No. 02-1624

In The
Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT, and
DAVID W. GORDON, Superintendent, EGUSD,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF ON THE MERITS OF *AMICUS CURIAE* PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

PETER D. LEPISCOPO*
LAW OFFICES OF PETER D. LEPISCOPO
2635 Camino del Rio South,
Suite 109
San Diego, California 92108
Telephone: (619) 299-5343
Facsimile: (619) 299-4767
e-mail: plepiscopo@worldnet.att.net

**Counsel of Record for Amicus Curiae Pacific Justice Institute*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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 a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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I. INTRODUCTION

In responding to the Questions presented by this case, Pacific Justice Institute ("Pacific Justice")[1] will address both aspects of the justiciability question. First, in Section III, *infra*, Pacific Justice will address the issue of whether the phrase "*under God*" in the Pledge of Allegiance ("Pledge") gives rise to a justiciable claim under the First Amendment's Establishment Clause. Second, in Section IV, *infra*, Pacific Justice will address the issue of whether Respondent has, in his own right, standing to prosecute a challenge to the recitation of the Pledge in the school district.

Pacific Justice is a nonprofit corporation organized for the purpose of engaging in litigation affecting the public interest. Pacific Justice has participated in litigation involving significant constitutional issues in both federal and state courts, including the instant litigation. In addition, Pacific Justice is a legal defense organization specializing in the defense of religious freedom, parental rights, and other civil liberties.

II. SUMMARY OF ARGUMENT

Although Respondent challenges the school district's policy that requires teachers to lead willing students in reciting the Pledge, this case will turn on this Court's determination of whether the inclusion of the words "*under God*" in the Pledge somehow converts it into a religious act, profession of religious belief, or prayer.

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[1] This brief is filed upon the written consent of the legal counsel for the Petitioners, Respondent, and the United States of America, which have been lodged with the Clerk of this Court. Pursuant to Rule 37.6, *amicus curiae*, Pacific Justice, and its counsel of record, Peter D. Lepiscopo, hereby affirm that no counsel for any party authorized this brief in whole or in part and that no person other than counsel of record drafted the brief. No person or entity, other than *amicus*, made any monetary contribution to the preparation or submission of this brief.

Pacific Justice will address the questions presented by this case in reverse order because the Ninth Circuit predicated its finding that Respondent had standing on its conclusion that the school district's policy relative to the daily recital of the Pledge was unconstitutional under the Establishment Clause of the First Amendment.

As to Question 2, Pacific Justice will address the issue of whether the inclusion of the phrase "*under God*" in the Pledge renders the school district's policy invalid under the Establishment Clause. Specifically, Pacific Justice will argue that the phrase "*under God*" does not contravene the Establishment Clause because that phrase is neither a religious act, profession of religious belief, nor prayer, but is merely a restatement of the political philosophy underpinning this Nation's form of government.

As to Question 1, Pacific Justice will argue that Respondent does not have standing for three reasons. First, the Ninth Circuit ignored a specific California Superior Court order that vested the mother of Respondent's daughter with ***sole*** legal custody. Thus he does *not*, as a matter of law, have power to assert any decision-making authority over his daughter in the areas of education or religion. Second, the Ninth Circuit similarly ignored California Family Code section 3006, which provides that the parent in whom ***sole*** legal custody is placed has plenary power over decisions relating to the child's education and religious beliefs. This essentially had the effect of nullifying California's public policy relating to family law. Finally, Respondent does not have standing because he does not have a justiciable claim as a taxpayer because he neither alleged nor proved that there was any specific and identifiable state expenditure made in connection with the alleged Establishment Clause violation.

III. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE (4 U.S.C. § 4) DOES *NOT* CREATE A JUSTICIABLE CLAIM UNDER THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE

This section is comprised of two sub-sections. Section A argues that the phrase "*under God*" is neither a religious act, profession of religious belief, nor prayer, but rather a statement of the political philosophy underpinning this Nation's form of government. Section B argues that Respondent's claim is not justiciable under this Court's Establishment Clause jurisprudence.

A. THE PHRASE "*UNDER GOD*" IN THE PLEDGE OF ALLEGIANCE IS NEITHER A RELIGIOUS ACT, PROFESSION OF RELIGIOUS BELIEF, NOR PRAYER, BUT IS MERELY A RESTATEMENT OF THE POLITICAL PHILOSOPHY UNDERPINNING THIS NATION'S FORM OF GOVERNMENT

The following immortal words set forth in the Declaration of Independence serve as an appropriate starting point for this discussion:

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their ***Creator*** with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness – That to secure these Rights, Governments are instituted among men, ***deriving*** *their just Powers from the* ***Consent of the Governed*** *. . .* "

U.S. Decl. Of Indep.

A sobering moment is being presented to this Court by way of the instant action. That is to say, if one may not recite the Pledge in a public school, one certainly may not recite the foregoing passage from the Declaration of Independence. Nor may one recite Abraham Lincoln's *Gettysburg Address* because it contains the phrase "this Nation, *under God*." In its lengthy decision, the Ninth Circuit

ignored this in its quest to excise the word "*God*" from the Pledge. In truth, that was the Respondent's goal, which subsequently became the goal of the Ninth Circuit. The goal of those like Respondent has, and continues to be, the same. Namely, to remove any reference to "*God*" from any public discourse, ignoring the fact that in casting aside all references to "*God*" results in our Nation's history and form of government also being cast aside. To make this point, a summary review of the underlying political philosophy of the Founders is in order.

Thomas Jefferson and the Founders were well versed in the works of Algernon Sydney ("*Discourses*"),[2] Charles de Montesquieu ("*Spirit of Laws*"),[3] and John Locke ("*2nd Treatise*")[4] relative to their political philosophy; hence, the phrase in the Declaration, "We find these Truths to be ***self-evident*** . . . " They are not, however, self-evident to the Ninth Circuit. If they were, then the conclusion reached by the Ninth Circuit would have been different. That is to say, the phrase "*under God*" would not have been interpreted as a religious act, profession of religious belief, or prayer, but rather as a paraphrasing of a political philosophy incorporated into the Declaration and Constitution, which finds its genesis in the works of Sydney, Montesquieu, and Locke.

It is important to note that Sydney's *Discourses* was written as a refutation to Sir Robert Filmer's *Patriarcha*, which defends the divine and natural power of kings to rule with **absolute** power over the people and that any rights of the people originate from the king. Consequently, the predominating theme in Sydney's *Discourses* is the *source* and limits of governmental powers. Drawing on Aristotle,

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[2] Sydney, Algernon, *Discourses Concerning Government*, (1990), Indianapolis: Liberty Fund, Inc. ("*Discourses*").

[3] Montesquieu, Charles De, *The Spirit of Laws*, (1952) Great Books of the Western World (Vol. 38), Chicago: Encyclopaedia Britannica, Inc. ("*Spirit of Laws*").

[4] Locke, John, *Second Treatise of Government*, (1980) Indianapolis: Hackett Publishing Company, Inc. ("*2nd Treatise*").

Sydney examines the *source* of power in a monarchy in order to illustrate how power in that form of government is circumscribed in relation to the source of that power:

> "But if Aristotle deserves credit, the princes who reign for themselves and not for the people, preferring their own pleasure or profit before the publick, become tyrants; which in his language is enemies to God and man."

Discourses, *supra*, at 288. Similarly, Sydney draws upon the experience of Israel under Moses in order to demonstrate that even God-appointed leaders are answerable to the people:

> "[T]he Scriptures declare the necessity of setting bounds to those who are placed in the highest dignities. Moses seems to have had as great abilities as any man that ever lived in the world; but he alone was not able to bear the weight of government, and therefore God appointed seventy chosen men to be his assistants."

Id. Sydney goes on to identify the *source* of Israel's liberty and the *source* of Moses' reign and power: "God by Moses gave liberty to his people to make a king." *Discourses*, *supra*, at 289. Clearly, Moses was the consequence of God vesting liberty in the people of Israel, not the other way around. Sydney recognized this principle, which serves as a barrier between the liberty of the people and the power of the government. As a foreshadowing of the Declaration, Sydney clearly articulates the proper ends of government:

> "[G]overnments are not set up for the advantage, profit, pleasure or glory of one or a few men, *but for the* ***good*** of society."

Discourses, supra, at 91. In short, Sydney was articulating the principle that governments may not be justly constituted except upon the *consent* of the people. We see this in the preamble of the Constitution:

> "***We the People*** of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure

> the Blessings of Liberty to ourselves and our Posterity, do ***ordain and establish*** this Constitution for the United States of America."

Clearly, the preamble identifies the ***source*** of the powers vested in the federal government: the People. This is consistent with the consent theory mentioned by Sydney in *Discourses*, which is similarly discussed by Montesquieu and Locke in their political treatises.

Moving to Montesquieu, in the *Spirit of Laws* we see two distinct political principles emerge, which were incorporated into our founding principles. The first principle is that government is created by the people (as phrased in the Declaration: "from the consent of the governed"). As discussed by Sydney, this principle is fundamental to a republican form of government:

> "The people, in whom the supreme power resides, ought to have the management of everything within their reach: that which exceeds their abilities must be conducted by their ministers. But they cannot properly be said to have ministers, without the power of nominating them: it is, therefore, a ***fundamental maxim*** *that the* ***people should choose*** *their ministers* – that is their magistrates."

Spirit of Laws, supra, at p. 4, § 2 (emphasis added). According to both Sydney and Montesquieu the people are vested with plenary power of selecting those individuals through whom their governmental affairs will be conducted.

Second, that the powers reposed in government by the people should not be vested in any one person or small group of persons. This, of course, is the principle of separation of powers. Montesquieu articulates this principle by contrasting liberty in the face of the concentration of governmental powers in any one person or persons. More specifically, the threat to liberty arises when combinations of legislative, executive, and judicial powers are joined and concentrated in one person or group of persons. As Montesquieu explains:

> "When the legislative and executive powers are united in the same person, or in the same body of magistrates, ***there can be no liberty***; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of everything, were the same man or the same body, whether of nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

Spirit of Laws, supra, at p. 70, § 6 (emphasis added).

Consistent with the principles articulated by Montesquieu, on June 13, 1787 the first draft of the Constitution's provisions that establish the federal government was introduced at the Constitutional Convention. This draft specifically created the three branches of government contemplated by Montesquieu, which had their constitutional powers clearly circumscribed and separated. *Madison's Journal* at pp. 160-61.[5]

In response to those who opposed ratification of the Constitution during the ratification debates, James Madison, echoing Montesquieu, addressed the issue of separation of powers in Federalist #47:[6]

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[5] Madison, James, *Journal of the Constitutional Convention (kept by James Madison)*, (1840 Ed.) reprinted 1893, Chicago: Scott, Foresman and Company ("*Madison's Journal")*.

[6] Hamilton, Alexander, Madison, James, Jay, John, *The Federalist Papers*, (1961), New York: NAL Penguin, Inc. ("*Federalist Papers*").

> "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that on which the objection is founded. The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

Federalist Papers, supra, at 301.

In his *2nd Treatise*, Locke starts with identifying that we, as humans, desire to enter into society with one another:

> "God have made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into society . . . "

2nd Treatise, supra, at 42.

Locke reasons that in order to understand the origins of civil government, one must first understand the state of humans prior to entering into society. Locke posits what he calls the "state of nature." In this state, humans are vested with all aspects of liberty, including the power to execute laws upon one another. Of course, this condition leads every person to being prosecutor, judge, jury, and executioner, which actually results in the loss of liberty. *Id.* at 8. That in order to secure liberty, humans enter into society by creating civil government. Hence, Locke argues in favor of consent theory (i.e., that government derives its powers from the consent of the governed). *Id.*

Locke further expounds upon the consent theory by presenting the argument that not only do humans have the plenary power to establish government, but also the power to alter or abolish their government in the event it becomes tyrannical:

> "But if a long train of abuses, prevarications and artifices, all tending the same way, make the design visible to the people, and they cannot but feel

> what they lie under, and see whither they are going; it is not to be wondered, that they should then rouze themselves, and endeavor to put the rule into such hands which may secure to them the ends for which government was at first erected."

Id. at 113. This passage was paraphrased and incorporated into the Declaration by Thomas Jefferson as the legal basis for separating from Great Britain:

> "But when a long train of Abuses and Usurpations, pursuing invariably the same Object, evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw of such Government, and to provide new guards for their Security."

U.S. Decl. Of Ind.

Once again, it is made clear by Locke that the *source* of these powers (i.e., to institute and abolish government) reposed in the people comes not from government but God:

> "[W]henever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slavery under arbitrary power, they put themselves into a state of war with the people, who are thereupon absolved from any farther obedience, and are left to the common refuge, ***which God hath provided for all men***, against force and violence."

2nd Treatise, supra, at 111 (emphasis added).

As the foregoing discussion of the political philosophy promoted by Sydney, Montesquieu, and Locke establishes, the predominating political principle, that the people obtain their liberty from God (rather than government), is present throughout the writings of the Founders. For example, in

his *Summary View of Rights of British America*,[7] Thomas Jefferson identifies the source of our Liberty:

> "The God who gave us life, gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them."

Summary View, supra, at 265.

From a legal point of view, what is important to the underpinnings of our Nation's form of government is not whether one believes in God, but rather that the principles upon which our Nation was founded remain intact and known to everyone. That is to say, what is important is that we understand that our government is subordinate to the people because our rights come not from government but God. This is not a theological notion, but a clearly defined political and philosophical principle that is the cornerstone of our liberty and the cornerstone upon which our form of government rests.

Thus, the necessary hierarchy is established: our rights are secured because the source of our rights comes from God, which makes government subordinate to the people. Any change in that balance will result in the people looking to government for their rights, which, as history has taught us, will lead to the loss of liberty. This is what is meant by Thomas Jefferson in the Declaration: "*That to secure these Rights, Governments are instituted among men,* ***deriving*** *their just powers from the* ***Consent of the Governed***." Once God, as the source of our liberty, is removed from this political equation, the result is "The governed derive their rights from the consent of the *government*." Clearly, this was not the Founders' intent; nor would liberty survive under this model. In this regard, Sydney posed a question to those who would like God removed from the equation:

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[7] Jefferson, Thomas, *A Summary View of the Rights of British America*, (1774), p. 265, reprinted in *Annals of America*, Vol. 2, (1976). Chicago: Encyclopaedia Britannica, Inc. ("*Summary View*").

> "Shall the ordinance of God be rendered of no effect; or the powers that he hath appointed to be set up for the distribution of justice, be made subservient to the lusts of one or a few men, and by impunity encourage them to commit all manner of crimes?"

Discourse, supra, at 226.

Furthermore, under the Ninth Circuit's reading of the Establishment Clause and misapplication of this Court's Establishment Clause decisions, the reading of President Lincoln's *Gettysburg Address* in a public school would constitute a religious act, profession of religious belief, or prayer because of its reference to God:

> "It is rather for us to be here dedicated to the great task remaining before us – that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion; that we highly resolve that these dead shall not have died in vain; that ***this nation, under God***, shall have a new birth of freedom; and that *government of the people, by the people, and for the people* shall not perish from the earth."[8]

Of course it is no secret that the phrase "*one Nation under God*" in the Pledge is ostensibly quoted from the Gettysburg Address. In writing those words, President Lincoln had in mind the political principles upon which our form of government was established and the writings of the Founders, as well as Sydney, Montesquieu, and Locke.

Similarly, under the Ninth Circuit's view of the Establishment Clause, a public school teacher's recitation of the Emancipation Proclamation during Black History month would transgress the Establishment Clause. In his Emancipation Proclamation, President Lincoln concludes with the following:

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[8] Lincoln, Abraham, *The Gettysburg Address* (1863), reprinted in *Annals of America*, Vol. 9, pp. 462-63 (1976). Chicago: Encyclopaedia Britannica, Inc.

> "And upon this act, sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the ***gracious favor of Almighty God***."[9]

Can liberty long survive if the federal courts begin to excise the word "*God*" from our founding documents and the writings of the Founders? Is this Court prepared to make U.S. district and circuit courts *ad hoc* editorial boards vested with power to review and excise words from our founding documents and the writings of the Founders? From where in the Constitution would such a power emanate? This, of course, would be the inevitable outcome if this Court affirms the Ninth Circuit's rationale in *Newdow*.

As the foregoing demonstrates, the phrase "*under God*" is an expression of political philosophy studied and adopted by the Founders to mean that the people receive their rights not from government but God. Whether or not one believes in God is irrelevant to the principle. As the people are vested with plenary power to govern themselves, government is "instituted" by the will and consent of the people. Essentially, "*under God*" is shorthand for "government is instituted by and subordinate to the people." In accordance with the foregoing history and as supported by the authorities set forth in the following sections, the Pledge is neither a religious act, profession of religious belief, nor prayer.

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[9] Lincoln, Abraham, *The Emancipation Proclamation* (1863), reprinted in *Annals of America*, Vol. 9, p. 399 (1976). Chicago: Encyclopaedia Britannica, Inc.

B. AS THE PHRASE "*UNDER GOD*" IS AN EXPRESSION OF POLITICAL PHILOSOPHY RATHER THAN A RELIGIOUS ACT, PROFESSION OF RELIGIOUS BELIEF, OR PRAYER, RESPONDENT'S CLAIM IS *NOT* JUSTICIABLE UNDER THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

This section will demonstrate that the Pledge does *not* contravene this Court's Establishment Clause decisions.

1. This Case Is *Not* A Government Compelled Speech Case, As Punishment Of Respondent's Daughter Was Neither Imposed Nor Threatened

It is worth noting that under consideration by the Court is *not* the situation where a student was compelled by the state to recite the Pledge. This type of state compelled speech would be unconstitutional even if the phrase "*under God*" were not in the Pledge.[10] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) ("*Barnette*").

2. As The Phrase "*under God*" In The Pledge Is Neither A Religious Act, Profession Of Religious Belief, Nor Prayer, It Does *Not* Contravene This Court's Establishment Clause Decisions

As an initial matter, in finding that the Pledge violates the Establishment Clause, the Ninth Circuit chose ***not*** to apply the 3-part test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) ("*Lemon*"); nor did it apply the "endorsement test" applied by this Court in *Lynch v. Donnelly*, 465 U.S. 668 (1984) ("*Lynch*") and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989) ("*Allegheny*").

[10] In fact, in *Barnette* the Pledge did *not* yet contain the phrase "*under God*."

Instead the Ninth Circuit applied the "*coercion test*" formulated by this Court in *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*") and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) ("*Santa Fe*"). *Newdow v. U.S. Congress,* 328 F.3d 466, 487 (2003) ("*Newdow*").

The Ninth Circuit found (without explaining) the following aspects of the Pledge as constituting a transgression of the "coercion test" formulated in *Lee* and *Santa Fe*:

> "In the context of the Pledge, the statement that the United States is a nation 'under God' is a profession of a religious belief in monotheism. The recitation that ours is a nation 'under God' is not a mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic. Rather, the phrase 'one nation under God' in the context of the Pledge is normative. To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and – since 1954 – monotheism. A profession that we are a nation 'under God' is identical, for the Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion. The school district's practice of teacher-led recitation of the plead aims to inculcate students a respect for the ideals set forth in the Pledge, including the religious values it incorporates."

Newdow, supra, 328 F.3d at 487.

It is clear from the foregoing that the Ninth Circuit does not believe that the Pledge is a secular statement, but rather is a prayer, or as the Ninth Circuit likes to refer to it, a "profession of faith." As will become clear, this assertion does not survive a proper analysis under *Lee* or *Santa Fe*. However, before turning to *Lee* and *Santa Fe* it is worth recounting this Court's Establishment Clause decisions in

the context of prayer and religious exercises in public schools.

In *Engel v. Vitale*, 370 U.S. 421 (1962) ("*Engel*"), this Court found violative of the Establishment Clause the following **state-*composed*** and **state-*mandated*** *prayer*, which was required to be recited by children attending New York's public school:

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

Id. at 422. In finding that the state-mandated prayer contravened the Establishment Clause, this Court held:

> "There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regent's ***prayer* is a *religious activity***. It is a ***solemn avowal of faith*** and ***supplication for the blessing of the Almighty***."

Id. at 424 (emphasis added).

The Court should see the stark contrast between the ***prayer*** in *Engel* and the Pledge in this case. In *Engel*, the New York prayer is directed to a ***deity***, whereas in this case the children's pledge is directed to the Flag of the United States of America. Moreover, the manner in which the Pledge is recited bears none of the hallmarks of a prayer or religious exercise. That is, it is neither a "*solemn avowal of faith*" nor a "*supplication for the blessings of the Almighty*." *Id*.

Furthermore, in *Engel* this Court was careful to distinguish the state-composed and state-mandated *prayer* in that case with what it characterized as "patriotic" or "ceremonial" occasions:

> "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 contains references to the ***Deity*** or by singing officially espoused anthems which include the composer's profession 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* and *ceremonial occasions* ***bear no true resemblance*** to the unquestioned ***religious exercise*** that the State of New York has sponsored in this instance."

Id. at 435, *fn.* 21 (emphasis added). So too, the reciting of the Pledge in public schools "*bears no true resemblance*" to a religious act, profession of religious belief, or prayer. *Id*.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) ("*Schempp*"), this Court considered similar state statutes from Pennsylvania and Maryland. The Pennsylvania statute required the reading of ten verses from the Bible; the Maryland statute required the reading of at least one chapter from the Bible in conjunction with the Lord's Prayer. *Id.* at 205 and 211, respectively. This Court found that these practices constituted: ***"religious exercises."*** *Id.* at 224 (emphasis added). In his concurring opinion, Justice Brennan found that history demonstrates that:

> "[D]aily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially ***religious exercises***."

Id. at 277-78 (emphasis added).

Finally, it is interesting to note that in the Pennsylvania case the Bible reading and recitation of the Lord's Prayer was followed by the students reciting the Pledge (which at that time had the phrase "*under God*" included in it), although this Court made no constitutional determination at that time. However, the Pledge (with its inclusion of the phrase "*under God*") did not go unnoticed to Justice Brennan, who made the following observation relating to the constitutional aspects of the Pledge, which is consistent with *amicus* Pacific Justice's position:

> "The reference to divinity in the *revised* pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "*under God*." Thus, *reciting the*

> *pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the* ***same*** *historical fact*."

Id. at 304 (emphasis added).

In *Wallace v. Jaffree*, 472 U.S. 38 (1985) ("*Wallace*"), this Court was called upon to review an Alabama statute that authorized a 1-minute period of silence in all public schools "*for meditation or voluntary prayer*." In finding this provision in contravention of the Establishment Clause, this Court found that the express legislative intent was to encourage religious activity and return prayer to public schools:

> "[The statute was enacted] for the sole purpose of expressing the State's endorsement of ***prayer activities*** for one minute at the beginning of each schoolday."

Id. at 60 (emphasis added). In response to Chief Justice Rehnquist's concern that the *Wallace* logic might result in the Pledge being held unconstitutional because it includes the phrase "*under God*," Justice O'Connor provided assurances this would not be the case:

> "In my view, the words '*under God*' in the Pledge, as codified at 36 U.S.C. § 172, serve as an acknowledgment of religion with 'the *legitimate* ***secular*** purposes of solemnizing public occasions, and expressing confidence in the future.' "

Id. at 78, *fn.* 5 (quoting *Lynch, supra*, 465 U.S. at 693; emphasis added).

Keeping the foregoing decisions in mind, review of *Lee* and *Santa Fe* will demonstrate that the inclusion of the phrase "*under God*" in the Pledge does *not* run afoul of the Establishment Clause.

In *Lee v. Weisman*, 505 U.S. 577 (1992) ("*Lee*"), this Court considered the constitutionality of a rabbi led invocation and benediction prayers at a graduation ceremony at a Providence, Rhode Island public middle school. Although both the invocation and benediction were nonsectarian,

they both were addressed to "God" and concluded with "Amen." *Id.* at 581-82.

Although invited to by petitioners and the United States in *Lee*, this Court would not reconsider *Lemon*,[11] instead applying the so called "coercion test." In deferring reconsideration of *Lemon*, this Court concluded that:

> "The government involvement with religious activity in this case is so pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us."

Id. at 587 (emphasis added). In *Lee*, the government's pervasive involvement includes, for example, the State of Rhode Island's official (i.e., the principal):

a. deciding that the invocation and benediction prayers should be given at the graduation ceremony;
b. selecting the religious participant (i.e., Rabbi Gutterman); and
c. determining the content and scope of the prayers.

Id. at 587-88.

Going on to find under the "coercion test" that the prayers in *Lee* were in contravention of the Establishment Clause, this Court held:

> "The ***prayer exercises*** in this case are especially improper because the State has in every practical

[11] Perhaps now would be an appropriate time to revisit the advisability of keeping *Lemon* on life support. The "endorsement" and "coercion" tests have supplanted *Lemon*, thereby creating a manageable framework for assessing Establishment Clause and Free Exercise Clause cases. If invited by the Court to do so, *amicus* Pacific Justice would provide additional briefing in this regard.

> sense ***compelled*** attendance and participation in an ***explicit religious exercise*** at an event of singular importance to every student, one the objecting student had no real alternative to avoid."

Id. at 598 (emphasis added).

Clearly, recitation of the Pledge does *not* implicate the foregoing principles embedded in the "coercion test." Moreover, the underlying premise of *Lee* is a ***state*-composed** and ***state*-sponsored** prayer in a ***state*-sponsored** formal ***religious exercise***. In the case at Bar, without a constitutional specter as a *sine qua non*, there can be no coercion. Stated differently, under *Lee* the reciting of the Pledge does *not* coerce Respondent's daughter to listen or be exposed to a ***state*-composed** or ***state*-sponsored *prayer*** during a ***state*-sponsored** formal ***religious exercise***. In the first instance it is *not* the coercion that makes the constitutional claim under *Lee*, but the state-composed and state-sponsored prayer given during the state-sponsored formal religious exercise. This is precisely where the Ninth Circuit's decision is fatally flawed: it declares that the Pledge **is** a *religious act* or *profession of religious belief* then rushes to the "coercion test" in *Lee* to strike-down the Pledge. Contrary to the Ninth Circuit's reasoning but consistent with *Lee*, there is no Establishment Clause violation implicated by the Pledge.

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) ("*Santa Fe*"), this Court considered the constitutionality of the recitation of a voluntary student-led, student-initiated prayer by students from the Santa Fe High School over the public address system prior to the kick-off of all home varsity football games. Initially, this Court distinguished school prayer cases from free speech cases in a limited public forum such as, for example, *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) ("*Rosenberger*"). This Court found that there was no evidence in *Santa Fe* that indicated that the school district opened the forum for unrestricted speech, thereby removing it from the free speech analysis. *Santa Fe, supra*, 530 U.S. at 303-04.

The fact that in *Santa Fe* the school district's policy permitted the students themselves to select their chaplain, who would give the prayers at the football games, was not persuasive to this Court. This is because the district's policy also provided that the person who was elected would also prepare the prayer, which had the effect of excluding minority views on what should be contained in the prayer. Citing *Barnette, supra*, this Court explained why such a voting system may not be utilized in the context of the Establishment Clause:

> "[T]his student election does nothing to protect minority views, but rather places the students who hold such minority views at the mercy of the majority. Because 'fundamental rights may not be submitted to vote; they depend on the outcome of no elections,' the District's elections are insufficient safeguards of diverse student speech."

Id. at 304-05. Furthermore, this Court dismissed the school district's contention that it had a hands-off policy towards the selection and delivery of the prayer at football games:

> "[T]he realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the 'degree of school involvement' makes it clear that the pre-game prayers bear 'the imprint of the State and thus put school-age children who objected in an untenable position."

Id. at 305.

In fact, in *Santa Fe* the school district's involvement in the prayer given at high school football games was pervasive. For example, by way of its own policy the school district had the power to: permit or deny the delivery of the prayer; designate the procedures for the election of the person giving the prayer; and supervise the student council relative to conducting the election. The most acute violation of all was the fact that the ***only*** type of message that the school district would permit at the beginning of the football games was a ***religious*** one. This Court also found that the intent of the school district was to promote a religious message because the school district's policy indicated that

the purpose of the prayer was "to solemnize the event." *Id*. at 306-07.

As a final point, in the context of Establishment Clause jurisprudence, the standard for assessing whether a state's practice or policy endorses religion is an ***objective*** test as to whether the ***"reasonable observer*** *would view a government practice as endorsing religion." Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 777 (1995) ("*Capitol Square*"). As explained by Justice O'Connor in her concurring opinion, the "reasonable observer" standard in the context of Establishment Clause cases makes good sense because:

> "there is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of display might feel uncomfortable."

Id. at 780 (emphasis original). What Justice O'Connor is referring to is not the "reasonable observer" but the unreasonable and hypersensitive observer. Moreover, this inquiry may not be answered in the abstract or conducted in a vacuum:

> "[T]he reasonable observer in the endorsement inquiry ***must*** *be deemed aware of the* ***history and context*** of the community and forum in which the religious display appears . . . 'the history and ubiquity of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.' "

Id. at 780 (also quoting *Allegheny, supra*, 492 U.S. at 630).

In *Santa Fe*, this Court applied the "reasonable observer" test in reaching its conclusion that the pre-game prayer gave the perception that the school district endorsed the prayer:

> "In this context, the members of the listening audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a ***religious*** activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer.' "

Santa Fe, supra, 530 U.S. at 308 (also quoting *Wallace*, *supra*, 472 U.S. at 76; emphasis added).

Of course, in the context of the Pledge, the Court must consider the history and principles discussed in Section III.A, *supra*, in assessing whether the Pledge creates the perceived or actual endorsement of religion. As discussed at length in Section III.A, *supra*, no "reasonable observer" could conclude that the Pledge is a religious act, profession of religious belief, or prayer that endorses religion. In fact, no such evidentiary finding is anywhere to be found in the record. Moreover, individuals with hypersensitivity such as Respondent are not who is intended to be included within the "reasonable observer" definition:

> "[T]he endorsement inquiry is ***not*** about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe."

Id. at 779 (emphasis added). It should be obvious from the Nation's outrage after the Pledge was declared unconstitutional by the Ninth Circuit that Respondent and the *Newdow* majority's view of the Pledge is ***not*** from the "reasonable observer" perspective, but rather from the "isolated nonadherents" perspective.

Applying the foregoing Establishment Clause decisions, along with the principles discussed in Section III.A, *supra*, the phrase "*under God*" is nothing more than an expression of the political philosophy adopted by the Founders when establishing our form of government. As such, it fails to contravene the Establishment Clause.

Moreover, there is no evidence in the record or in history that would lead one to believe that the Pledge is a state-sponsored religious act, profession of religious belief, or prayer mandated by the state to be recited during a state-sponsored religious activity. Consequently, the Pledge does ***not*** transgress the dictates of the Establishment Clause.

3. This Court Should Adopt The 7th Circuit's Decision In *Sherman v. Community Consolidated School District 21* Because It Is Consistent With This Court's Establishment Clause Decisions And Is Consistent With This Court's Many Explicit References To The Obvious Constitutionality Of The Pledge

It is worth mentioning from the outset that until the Ninth Circuit's decision in this case, neither this Court nor any other federal court has ever expanded this Court's school prayer decisions to apply to cases where there was no state-sponsored prayer or state-sponsored formal religious exercise involved.

The Pledge is no stranger to this Court. On numerous occasions in the constitutional context of Establishment Clause cases, this Court has placed the Pledge in contradistinction with the state-sponsored activities that constituted violations of the Establishment Clause. For example, in *Schempp* students recited the Pledge after Bible reading and reciting the Lord's Prayer, and in *Lee* the Pledge was recited before the rabbi gave the invocation at the graduation ceremonies.

In addition, there are many explicit references by this Court relative to the constitutionality of the Pledge. *See, e.g., Lynch, supra*, 465 U.S. at 676 ("Other examples of reference to our religious heritage are found . . . in the language 'One nation under God,' as part of the Pledge of Allegiance to the American Flag. That pledge is recited by many thousands of public school children – and adults – every year."); *Allegheny, supra,* 492 U.S. at 602-03 ("Our

previous opinions have considered in dicta the motto ["In God we trust"] and the pledge ["*under God*"], characterizing them as ***consistent*** with the proposition that government may not communicate an endorsement of religious belief."); *Wallace, supra*, 472 U.S. at 78, fn. 5 ("[T]he words "*under God*" in the Pledge . . . serves as an acknowledgment of religion with 'the *legitimate* ***secular*** purposes of solemnizing public occasions, and expressing confidence in the future."); *Schempp, supra,* 374 U.S. at 304 ([R]eciting the pledge may be no more a religious exercise than the reading aloud of Lincoln's Gettysburg Address."); *Engel, supra*, 370 U.S. at 440, fn. 5 (In his concurring opinion, Justice Douglas indicated that the Pledge "in no way run[s] contrary to the First Amendment").

Moving now to the Seventh Circuit's decision in *Sherman v. Community Consolidated School District 21,* 980 F.2d 437 (7th Cir.1992), *cert. denied,* 508 U.S. 950 (1993) (*"Sherman"),* which is in direct conflict with the Ninth Circuit's decision in *Newdow.* At issue in *Sherman* was an Illinois statute that mandated that the Pledge must be recited each school day. Consistent with *Barnette*, students were free to not participate in reciting the Pledge. When confronted with the same Establishment Clause challenge to the Pledge as in this case, the Seventh Circuit framed the issue as follows:

> "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?"

Id. at 445. In *Sherman*, the Seventh Circuit answered this question in the negative. The Seventh Circuit reasoned that our history, our historical documents (*e.g.*, Declaration, Gettysburg Address, etc.), and this Court's Establishment Clause decisions (*e.g.*, *Lee*, *Engel*, *Schempp, Lynch,* etc.) demonstrate that the Pledge is ***not*** a state-sponsored *prayer*, but rather a ***patriotic*** *expression*. *Sherman, supra*, 980 F.2d at 445-48 (emphasis added). As the reciting of the Pledge was found to be a patriotic expression (rather than a prayer) it did ***not*** give rise to a claim under the Establishment Clause. *Id.*

The foregoing demonstrates that the Ninth Circuit's decision is at odds with *Sherman* and this Court's Establishment Clause decisions.

IV. RESPONDENT DOES *NOT* HAVE STANDING IN HIS OWN RIGHT TO MAINTAIN THIS ACTION, AS HE IS MERELY ASSERTING TAXPAYER STANDING MASQUERADING AS "PARENTAL" STANDING

For purposes of analyzing the issue of whether Respondent has Article III standing, it is worth reminding this Court that the Ninth Circuit's *original* opinion in this matter was issued in June 2002, *Newdow v. U.S. Congress*, 292 F.3d 597, 602 (9th Cir.2002). In that opinion the Ninth Circuit found that Respondent had standing under Article III pursuant to its decisions in *Doe v. Madison School District No. 321*, 177 F.3d 789 (9th Cir.1999) (*en banc*) and *Grove v. Mead School District No. 354*, 753 F.2d 1528 (9th Cir.1985).

After the original opinion was issued, Sandra Banning, the mother of Respondent's daughter, filed a motion for leave to intervene on behalf of Respondent's daughter. Ms. Banning based her motion on the fact that she had ***sole* legal custody** of her daughter and that her daughter did *not* object to reciting the Pledge. Ms. Banning based her claim of ***sole*** legal custody on a California Superior Court custody order ("Sole Custody Order"), which reads as follows:

> "The child's mother, Ms. Banning, to have ***sole*** legal custody as to the rights and responsibilities to make decisions relating to the health, ***education*** and welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and ***educational*** needs of [the child]. If mutual agreement is not reached in the above, then ***Ms. Banning may exercise legal control of [the child]*** that is not specifically prohibited or

> inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records."[12]

The Sole Custody Order is consistent with California Family Code section 3006, which provides:

> "'***Sole*** legal custody' means that ***one*** parent ***shall*** have the ***right*** and the responsibility to make decisions relating to health, ***education***, and welfare of the child."

(Emphasis added.)

On September 25, 2002 the California Superior Court issued an order enjoining Respondent from pleading his daughter as an unnamed party or representing her as a "next of friend" in the case before the Ninth Circuit.

In denying Ms. Banning's motion to intervene the Ninth Circuit sidestepped both the Sole Custody Order and Family Code section 3006 by refusing to apply section 3006. The Ninth Circuit's refusal to apply Family Code section 3006 was predicated upon its finding that reciting of the Pledge is an unconstitutional act (i.e., violates the Establishment Clause). That is to say, the Ninth Circuit concluded that Respondent has standing because his daughter's mother, who has ***sole*** **legal custody**, lost sole custody for purposes of intervention because she may not force her daughter to endure the unconstitutional actions of the school district (i.e., listening to the reciting of the Pledge in her presence). Of course, in reaching this decision the Ninth Circuit assumes a violation of the Establishment Clause in order to deprive Ms. Banning of protection under the Sole Custody Order and Family Code section 3006. Although a novel concept, there is no such authority, either federal or state, to support the Ninth Circuit's conclusion. Moreover, the Ninth Circuit essentially

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[12] The opinion and orders of the Ninth Circuit denying Ms. Banning's motion for intervention are reported at 313 F.3d 495 (9th Cir.2002) and 313 F.3d 506 (9th Cir.2002).

nullified California's public policy relating to rights and duties associated with ***sole*** legal custody.

Also imbedded in the Ninth Circuit's finding is the fact that they simply ignored Respondent's daughter's desire (and the desire of her mother, the person with ***sole*** legal custody) to recite the Pledge. It was paramount to finding standing that the Ninth Circuit had to ignore these facts because if Ms. Banning did not object to her daughter's reciting of the Pledge (or of it being recited in her daughter's presence), then the "coercion test" in *Lee* and *Santa Fe* would ***not*** be violated.

What is revealing about the Ninth Circuit's curious approach to standing is the reason given in the last sentence of its order denying Ms. Banning's motion to intervene, which indicates that Ms. Banning "*has no protectable interest at stake in this action*." Unbelievably, the Ninth Circuit ignored the Sole Custody Order and Family Code section 3006 to find that Respondent has standing, but that Ms. Banning does not.

In support of their decision to divest Ms. Banning of her status as the parent with ***sole*** legal custody, the Ninth Circuit misapplied *In re Marriage of Murga*, 103 Cal.App.3d 498 (1980) ("*Murga*"). The Ninth Circuit cites *Murga* for the proposition that Respondent has standing because he has the right to direct the religious education of his daughter. It is important to note that this is the **sole** right upon which the Ninth Circuit based its entire conclusion that Respondent has Article III standing:

> "Newdow has standing as a **parent** to challenge a practice that interferes with his right to **direct** the ***religious education*** of his daughter."

Newdow, supra, 328 F.3d at 485 (emphasis added). Even a cursory review of *Murga* demonstrates that in its zeal to excise the word "*God*" from the Pledge, the Ninth Circuit misapplied that case. In *Murga*, the California court of appeal determined that although the non-custodial parent (such as Respondent) may discuss religion with the child, the person with ***sole*** **legal custody** (such as Mr. Banning)

has the **exclusive** power to decide the child's religious upbringing and education:

> "[T]he ***custodial*** parent undoubtedly has the right to make ultimate decisions concerning the child's ***religious*** upbringing . . . "

Id. at 505 (emphasis added). So, in fact, the *Murga* decision serves to contradict the Ninth Circuit's finding that Respondent has Article III standing, while at the same time it **supports** *Amicus* Pacific Justice's position that Respondent does *not* have standing. Interestingly, *Murga* is fully consistent with California Family Code section 3006, but the Ninth Circuit's interpretation and application of *Murga* are clearly inconsistent with that case and section 3006. In effect, the Ninth Circuit amended the unequivocal language of section 3006. Accordingly, *Murga* makes clear that Respondent does *not* have Article III standing because he has absolutely no authority to direct the ***religious education*** of his daughter. *Id.*

As found by the Ninth Circuit, Respondent contends that the Establishment Clause violation occurred as follows:

> "Newdow does not allege that his daughter's teacher or school district requires his daughter to participate in reciting the Pledge. Rather, he 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, supra, 328 F.3d at 483 (emphasis added).

Of course the Ninth Circuit's conclusion that Respondent has standing to direct his daughter's "religious education" presupposes that the Pledge is a religious act, profession of religious belief, or prayer. As demonstrated in Section III.A, *supra*, the Pledge is nothing more than a paraphrasing of the Founder's political philosophy. Consequently, the terms of the Ninth Circuit's own opinion demonstrates that Respondent does *not* have standing.

Stated differently, if the Ninth Circuit is incorrect in its legal conclusion that the Pledge constitutes a religious act, profession of religious belief, or prayer, then it follows that the legal basis upon which standing has been placed is incorrect, thereby depriving Respondent of standing. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 180-81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Clearly, Respondent does ***not*** have standing to directly or indirectly press his daughter's alleged constitutional claim because Ms. Banning has ***sole*** **legal custody** of Respondent's daughter. Thus, Respondent is reduced to asserting standing as a taxpayer, although it has been disguised by the Ninth Circuit as "parental" standing. As there was no evidence of a specific and identifiable expenditure of state funds associated with the recitation of the Pledge, Respondent does ***not*** have taxpayer standing to challenge the Pledge in his own right. *See, e.g., Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) ("*Valley Forge*").

In *Valley Forge*, this Court addressed the issue of whether the respondents in that case had standing to challenge the transfer of property of the United States to a church-based college as a violation of the Establishment Clause. One basis upon which respondents sought to establish standing was as taxpayers. In *Valley Forge* this Court found that respondents did *not* have taxpayer standing:

> "[T]he expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though [respondent] contributes to the public coffers as a taxpayer."

Id. at 477.

Finally, in *Doremus v. Board of Education*, 342 U.S. 429 (1952) this Court addressed the issue of whether taxpayers had standing to challenge a New Jersey law that authorized public school teachers to read passages from the Bible in the classroom. In finding that the parties did *not* have taxpayer standing, this Court explained:

> "This Court has held that the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain, and indirect to furnish a basis for [standing] . . . The party who invokes the [court's] power must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people in general."

Id. at 433-34.

Based on the foregoing, Respondent does ***not*** have standing under Article III to challenge the school district's policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "*under God*."

V. CONCLUSION

As the foregoing demonstrates, Respondent does **not** have a justiciable claim under the First Amendment's Establishment Clause. *Amicus* Pacific Justice respectfully requests this Court to reverse the Ninth Circuit's decision in *Newdow* with instructions to dismiss the case in its entirety.

Respectfully submitted,

PETER D. LEPISCOPO*
LAW OFFICES OF PETER D. LEPISCOPO
2635 Camino del Rio South,
Suite 109
San Diego, California 92108
Telephone: (619) 299-5343
Facsimile: (619) 299-4767
e-mail: plepiscopo@worldnet.att.net

**Counsel of Record for Amicus*
Curiae Pacific Justice Institute