

Appeal Nos. 05-17257, 05-17344, 06-15093
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROECHILD-2 and JAN ROE,

Plaintiffs-Appellees,

- against -

JOHN CAREY, ADRIENNE CAREY, BRENDEN CAREY,
THE KNIGHTS OF COLUMBUS, *et al.*

Defendant-Intervenor-Appellants,

- and -

RIO LINDA UNION SCHOOL DISTRICT,

Defendant-Appellant,

- and -

THE UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Case No. 05-cv-00017

REPLY BRIEF OF DEFENDANT-INTERVENOR-APPELLANTS
JOHN CAREY *et al.*

Kevin J. Hasson
Anthony R. Picarello, Jr.*
Derek L. Gaubatz (C.B.N. 208405)
Eric Rassbach
Jared N. Leland
*Attorneys for Defendant-
Intervenor-Appellants*

The Becket Fund for Religious Liberty
1350 Connecticut Ave., N.W., Ste. 605
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
*Counsel of Record

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. PLAINTIFFS FAIL TO REBUT CAREY DEFENDANTS’ SHOWING THAT THIS COURT IS NOT BOUND BY THE PANEL DECISION IN *NEWDOW III*.....3

II. PLAINTIFFS FAIL TO REBUT CAREY DEFENDANTS’ SHOWING THAT THE SCHOOL DISTRICT’S POLICY OF LEADING WILLING CHILDREN IN RECITING THE PLEDGE DOESN’T VIOLATE THE ESTABLISHMENT CLAUSE.....5

 A. Plaintiffs Fail To Rebut Carey Defendants’ Showing That the School District’s Policy Doesn’t Have the Primary Purpose of Advancing or Inhibiting Religion.6

 1. Plaintiffs mistakenly focus on the purpose of the Pledge statute, rather than on the School District’s patriotic exercise policy.....6

 2. Even if the purpose of the Pledge statute were relevant, Plaintiffs fail to rebut Carey Defendants’ showing that the purpose of adding “under God” to the Pledge was to proclaim a philosophy of limited government and inalienable rights, not to impermissibly advance religion.8

 B. Plaintiffs Fail To Rebut Carey Defendants’ Showing That the School District’s Policy Doesn’t Have the Primary Effect of Advancing or Inhibiting Religion.9

 1. Plaintiffs Fail To Rebut Carey Defendants’ Showing That the School District’s Policy Doesn’t Have the Primary Effect of Endorsing Religion.9

 a. Plaintiffs’ tendentious account of Supreme Court precedent fails to rebut Carey Defendants’ showing to the contrary.9

 b. Plaintiffs’ repeated assertion that the Pledge represents “religious dogma” or a “religious belief” doesn’t rebut Carey Defendants’ showing that “under God” in the Pledge actually reflects a philosophy of limited government and inalienable rights.10

 c. Plaintiffs’ proposed endorsement rule would ban the word “God” from the government lexicon, contrary to both the views of the Founders and the unbroken

practice of all three branches of government since the Founding.....	11
d. Plaintiffs ignore the Carey Defendants’ argument that the Establishment Clause must be read in tandem with the parts of the Constitution that endorse a natural rights theory of the polity.	14
e. Plaintiffs do not distinguish themselves from parents who do not want evolution taught in public schools, or other unreasonable observers.....	15
f. Plaintiffs do not respond to the Carey Defendants’ argument that banning the word “God” from the Pledge—and the government lexicon—would exhibit a hostility to religion that <i>Van Orden</i> prohibits.....	16
2. The School District’s Policy Doesn’t Have the Primary Effect of Coercing Religious Observance.	17
a. Plaintiffs’ reliance on <i>Engel v. Vitale</i> is misplaced because <i>Engel</i> expressly endorses recitation of the Declaration of Independence.	18
b. Plaintiffs’ reliance on <i>Lee v. Weisman</i> is misplaced because the Pledge is not a prayer or any other religious exercise.	19
c. Plaintiffs admit that the District Court had no evidence before it that RoeChild-2 was coerced into saying the Pledge, or felt any coercive pressures at all. .	20
3. Plaintiffs’ Neutrality Argument Fails Because the Pledge is Not a Religious Exercise.....	22
C. Plaintiffs Have Waived Any Claim of Excessive Entanglement.....	24
III. PLAINTIFFS ADMIT THAT AFFIRMING THE DISTRICT COURT WOULD CREATE A CIRCUIT SPLIT, IN WHICH THIS CIRCUIT WOULD REPRESENT THE SOLE OUTLIER.....	24
CONCLUSION.....	25
CERTIFICATE OF SERVICE	27
CERTIFICATE OF COMPLIANCE.....	28

TABLE OF AUTHORITIES

Cases

<i>Brown v. Woodland Joint Unified Sch. Dist.</i> , 27 F.3d 1373 (9th Cir. 1994)	15
<i>Capitol Square Review and Advisory Bd. v. Pinette</i> , 515 U.S. 753 (1995).....	5
<i>Crowley v. Smithsonian Inst.</i> , 636 F.2d 738 (D.C. Cir. 1980)	15
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 527 U.S. 1 (2004)	3
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962).....	11, 17, 18
<i>Green v. Board of County Comm’rs of County of Haskell</i> , 2006 WL 2434448 (E.D. Okla. Aug. 18, 2006)	17
<i>Joseph Burstyn, Inc. v. Wilson</i> , 343 U.S. 495 (1952).....	15
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992)	17, 19
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	14, 22
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983).....	24
<i>McCreary County v. ACLU</i> , 125 S.Ct. 2722 (2005)	7, 23
<i>Myers v. Loudon County Pub. Schs.</i> , 418 F.3d 395 (4th Cir. 2005).....	15, 24
<i>N.L.R.B v. Carlisle Lumber Co.</i> , 99 F.2d 533 (9th Cir. 1938)	5
<i>Newdow v. United States Congress</i> , 328 F.3d 466 (9th Cir. 2003), <i>rev’d sub nom. Elk Grove Unified Sch. Dist. v. Newdow</i> , 527 U.S. 1 (2004).....	3, 11
<i>School Dist. of Abington v. Schempp</i> , 374 U.S. 203 (1963).....	19, 23
<i>Sherman v. Community Consol. Sch. Dist. 21</i> , 980 F.2d 437 (7th Cir. 1992), <i>cert. denied</i> , 508 U.S. 950 (1993)	24
<i>Spears v. Stewart</i> , 283 F.3d 992 (9th Cir. 2006)	4
<i>Van Orden v. Perry</i> , 125 S.Ct. 2854 (2005)	7, 16, 17, 23
<i>West Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	16
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2002)	5

Statutes

CAL EDUC. CODE § 527207
U.S. CONSTITUTION14

Other Authorities

ENCYCLOPEDIA OF WORLD RELIGIONS 437 (Wendy Doniger, ed.,
1999)1
JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST
RELIGIOUS ASSESSMENTS (1785)13
THE DECLARATION OF INDEPENDENCE19

Rules

FEDERAL RULES OF APPELLATE PROCEDURE 2822

ARGUMENT

Plaintiffs' response¹ to Defendants' opening briefs is to breathlessly assert *ad nauseam* that reciting the Pledge, on its face a political proclamation, is in fact a religious activity. Plaintiffs call the Pledge "religious dogma" (used 9 times in their brief), or a "religious belief" (used 18 times in their brief), and characterize it as an establishment of the religion "Monotheism"² (used 29 times in their brief). And though they cannot bring themselves to assert outright that the Pledge is a prayer (despite using the word 46 times in their brief), they think it important that some people have called the Pledge a prayer.

This is the argument of an ideologue. And like the arguments of tax avoiders, parents who object to the theory of evolution, or other ideologically-driven litigants that come before this Court, Plaintiffs' argument does little to aid the Court in deciding the real issues before it. The rule Plaintiffs would

¹ The Court has not ruled on Plaintiffs' motion to file an amended brief, which was filed on August 16, along with the proposed amended brief. All citations in this brief are to Plaintiffs' proposed amended brief.

² Plaintiffs claim throughout their brief that there is a religion they call "Monotheism," but never define or describe this putative "religion." Monotheism is of course a way of describing different religions, not a religion itself. Plaintiffs' use of this term also assumes without demonstrating that that the word "God" always means a single god rather than a plural deity. This straitjacketed understanding of human concepts of "God" is belied by much of human religious experience. *See, e.g.*, ENCYCLOPEDIA OF WORLD RELIGIONS 437 (Wendy Doniger, ed., 1999)("Hindus differ, however, as to whether this ultimate reality is best conceived as lacking attributes and qualities—the impersonal Brahman—or as a personal God, especially Vishnu, Shiva, or the Goddess... .")

have this Court adopt—that the word “God” taints whatever it touches with religious belief—defies both Supreme Court precedent and common sense.³ Use of the word “God” does not make the Pledge any more unconstitutional than the Ten Commandments allowed in *Van Orden* or the Declaration of Independence, which both use the word “God.” The Pledge is in fact a proclamation of a political philosophy of the United States, a philosophy of many parts: republican government (“the Republic”), overcoming ethnic division (“one Nation”), union (“indivisible”), love of freedom (“liberty”), love of justice (“justice”), equality (“for all”) and, not least, inalienable human rights (“under God”).

This Court can and should rule, together with the Supreme Court and the other Courts of Appeals to decide the issue, that when schoolchildren voluntarily say the Pledge in the presence of other children who exercise their right not to say the Pledge, there is no violation of the Establishment Clause.

³ Plaintiffs claim that they are not trying to remove all references to “God” from public discourse. Plaintiffs’ Br. 17-18. But for Plaintiffs, where government speaks, public discourse ends. The rule they urge on this Court is that no government actor may refer to “God” because that reference conveys “[t]he message ... that God exists[.]” Plaintiffs’ Br. 18. Plaintiffs never explain why merely saying the word “God” inevitably sends the message that God exists, a proposition that Nietzsche, among others, might disagree with.

I. PLAINTIFFS FAIL TO REBUT CAREY DEFENDANTS' SHOWING THAT THIS COURT IS NOT BOUND BY THE PANEL DECISION IN *NEWDOW III*.

Carey Defendants demonstrated that the District Court erred by holding itself bound by this Court's decision in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow III*"), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 527 U.S. 1 (2004), because a court reversed on standing grounds—whether prudential or Article III—had “no business deciding [the merits], or expounding the law in the course of doing so.” *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1861 (2006).

Plaintiffs make three arguments in response. First, they argue that *Newdow* *did* have the requisite standing to support the panel's decision in 2003, because *Newdow* had full joint legal custody “beyond the completion of briefing during the appeal.” Plaintiffs' Br. 68. This Court should reject this invitation to overrule the Supreme Court's central holding in *Elk Grove* that *Newdow* lacked standing. *Elk Grove*, 527 U.S. at 17-18.

Second, Plaintiffs argue that judicial economy would be served “by considering *Newdow III* as binding.” Plaintiffs' Br. 68. This argument begs the question before the Court—whether *Newdow III* is indeed binding. And since so ruling would create a Circuit split, the argument would only make sense if we could somehow divine that the Supreme Court also agreed with *Newdow III*'s reasoning on the merits, a dubious proposition at best. If the Supreme

Court does in fact disagree with *Newdow III* on the merits, then there would be a far greater expenditure of judicial resources were this Court to punt the central question before it.

Third, Plaintiffs argue, by analogy to *Younger* abstention and Eleventh Amendment jurisprudence, that “prudential standing doctrine reflects only ‘equitable principles of comity and federalism’” and that the “federal courts could (were a state willing to provide a waiver) assume jurisdiction.” Plaintiffs’ Br. 69. Even aside from the fact that no court agrees, least of all the Supreme Court, that standing is subject to waiver, this argument confuses prudential standing, an inherent limit on judicial power, with the federalism concerns present in *Younger* and Eleventh Amendment analysis. To be sure, both are animated by prudence, but so is (or should be) every other decision of the federal courts.

Plaintiffs also cite several other cases, none of which is on point. *See, e.g.*, Plaintiffs’ Br. 69 (citing concurring opinion of Judge Kozinski in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2006) for the unremarkable proposition that reversal of one merits decision does not affect another merits decision based on different grounds). Plaintiffs have failed to rebut—or even squarely address—the Carey Defendants’ arguments, the arguments of the other Defendants, or the arguments set forth in the Brief of *Amicus Curiae* The American Legion, which

explains that this Court has already ruled that reversal alone means that a prior decision “is no longer binding precedent.” *Id.* at 5 (quoting *N.L.R.B v. Carlisle Lumber Co.*, 99 F.2d 533 (9th Cir. 1938)). Carey Defendants adopt in full the prudential standing argument of *amicus curiae* The American Legion set forth on pages 4-8 of its brief.

II. PLAINTIFFS FAIL TO REBUT CAREY DEFENDANTS’ SHOWING THAT THE SCHOOL DISTRICT’S POLICY OF LEADING WILLING CHILDREN IN RECITING THE PLEDGE DOESN’T VIOLATE THE ESTABLISHMENT CLAUSE.

Plaintiffs make seven different arguments insisting that the School District’s Pledge recitation policy violates the Establishment Clause: six are various Establishment Clause tests Plaintiffs claim exist, Plaintiffs’ Br. § C (1)-(6), while one is a survey of Supreme Court dicta Plaintiffs think supports their position, Plaintiffs’ Br. § D. Two of Plaintiffs’ six Establishment Clause tests—the newly-minted “outsider” and “imprimatur” tests—are actually part of the endorsement test. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773 (1995) (“[e]ndorsement sends a message to nonadherents that they are outsiders”) (citation omitted); *Zelman v. Simmons-Harris*, 536 U.S. 639, 640 (2002) (“the *imprimatur* of government endorsement”). And the *Lemon* test, however dubious its continued vitality, has two constituent subtests—purpose and effect, with a third concern, entanglement, folded into the “effect” inquiry.

Plaintiffs’ claims can thus be summarized as purpose, effect, endorsement,

coercion, neutrality, and entanglement. For the reasons described below, none of Plaintiffs' assorted theories adequately rebuts Carey Defendants' showing that voluntary recitation of the Pledge in public schools fits comfortably within the confines of the Establishment Clause.

A. Plaintiffs Fail To Rebut Carey Defendants' Showing That the School District's Policy Doesn't Have the Primary Purpose of Advancing or Inhibiting Religion.

- 1. Plaintiffs mistakenly focus on the purpose of the Pledge statute, rather than on the School District's patriotic exercise policy.*

On the question of primary purpose, Plaintiffs misdirect their fire. They say nothing about the School District's purpose in promulgating the policy that governs Pledge recitation in RoeChild-2's school. Instead they myopically focus on the 1954 Congress' purposes in amending the Pledge statute. Plaintiffs' Br. 31-32. One might view this as an attempt to revive Plaintiffs' claims that the text of the federal Pledge statute itself violates the Establishment Clause. The District Court dismissed those claims and Plaintiffs have not cross-appealed that dismissal. R-227.

Whatever the goal of Plaintiffs' purpose argument may be, it fails because Congress' purpose in amending the Pledge statute is irrelevant to the School District's purpose in promulgating the Pledge policy. It is not the originator of a phrase whose primary purpose is decisive, but the government entity that mandates its expression. Otherwise the Supreme Court in *McCreary* and *Van Orden* would

have looked to Moses' primary purpose in proclaiming the Ten Commandments to Israel instead of the more mundane purposes of Kentucky and Texas officials in commemorating them. *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005); *Van Orden v. Perry*, 125 S.Ct. 2854 (2005). In dismissing some of Plaintiffs' claims, the District Court correctly recognized this distinction: "plaintiffs are complaining about a school board policy or practice." R-225.

There is nothing in the record indicating, and the District Court did not find, that the School District's primary purpose in promulgating its Pledge policy was to advance religion. Absent evidence about the history and origins of the School District's Pledge policy in the record, this Court cannot substitute an "ignorant observer" into the role of an "objective observer" "presumed to be familiar with the history of the government's actions[.]" *McCreary*, 125 S.Ct. 2722, 2737, *see also id.* at 2734 ("The eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act.") (citation omitted). And as Carey Defendants pointed out in their opening brief, the only evidence of purpose before the District Court was the text of the policy of the School District (R-190-191) and the pleadings (R-1-167, R-229-237), conclusively establishing the School District's "ostensible and predominant purpose" of implementing CAL EDUC. CODE § 52720. Carey Br. 17-18.

2. *Even if the purpose of the Pledge statute were relevant, Plaintiffs fail to rebut Carey Defendants' showing that the purpose of adding "under God" to the Pledge was to proclaim a philosophy of limited government and inalienable rights, not to impermissibly advance religion.*

Carey Defendants demonstrated in their brief that the purpose of those who drafted the 1954 Pledge amendment was to demonstrate the difference between the opposed political systems of the United States and the Soviet Union. Carey Br. 40-42. Plaintiffs admit that the “ultimate goal behind the Act of 1954” may have been “differentiating ourselves from the Soviets,” but argue that the “immediate purpose” was to “endorse Monotheism” and disapprove of atheism. Plaintiffs’ Br. 32. Although the record is replete with references to the Soviet system and the need to distinguish it from the American system, Plaintiffs do not point the Court to a single example of the word “monotheism” or its variants in the Congressional Record. And a fair reading of the Congressional Record shows that Congress’ purpose was not to establish a religion—not even the made-up religion of “Monotheism”⁴—but to make a *political* statement about the *political* philosophy of the United States. Carey Br. 40-42.

⁴ See *supra* fn.1.

B. Plaintiffs Fail To Rebut Carey Defendants’ Showing That the School District’s Policy Doesn’t Have the Primary Effect of Advancing or Inhibiting Religion.

1. Plaintiffs Fail To Rebut Carey Defendants’ Showing That the School District’s Policy Doesn’t Have the Primary Effect of Endorsing Religion.

In their opening brief, Carey Defendants conclusively demonstrated that the School District’s Pledge recitation policy does not endorse any religious belief. Plaintiffs respond by asserting that the “Pledge of Allegiance endorses the purely religious ideas that (a) there is a God, and (b) our nation is under ‘Him.’” Plaintiffs’ Br. 26; *see also* Plaintiffs’ Br. 32-34 (Pledge endorses “Monotheism”). Like Plaintiffs’ other arguments, this one rests on their unfounded (and largely undefended) assertion that saying “God” is equivalent to saying “God exists.” And it fails just as the others do.

a. Plaintiffs’ tendentious account of Supreme Court precedent fails to rebut Carey Defendants’ showing to the contrary.

Carey Defendants demonstrated conclusively that Supreme Court dicta consistently describe the Pledge as an example of government expression that does not violate the Establishment Clause. Carey Br. 21-23. In response, Plaintiffs attempt to create a false distinction between the dicta described in Carey Defendants’ opening brief and what they call “principled dicta.” Plaintiffs’ Br. 48-52. According to Plaintiffs, “principled dicta” are dicta that don’t mention the Pledge but do describe Establishment Clause tests that when applied—by Plaintiffs, naturally—would find the Pledge to violate the Establishment Clause.

Plaintiffs’ Br. 48. By contrast, Plaintiffs seek to avoid the force of the on-point dicta actually discussing the Pledge by claiming that the Justices didn’t really mean what they said. *See, e.g.*, Plaintiffs’ Br. 48 (asserting that Supreme Court language describing Pledge as constitutional were included only to “maintain a consensus against a dissenter who points out that the majority’s reasoning would lead to invalidation of the Pledge.”) Plaintiffs’ Br. 48. Plaintiffs’ whistling in the dark should fool no one. This Court should ignore Plaintiffs’ selective proof-text approach and instead follow the guidance of the Supreme Court’s language *that actually discusses the Pledge*.

- b. Plaintiffs’ repeated assertion that the Pledge represents “religious dogma” or a “religious belief” doesn’t rebut Carey Defendants’ showing that “under God” in the Pledge actually reflects a philosophy of limited government and inalienable rights.

Although Plaintiffs often repeat their claim that the Pledge represents “religious dogma” or a “religious belief,” they do not rebut Carey Defendants’ showing that “under God” communicates—as it has done for centuries—the political philosophy that civil rights are inalienable because they exist logically prior to the state. Carey Br. 24-36. Plaintiffs’ only response is to argue that Carey Defendants have “invent[ed]” the idea that “under God” has the “ability to impart an enormity of information that is found nowhere in the words.” Plaintiffs’ Br. 12. Yet the chief case Plaintiffs rely on—*Newdow III*—itself recognized that the Pledge conveys concepts like “unity, indivisibility, liberty, [and] justice” that have

spawned libraries of discussion and ideas. *Newdow III*, 328 F.3d at 487. It is therefore hypocrisy to then assert, as Plaintiffs do, that the words “one Nation under God” in the Pledge cannot invoke the tradition of limited government that leads from Bracton through the Gettysburg Address to today. Few words can convey many ideas, as the Gettysburg Address itself famously does. Like the Gettysburg Address, the Pledge is an elegant way of proclaiming a political philosophy that motivated the Founders and generations since.

Plaintiffs also notably fail to offer any response to Carey Defendants’ showing that the phrase “under God” has a history that extends further back than 1954. This failure to engage the argument is of a piece with Plaintiffs’ selective historical proof-texting, and provides no basis for the Court to find the Pledge unconstitutional.

- c. Plaintiffs’ proposed endorsement rule would ban the word “God” from the government lexicon, contrary to both the views of the Founders and the unbroken practice of all three branches of government since the Founding.

Carey Defendants have also demonstrated, Carey Br. 29-32, 36-44, that both the Founders and government actors from all three branches since the Founding have made “references to the Deity” without thereby establishing a religion. *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962).

Plaintiffs appear to concede this point in their brief, even providing additional evidence that the Founders did not view public statements that include

“God” as wrong or prohibited. Plaintiffs’ Br. 19 & Appendix at 4. Indeed, Plaintiffs would have the Court believe that when they enacted the First Amendment, the Founders intended to outlaw things they themselves had been saying only a few years before. Plaintiffs’ Br. 19. Plaintiffs also concede throughout their brief that all three branches have affirmed the use of the word “God”.

This insight is only buttressed by a fair (and full) reading of Madison’s *Memorial and Remonstrance*, perhaps the most-abused proof-text in an Establishment Clause jurisprudence unfortunately rife with them. Plaintiffs claim that the *Memorial and Remonstrance* helps their case. Plaintiffs’ Br. 23-24. But the *Memorial and Remonstrance* actually proclaims the same thing the Pledge does—that inalienable rights inhere in each person because they are from God and not the state:

[W]e hold it for a fundamental and undeniable truth, “that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.” The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. ***This right is in its nature an unalienable right.*** It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: ***It is unalienable also, because what is here a right towards men, is a duty towards the Creator.*** It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. ***This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society. Before any man can be considered as a member of Civil Society, he must be considered as a***

subject of the Governour of the Universe: And if a member of Civil Society, do it with a saving of his allegiance to the Universal Sovereign. We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.

JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785) (emphases added). This excerpt makes clear the same point that the Pledge does—the state's sovereignty is limited because people have “unalienable right[s],” “precedent ... to the claims of Civil Society,” that proceed from the “Universal Sovereign.” *Id.* Thus Plaintiffs' argument that the *Memorial and Remonstrance* provides unequivocal support for Plaintiffs' position gets it exactly backwards.⁵

Moreover, Plaintiffs' argument that the Court should treat as dispositive those views of the Founders selectively quoted by Plaintiffs is undercut by their later argument that following the Founders' views would allow a Pledge including the words “under Male Superiority” and “under White Dominion.” Plaintiffs' Br. 58-59. Plaintiffs cannot have it both ways—the Court should consider all of the statements of the Founders, not just the proof-texts that Plaintiffs have supplied.

⁵ Relying on the *Memorial and Remonstrance* would, under Plaintiffs' theory of the Establishment Clause, place this Court at risk of unlawfully endorsing religion, since its references to the “Creator,” “Governour of the Universe,” “Universal Sovereign,” “God,” “Providence,” “Author” and “Supreme Lawgiver of the Universe” invoke Plaintiffs' dreaded “Monotheism” at least as much as “under God.”

Plaintiffs seek to have this Court establish a rule—that government references to “God” are *always* impermissible because they *always* imply a claim that God exists—that would repudiate the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789[.]” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). The Court should reject Plaintiffs’ demand.

- d. Plaintiffs ignore the Carey Defendants’ argument that the Establishment Clause must be read in tandem with the parts of the Constitution that endorse a natural rights theory of the polity.

Plaintiffs do not directly respond to the Carey Defendants’ argument that the other parts of the Constitution—including the Preamble, the Ninth Amendment, and the Tenth Amendment—endorse a natural rights theory of the American polity. Carey Br. 44-46. The closest they get is to argue that the Constitution could have had more references to religion than it does. Plaintiffs’ Br. 20.

Plaintiffs have missed the point. No one has argued that the Constitution is a religious document and that therefore religious statements should be allowed. The Carey Defendants argue instead that the Constitution’s text reveals its roots in a natural law theory of civil and political rights. For example, the phrase “Blessings of Liberty” presupposes, without affirming the existence of, a Blesser. U.S. CONST., preamble. “[O]ne nation under God” merely recapitulates that natural law theory, and similarly makes a reference to God without trying to prove God’s

existence. The Establishment Clause cannot be read to prohibit a political idea that the rest of the Constitution proclaims.

- e. Plaintiffs do not distinguish themselves from parents who do not want evolution taught in public schools, or other unreasonable observers.

Plaintiffs do not respond to Carey Defendants' argument, Carey Br. 48-50, that the School District has no duty to keep RoeChild-2 from coming into contact with religious beliefs different from his parent's atheistic religious beliefs, as "the state has no legitimate interest in protecting any or all religions from views distasteful to them" *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). Instead, they merely reiterate their opinion that Pledge policies like the School District's are "terribly offensive[.]" Plaintiffs' Br. 66. But as numerous courts have held, whether government expression offends someone's religious sensibilities is simply not relevant to First Amendment analysis. Parents have no right under the Constitution to object to the teaching of evolution in the schools, *see Crowley v. Smithsonian Inst.*, 636 F.2d 738, 742 (D.C. Cir. 1980), to the teaching of what they believe to be witchcraft, *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir.1994), or to hearing the Pledge spoken in their presence even when it offends their religious beliefs, *Myers v. Loudon County Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005). Likewise, the Supreme Court in *Barnette* specifically allowed religiously offended students to "remain[] passive" while other students recited the Pledge in their presence. *West Virginia State Bd.*

of *Educ. v. Barnette*, 319 U.S. 624, 634 (1943). The Court held that forcing students to participate in the Pledge recitation “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.” *Id.* at 642. But nowhere did the Court suggest that hearing other children recite the Pledge even though that recitation was religiously offensive idol worship was not such an invasion. *Id.*⁶

Thus it is entirely irrelevant that Plaintiffs believe the Pledge to be a religious statement or that it is “terribly offensive” to them.

- f. Plaintiffs do not respond to the Carey Defendants’ argument that banning the word “God” from the Pledge—and the government lexicon—would exhibit a hostility to religion that *Van Orden* prohibits.

Carey Defendants explained in their opening brief that banning the word “God” from the Pledge would “lead the law to exhibit a hostility toward religion” that *Van Orden* prohibits. *Van Orden*, 125 S.Ct. at 2871 (Breyer, J., concurring); Carey Br. 52-54. Plaintiffs do not respond to this argument, although they do see fit to protest repeatedly that they are themselves not hostile towards religion. Plaintiffs’ Br. 7, 17.

But Plaintiffs’ hostility or lack thereof is beside the point. Courts, like every

⁶ Plaintiffs try to have it both ways when they claim that *Barnette* is inapplicable to the coercion analysis because it involved political rather than religious speech. Plaintiffs’ Br. 9 n.11. However, since their theory of coercion is based on the offense to their religious sensibilities, they cannot claim to be any different from the Jehovah’s Witness plaintiffs in *Barnette* who also had religious objections to political speech.

other branch of government, must not create the appearance of hostility towards religion because that would result in “the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” *Van Orden* at 2871. Carey Defendants’ unrebutted argument is that altering the Pledge would create an appearance of government hostility towards religion, just as the decision in *Newdow III* did four years ago. This insight recently prompted one court to ask,

could such [religious] intolerance exist because the courts have so broadened the scope of potentially unconstitutional religious activity that they have actually magnified the state's hostility to religion while simultaneously providing federal court remedies for the slightest of hurt feelings? ... This court does not feign to know the answers to these questions, or whether the questions themselves are valid. Nevertheless, one observation is now indisputable. No governmental action even touching upon religious subjects will fail to garner a congregation of eager litigants rapid to oppose it. Perhaps this is not so much evidence of government establishing religion as it is evidence of jurisprudence provoking litigiousness.

Green v. Board of County Comm’rs of County of Haskell, 2006 WL 2434448 at *14 (E.D. Okla. Aug. 18, 2006).

2. *The School District’s Policy Doesn’t Have the Primary Effect of Coercing Religious Observance.*

Plaintiffs rely on *Engel v. Vitale*, 370 U.S. 421, 446 (1962), and *Lee v. Weisman*, 505 U.S. 577 (1992) in arguing that voluntary recitation of the Pledge by some students unlawfully “coerces” RoeChild-2. Plaintiffs’ Br. 40-42. As detailed below, neither of these cases nor the facts in the record support Plaintiffs’ argument.

- a. Plaintiffs' reliance on *Engel v. Vitale* is misplaced because *Engel* expressly endorses recitation of the Declaration of Independence.

The *Engel* Court held that “a solemn avowal of divine faith and supplication for the blessings of the Almighty”—in other words, a prayer—could not be led in the public schools. The Pledge is of course neither an avowal of faith nor a supplication, and Plaintiffs never claim that the Pledge *is* a prayer, saying only that this distinction is a “straw man.” Plaintiffs’ Br. 40. Instead, they argue that because the Pledge contains, in their view, “religious verbiage” and the prayer in *Engel* also contained “religious verbiage,” that the Pledge must be forbidden. *Id.*

This argument is at odds with *Engel* itself, which explained—in its holding, not dicta—that “references to the Deity” do not turn expressions into “religious exercise”:

There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting *historical documents* such as the Declaration of Independence *which contain references to the Deity or by singing officially espoused anthems* which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. *Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.*

Engel, 370 U.S. at 435 n.21 (emphases added). In fact, *Engel* expressly allows “manifestations in our public life of belief in God,” something that Plaintiffs fail to mention, despite their extensive quotations from *Engel*. Plaintiffs’ Br. 40-42. The

Pledge proclaims a political philosophy, not a theology. If schoolchildren can refer to a “Creator” that endows them with inalienable rights or to “Nature’s God,” there is no principled reason why they cannot say “one Nation under God.” THE DECLARATION OF INDEPENDENCE, para. 2. *Engel* thus stands for a common sense view of “references to the Deity” in public life, not as an edict requiring an ideological purge of the word “God” from all things public.

- b. Plaintiffs’ reliance on *Lee v. Weisman* is misplaced because the Pledge is not a prayer or any other religious exercise.

Plaintiffs also rely on *Lee v. Weisman*, arguing that because the Pledge is said more often than the rabbi’s prayer at issue in *Lee*, it is even more coercive. Plaintiffs’ Br. 37. But *Lee* dealt with “prayer exercises in public schools,” not a political statement like the Pledge, which even Plaintiffs do not claim is a prayer. *Lee*, 505 U.S. at 587, 592, 597, 598. And like *Engel*, *Lee* recognizes that “there must be a place in the student’s life for precepts of a morality higher even than the law we today enforce” and that “[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” *Lee*, (citing *School Dist. of Abington v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring)). The Court is faced with just such a “relentless and all-pervasive attempt” here, and should reject it.⁷

⁷ Although Plaintiffs claim not to be on a crusade to rid the public sphere of

- c. Plaintiffs admit that the District Court had no evidence before it that RoeChild-2 was coerced into saying the Pledge, or felt any coercive pressures at all.

Plaintiffs admit in their brief that the District Court issued the permanent injunction “prior to any testimony,” and rests on nothing more than the bare allegations in their complaint. Plaintiffs’ Br. 33, 66. The operative record,⁸ as described in Carey Defendants’ opening brief, Carey Br. 8-9, and not even addressed by Plaintiffs, reveals that:

all references to “God,” Plaintiffs’ Br. 18, counsel for Plaintiffs has filed a number of actions seeking to prohibit “In God We Trust,” “So help me God” and the like. Carey Br. 12 n.3. An objective observer familiar with the entire history and context of Plaintiffs’ counsel’s actions might have a hard time distinguishing between the efforts of Plaintiffs’ counsel and an ideological crusade.

⁸ Plaintiffs mislead the Court when they state that Defendants did not attempt to present any evidence countering the allegations in Plaintiffs’ complaint that children always view the Pledge as religious speech. Plaintiffs’ Br. 33. At the hearing on Defendants’ motions to dismiss held on July 18, 2005, the District Court announced that it considered itself bound by *Newdow III* and would enter a permanent injunction in favor of Plaintiffs. R-268-69. An order followed on September 18, 2005. R-269. At a status conference held on October 5, 2005, the Court ordered the parties to produce affidavits regarding Plaintiffs’ standing, but the key issue in the case—whether the School District’s policy violated the Establishment Clause—had already been decided before Defendants (or the Plaintiffs) had an opportunity to put on evidence regarding Plaintiffs’ claims. Once the Court had the affidavits demonstrating standing for some Plaintiffs and lack of standing for others, it issued the permanent injunction almost immediately. Moreover, the District Court did not rule on any of Defendants’ evidentiary objections to Plaintiffs’ affidavits, R-270-71, but merely issued the permanent injunction and ruled on standing issues. R-241-44. Plaintiffs therefore demonstrate considerable chutzpah in claiming that Defendants failed to offer any evidence regarding endorsement.

- Plaintiffs admit that RoeChild-2 has not “been actually compelled to say the words, ‘under God,’ in the Pledge of Allegiance.” R-16.
- Plaintiffs allege that being present when other children willingly recite the Pledge “[c]oerce[s]” RoeChild-2 “to unwillingly confront religious doctrine.” R-27.
- RoeChild-2 is the only Plaintiff whose personal religious beliefs were not described in the First Amended Complaint, and there is no allegation or evidence that RoeChild-2 has any personal objection to reciting the Pledge. Nor is there any allegation or evidence that RoeChild-2 has felt any pressure at all to participate in Pledge recitation.
- Plaintiffs have made no allegation or presented any evidence that RoeChild-2 has ever exercised his right to opt out of saying some or all of the Pledge.

Plaintiffs have thus *never* alleged, much less proven, that RoeChild-2 has been coerced to say the Pledge. This allegation is conspicuous by its absence, and without it Plaintiffs cannot support a finding that RoeChild-2 has been coerced in contravention of the Establishment Clause. The District Court therefore erred when it failed to dismiss Plaintiffs’ coercion claim.⁹

⁹ This Court should also disregard the attempt of proposed *amicus* Atheists and Other Freethinkers to introduce new affidavit evidence of various non-parties into the record, as well as Plaintiffs’ reference to this *amicus* brief. *See* Plaintiffs’

3. *Plaintiffs' Neutrality Argument Fails Because the Pledge is Not a Religious Exercise.*

Plaintiffs also argue that “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.” Plaintiffs’ Br. 23. The “is it neutral?” test urged by Plaintiffs is simply not applicable here because the Pledge does not take sides on any theological question, including God’s existence. Although Plaintiffs repeatedly assert that saying the word “God” necessarily and always implies a statement of belief that God exists and there is only one of Him, nowhere do they attempt to explain why this is so. Nor do they respond to Carey Defendants’ argument that “presuppos[ing] a Supreme Being,” as the Pledge does, is not equivalent to proclaiming the existence of a Supreme Being—a premise is not a conclusion. *Lynch*, 465 U.S. at 675); Carey Br. 25-26, 42. Finally, as set forth in Section II.B.1.e *supra*, government is not required to ensure that everything it expresses does not contradict citizens’ religious beliefs.

Moreover, Justice Breyer’s controlling concurrence in *Van Orden* raises serious questions about the continued vitality of a stand-alone neutrality test:

Br. 33-34. It is well-established that new evidence may not be submitted into the appellate record, much less by an *amicus*. The Court should also disregard Plaintiffs’ references to briefs filed in previous lawsuits that have not been included in the record, because these references violate FRAP 28 and related Circuit Rules. *See* Plaintiffs’ Br. 33 n. 44.

Where the Establishment Clause is at issue, tests designed to measure “neutrality” alone are insufficient, both because it is sometimes difficult to determine when a legal rule is “neutral,” and because “untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”

Van Orden, 125 S.Ct. at 2868-2869 (Breyer, J., concurring) (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (Goldberg, J., concurring)).

This is not to say that the Establishment Clause does not demand adherence to a principle of neutrality at some level of abstraction. But Justice Breyer’s holding is that an Establishment Clause test asking simply “Is it neutral?” has limited usefulness, and may even create a systematic anti-religious bias. And the more recent Supreme Court cases that Plaintiffs cite, though they tip their rhetorical hats to the *principle* of neutrality, were not decided by applying a neutrality *test*. For example, in *McCreary*, although the Court said that neutrality is the “touchstone” of Establishment Clause analysis, the test it actually *used* to determine whether the Establishment Clause had been violated was the “primary purpose” test. *McCreary*, 125 S.Ct. at 2733 (proclaiming principle of neutrality, but applying the “primary purpose” test to determine whether principle has been adhered to). This

Court should be careful not to allow the broad strokes of the neutrality principle to become a substitute for constitutional analysis.¹⁰

C. Plaintiffs Have Waived Any Claim of Excessive Entanglement.

Plaintiffs concede the lack of entanglement in their brief. Plaintiffs' Br. 30 n.42. Therefore they have waived this claim.

III. PLAINTIFFS ADMIT THAT AFFIRMING THE DISTRICT COURT WOULD CREATE A CIRCUIT SPLIT, IN WHICH THIS CIRCUIT WOULD REPRESENT THE SOLE OUTLIER.

Plaintiffs specifically request that this Court create a Circuit split by contradicting all the other Courts of Appeals to address this issue. In their brief, Plaintiffs heap 11 pages of scorn onto the opinions in *Sherman v. Community Consol. Sch. 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), both of which upheld Pledge recitation in public schools. Plaintiffs' Br. 54-64 (describing decisions as “folly” and “illogic”). Along the way, they also question the validity of Supreme Court’s decision in *Marsh v. Chambers*, 463 U.S. 783 (1983), asking “[h]ow paradigmatic can *Marsh* be, anyway”? Plaintiffs' Br. 62. Rather than follow basic appellate practice by attempting to distinguish these

¹⁰ Plaintiffs also urge an “equality” test on the Court that has an uncertain relationship to the “neutrality” test. Plaintiffs' Br. 23-25. In any case, and to the extent the “equality” test is in fact different from the “neutrality” test, the School District’s Pledge recitation policy passes the “equality” test for the same reasons it passes the “neutrality” test.

cases, Plaintiffs merely cast aspersions on their holdings. They focus special attention on the lack of discussion in *Sherman* and *Myers* of Congress' intent in amending the Pledge statute in 1954. Plaintiffs' Br. 64. But, once again, this argument ignores the fact that the government authority leading Pledge recitation is not Congress, but the School District. *See supra* Section II.A.1.

Like other ideologues, Plaintiffs do not even attempt to engage the arguments of those (even courts) they disagree with. In fact, Plaintiffs have every reason to want a Circuit split with the courts in *Sherman* and *Myers*, because that will make a repeat trip to the Supreme Court more likely. This Court should not reward Plaintiffs' refusal to actually make their case with a trip to Washington.

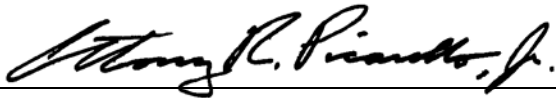
CONCLUSION

Plaintiffs' basic argument is that saying the Pledge is a religious exercise. But this assertion—however many times it may be made—belies common sense. When the judges of this Court themselves say the Pledge they are not engaging in religious exercise, but instead telling others what America is all about. Schoolkids should have that right too.

Respectfully submitted,

Dated: September 5, 2006

THE BECKET FUND FOR RELIGIOUS LIBERTY

By:  _____

Anthony R. Picarello, Jr.*

Kevin J. Hasson

Derek L. Gaubatz (C.B.N. 208405)

Eric Rassbach

Jared N. Leland

1350 Connecticut Avenue, NW, Suite 605

Washington, DC 20036

Phone: (202) 955-0095

Fax: (202) 955-0090

* *Counsel of Record*

*Attorneys for Defendant-Intervenor-
Appellants John Carey et al.*

CERTIFICATE OF SERVICE

I, Anthony R. Picarello, Jr., attorney for Defendant-Intervenor-Appellants, hereby certify that on the 5th day of September, 2006, two (2) true and correct copies of the Reply Brief of Defendant-Intervenor-Appellants John Carey, *et al.* were placed in the United States Mail, postage pre-paid, addressed to the following:

Michael A. Newdow
FIRST AMENDMIST CHURCH OF TRUE SCIENCE
P.O Box 233345
Sacramento, CA 95823

Lowell V. Sturgill, Jr.
Theodore Hirt
Department of Justice
Civil Division/Appellate Staff
10th & Pennsylvania Ave., NW
Washington, DC 20530

Terrence John Cassidy
PORTER SCOTT WEIBERG AND DELEHANT
P O Box 255428
350 University Avenue
Sacramento, CA 95865

Dated: September 5, 2006

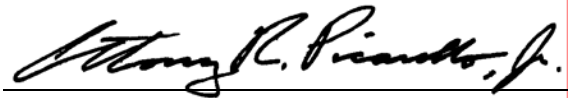


Anthony R. Picarello, Jr.
Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains 6,302 words, as calculated by Microsoft Word.

Dated: September 5, 2006

A handwritten signature in black ink, reading "Anthony R. Picarello, Jr.", is written over a horizontal line. A vertical red line is positioned to the right of the signature.

Anthony R. Picarello, Jr.
Counsel of Record