624, 642 (1943).[65] It then completely ignores those words. Doesn't the revised Pledge prescribe what shall be orthodox in religion (i.e., belief that we are "one Nation under God")?

Similarly, despite the fact that the Supreme Court had issued its opinion in *Lee v. Weisman* earlier that year, the *Sherman* panel never applied the coercion (nor any other) Supreme Court Establishment Clause test. "Circuit courts are not free to ignore Supreme Court precedent in this manner." *Newdow III*, 328 F.3d at 490.

Although the coercion test was not applied, it was referenced. The *Sherman* Court apparently recognized that coercion (a) is not necessary to demonstrate a First Amendment violation,[66] and (b) exists by definition whenever an impressionable schoolchild is placed in a situation such as exists during Pledge recitations.[67] It even enunciated the rule:

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[65] The Supreme Court has specifically noted that these words in *Barnette* evidenced "the influence of a teacher over students." *Branti v. Finkel*, 445 U.S. 507, 514 n.9 (1980).

[66] "[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring).

[67] "In *School District of Abington Township v. Schempp* … it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); "The prayer invalidated in Engel was unquestionably coercive in an indirect manner." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (Kennedy, J., concurring in part and dissenting in part) n. 1; "The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." Grand Rapids School District v. Ball, 473 U.S. 373, 390 (1985).

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, the Pledge of Allegiance becomes unconstitutional under all circumstances.

980 F.2d at 444. Yet it then ruled that the Pledge was **not** unconstitutional!?

Myers was little better. Its folly was signaled by its choice of *Marsh v. Chambers*, 463 U.S. 783 (1983) as its "paradigmatic example." 418 F.3d at 403. *Marsh* – which has been referred to as "a narrow space tightly sealed off from otherwise applicable first amendment doctrine." *Kurtz v. Baker*, 265 U.S. App. D.C. 1, 829 F.2d 1133, 1147 (1987) (R.B. Ginsburg, J., dissenting) – "explicitly relied on the singular, 200-year pedigree of legislative chaplains, noting that '[t]his unique history' justified carving out an exception for the specific practice in question." *Rosenberger v. University of Virginia*, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting). The "specific practice" here (i.e., pledging allegiance "under God") didn't first take place until 1954, and the Framers did the exact opposite – removing, not adding, references to God – when they created their own "pledge." *See* at page 20, *supra*.

How paradigmatic can *Marsh* be, anyway, when the Supreme Court has since written that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000)? More

importantly, the Court specifically noted that "[i]nherent differences between the public school system and a session of a state legislature distinguish [public school] case[s] from *Marsh v. Chambers*." *Lee v. Weisman*, 505 U.S. 577, 596 (1992). To use *Marsh* as the "paradigmatic example" in these circumstances is inappropriate.

As with *Sherman*, no Supreme Court Establishment Clause test was actually applied in *Myers*. Rather, it was alleged that "the Justices of the Supreme Court have stated, repeatedly and expressly, that the Pledge of Allegiance's mention of God does not violate the First Amendment." 418 F.3d at 411 (Motz, J., concurring). This is a highly misleading statement. As noted, the rare dicta from the pre-*Elk Grove* cases involved litigation that had nothing to do with the Pledge. Moreover, not one of the statements referenced any principle, and virtually all were in response to dissents that revealed how the Pledge **failed** the test upon which the given majority opinion relied. *See* at 50, *supra*.

As with *Sherman*, the "coercion test" was only mentioned, and not applied, in *Myers*. Judge Williams – writing the majority opinion – focused first on "prayer," which one can reasonably claim is different from saying a pledge to "one Nation under God" (even though Congress and two Presidents described the Pledge as such. *See* at page **Error! Bookmark not defined.**, *supra*). Then, by juxtaposing "prayer" with "religious exercise or activity" (within which pledging "under God" unquestionably falls), 418 F.3d at 407, combining the resulting

muddle with the deeply flawed "take the Pledge as a whole" claim, *Id*., and then throwing in the intellectually dishonest "acknowledgments of religion" contention, *Id*. at 408, she reached her desired conclusion: "The indirect coercion analysis discussed in *Lee*, *Schempp*, and *Engel*, simply is not relevant in cases, like this one, challenging non-religious activities." *Id*.

Judge Williams' reasoning resulted in a conclusion that conflicts directly with the conclusions of the only two Justices to have applied the coercion test to the Pledge. *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring); *Lee*, 505 U.S. at 639 (Scalia, J., dissenting). Lest anyone forget, it is **a pledge to a nation "under God."** That is a purely religious exercise, involving "compelling and meaningful" (positively to some and negatively to others) words. The courts may not simply ignore this reality.

Incidentally, it is uncertain whether any material concerning the legislative history of the Act of 1954 was presented by the *Sherman* or *Myers* plaintiffs. However, it is unlikely that it was anything close to what has been presented here, EOR 59-83 (comprising *Complaint* Appendices D-H), inasmuch as any candid application to that history of either the *Lemon* or the endorsement test also mandates invalidation of the "under God" verbiage. Thus this circuit was correct in *Newdow III* (and *Newdow I)*: Supreme Court holdings, dicta and precedent – as

well as honesty, common sense and constitutional principle – all require a ruling in Plaintiffs' favor.

F. "UNDER GOD" CAUSES REAL HARMS.

The attorneys general of every state in the union have signed on to a brief that asserts that governmental activity such as placing the words "under God" into the Pledge of Allegiance "has never posed a threat of the dangers the Establishment Clause was intended to prevent." *Brief for amicus curiae Texas*, at 18. How would they know? Have they ever looked to see whether any dangers or harms have materialized?[68] In a nation where the highest law enforcement officer can feel no compunction about starting each of his official meetings with prayers to God,[69] where are those injured by "under God" to turn? It is ironic, indeed, to hear the attorneys general so righteously claim that "the United States has fought to protect the freedom of conscience of **all** her citizens," *Id*. at 4 (emphasis added), and that "both the Free Exercise Clause and the Establishment Clause serve the

[68] Their claim sounds remarkably similar to those of some of the legislators supporting the Act of 1954, who also were unable to see beyond their own beliefs. "[The joint resolution] seems to have struck a note of universal approval, indicating an underlying acknowledgement of our indebtedness to God and our dependence upon Him." 100 Cong. Rec. 6, 7762-7763 (June 7, 1954) (Statement of Rep. Wolverton); "In my experience as a public servant and as a Member of Congress I have never seen a bill which was so noncontroversial in nature or so inspiring in purpose." 100 Cong. Rec. 6, 7989 (June 10, 1954) (Statement of Rep. Charles G. Oakman).
[69] Arellano K. *Ashcroft wants leadership from Christians*. Denver Post. July 11, 2006, p. C-03.

same end: protecting and promoting religious liberty for **all** Americans," *Id*. at 6 (emphasis added), when eight of them have provisions **in their state constitutions** explicitly denying to Atheists the right to hold public office. *Appendix*, p. 9.

More atrociously, it appears that fifty of them are working to ensure that their states' public school students will receive thirteen years of Monotheistic indoctrination to ensure that those terribly offensive provisions remain. The *Brief for Atheists and Other Freethinkers* poignantly shows that our nation's fifty states attorneys general haven't a clue about the harms they are willing to inflict upon a religious minority. The "dangers" they are so willing to disregard have not only been threatened, they have come to fruition – over and over – to children one would have expected they'd be protecting.

G. THERE IS NO EVIDENCE BEFORE THIS COURT CONTRADICTING PLAINTIFFS' CLAIMS.

It must be highlighted that this case was decided prior to any testimony, upon the District Court's consideration of the Defendants' Motions to Dismiss. EOR p. 269 (Docket Entry #81). Defendants never attempted to present contrary evidence on the issue of harm. Thus, Plaintiffs' allegations are all to be accepted as true. "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005).

Plaintiffs do not believe that further proceedings in the lower court are necessary to show that the Establishment Clause has been violated. However, if the Court does not believe it cannot reach this conclusion based on the material already provided (showing violations of the neutrality, endorsement, purpose, effects, outsider, imprimatur and coercion tests), Plaintiffs respectfully request that the case be remanded so that the necessary evidence can be supplied.

II. THE DISTRICT COURT USED VALID REASONING IN FINDING THAT *ELK GROVE V. NEWDOW* IS BINDING PRECEDENT

In regard to the District Court's determination that *Elk Grove v. Newdow* is binding precedent, *Order*, September 14, 2005, EOR 198-227, at 223:4-6, it should first be noted that the plaintiff in *Elk Grove* had full joint legal custody of his child when that case was first brought, and that custodial arrangement persisted throughout the proceedings in the District Court, and beyond the completion of briefing during the appeal.[70] Thus, except for a state court decision that had no effect whatsoever upon the presentation of the case or the appellate panel's deliberations, the proceedings were in no way different than they would otherwise have been (had the plaintiff's legal custody never been taken).

[70] Briefing was completed on February 20, 2001. Docket sheet in 9th Circuit Case No. 00-16423, *Newdow v. United States Cong*. The appeal was "ready for calendaring on November 21, 2001. *Id*. "Sole legal custody" wasn't granted to the mother until February 6, 2002. Br. of Appellant, *Elk Grove* at 40.

Second, judicial economy would certainly be served by considering *Newdow III* as binding. If "[t]o abandon the case at an advanced stage may prove more wasteful than frugal," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191-92 (2000), then abandoning it when it has been completely litigated is more wasteful still.

Nonetheless, the question remains: Does a reversal on prudential standing grounds deprive the Newdow III decision of its precedential value on the merits? Certainly the issue was presented and addressed:

> [S]o long as the issue is presented in the case and expressly addressed in the opinion, that holding is binding and cannot be overlooked or ignored by later panels of this court or by other courts of the circuit. This principle is well entrenched in our nation's jurisprudence. The Supreme Court made this absolutely clear over a century ago in *Railroad Companies v. Schutte*, 103 U.S. 118, 143, 26 L. Ed. 327 (1880).

Spears v. Stewart, 283 F.3d 992, 1006 (9th Cir. 2002) (Kozinski, J., statement concerning the denial of the petitions for rehearing en banc). Yet, "[w]ithout jurisdiction the court cannot proceed at all in any cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). On the other hand, "'[j]urisdiction,' … 'is a word of many, too many, meanings.'" *Id*. at 90 (citation omitted).

There is a significant difference between prudential and Article III standing. Only the latter is "mandated by Article III of the Constitution." *City of Chicago v. Morales*, 527 U.S. 41, 55 (1999). Thus – because prudential standing doctrine reflects only "equitable principles of comity and federalism,"

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479 (1977) (discussing the analogous situation of *Younger* abstention) – the federal courts could (were a state willing to provide a waiver) assume jurisdiction. *Cf. Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 26 (1989) (considering "the application of prudential – **rather than true jurisdictional** – concerns" in an Eleventh Amendment setting. (Emphasis added));[71] *Am. Iron & Steel Inst. v. OSHA*, 182 F.3d 1261, 1274 (1999) (stating that "prudential standing is flexible and not jurisdictional in nature" (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) for the proposition that courts cannot pretermit Article III standing issues, but can pretermit prudential standing issues)).

Cases such as *U.S. v. Munsingwear*, 340 U.S. 36 (1950) and *Hearn v. R.J. Reynolds*, 279 F.Supp.2d 1096, 1111 (D. Ariz. 2003), *Brief for RLUSD* at 27-28, are unhelpful because they do not address reversals "on other grounds." Although *INS v. Ventura*, 537 U.S. 12 (2002), is a closer call, the reversal was integrally related to the merits question, since the Ninth Circuit failed to allow the INS "bring its expertise to bear upon the matter." 537 U.S. at 17. Thus, the *Ventura* decision was reached without key data. In *Newdow III*, the Ninth Circuit had everything it needed to decide the case.

[71] *Union Gas* was overruled on a different (albeit related) issue in *Seminole Tribe v. Florida*, 517

The case perhaps most relevant is one from the Fifth Circuit, where – like *Newdow III* – a decision subsequently "reversed on other grounds" by the Supreme Court was still determined to be binding in the Circuit:

> This case illustrates the important difference between our treatment of a panel opinion after *vacatur* by the Supreme Court and our treatment when a judgment is reversed on other grounds. While our prior opinion in *Leiter Minerals II* did not bind the *Little Lake* panel because it was *vacated*, the opinion in *Little Lake* binds us because only the *judgment* was reversed on other grounds.

Central Pines Land Co. v. United States, 274 F.3d 881, 894 (5th Cir. 2001).

In *Newdow III*, the Ninth Circuit heard the case in the exact same manner as it would have had the plaintiff not lost custody after all the briefing was completed. Thus, the key functional reason for having Article III standing rules – i.e., to ensure that a plaintiff has "alleged 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," *Baker v. Carr*, 369 U.S. 186, 204 (1962) – existed. With the Supreme Court having noted that the judiciary ought not "foster repetitive and time-consuming litigation under the guise of caution and prudence," *Craig v. Boren*, 429 U.S. 190, 194 (1976), there is reason to accord *Newdow III* binding precedential weight.

U.S. 44 (1996).

CONCLUSION

This case involves government-sponsored inculcation of religious belief in children in the public schools. This the Supreme Court has never permitted. In fact, this case involves government agents "urging" children to stand up, face the American flag, place their hands on their hearts and affirm in unison that this is "one Nation under God." Thus, this case also involves a clear violation of the neutrality which the High Court has deemed "the touchstone" of its Religion Clause analyses. Accordingly, this Court has no choice but to follow the lead of the Supreme Court and uphold the Constitution.

Respondent respectfully requests that the Court explain to the American people what it surely must now understand, so that Plaintiffs and the rest of the Nation may once again join together and pledge to "one Nation indivisible, with liberty and justice for all."

Respectfully submitted,

July 17, 2006

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STATEMENT OF RELATED CASES

Pursuant to Local Rule 28-2.6, Plaintiffs know of no related case pending in this court. Past related cases (provided pursuant to L.R. 28-2.6(b)) are discussed in this brief. *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002) ("*Newdow I*"); *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow III*").

CERTIFICATE OF COMPLIANCE

Case #05-17257, 05-17344, 06-15093

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 17,437 words.

According to Microsoft Word's "Statistics," this document – excluding the Cover Page, Table of Contents, Table of Citations, Statement of Related Cases, Signature Page, Appendix, (this) Certificate of Compliance, and Certificate of Service – contains exactly 17,437 words.

July 17, 2006 _____

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CERTIFICATE OF SERVICE

Case #05-17257, 05-17344, 06-15093

I HEREBY CERTIFY that on this 17th day of July, 2006, true and correct copies of the **ANSWERING BRIEF FOR THE PLAINTIFFS-APPELLEES** were delivered by e-mail to the following individuals:

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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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