No. 02-1624

In The

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Brief of *Amicus Curiae* The Claremont Institute
Center for Constitutional Jurisprudence
In Support of Petitioners

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QUESTIONS PRESENTED

1. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance?
2. Whether the expansive interpretation given to the Establishment Clause by the Ninth Circuit in holding that the public school teacher-led voluntary recitation of the Pledge of Allegiance, with its phrase, "One Nation Under God," is compelled by controlling precedent of this Court or is it instead an unwarranted extension of that precedent that impermissibly intrudes on the core state function of providing for the health, safety, welfare, *and morals* of the people?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES,
& CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principles, at issue in this case, that among the core powers reserved to the states or to the people is the power to further the health, safety, welfare and morals of the people through education, and that all human beings are endowed by their *Creator* with certain unalienable rights. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, on the importance—and constitutionality—of public devotion to moral and religious principles as the necessary condition to maintaining liberty and our republican form of government, including Harry V. Jaffa, *Equality and Liberty: Theory and Practice in American Politics* (Oxford Univ. Press 1965); Harry V. Jaffa, *Conditions of Freedom: Essays in Political Philosophy* (Johns Hopkins Univ. Press 1999); Larry P. Arnn and Douglas A. Jeffrey, *"We Pledge Allegiance"—American Christians and Patriotic Citizenship*; Christopher Flannery, *Moral Ideas for America: Educating Americans*; Daniel C. Palm, ed., *On Faith and Free Government* (Roman & Littlefield 1997); and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being,"* 5 Nexus: J. Opinion 13 (Fall 2000).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000), and *Schaffer v. O'Neill*, 534 U.S. 992 (2001).

STATEMENT OF THE CASE

Michael Newdow is an atheist whose daughter attends public elementary school in the Elk Grove Unified School District ("EGUSD") in California. In accordance with state

law and a school district rule, EGUSD teachers begin each school day by leading their students in a recitation of the Pledge of Allegiance ("the Pledge"). The California Education Code requires that public schools begin each school day with "appropriate patriotic exercises" and specifies that "the giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" the requirement. Cal. Educ. Code § 52720 (1989) (hereinafter "California statute").[2] To implement the California statute, the school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: "Each elementary school class [shall] recite the pledge of allegiance to the flag once each day."

The classmates of Newdow's daughter in the EGUSD are led by their teacher in reciting the Pledge codified in federal law. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942) (codified at 36 U.S.C. § 172). On June 14, 1954, Congress amended Section 172 to add the words "under God" after the word "Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954) ("1954 Act"). The Pledge is currently codified as "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it

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[2] The relevant portion of California Education Code § 52720 reads:

> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

stands, one nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (1998).[3]

Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge—compelling students to recite the Pledge was held to be a First Amendment violation in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Rather, Newdow claims that his daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'" *Newdow v. U.S. Congress*, 328 U.S. 466, 483 (9th Cir. 2003). Newdow's complaint in the district court challenged the constitutionality, under the First Amendment, of the 1954 Act, the California statute, and the school district's policy requiring teachers to lead willing students in recitation of the Pledge. He sought declaratory and injunctive relief, but did not seek damages.

The school districts and their superintendents (collectively, "school district defendants") filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. Magistrate Judge Peter A. Nowinski held a hearing at which the school district defendants requested that the court rule only on the constitutionality of the Pledge and defer any ruling on sovereign immunity. The United States Congress, the United States, and the President of the United States (collectively, "the federal defendants") joined in the motion to dismiss filed by the school district defendants. The magistrate judge reported findings and a recommendation; District Judge Edward J. Schwartz approved the recommendation and entered a judgment of dismissal. Newdow appealed from that judgment and a split panel of the Ninth

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[3] Title 36 was revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998). Section 172 was abolished, and the Pledge is now found in Title 4.

Circuit (Goodwin and Reinhardt, Jj., with Fernandez, J., concurring in part and dissenting in part) reversed and remanded the case back to the trial court for further proceedings. The panel held that, in the context of the Pledge of Allegiance, the statement that the United States is a nation "under God" was an endorsement of religion, namely, a belief in monotheism. The panel further held that the school district's practice of teacher-led recitation of the Pledge aimed to inculcate in students a respect for the ideals set forth in the Pledge, and, thus, amounted to state endorsement of those ideals. The panel found that the Pledge adopted by Congress and the school district's policy embracing it failed the Supreme Court's endorsement test, coercion test, and the effects prong of the *Lemon* test for evaluating alleged violations of the prohibition against government establishment of religion. The panel finally held that Congress's addition of the words "under God" to the Pledge, and the school district's policy and practice of teacher-led recitation of the Pledge, were unconstitutional.

Defendants/Appellees unsuccessfully petitioned for rehearing and rehearing en banc, but the panel issued a modified opinion reiterating its conclusion that the voluntary recitation of the Pledge of Allegiance in public schools was unconstitutional (thereby affecting over 9.6 million students in the western United States).

SUMMARY OF ARGUMENT

Whether or not Newdow has standing to challenge the constitutional violations he alleges, this Court should eliminate the disparity in how it treats structural constitutional violations. The Establishment Clause has neither more nor less of a preferred place in our constitutional order than other provisions of the Constitution.

On the merits, the addition of the words "under God" to the Pledge, and the school district's policy and practice of teacher-led recitation of the Pledge, do not violate the Estab-

lishment Clause. The people who wrote and ratified the Establishment Clause never intended that it should be read to prohibit a school district or a state from encouraging a profound respect for the Creator who is the source of all our rights. Indeed, the best evidence suggests just the opposite: The Establishment Clause was designed not just to prevent the establishment of a national church but to prohibit the federal government from interfering with state encouragement of religion as the states exercised their core police powers to protect the health, safety, welfare, *and morals* of the people. To hold that the Constitution prohibits the State or school district from allowing the recitation of a pledge that acknowledges the existence of God would ignore the history and intent of the First Amendment and would undermine the efforts of the States to foster the kind of moral virtue the Founders thought essential to the perpetuation of republican institutions.

ARGUMENT

I. Whether or not Newdow has standing, either as a parent or a taxpayer, this Court should revisit the preferred place it has given to standing in Establishment Clause claims.

Amicus Curiae The Claremont Institute Center for Constitutional Jurisprudence is agnostic on the question whether Newdow should be deemed to have standing to challenge public school policies that allegedly contravene the Establishment Clause.

On the one hand, it believes that Newdow clearly does not have standing under existing precedent. The harm he has alleged, either in his own name or on behalf of his daughter, is no different than the "harm" suffered by the more than 9.6 million public school children in the western United States affected by the Ninth Circuit's ruling, and therefore not "particularized" (unless the fact that he thinks it a harm to listen to the Pledge of Allegiance, when the overwhelming major-

ity of people think it a noble thing, somehow confers on him the "particularized" status required by this Court's existing precedent). *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1972). Nor does he qualify for taxpayer standing under *Flast v. v. Cohen*, 392 U.S. 83 (1968), because there is no direct, specific expenditure of funds at issue here that are spent solely for the challenged activity. *See Doremus v. Board of Education*, 342 U.S. 429 (1952); *see also Doe v. Madison School District* No. 321, 177 F.3d 789 (9th Cir. 1999) (*en banc*) (summarizing the *Doremus* requirements).

On the other hand, the Institute believes that existing standing doctrine is too cramped, blocking access to the federal courts for plaintiffs with serious, structural constitutional challenges merely because the harm they suffer is widespread rather than narrowly focused. As Professor Richard Epstein has noted, the law has always had a particularly difficult time providing redress for small injuries inflicted upon large groups of people where no one has a particularized harm different from the harm suffered equally by everyone else. In such situations, there is a real danger that "[t]he public's business becomes nobody's business because no person has the incentive to take steps to protect that interest." Richard Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV.1, 30 (2001). According to Epstein, the Article III grant of *equity* power to the federal courts was designed in part to address this problem of structural harms.

In *Crampton* v. *Zabriskie*, this Court expressly recognized, for example, "the right of resident tax-payers to invoke the interposition of a court *of equity* to prevent an illegal disposition of the moneys of the county." 101 U.S. 601,

609 (1879) (emphasis added).[4] This was so because only it could "prevent the consummation of a wrong, when the officers of [the government] assume, in excess of their powers, to create burdens on property-holders." *Id.*; *see also* James Wilson, *Speech in the Pennsylvania Ratification Convention* (Dec. 1, 1787), *reprinted in* 1 DEBATES ON THE CONSTITUTION 820, 822-823 (B. Bailyn, ed., 1993) ("under this constitution, the legislature may be restrained, and kept within its prescribed bounds, by the interposition of the judicial department").

Even today, the principle that federal courts of equity may address such structural (but undifferentiated) harms is routinely recognized in analogous contexts such as shareholder derivative suits, where individual shareholders are afforded standing to raise the claims of the entire class despite their lack of any particularized harm. *See, e.g.,* Fed. R. Civ. P. 23; *see also* Epstein, *supra,* at 49. There is no reason —textual or otherwise—why the "equity" language of Article III does not equally apply to taxpayer or even citizen challenges to violations of the Constitution's structural limits. In such circumstances, it is particularly important for the federal courts to apply this Court's equity-based rule in *Flast* rather than the contrary, law-based rule in *Frothingham* v. *Mellon,* 262 U.S. 447 (1923).

Thus, if this Court holds that Newdow does have standing to assert his constitutional claims based on an allegation of what is essentially a non-particularized structural harm, it should do so with greater clarity on the distinction between

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[4] *Crampton* has never been overruled, but subsequent decisions such as *Frothingham* v. *Mellon,* 262 U.S. 447 (1923), have limited its holding to cases brought against *cities* by taxpayers. This is a distinction without a difference. "[T]here is nothing to suggest that the right to enjoin illegal behavior in *Crampton* depended on the taxpayer being able to show some minimum level of financial harm…. [*Frothingham*] does not explain why the difference in the number of taxpayers at the federal level works a difference in principle." Epstein, *supra* at 35.

the equitable and legal powers of the federal courts than it has previously provided.

Such a holding would go a long way toward eliminating the textually unsustainable preferential place that this Court's standing decisions has given to Establishment Clause claims over claims alleging other constitutional violations. Other clauses in the Constitution contain specific prohibitions every bit as clear as the Establishment Clause prohibitions for which this Court found taxpayer standing to challenge in *Flast*. *See* U.S. Const. Art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time"); U.S. Const. Art. I, § 8, cl. 12 ("[Congress shall have power to] raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years"); U.S. Const. Art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"); U.S. Const. Art. II, § 1, cl. 7 ("The President shall, at stated times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected"); U.S. Const. Amend. XXVII ("No law, varying the compensation for the services of Senators and Representatives, shall take effect, until an election of Representatives shall have intervened"); *but see Schlesinger* v. *Reservists to Stop The War*, 418 U.S. 208, 227 (1974) (rejecting taxpayer and citizen standing to challenge alleged violations of the Incompatibility Clause, Art. I, §6, cl. 2); *Western Min. Council v. Watt*, 643 F.2d 618, 633-34 & n.26 (9th Cir. 1981) (dismissing Art. I, § 8, cl. 12 claim without determining whether plaintiffs had standing); *United States v. Richardson*, 418 U.S. 166 (1974) (denying standing to raise Art. I,

§ 9, cl. 7 claim); *Schaffer v. Clinton*, 240 F.3d 878 (10th Cir. 2001) (rejecting taxpayer and legislator standing to challenge violations of the 27th Amendment).

The Spending Clause itself contains a "national" vs. "local" limitation akin to the Commerce Clause limitations recently reiterated by this Court in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). *See* John C. Eastman, *"Restoring the 'General' to the General Welfare Clause*," 4 Chap. L. Rev. 63 (Spring 2001). Indeed, this Court's recent concern with the potentially corrupting influence of campaign contributions, addressed in *McConnell v. Federal Election Commission*, 2003 WL 22900467 (Dec. 10, 2003)—a concern that opened the Court to the claim that it was diluting the free speech protections of the First Amendment, *see id.* at *82 (Scalia, J., dissenting in part) ("This is a sad day for the freedom of speech")—is in no small measure the result of this Court's declination to enforce the limitations of the Spending Clause, exacerbated by holdings that have denied standing to anyone challenging the constitutionality of various spending programs, *see Frothingham v. Mellon*, 262 U.S. 447 (1923).

These are just the kind of widespread "structural" claims that the "equity" power conferred by Article III, Section 2 (as opposed to the "law" power) was designed in part to address. *See* U.S. Const. art. III, § 2; *see also* Epstein, *supra* at 30; Federalist No. 78 (A. Hamilton) ("the courts were *designed* to be an intermediate body between the people and the legislature, in order, among other things, *to keep the latter within the limits assigned to their authority*" (emphasis added)). Newdow's claim of standing is certainly no stronger than the assertions of standing that have been repeatedly rejected by this Court and the lower courts in cases raising constitutional challenges that are of much greater moment than the challenge raised here. If this Court holds that he has standing,

therefore, it should make clear that it will likewise reconsider its equitable power to accept taxpayer or citizen standing to challenge structural violations generally. And then, for the reasons described below, it should reject Newdow's claims on the merits.

II. The Recitation Of The Pledge Helps Foster An Appreciation For The Principles Upon Which The Nation Was Founded, Including The Principle That Government Is Instituted To Protect The Unalienable Rights With Which We Are Endowed By Our Creator.

The Supreme Court has recognized that the interpretation of the Establishment Clause should "comport with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). A key part of that history includes a substantial role for the public acknowledgment of a "Creator" as the source of "unalienable rights" and the use of religion to support that understanding. This is particularly true in educational settings, for America's founders believed that the education of children was vital to keeping America a free and functioning society. "If a people expect to be ignorant and free," wrote Thomas Jefferson, "they want what never was, and never can be, in the history of the world." *Letter from Thomas Jefferson to Charles Yancey*, (Jan. 6, 1816), *in* 10 THE WORKS OF THOMAS JEFFERSON 493, 497 (P. Ford ed. 1905). James Madison agreed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps, both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.

Letter from James Madison to William Barry, (Aug. 4, 1822), *in* Madison: WRITINGS 790 (J. Rakove, ed., 1999).

But by "education," the Founders did not merely mean the dissemination of the facts of science or history; they meant also the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry, *see* MONTESQUIEU, THE SPIRIT OF THE LAWS 13, 15 (T. Nugent trans., Britannica Great Books 1952) (1748), our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "That no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15. The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality …." Mass. Const. of 1780, Pt. 1, Art. 3.

Perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.

The Federalist No. 55, at 346 (C. Rossiter and C. Kesler eds., 1999).

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 51, 53 n. a (July 13, 1787, reenacted Aug. 7, 1789); *see also, e.g.*, Mass. Const. of 1780, Ch. V, Sec. 2 ("wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties"). Even Thomas Jefferson, who coined the phrase "a wall of separation between church and state," *Letter to the Danbury Baptist Association*, Jan. 1, 1802, *in* JEFFERSON: WRITINGS 510 (M. Peterson, ed. 1984), provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA *reprinted in id.* at 125, 273 (1785).

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, Farewell Address,

reprinted in William B. Allen, ed., George Washington: A Collection 521 (1988). Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 595 (1976). Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would "make dutiful children, teachable scholars, and afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peacable sailors, and, in everything that relates to this country, good citizens." Benjamin Rush, To The Citizens of Philadelphia: A Plan for Free Schools, *reprinted in* L.H. Butterfield, ed., 1 Letters of Benjamin Rush 412, 424 (1951) (1786).

In addition, several of the States explicitly provided for religious education in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning...shall be encouraged and protected." Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, Ch. II § XLI ("all religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning, shall be encouraged and protected"). The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require…the several towns…or religious societies to make suitable provision at their own expense…for the support and maintenance of public protestant teachers of piety, religion and morality.

Mass. Const. of 1780, Pt. I § 3. And New Hampshire's Constitution authorized the legislature

> to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety…will give the best and security to government ….

N.H. Const. of 1784, Pt. I § 5.

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic. *See, e.g.,* Nebr. Const. Art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature … to encourage schools and the means of instruction"); Vt. Const. ch. II, § 68; Ind. Const. Art. 8, § 1; Iowa Const., Art. IX, § 3; *see also* Mass. Ann. Laws ch. 71, § 30 (2001) (providing that it is the "duty" of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice" (emphasis added)).

Given the Founders' views on the subject, the Ninth Circuit's holding that the constitutional amendment those same Founders drafted and ratified mandates the *exclusion* of the words "under God" from a pledge recited in schools is extraordinary. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it hinders rather than fosters the public's appreciation of the principle upon which the very legitimacy of republican government is based, namely, that human beings are endowed *by their Creator* rather than by government with certain unalienable rights. See Decl. of Independence ¶ 2 (recognizing as

a self-evidence truth that all men "are endowed by their Creator with certain unalienable rights").

For most of our nation's history, religion was not barred from the public schools. It was thought to be a necessary component of public education and, indeed, of public life generally. The Establishment Clause of the First Amendment was designed simply to prevent the federal government from establishing a national church—that is, from giving preference by federal law to one religious sect over others with tax funds or otherwise, or from compelling attendance at such a church. It did not prevent non-sectarian prayer in public schools or aid to religion generally. That was an error in interpretation suggested *in dictum* by this Court more than 150 years after the Amendment was ratified but subsequently treated as constitutional gospel. *Everson v. Board of Ed. Of Ewing Township*, 330 U.S. 1, 15 (1947) (erroneously noting that neither a state nor the Federal Government "can pass laws which aid one religion, *aid all religions*, or prefer one religion over another" (emphasis added)).

Certainly, the Founders never intended the Establishment Clause to bar public acknowledgement of the Creator credited by Jefferson himself in the Declaration of Independence as the Source of all our rights. Throughout our entire history, public pronouncements routinely acknowledged our dependence upon God for the good fortune of our nation. In his first official Act as President, for example, George Washington prayed that the "Almighty Being who rules over the universe" would "consecrate" the government formed by the people of the United States. George Washington, *First Inaugural Address* (April 30, 1789), *reprinted in* George Washington: A Collection 460-61 (William B. Allen ed., Liberty Classics 1988). And his proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness."

Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficient Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late ware, for the great degree of tranquility, union, and plenty, which we have since enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our

> national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.

George Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), reprinted in George Washington: A Collection 534-35 (William B. Allen ed., Liberty Classics 1988).

Even Thomas Jefferson, the patron saint of the separation of church and state movement, began the Virginia Statute for Religious Freedom by invoking "Almighty God, "the Holy author of our religion," the "Lord of body and mind." *A Bill for Establishing Religious Freedom*, reprinted in Thomas Jefferson, Writings, 346 (Merrill Peterson, ed., Library of America 1984). Under the Ninth Circuit's expanded interpretation of the Establishment Clause, all of these references to God would constitute an unconstitutional establishment of religion by the very people who drafted and ratified the Establishment Clause.

Justice William O. Douglas acknowledged the Founders' views when, in the 1952 case of *Zorach v. Clauson*, he wrote for the Court: "We are a religious people, whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The very legitimacy of government by consent is based on the self-evident truth articulated in the Declaration of Independence (by Thomas Jefferson, no less) that all men, all human beings, are *created* equal. Decl. of Independence, ¶ 2,

1 Stat. 1. And the very idea that people have rights that precede and are superior to government is based on the self-evident truth articulated in the Declaration of Independence that human beings "are endowed, *by their Creator*, with certain unalienable rights," including the rights to life, liberty, and the pursuit of happiness. *Id.* (emphasis added). This is one of the first principles of our regime. If our liberties are to be preserved against the encroaching tendencies of government, it is imperative that the next generation be educated with an appreciation of those principles.

This understanding of God as the source of the rights of mankind is thus more than merely of historical interest. *Cf. Marsh v. Chambers*, 463 U.S. 783 (1983). Moreover, every one of the original States, and nearly every one of the current fifty, continues to acknowledge God in its constitution. The preamble to California's constitution is typical: "We, the people of California, *grateful to Almighty God* for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." Cal. Const. of 1879, Preamble, *reprinted in* Francis Newton Thorpe, 1 The Federal and State Constitutions 412 (William S. Hein & Co., 1993) (1909). The Massachusetts Constitution of 1780 provided for "public instructions in piety, religion and morality" because "the happiness of a people, and the good order and preservation of civil government, essentially depend upon . . . the public worship of God." Mass. Const. of 1780, Pt. 1, Art. 3, *reprinted in* 1 Thorpe 1888, 1889-90. Although Massachusetts eliminated its established church in 1833, its constitution continues to recognize that "the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government." Mass. Const., Amend. XI (ratified Nov. 11, 1833), *reprinted in* 3 Thorpe 1888, 1914, 1922. Indeed, many of the state constitutions recognize that the *public* worship of God is a duty of mankind, even while they expressly protect against formal sectarian establishments and provide

for the free exercise of religion. *See*, *e.g.*, Del. Const. of 1897, Art. I, Sec. 1, *reprinted in* 1 Thorpe 600, 601 ("Although it is the duty of all men frequently to assemble together for the public worship of Almighty God; . . . yet no man shall or ought to be compelled to attend any religious worship");[5] Md. Const. of 1970, Art. 36 ("That as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty"); Mass. Const. of 1780, Pt. I, Art. II, *reprinted in* 3 Thorpe 1888, 1889 ("It is the right as well as the Duty of all men in society, publickly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe").

Of course, a state constitution cannot trump the requirements of the federal Constitution. But because of the mechanism by which new states are added to the national union, *see* U.S. Const., Art. IV, sec. 3, we can assess whether Congress viewed state constitutional provisions that invoked God or encouraged public worship as contrary to the First Amendment. The first Congress, comprised of the same elected officials who drafted the First Amendment, admitted Vermont as a new State, with a constitution that provided: "every sect or denomination of Christians ought to observe the Sabbath or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." Vt. Const. of 1786, Ch. 1, Art. 3, *reprinted in* 6 Thorpe 3749, 3752.

If one looks instead to the time period of the adoption of the 14th Amendment (which is the more relevant time period, given that the 14th Amendment, via the Incorporation Doctrine, is the means by which this Court made the Establishment Clause applicable to the states), the same holds true. Nebraska's Constitution of 1866 contains the following pre-

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[5] Virtually identical language first appeared in the Delaware Constitution of 1792, Art. 1, Sec. 1, *reprinted in* 1 Thorpe 568.

amble: "We, the people of Nebraska, grateful to Almighty God for our freedom, do establish this constitution." Nebr. Const. of 1866, Preamble, *reprinted in* 4 Thorpe 2349. Even more significantly, the Nebraska Bill of Rights, after recognizing freedom of conscience, contains the following passage, modeled after the Northwest Ordinance:

> Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship and to encourage schools and the means of instruction.

Nebr. Const. of 1866, Art. I, sec. 16, *reprinted in* 4 Thorpe 2350. The language was repeated *verbatim* in the 1875 constitution, after adoption of the Fourteenth Amendment. *See* Nebr. Const. of 1875, Art. 1, sec. 4, *reprinted in* 4 Thorpe 2361, 2362. These passages are particularly significant because the enabling act for Nebraska specifically required that the state's constitution "shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence," and "that perfect toleration of religious sentiment shall be secured." Enabling Act for Nebraska, 38th Cong., 1st Sess., sec. 4, *reprinted in* 4 Thorpe 2343, 2344.

Explicit religious invocations are also found in the "reconstruction" constitutions of the southern states, adopted after passage of the Fourteenth Amendment by Congress as those states were petitioning the same Congress for readmission to the Union. Georgia's 1868 Constitution, for example, "acknowledg[es] and invok[es] the guidance of Almighty God, the author of all good government," in its preamble, even while protecting "perfect freedom of religious sentiment." Ga. Const. of 1868, Preamble; Art. I, sec. 6, *reprinted in* 2 Thorpe 822. The preamble to North Carolina's 1868 Constitution reads like a prayer: "[G]rateful to Almighty

God, the sovereign ruler of nations, for the preservation of the American Union and the existence of our civil, political, and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity." N.C. Const. of 1868, Preamble, *reprinted in* 5 Thorpe 2800. *See also, e.g.*, Va. Const. of 1870, Preamble, *reprinted in* 7 Thorpe 3871, 3873 ("invoking the favor and guidance of Almighty God"); Ala. Const. of 1867, Preamble, *reprinted in* 1 Thorpe 132 (same).

Thus Congress—the very Congress that adopted the Fourteenth Amendment—saw no Establishment Clause problem with state constitutions that acknowledged God, gave thanks to God, and even encouraged the public worship of God, nor did it see such acknowledgments as inconsistent with the Free Exercise and Establishment clauses of the U.S. Constitution or with comparable clauses in the states' own constitutions.

Nor have subsequent Congresses or Presidents. All of the states created out of the Dakota Territory in 1889 were admitted with constitutions containing similar acknowledgements of God and similar prohibitions of establishment. The people of Idaho, for example, announced in their first constitution that they were "grateful to Almighty God for [their] freedom," even though the constitution also provided that "no person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent." Id. Const. of 1889, Preamble; Art. 1, sec. 4, *reprinted in* 2 Thorpe 913, 918. Congress admitted Idaho to statehood on July 3, 1990, after finding that the proposed constitution was "republican in form and . . . in conformity with the Constitution of the United States"—a constitution that had included the Fourteenth Amendment for more than twenty years. *See* An Act to provide for the admission of the State of Idaho into the Union (July 3, 1890), *reprinted in* 2 Thorpe 913, 918.

Wyoming's constitution announced that its people were "grateful to God" for their "civil, political, and religious liberties," even while it declared that 'the free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this State." Wy. Const. of 1889, Preamble; Art. 1, sec. 18, *reprinted in* 7 Thorpe 4118. Congress admitted Wyoming to statehood after finding that its constitution was "in conformity with the Constitution of the United States." Act of July 10, 1890, *reprinted in* 7 Thorpe 4111, 4112.

Montana, South Dakota, and Washington were all admitted to statehood in 1889 by Presidential proclamation rather than directly by act of Congress. Before the President was authorized to issue the proclamation of statehood, however, he had to find that their constitutions were "not repugnant to the Constitution of the United States and the principles of the Declaration of Independence." *See* Act of Feb. 22, 1889. Montana's preamble expressed gratitude "to Almighty God for the blessings of liberty" even while the constitution elsewhere barred "preference . . . to any religious denomination or mode of worship." Mt. Const. of 1889, Preamble; Art. III, sec. 4, *reprinted in* 4 Thorpe 2300, 2301. President Benjamin Harrison found the constitution consistent with the United States Constitution and proclaimed Montana a state on November 8, 1889. *See* Proclamation of Nov. 8, 1889, *reprinted in* 4 Thorpe 2299-2300. Similar provisions are found in the first constitutions of South Dakota and Washington. S.D. Const. of 1889, Preamble and Art. VI, sec. 3, *reprinted in* 6 Thorpe 3357, 3370; Wash. Const. of 1889, Preamble and Art. I, sec. 11, *reprinted in* 7 Thorpe 3973, 3974. Both received Presidential approval. Proclamation of Nov. 2, 1889, *reprinted in* 6 Thorpe 3355-57 (admitting South Dakota to statehood); Proclamation of Nov. 11, 1889, *reprinted in* 7 Thorpe 3971-73 (admitting Washington to statehood).

Even more significantly because of the fight over polygamy and its free exercise of religion overtones, the Utah

Constitution of 1895 contained one of the most strongly-worded anti-establishment provisions:

> The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, …. There shall be no union of church and state, nor shall any church dominate the State or interfere with its functions.

Utah Const. of 1895, Art. I, sec. 4, *reprinted in* 6 Thorpe 3702. Despite this strong anti-establishment language, the preamble of the same constitution acknowledges that the people of Utah were "grateful to Almighty God for life and liberty." *Id*. President Grover Cleveland accepted Utah to statehood after finding that "said constitution is not repugnant to the Constitution of the United States and the Declaration of Independence." Proclamation of January 4, 1896, *reprinted in* 6 Thorpe 3700.

Neither the President nor Congress found such public acknowledges of God to be contrary to the Establishment Clause, well after adoption of the Fourteenth Amendment, and neither have the courts. These and similar constitutional acknowledgements of God remain in place to this very day, in nearly every one of the fifty states. It is a strange interpretation indeed that would prohibit the very public acknowledgement of God to which so many of the state constitutions give voice. It would be just as strange to interpret the Establishment Clause of the First Amendment in a way that actually prohibits acknowledgement of the very Source of the rights claimed by those who oppose the teacher-led pledge, such as is articulated in the Declaration of Independence, yet that is precisely what the Ninth Circuit's decision would require.

III. Interpreting The Establishment Clause To Bar The School District From Inviting Students To Recite The Pledge That Acknowledges A Belief In God Is Incompatible With This Court's Recent Federalism Jurisprudence.

A. Moral Education is a Core, Perhaps *The* Core, Function of State and Local Governments.

This Court's recent federalism decisions further demonstrate the error of the Ninth Circuit's decision. As this Court has often acknowledged, the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people. *See, e.g.*, *Lopez*, 514 U.S., at 552; U.S. CONST. amend. X; Federalist No. 45 (J. Madison).

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people, and as the discussion in Part I above demonstrates, moral instruction, particularly including the kind of moral instruction fostered by religion, has for most of our nation's history been viewed as an essential component of that core state function. Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important place religion has always played in state efforts to undertake this core police power.

B. Applying An Expansive Interpretation of the Establishment Clause to the States Threatens to Undermine a Core State Police Power to Foster an Appreciation of God as the Source of All Our Rights.

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law …" meant

precisely that. U.S. Const. Amend. I (emphasis added); *see also Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Permoli v. New Orleans*, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states). This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from establishing a national church; and to prevent the federal government from interfering with the state established churches and other state aid to religion that existed at the time. *See, e.g.*, *Zelman*, 536 U.S., at 678 (Thomas, J., concurring); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting); W. Katz, Religion and American Constitutions 8-10 (1964); M. Howe, The Garden and the Wilderness 23 (1965); J. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being."* 5 Nexus: J. Opinion 13 (Fall 2000); *see also* Neil Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

Of course, the 14th Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the 14th Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when Justice Black wrote in *Everson* v. *Board of Ed.*, 330 U.S. 1 (1947), that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the 14th Amendment, he merely cited prior cases incorporating the Free Speech and

Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause. *See id.*, at 5 (citing *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id.*, at 15 (citing, e.g., *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider* v. *State*, 308 U.S. 147 (1939), a free speech case). *Everson*'s incorporation holding has recently been called into question. *See Zelman*, 536 U.S., at 677-78 (Thomas, J., concurring). The reconsideration of that holding is long overdue.

Moreover, the application of the Establishment Clause to the states has allowed the federal courts (and, via section 5 of the 14th Amendment, the Congress) to do the very thing the clause was arguably designed to prevent, namely, interfere with state support of or reliance on religion in the exercise of its state police powers. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials, *see New York* v. *United States*, 505 U.S. 144 (1992), the limits of federal power inherent in the doctrine of enumerated powers, *see Lopez*, 514 U. 549, or even the barrier to federal power erected by the doctrine of state sovereign immunity that this Court has held to be implicit in the 11th Amendment, *see Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996). Yet in each of these latter areas, this Court has in recent years given renewed attention to the limits of federal power.

This Court need not fully repudiate the long-standing precedent incorporating the Establishment Clause, however, in order to give due consideration to that precedent's effect on federalism. All that is required is for this Court to recognize, as Justice Thomas invited in *Zelman*, that the scope of activity prohibited by the Establishment Clause may well be narrower with respect to the States than with respect to the

Federal government.[6] Such a distinction is particularly important in light of the fact that the States rather than the federal government have historically been viewed as the repository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people. *See, e.g., Barnes v. Glen Theatre, Inc.*; 501 U.S. 560, 569 (1991); *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 304 (1932). Thus, even if the Ninth Circuit's decision were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government (which it is not, for the reasons articulated in Part II above), the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the 14th Amendment.

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[6] Although the Pledge was adopted by the Federal government, in this case, it is the State and local governments that have decided to use its language in school. As Judge Fernandez noted in his opinion concurring and dissenting in part from the initial panel decision, "Congress has not compelled anyone to do anything. It surely has not directed that the Pledge be recited in class; only the California authorities have done that." *Newdow v. U. S. Congress*, 292 F.3d 597, 612 n.2 (9th Cir. 2002), *opinion amended*, 328 F.3d 466 ((9th Cir. 2003).

CONCLUSION

The decision of the Ninth Circuit should be reversed, and the original decision of the district court dismissing Newdow's complaint for failure to state a claim should be reinstated.

Respectfully submitted,

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