No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
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 THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS ELK GROVE UNIFIED SCHOOL DISTRICT AND DAVID W. GORDON, SUPERINTENDENT

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INTEREST OF THE *AMICUS CURIAE*

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our armed services.

[1] Pursuant to Supreme Court Rule 37.3(a), *amicus* has received consent to file this brief from counsel for the petitioners and the respondent *pro se*. The original letters of consent were filed with the Clerk of the Court before the Court's consideration of the petition for writ of certiorari. Photocopies of the consent letters, with the portion consenting to the filing of this brief on the merits highlighted, have been resubmitted to the Clerk's Office. No part of this brief was authored by a party or counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

The Legion long has worked to foster patriotism in general and respect for our nation's flag in particular. The Legion was chartered as a corporation in 1919 by Act of Congress. Act of September 16, 1919, ch. 59, 41 Stat. 284 (current version at 36 U.S.C. §§ 21701-21708 (2000)). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. 36 U.S.C. § 21702 (2000).

The Legion has a long-standing interest in the Pledge of Allegiance to the Flag ("Pledge"). The Legion convened the first National Flag Conference in Washington, D.C. in June 1923. At that conference, which was attended by President Harding, the words of the Pledge were changed from, "I pledge allegiance to my Flag . . ." to "I pledge allegiance to the Flag of the United States . . . ." *See* The Flag Code, adopted at the Nat'l Flag Conf., at 4 (Washington D.C., June 14-15, 1923). At a second National Flag Conference the following year, the Director of the Legion's National Americanism Commission, Garland W. Powell, was elected Permanent Chairman of the Conference. At the 1924 Conference, the words of the Pledge were changed from ". . . Flag of the United States" to ". . . Flag of the United States of America . . . ." *See* Summ. of Proceedings of the All Americanism Conf. called by the Nat'l Americanism Comm'n of the American Legion, at 2 (Washington D.C., May 15-17, 1924).

The Legion also was active in securing enactment of the Act of June 14, 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249 ("1954 Act"), which added the words "under God" to the Pledge, 4 U.S.C. § 4 (2000). *See, e.g.*, American Legion, Nat'l Exec. Comm. Res. 72 (May 1954) (supporting inclusion of "under God" in the Pledge). This case, which implicates the constitutionality of the Pledge as amended by

the 1954 Act,[2] raises important issues about our society and our Constitution. Its implications transcend the interests of the parties and are of great importance to the Legion and its members.

There is no religious test for Legion membership. *See* 36 U.S.C. § 21703 (2000) (establishing honorable service in the armed forces during any listed period of hostilities as membership requirement). Nor has the Legion polled its members as to their religious beliefs. In all likelihood, though, some of the Legion's more than 2.6 million members do not believe in a single Supreme Being. But this case is neither about religion nor an establishment of religion. Rather, it is about patriotism, and about the propriety of the government's encouraging Americans to honor their country and its symbol—the American Flag.

SUMMARY OF ARGUMENT

The Pledge, whose wording is established by federal law, is recited by millions of Americans daily. The court of appeals' decision alters the Pledge's wording for public school students in nine states, while citizens in the rest of the nation, and citizens in the Ninth Circuit who attend non-school ceremonial functions, recite the Pledge as enacted by Congress. The decision below held that the presence of two words—"under God"—transforms the recitation of the Pledge from an expression of patriotism into a "religious act" that violates the Establishment Clause when voluntarily recited by public school students pursuant to school district policy.

The court of appeals arrived at its judgment through application of this Court's school-prayer precedents. The conclusion that the school district's policy impermissibly

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[2] On November 13, 2002, in response to the original panel decision below, Congress reaffirmed the Pledge as amended by the 1954 Act. *See* Act of November 13, 2002, Pub. L. No. 107-293, § 2(b), 116 Stat. 2060.

coerces a religious act, however, is founded upon an erroneous premise—that the Pledge is the equivalent of a prayer. But the Pledge is not a prayer. Its recitation is no more a religious act than such other acknowledgments of this country's religious heritage as the national motto ("In God We Trust"), the references to the Creator in the Declaration of Independence, or references to God in "The Star Spangled Banner."

The Pledge has the secular purpose of promoting patriotism. Even with the words "under God," it is not an endorsement of religion. To the contrary, it has been characterized by this Court as consistent with the Establishment Clause. Nor does the school district's policy of voluntary Pledge recitation in classrooms lead to excessive government entanglement with religion.

ARGUMENT

Neither the words "under God" in the Pledge, nor the Pledge as a whole, nor the school board's daily recitation policy violates the Establishment Clause.[3]

"Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST., amend. I. The same stricture applies, through the Due Process Clause of the Fourteenth Amendment, to state and local governments. *Everson v. Bd. of Education*, 330 U.S. 1 (1947). The Establishment Clause is directed not against every government action or activity that might "'happen[] to coincide or harmonize with the tenets of some . . . religions,'" *Lynch v. Donnelly*, 465 U.S. 668, 682 (1984) (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)), but against "'sponsorship, financial sup-

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[3] *Amicus* expresses no view on Question 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."

port, and active involvement of the sovereign in religious activity,'" *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). Moreover, no "school can persuade or compel a student to participate in a religious exercise." *Lee v. Weisman*, 505 U.S. 577, 599 (1992).

Under *Lemon*, the test of whether there is an Establishment Clause violation has three prongs:

First, does the challenged statute or activity have a secular purpose? *Lemon*, 403 U.S. at 612. There is no violation if the purpose is at least partly secular, *Lynch*, 465 U.S. at 680-81 & n. 6; *American Family Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002) (requiring plausible secular purpose), so long as the supposedly secular purpose isn't a sham, *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 308-10 (2000).

Second, does the activity's principal or primary effect endorse or inhibit religion? *Lemon*, 403 U.S. at 612. In order to pass muster, it must do neither when considered in its overall context, *see Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring), and from the viewpoint of an informed and reasonable observer, *American Family Ass'n*, 277 F.3d at 1122.[4]

Finally, does the activity foster "'an excessive government entanglement with religion'"? *Lemon*, 403 U.S. at 613 (quoting *Walz*, 397 U.S. at 674); *Agostini v. Felton*, 521 U.S. 203, 233 (1997). Such entanglement violates the Establishment Clause. A statute or activity that fails any prong of the *Lemon* test cannot stand. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

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[4] For this reason, Dr. Newdow's subjective allegation that he feels like an outsider when he attends class with his daughter and hears the Pledge being recited is not dispositive.

The "endorsement" test, first articulated by Justice O'Connor in *Lynch v. Donnelly*, essentially combines the first two prongs of the *Lemon* test. It holds that the "Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)).

In its revised opinion, the court of appeals applied the "coercion" test of *Lee v. Weisman* to hold the school district's policy of voluntary Pledge recitation unconstitutional. *Newdow v. United States Congress*, 328 F.3d 466, 487 (9th Cir. 2003) ("we conclude that the school district policy impermissibly coerces a religious act and accordingly hold the policy unconstitutional"). Once it found that the Elk Grove school district's policy failed that test, the court did not consider the endorsement test or the *Lemon* test. *Id.* The court of appeals held: (1) that teacher-led recitation of the Pledge "impermissibly coerces a religious act," and (2) "[i]n light of Supreme Court precedent," "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." *Id.* at 487, 490. Although the panel majority expressly declined to decide the constitutionality of the 1954 Act, *id.* at 490, by implication the judgment held the 1954 Act unconstitutional as applied to public school students in the Ninth Circuit.

I. THIS CASE INVOLVES NEITHER COMPULSORY RECITAL OF THE PLEDGE NOR COMPULSORY PRESENCE AT A GOVERNMENT-SPONSORED RELIGIOUS ACTIVITY.

Contrary to the court of appeals' majority opinion, there is no Establishment Clause violation in this case. In the first place, Dr. Newdow's daughter is not being required to recite

the Pledge, *Newdow*, 328 F.3d at 487, so the compulsion that actuated the Court in *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943), is absent here. Were the Pledge a prayer, of course, even permitting objectors to absent themselves would not avoid an Establishment Clause violation, in part because prayer is inherently religious. *Lee*, 505 U.S. 577 (1992) (prohibiting prayers offered by clergy at public school graduations); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (prohibiting teacher-led prayers in public schools regardless of whether students are compelled to recite them).

But the Pledge is not a prayer. It is a patriotic celebration of Nation and Flag.

> Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values. Separation of church from state does not imply separation of state from state. Schools are entitled to hold their causes and virtues out as worthy subjects of approval and adoption, to persuade even though they cannot compel, and even though those who resist persuasion may feel at odds with those who embrace the values they are taught.

Sherman v. Community Consol. School Dist. No. 21, 980 F.2d 437, 444 (7th Cir. 1992) (emphasis in original) (holding that non-compulsory recitation of the Pledge, including the words "under God," does not violate the Establishment Clause).

The Supreme Court, in striking down the Regents' Prayer in *Engel v. Vitale*, said that—

> there is . . . nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express *love for our country* by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being,

> or with the fact that there are many manifestations in our public life of belief in God. Such *patriotic or ceremonial occasions* bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Engel, 370 U.S. at 435 n. 21 (emphasis added).

Because recitation of the Pledge as amended by the 1954 Act is neither a prayer nor a religious act, the concerns about requiring public school students' participation in a "religious exercise" that motivated this Court in *Lee*, 505 U.S. at 592-97, and the court of appeals majority in this case, do not obtain here. *Lee* is limited by its "dominant facts," which involved a "formal religious exercise" at a high school graduation ceremony. *Id.* at 586. That the facts involved prayer "control[led] the confines" of the holding in *Lee*. *Id.* Indeed, as Justice Scalia observed in his dissent, even though the students recited the Pledge, with the words "under God," at the graduation ceremony, only the prayer ran afoul of the Establishment Clause. *Id.* at 638-39 (Scalia, J., dissenting); *see id.* at 583 (opinion of the Court noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers."). And as Judge O'Scannlain observed in his dissent from the denial of rehearing *en banc* below, "[n]o court, state or federal, has *ever* held, even now, that the Supreme Court's school prayer cases apply outside a context of state-sanctioned formal religious observances." *Newdow*, 328 F.3d at 477 (O'Scannlain, J., dissenting from denial of rehearing *en banc*) (emphasis in original). The panel majority extended this Court's school-prayer cases to the Pledge, he continued, only by "obfuscat[ing] the nature of the exercise at issue." *Id.*

II. THE PLEDGE SATISFIES THE TEST SET FORTH IN *LEMON V. KURTZMAN*.

The amended Pledge satisfies each prong of the test enunciated in *Lemon v. Kurtzman* and thereby also passes the "endorsement" test discussed in *County of Allegheny*, 492 U.S. at 592-94.

A. The Pledge, the words "under God" in the Pledge, and the school district's recital policy have secular purposes.

As originally enacted into federal law, the Pledge read: "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." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.[5] Indisputably the 1942 version of the Pledge had a secular purpose, for it contains no religious references.

Congress's addition of "under God" also had a markedly secular purpose, namely distinguishing the United States—a religious nation, *see Zorach v. Clauson*, 343 U.S. 306, 313 (1952)—from its communist political adversaries, *Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *see Lynch*, 465 U.S. at 682 (secular purpose not vitiated because it may coincide with tenets of some religions).[6] References such as that in the Pledge "are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could

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[5] The Pledge dates to 1892 but was not enacted into federal law until fifty years later.

[6] Absent evidence to the contrary, a court should accept the purpose(s) set out in the text or legislative history of the statute or practice under review. *Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor, J., concurring in the judgment).

not be fully served in our culture if government were limited to purely nonreligious phrases." *Lynch*, 465 U.S. at 717 (Brennan, J., dissenting).

Further, *Lemon* makes context highly relevant. The school district's policy calls for recital of the *entire* Pledge, not merely the words added by the 1954 Act, and it is the full text of the Pledge that is the proper measure of whether the activity has a secular purpose. *See County of Allegheny*, 492 U.S. at 595-97 & n. 46 (Blackmun and Stevens, JJ.) (stating that "the effect of the government's use of religious symbolism depends upon its context"); *Lynch*, 465 U.S. at 690-92 (O'Connor, J., concurring) (concluding that inclusion of creche in city's Christmas display was not an endorsement of religion in part because creche was displayed along with "purely secular symbols").[7] Indeed, even Dr. Newdow concedes that the intent behind the school district's policy of Pledge recital is "the secular purpose of fostering patriotism." *Newdow v. United States Congress*, 292 F.3d 597, 611 (9th Cir. 2002), *amended and superseded*, 328 F.3d 466 (9th Cir. 2003). The Pledge is secular in purpose. Although the relevant inquiry is the nature of the Pledge as a whole, even the 1954 Act has a secular purpose because the words it added appear amid secular, patriotic phrases, and were added to distinguish—for *political*, not religious reasons—this nation from communist regimes. Hence the first *Lemon* prong is satisfied.

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[7] *Wallace's* focus on the Alabama act adding "or voluntary prayer" to an existing moment-of-silence statute is not to the contrary because the addition of "under God" to the Pledge was motivated by a desire to foster patriotism, not (as in *Wallace*) religion or prayer. *See Engel*, 370 U.S. at 440 (citing and quoting from legislative history of 1954 Act); *Wallace*, 472 U.S. at 78 n. 5 (O'Connor, J., concurring in the judgment) (suggesting that the 1954 Act merely acknowledges, rather than endorses, the presence of religion in American life).

B. The Pledge, the words "under God" in the Pledge, and the school district's recital policy neither endorse nor inhibit religion.

The second *Lemon* prong, and the emphasis of the endorsement test, is whether the state-sponsored activity can be considered an endorsement of religion. *County of Allegheny*, 492 U.S. at 592-94; *Lemon*, 403 U.S. at 612. Neither the addition of "under God" nor the school district's policy that the Pledge be recited (though recital is not compulsory for Dr. Newdow's daughter or any other student) has the purpose or effect of endorsing religion as opposed to agnosticism or atheism. This is especially so when compared to activities this Court has ruled permissible under the Establishment Clause. These include praying at the opening of state legislative sessions, *Marsh v. Chambers*, 463 U.S. 783 (1983), the First Congress's appointing paid chaplains contemporaneously with its approval of the language of the Bill of Rights, *id.* at 787-91, "printing . . . 'In God We Trust' on coins, . . . opening court sessions with 'God save the United States and this honorable court,'" and including a creche or menorah as part of a municipality's overall Christmas holiday display, *Lynch*, 465 U.S. at 690-93; *County of Allegheny*, 492 U.S. 573.

In *Lynch*, the Court observed that "the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag ... recited by thousands of public school children—and adults—every year" is a "reference to our religious heritage" in the same vein as "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers." *Lynch*, 465 U.S. 668, 675, 676 (1984).

> These government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encour-

> aging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 693.

Even Justice Brennan, who was "among the most stalwart of separationists," *Sherman*, 980 F.2d at 447, conceded that—

> [w]e have simply woven the [national] motto [In God We Trust] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. *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.

Abingdon School Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (emphasis added). Elsewhere in the same opinion, Justice Brennan took note of the claim that the Bible reading there at issue had secular purposes (i.e., fostering tolerance and harmony among the students; inspiring better discipline). *Id.* at 280-81. Even were that so, he continued, he could see no reason why that secular purpose could not be fulfilled by such *non-religious* activities as "daily recitation of the Pledge of Allegiance." *Id.* at 281.

In 1989, five justices noted that the Court has characterized the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious

belief" and that "there is an obvious distinction between creche displays," on the one hand, "and references to God in the [national] motto and the pledge," on the other. *County of Allegheny*, 492 U.S. at 602-03. As the Court observed, "[o]ur previous opinions have considered in dicta the motto ["In God We Trust"] and the pledge [with the phrase "under God" added by the 1954 Act], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* Thus, said the Court, including a menorah—admittedly a religious item when considered by itself—in a holiday display does not mean that the municipality "has endorsed religious belief over nonbelief." *Id.* at 618. Similarly, including "under God" in the secular Pledge does not mean that the federal government has endorsed religious belief over nonbelief, and adopting a policy of Pledge recital does not mean that the Elk Grove school district has made such an endorsement, either. Thus the school district's policy does not violate the second prong of *Lemon*.

C. The Pledge, the words "under God" in the Pledge, and the school district's recital policy do not lead to excessive government entanglement with religion.

The final *Lemon* prong is whether the activity leads to excessive government entanglement with religion or religious activity. *Lemon*, 403 U.S. at 612-13; *Agostini*, 521 U.S. at 233. There is no entanglement issue here. This Court has held that excessive entanglement does not occur where the government reviews religious grantees' adolescent counseling programs, *Bowen v. Kendrick*, 487 U.S. 589, 615-17 (1988), or audits categorical grants to religious colleges to ensure that they're not being used to teach religion, *Romer v. Bd. of Public Works*, 426 U.S. 736, 764-65 (1976). Here, there is no government followup beyond the possibility that a principal occasionally may check whether the Pledge is being recited in

her school's classrooms. The level of government involvement here is less than what has been permitted by this Court and the third *Lemon* prong accordingly presents no problem.

Thus the Pledge, the words "under God," and the school district's recital policy satisfy all three *Lemon* prongs: First, the principal purpose of the statutes and activity is patriotic and hence secular. Second, there is no endorsement of religion despite the reference to God. Finally, there is no potential for excessive entanglement of the government in religious activity, both because no such activity is present and because the likelihood of government involvement in overseeing the school district's recital policy is negligible. Accordingly, the recital policy does not violate the rights of Dr. Newdow or his daughter.

CONCLUSION

For the foregoing reasons, as well as those advanced by the petitioners, this Court should reverse the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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