

9th Cir. 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,

vs.

RIO LINDA UNION SCHOOL DISTRICT,
Defendant/Appellant,

and

UNITED STATES OF AMERICA,
Defendant/Intervenor - Appellant,

and

JOHN CAREY, et al.
Defendant/Intervenors - Appellants,

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

BRIEF OF *AMICUS CURIAE* COUNTY OF LOS ANGELES
IN SUPPORT OF DEFENDANT-APPELLANT'S
REQUEST TO VACATE INJUNCTION AND GRANT MOTION TO DISMISS

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STATEMENT OF CONSENT

Pursuant to Federal Rules of Appellate Procedure, Rule 29(a), this *amicus curiae* brief is filed with the written consent of all parties.

INTRODUCTION AND INTEREST OF AMICUS CURIAE

Amicus curiae, the County of Los Angeles, has a population of approximately 10 million people, over 36 percent of whom originate from foreign countries. Almost one-fourth of the population of the State of California resides in the county, including 1.7 million public elementary school children.¹ Most of these children are led each school day in a voluntary recitation of the Pledge of Allegiance.²

Accordingly, *amicus curiae* has a particular interest in the outcome of this appeal. The Pledge of Allegiance has long been used in Los Angeles County for the valid secular purpose of teaching children patriotism and the shared values inherent in citizenship in a civilized society. A decision that leading willing children in reciting

¹ Figures based upon 2005 estimates of the U. S. Census Bureau.

² The Pledge of Allegiance is recited in public elementary schools throughout Los Angeles County pursuant to California Education Code § 52720 ("Patriotic Exercises").

the Pledge violates the Establishment Clause would remove from the county's public school system one of its most effective and time honored educational tools.

In addition, the weekly public meetings of the Los Angeles County Board of Supervisors, the county's governing body, are begun with a recitation of the Pledge of Allegiance. Through this practice, county officials communicate to the public the important message that their government fosters national unity, patriotism, and an appreciation for common values that define our country. To the County of Los Angeles, where one-third of the population originates from foreign countries, the public affirmation of loyalty to our nation is uniquely valuable. In a melting pot of ethnic and cultural backgrounds, the common thread that binds the residents of Los Angeles County is their shared status as American citizens.

Los Angeles County's practices are now vulnerable. Although the injunction in this case on its face impacts only elementary school children, the County is concerned that an adverse decision would mark the beginning rather than the end of Pledge litigation.³ The principle advanced by plaintiffs--that hearing the word "God" is

³ At a minimum, upholding the injunction would raise a host of questions regarding where and when the Pledge of Allegiance may be recited in Los Angeles County, particularly if children are present.

offensive to their "religious beliefs"--threatens potentially sweeping consequences. Indeed, plaintiffs' ultimate goal appears to be to obliterate all public references to "God." But the County of Los Angeles is a huge governmental entity, massive in terms of square miles as well as population, whose numerous activities occasionally present the word "God." *Amicus curiae*, therefore, has an interest in urging this Court to adopt a rule that will not force Los Angeles County to choose between defending a flood of constitutional challenges and abandoning its cherished and established practices.

ARGUMENT

I. UPHOLDING THE DISTRICT COURT'S RULING WOULD UNDERMINE LOS ANGELES COUNTY'S ABILITY TO PROMOTE NATIONAL UNITY THROUGH ESTABLISHED PATRIOTIC EXERCISES.

A. The Pledge of Allegiance is Recited in the Opening Exercises of Weekly Meetings of the Board of Supervisors, Los Angeles County's Governing Body.

Amicus curiae, the County of Los Angeles, is a charter county. The Los Angeles County Charter [hereinafter Charter], framed and adopted under section 7 1/2 of article XI of the California Constitution, established as the governing body of the

County, a Board of Supervisors consisting of five members elected for terms of four year from five supervisorial districts. Charter, art. I, § 2; art. II, §§ 4, 5.

The Los Angeles County Board of Supervisors meets each and every Tuesday at 9:30 a.m. at the Kenneth Hahn Hall of Administration in the City of Los Angeles. Rules of the Board of Supervisors [hereinafter Rules], ch. II, § 2. In accordance with the Ralph M. Brown Act, Gov't Code § 54950, these meetings are open to the public. Additionally, a delayed taped broadcast of the meeting is televised on KLCS, the Los Angeles Unified School District's cable channel, usually at 10:00 p.m. on the day of the meeting. Under the Rules, ch. IV, § 13, each regular meeting of the Board begins with a recitation of the Pledge of Allegiance.⁴

The Los Angeles County Board of Supervisors wishes to retain its current practice of opening its weekly meetings by reciting the Pledge. A political rather than religious statement, the Pledge of Allegiance--as amended to include the words "under God"-- expresses the philosophy that "[o]ur American Government is founded on the concept of the individuality and the dignity of the human being," and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no

⁴ In addition, the Pledge of Allegiance is recited at numerous public governmental functions throughout Los Angeles County, including meetings of the County Board of Education.

civil authority may usurp." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954). The symbolic exercise of pledging allegiance to our nation's flag sets the tone for the weekly meetings and communicates to the residents of Los Angeles County that their government leaders promote both national unity and the sovereignty of the individual.

1. Recitation of the Pledge of Allegiance at Public Functions is Consistent With Los Angeles County's Long-Standing Practice of Promoting Patriotism.

Los Angeles County has a long history of endorsing public affirmations of loyalty to our nation. For example, in 1923, the County Board of Supervisors adopted a resolution to erect and maintain a building known as "Victory Hall" in downtown Los Angeles to be used "exclusively as a meeting place for the use of patriotic, fraternal and benevolent associations" with membership comprised of U. S. war veterans. In striking down a challenge to the constitutionality of the use of public funds for a building whose use was restricted to war veterans, the California Supreme Court held, "We do not think that it is necessary that the proposed Victory Hall should be open to the public generally in order to bring its erection and maintenance within the meaning and designation of a public purpose . . . The obvious object of the use of the hall is to promote patriotism and when it has done that it has

done all that is required.⁵" *Allied Architects' Assoc. of Los Angeles v. Payne*, 192 Cal. 431, 435, 211 P. 209, 30 A.L.R. 1029 (1923).

The court further explained that "[i]t is settled beyond question that the promotion of patriotism, involving as it does the sense of self-preservation, is not only a public purpose but the most elemental of public purposes (citations omitted)." *Allied Architects'*, 192 Cal. At 434. The court continued, "The continuity of our governmental institutions is dependent in a large measure upon the perpetuation of a patriotic impulse which is but the willingness to sacrifice all for the ideas and the ideals which form the foundation stones of our republic." *Id.*

The principle that a local governmental body may publically promote patriotism was affirmed by the United States Supreme Court twenty years after *Allied Architects'*. The Court stated plainly that "[n]ational unity as an end which officials may foster by persuasion and example is not in question." *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624, 640 (1943).

⁵ Victory Hall, currently known as "Bob Hope Patriotic Hall," was opened to the public in September 1926.

If the allocation of public funds in California for a patriotic building not open to the general public advances national unity, it cannot be gainsaid that the recitation of the Pledge of Allegiance at the public meetings of the County's Board of Supervisors promotes patriotism and serves a valid secular purpose. In fact, the public format and highly visible televised broadcasts of the Board of Supervisor's weekly meetings make the reciting of the Pledge a particularly effective "public acknowledgment of the ideals that our flag symbolizes." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). Indeed, public affirmations of loyalty and allegiance to our nation are an established and valuable aspect of Los Angeles County's history. Plaintiffs' principles, if adopted, will undermine the County's long-standing tradition of publically promoting and encouraging patriotism and national allegiance.

2. Los Angeles County's Pledge Practice Promotes National Unity, Which Is Particularly Important to County Residents, One-third of Whom Originate from Foreign Countries.

A British review of the 2006 Hollywood film *Crash*,⁶ richly illustrates a common perception of life in Los Angeles County. According to the film's critic, *Crash* depicts residents of Los Angeles via a cast of characters "drawn from every facet of the city's diverse ethnic spectrum" whose lives intersect in a "labyrinthine matrix of

⁶ *Crash* won the 2006 Academy Award® for Best Motion Picture.

race relations." The city itself "serves as more than a mere backdrop. Crucial to [the] depiction of life in the City of Angels are its sprawling infrastructure; its near-total reliance on hermetically sealed automobiles; its ghettoising freeway system that carves unbridgeable psychological gulfs between rich neighborhoods and poor; its desolate sidewalks, deserted subway stations and monolithic parking lots, all of which contribute to a pall of mistrust that hangs as heavy in the air as smog." Simon Braund, "Crash", *Empire Magazine* (UK) (August 12, 2005).

Obviously, Hollywood films do not always create an accurate perception of reality. But statistics confirm that more than one-third of the residents of Los Angeles County are foreign born, making the county a "modern-day Ellis Island." This cultural diversity and the massive physical layout of the county⁷ create a unique environment where the promotion of national unity is of paramount importance to government leaders. The public affirmation of allegiance to the ideals symbolized by our flag serves to unite the residents of the County of Los Angeles by highlighting their shared status of American citizens.

⁷ Los Angeles County occupies an area of approximate 4,061 square miles in Southern California.

B. Plaintiffs' Attack on the Words "under God," If Sanctioned by This Court, Could Open the Floodgates to Constitutional Litigation in Los Angeles County.

Plaintiffs argue that the recitation of the Pledge of Allegiance, long recognized as a patriotic exercise designed to promote national unity and pride, threatens the establishment of religion. At its core, plaintiffs' argument advances the principle that hearing the word "God" or engaging in activities that acknowledge the existence of "God" is somehow offensive and distasteful to their religious beliefs. Plaintiffs' unstated goal appears to be to eliminate all public references to "God" or a supreme being. But by virtue of its massive size and population, the County of Los Angeles engages in activities daily where the word "God" or an acknowledgment of the existence of a "supreme being" is present. Plaintiffs' principle, if adopted by this Court, could result in a flood of Establishment Clause challenges in a county already overburdened with litigation. The end result would be that Los Angeles County, one of the nation's largest governmental entities, would be forced to invest valuable time and resources to defend against

constitutional challenges to exercises historically used to promote patriotism and national unity, or worse, to abandon them.

II. THIS COURT'S PRIOR DECISION IN *NEWDOW III* IS NOT BINDING PRECEDENT. INSTEAD, THIS COURT SHOULD HOLD THAT LEADING STUDENTS IN A VOLUNTARY RECITATION OF THE PLEDGE OF ALLEGIANCE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE .⁸

A. *Newdow III* Was Reversed for Lack of Jurisdiction and Lacks Precedential Value.

The district court granted a permanent injunction against Rio Linda School District because it improperly concluded that *Newdow III*⁹, which it believed was reversed but not vacated for lack of prudential standing, remained binding precedent. R-219. But prudential standing principles are "judicially-imposed limits on the exercise of federal jurisdiction" and, like Article III standing principles, are "founded in concern about the proper - and properly limited - role of the courts in a democratic society." *Allen v. Wright*, 468 U. S. at 751 (quoting *Warth v. Seldin*, 422 U. W. 490, 498 (1975)). It follows that *Newdow III* lacks precedential value, because "[w]ithout

⁸ Mindful of the supplemental nature of this brief, *amicus curiae* respectfully joins in the entire argument set forth in the Brief of Defendant-Intervenor-Appellant, The United States of America. A short summary of the argument is included for the Court's convenience. See Adv. Comm. Note to Rule 29(d), Fed. R. App. P.

⁹ *Newdow v. Congress of the United States*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow III*").

jurisdiction [,] the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Environment*, 523 U. S. 83, 94 (1996) (quoting *Ex Parte McCordle*, 74 U. S. (7 Wall.) 506, 514 (1968)).

B. Leading Students in a Voluntary Recitation of the Pledge of Allegiance Does Not Violate the Establishment Clause.

Without the binding effect of *Newdow III*, Supreme Court precedent requires that the district court's injunction be vacated. First, "religion has been closely identified with our history and government. . . [and] [t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212-213 (1963). Second, the Supreme Court has repeatedly held that official acknowledgments of the Nation's religious history and current religious character do not violate the Establishment Clause. The Court has specifically refused to "press the concept of separation of Church and State to . . . extremes" by invalidating "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). Indeed, the Supreme Court has "asserted pointedly" on five different occasions that "[w]e are a religious people

whose institutions presuppose a Supreme Being." *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 213 (1963); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

It is evident, therefore, that the official acknowledgment of religion does not violate the Establishment Clause because it does not "establish[] a religion or religious faith, or tend[] to do so." *Lynch*, 465 U. S. at 678. The Supreme Court in *Lynch* went on to emphasize that "[a]ny notion" that such measures "pose a real danger of establishment of a state church" would be considered "farfetched." *Id.* at 686.

Turning to the Pledge of Allegiance in particular, the Supreme Court has repeatedly recognized that the term one nation "under God" does not violate the Establishment Clause. *Lynch v. Donnelly*, 465 U.S. 668, 674, 677(1984); *County of Allegheny v. ACLU*, 492 U.S. 573, 598, 603 (1989); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). Though the issue of the constitutionality of the Pledge has not been decided by the High Court on the merits, Supreme Court dicta "have a weight that is greater than ordinary judicial dicta" because they may signal the direction of future Supreme Court decisions and are "not to be lightly disregarded" but treated

with "due deference." *Laub v. United States Dept. of Interior*, 342 F.3d 1080, 1090, fn.8 (9th Cir. 2003); *McCalla v. Royal MacCabees Life Ins. Co.*, 369 F.3d 1128, 1132 (9th Cir. 2004). Recently, both the Fourth and Seventh Circuits, in upholding the constitutionality of the Pledge of Allegiance, have recognized the value of the Supreme Court's dicta. See *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 405 (4th Cir.2005) and *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992).

C. The U. S. Supreme Court's decision in *Elk Grove* Requires Re-Examination of *Newdow III*.

Even if this Court agrees with the district court that *Newdow III* has precedential effect, the intervening Supreme Court decision in *Elk Grove* undercuts the theory behind *Newdow III* and necessitates re-examination. See *E.E.O.C. v. Luce Forward, Hamilton & Scripps*, 345 F. 3d 742, 744, fn.1 (9th Cir. 2003) (en banc); *Miller v. Gammie*, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc); *United States v. Lancellotti*, 761 F.2d 1363, 1366 (9th Cir. 1985) and *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 495 (9th Cir. 1979). *Elk Grove* explains that reciting the Pledge of Allegiance "is a patriotic exercise designed to foster national unity and pride in those principles" on which our Nation was founded, including its

"proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.'" *Elk Grove*, 542 U. S. at 6 (quoting *Texas v. Johnson*, 491 U. S. 397, 405 (1989)). "National unity as an end which officials may foster by persuasion and example is not in question." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943).

Moreover, only compelled recitation of the Pledge of Allegiance, without the possibility of opting out, violates the Establishment Clause and is coercive. *Id.* at p. 642, *accord Elk Grove*, 542 U.S. at 8 (citing *Barnette*). The California statute at issue here permits children to refrain from saying the words "under God" or to entirely refuse to participate in reciting the Pledge; thus, it comports with the Establishment Clause.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the County of Los Angeles, respectfully submits that this Court should vacate the permanent injunction and remand the case with instruction to grant the motion to dismiss.

Dated: June 13, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that (check appropriate option(s))

X 3. Amicus Briefs.

9 Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7000 words or less,

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9 Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7000 words or 650 lines of text,

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Dated: June 13, 2006

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