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.

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

AMICUS CURIAE BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION, AND AMERICANS FOR RELIGIOUS LIBERTY IN SUPPORT OF AFFIRMANCE

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INTEREST OF AMICI[1]

Americans United for Separation of Church and State is a 75,000-member non-profit organization dedicated to defending separation of church and state and religious liberty. The American Civil Liberties Union is a non-profit organization with 400,000 members and affiliates nationwide, including California, dedicated to liberty and equality under the Constitution. Americans for Religious Liberty is a non-profit organization dedicated to defending religious freedom and separation of church and state. All have appeared before the Court as counsel or amicus in Establishment Clause cases.

SUMMARY

In 1943, in the darkest hours of World War II, the Court took the wrenching step of striking down a school board policy compelling schoolchildren to salute the Flag, a step the Court had decisively rejected only three years earlier. The Court took this step because it concluded that the First Amendment forbids the government to compel individuals to proclaim allegiance to the political beliefs expressed in the Pledge.

The school district policy now under review is also constitutionally flawed, though in a different way than the policy invalidated in 1943. Since 1954 the Pledge has expressed allegiance to religious as well as political beliefs. Although the First Amendment allows the government to promote patriotism as long as participation is

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

not compelled, the Establishment Clause forbids the government to endorse religion or pressure schoolchildren, even indirectly, to proclaim religious belief. The policy under review does both and is therefore unconstitutional.

1. Newdow has standing to challenge EGUSD's Pledge policy. His standing is based on his retained parental rights under California law, as interpreted by the Ninth Circuit. The Ninth Circuit held, as a matter of California law, that (a) Newdow retains a right to influence his daughter's religious development; (b) this retained parental right includes the right to object on constitutional grounds to government action that interferes with his ability to influence his daughter's religious development; and (c) the Superior Court's orders granting the child's mother final decision-making authority with respect to the child did not vitiate this retained parental right.

If the Ninth Circuit correctly interpreted California law, Newdow has standing: He has a legally protected interest (the retained parental right); EGUSD's Pledge policy threatens that interest (by communicating a message of government endorsement of religion to his daughter and indirectly coercing her, within the meaning of *Engel* v. *Vitale*, 370 U.S. 421 (1962); *Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963); *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000), to declare religious belief and affirm religion); and invalidating EGUSD's Pledge policy would redress that injury. The arguments against Newdow's standing misperceive his claims, miscalculate a court's power to redress his injury, and ultimately ignore the Ninth Circuit's reliance on California law.

2. EGUSD's Pledge policy violates the Establishment Clause. Unlike other historical and cultural texts, the Pledge is an expression of personal belief and commitment. Its recitation, as the Court has recognized, is a

"ceremony of assent." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). The qualities ascribed to the Republic for which the flag stands are not descriptive but aspirational, and to recite the Pledge is to subscribe to those aspirations. *Id. Barnette* rejected the contention that the qualities the Pledge ascribes to the Republic are simply "acknowledgements" of historical fact.

Since 1954, the "ceremony of assent" has included an expression of belief in "God" and devotion to a nation "under God." This is how schoolchildren would naturally understand the Pledge, how social science research indicates schoolchildren actually understand the Pledge, and how Congress meant schoolchildren to understand the Pledge. In adding "under God" to the Pledge, Congress *intended* to make its recitation an affirmation of religious belief. The 1954 law adding "under God" to the Pledge made affirmation of religious belief an official element of patriotism and religiosity an official element of national identity. Reciting the Pledge thus became a religious exercise— not because it refers to "God," but because it is a *pledge*.

EGUSD's Pledge policy violates the Establishment Clause both because it communicates to schoolchildren a forbidden message of government endorsement of religion and because, like the school-prayer policies invalidated by the Court beginning with *Engel*, EGUSD's policy pressures schoolchildren to profess religious belief and affirm religious ideals. Indeed, the policy pressures schoolchildren to profess a *particular* religious doctrine, monotheism, thereby violating the Clause's command of neutrality among religions. And by yoking patriotism to religion, EGUSD's policy exerts an even greater coercive pressure than the school-prayer policies, forcing schoolchildren to choose between declaring religious belief and being branded religious *and* political outsiders.

ARGUMENT

I. NEWDOW HAS STANDING IF THE NINTH CIRCUIT CORRECTLY INTERPRETED CALIFORNIA LAW.

A. Newdow has standing to challenge EGUSD's Pledge policy based on his retained parental rights under California law.

Under Article III, a plaintiff has standing to invoke federal court jurisdiction if three conditions are satisfied: (1) the plaintiff must have suffered "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent"; (2) "the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted); see also *McConnell* v. *FEC*, 124 S. Ct. 619, 707 (2003) (citations omitted).

If the Ninth Circuit correctly interpreted California law, Newdow satisfies each of these conditions. First, he is suffering a concrete and particularized invasion of a legally protected interest—his retained parental right under California law to influence his daughter's religious development. The Ninth Circuit held that a parent in Newdow's position has such a right as a matter of California law; that this right includes the right to influence his daughter's religious development free from unconstitutional government interference; and that California law does not permit a state court to impose custody terms that vitiate this right. J.A. 144-56 (discussing *Murga* v. *Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980), and *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App.

1983)).[2] Second, Newdow's injury is "fairly traceable" to EGUSD's policy because it is the policy that interferes with his retained parental right. Third, invalidation of EGUSD's policy would redress Newdow's injury.

B. The arguments against standing lack merit.

1. The United States misperceives the right that the Ninth Circuit found Newdow entitled to assert.

The United States and EGUSD dispute Newdow's standing by attacking a series of straw men—claims that they ascribe to Newdow but that did not form the basis of the Ninth Circuit's holding that Newdow has standing.

Contrary to the United States, the issue here is not whether Newdow may "su[e] to enforce [his daughter's] rights," US Br. 11, or has a general right to shield her from "other influences," *id.* at 7, "other viewpoints," *id.* at 13, or "messages" with which he disagrees, *id.* at 14. Nor is the issue whether Newdow has a right to avoid having his message "countered by governmental speech with which he disagrees," *id.* at 8, or "diluted by the government's educational practices," *id.* at 14, or has a right to "direct the education of his daughter," *id.* at 11, to "dictate the curriculum" in her school, *id.* at 14, or to decide "whether the child should salute the flag of the United States," *id.* at 12. The issue also is not whether he may challenge a "playground tort." *Id.* at 16. And contrary to EGUSD, the issue is not whether he may "prevent[ ] his

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[2] The state-law basis of the Ninth Circuit's conclusion that Newdow has standing is discussed in the Amicus Curiae Br. of Justice Joseph R. Grodin in Supp. of Neither Party (Vacatur) ["Grodin Vacatur Br."] at 6-8, 10-14, 17, 18-24.

daughter from both hearing and reciting the Pledge." EGUSD Br. 20.

These are all straw men.[3] The Ninth Circuit held that Newdow had standing to challenge EGUSD's Pledge policy on the ground that, by pressuring his daughter to participate in a religious exercise, EGUSD's policy unconstitutionally interferes with *Newdow*'s right under California law to influence his daughter's religious development. Unlike the fictional rights addressed by the United States, the right the Ninth Circuit held Newdow entitled to assert is a parental right, not a "generalized interest that could be asserted by a grandparent, nanny, or proselytizing friend," US Br. 14, or by any other "concerned individual," *id.* at 15.

2. The United States miscalculates a court's ability to redress the asserted injury.

The injury claimed by Newdow is EGUSD's interference with his retained parental right by pressuring his daughter, unconstitutionally, to participate in a religious exercise. This claimed injury is "concrete and particularized" and "actual," *Lujan*, 504 U.S. at 560, not "diffuse," US Br. 14. A court can redress this injury by invalidating EGUSD's Pledge policy.

Because it is the *government's* sponsorship of the exercise that causes Newdow's injury, it is irrelevant that the child's mother could send the child to a private school where recitation of the Pledge or even prayer is required. See *id.* at 14, 17. And because it is the *government's* in-

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[3] The United States does not explain its characterization of the Pledge as "governmental speech." US Br. 8. To recite the Pledge is to declare personal belief and commitment, not to serve as a mouthpiece for the government.

culcation of religion in his daughter that injures Newdow, it is irrelevant that, even if he prevails, the child might still be exposed to "the daily Christian influence of the mother and . . . church activities." *Id.* at 16-17.

Nor does the fact that the mother has not chosen to enroll the child in private school make the mother an "independent" cause of Newdow's injury. See *id.* at 16. In our system, public education is the default, especially for those of limited means. Newdow's injury results not from the fact that the mother has enrolled the child in a public school but from the fact that the public school district coerces its schoolchildren to participate in a religious exercise. A court cannot "control or predict" whether the mother will enroll the child in public or private school. See *id.* at 17. But a court can prevent the injury to Newdow that results when the child *is* enrolled in a public school that coerces her to participate in a religious exercise. Newdow's injury is therefore redressable.

Noting that the Ninth Circuit stated that Newdow has a right not to have his daughter "subjected to *unconstitutional* state action," *id.* at 14 (citing Pet. App. 95 (emphasis added)), the United States asserts that the Ninth Circuit erroneously "conflated" the standing inquiry with the merits of Newdow's claim. See *id.* at 14-15. The Ninth Circuit, however, was simply saying that Newdow has a right to challenge government action that is alleged to be unconstitutional. Here, the injury that Newdow has alleged is government interference with his right to influence his daughter's religious development; the merits issue he seeks to have decided is the constitutionality of that interference.

3. The United States and EGUSD ignore the Ninth Circuit's conclusion that California law does not permit a state court to vitiate Newdow's retained parental rights.

To the extent that the United States and EGUSD do focus on Newdow's rights as a parent, they ignore the Ninth Circuit's reliance on California law as the basis of its finding that Newdow has standing to challenge EGUSD's Pledge policy despite the rights awarded to the child's mother by the Superior Court.

The United States and EGUSD argue that Newdow does not have standing to challenge the Pledge policy because the Superior Court awarded the mother sole legal custody of the child; they assert that the court's holding that Newdow may challenge the policy is "flatly inconsistent with the custody determination." US Br. 13-14; EGUSD Br. 8, 16-17. Their *Rooker-Feldman* argument rests on the same premise: that the Ninth Circuit's holding that Newdow has standing contradicts the custody orders delimiting his rights. *Id.* at 17-20; *id.* at 21-22.

The Ninth Circuit's conclusion that Newdow could challenge the Pledge policy did not contradict the custody orders but construed their reach in light of background state law. Specifically, the Ninth Circuit held that, as a matter of California law (as set forth in *Murga* and *Mentry*), the Superior Court could not empower the mother to prevent Newdow from challenging EGUSD's policy as an unconstitutional interference with his right to influence their child's religious development. See J.A. 146-47; Grodin Vacatur Br., *supra* note 2, at 7-8, 18-19, 21-22.

Neither the United States nor the school district confronts the Ninth Circuit's analysis of *Murga* and *Mentry*. The United States does not mention the two cases at all; it asserts, incorrectly, that the Ninth Circuit "cited no

state law authority" for its conclusion that Newdow has standing. US Br. 13. EGUSD cites *Murga* and *Mentry*, but in a manner that it claims supports its argument. EGUSD Br. 19. Neither the United States nor EGUSD acknowledges that Newdow has standing if the Ninth Circuit correctly concluded that California law constrains the Superior Court's authority to limit Newdow's rights.

C. If the Court is uncertain about the Ninth Circuit's reading of California law, it should vacate and remand with a direction to certify.

Amici express no view on whether the Ninth Circuit's interpretation of California law is correct. If the Court is uncertain about whether the Ninth Circuit's interpretation of California law is correct, the Court should vacate and remand to the Ninth Circuit with a direction to certify to the California Supreme Court the state-law questions on which the Ninth Circuit rested its holding that Newdow has standing. See Grodin Vacatur Br., *supra* note 2, at 27-30; *id.* at 14-17.

II. EGUSD'S PLEDGE POLICY VIOLATES THE ESTABLISHMENT CLAUSE.

A. Children are uniquely susceptible to coercive pressure in school settings.

Elementary school in Elk Grove Unified School District begins at kindergarten. Those subject to EGUSD's policy are children, some as young as five years old.

The Court has long recognized that schoolchildren are subject to a "pronounced" and "particular risk" of indirect religious coercion in school settings. *Lee*, 505 U.S. at 592; see also, *e.g.*, *Santa Fe*, 530 U.S. at 315-17; *Edwards* v. *Aguillard*, 482 U.S. 578, 583-84 (1987); *Wallace* v. *Jaffree*, 472 U.S. 38, 81 (1985) (O'Connor, J., concurring in judgment); *Sch. Dist.* v. *Schempp*, 374 U.S. 203, 290 (1963) (Brennan, J., concurring); *Illinois ex rel.*

McCollum v. *Bd. of Educ.*, 333 U.S. 203, 227 (1949) (Frankfurter, J., concurring). The Court accordingly has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in [the primary and secondary school] context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart* v. *Books*, 532 U.S. 1058, 1061 (2001) (Rehnquist, C.J., joined by Scalia & Thomas, JJ., dissenting from denial of certiorari) (quoting *Aguillard*, 482 U.S. at 583-84). "When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause." *Lee*, 505 U.S. at 631 (Souter, J., joined by Stevens & O'Connor, JJ., concurring).

The Court has further recognized that, even if students are not formally required to participate in a religious exercise in school, their susceptibility to peer pressure and their desire to please adult school officials in a setting where attendance is mandatory produce an "improper" coercive effect, *Santa Fe*, 530 U.S. at 312, placing students in an "untenable position" of choosing between participation and protest, *Lee*, 505 U.S. at 590. For primary and secondary schoolchildren, the Court has stated that such a choice is no choice at all. *Id.* at 593-94. Contrast *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983) (Establishment Clause concerns diminish when those claiming injury are adults "not readily susceptible to 'religious indoctrination' . . . or peer pressure"); *Tilton* v. *Richardson*, 403 U.S. 672, 686 (1971) (plurality opinion) ("college students are less impressionable and less susceptible to religious indoctrination" than elementary and secondary school-age children).

B. Ritual classroom recitation of the Pledge coerces children to affirm religious belief.

1. The Pledge affirms belief, including religious belief.

The Pledge is a "ceremony of assent." *Barnette*, 319 U.S. at 634. It is a "ritual," *id.*, accompanied by "gestures of acceptance or respect." *Id.* at 632. To recite the Pledge is "to declare a belief," *id.* at 631, to affirm "a belief and an attitude of mind," *id.* at 633. In this "prescribed ceremony," *id.* at 633, students stand at attention, facing the flag, right hand on heart, and in unison with each other and adult authorities proclaim their "allegiance to the flag of the United States of America and to the Republic for which it stands." As codified in 1942, the Pledge defined that Republic by the qualities of unity and indivisibility ("one Nation indivisible") and universal "liberty and justice." Since 1954, the Pledge has also defined the Republic by the quality of national subordination to a "God" whose existence and authority are presupposed.

The United States and EGUSD argue that these qualities are "descriptive, not 'normative.'" US Br. 40; EGUSD Br. 32. In *Barnette*, however, the Court recognized that the Pledge is *not* "descriptive of the present order" or "political history," but is instead a "statement of belief" in an "ideal" vision. 319 U.S. at 634 & n.14. The purpose of ritual classroom recitation of the Pledge is to inculcate children with this ideal vision, through a ritual communicating "by word and sign" their "acceptance of the political ideas [the flag] bespeaks," *id.* at 633, and, since 1954, a religious "idea" as well. Schoolchildren would reasonably so perceive the meaning of this ritual.

Although the United States suggests otherwise, the "reasonable observer" in this case is not an adult but a child; and the Establishment Clause analysis here must

therefore consider "how the students understand the [school district's] policy." *Santa Fe*, 530 U.S. at 307. Compare US Br. 32, 43, 46 (invoking adult "reasonable observer," including members of the Court). In considering whether a school policy violates the Establishment Clause, "a child's perception that the school has endorsed a particular religion or religion in general may . . . prove critically important." *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 128 (2001) (Breyer, J., concurring). Thus, what is relevant here is how the Pledge is likely to be perceived by "impressionable" schoolchildren, for whom "government endorsement is much more likely to result in coerced religious beliefs." *Jaffree*, 472 U.S. at 81 (O'Connor, J., concurring in judgment).

Schoolchildren would reasonably perceive the Pledge as expressing religious belief and affirming a religious ideal. They are unlikely to perceive "under God" as merely descriptive of historical or cultural fact. First, the phrase is one in a series of other phrases that the Court in *Barnette* recognized are *not* "descriptive" of such fact but express ideals in which the Pledge affirms belief. See *supra* p. 11. Applying traditional rules of construction, a court would presume that "under God," like its neighbors, also expresses an ideal. See *Gutierrez* v. *Ada*, 528 U.S. 250, 255 (2000) (applying *noscitur a sociis*); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (same). There is no reason to suppose that a schoolchild would presume otherwise.

Moreover, it would take a very subtle six-year-old to view the averment that ours is "one Nation under God" —when proclaimed as part of a daily classroom ritual, and beginning with the words "I pledge"—as simply an "acknowledgment" of beliefs that *other people* hold or once held and that might or might not be true. Although the United States and EGUSD propose various ways of

interpreting "under God" as something other than an affirmation of religion and religious belief, their proposals do not even pretend to reflect the likely perception of a child reciting the Pledge.[4]

This attempt to shift the constitutional focus away from children only highlights the constitutional problem. Social science research has indeed found that, insofar as young schoolchildren ascribe any meaning to the Pledge, they perceive "under God" as expressing religious belief:

> A typical first-grader does not understand the meaning of many words in the pledge of allegiance or the "Star-Spangled Banner." The questionnaire responses showed that a number of second-grade children believed the pledge of allegiance was a prayer to God.

Robert D. Hess & Judith V. Torney, *The Development of Political Attitudes in Children* 105 (1967); see also Carol Seefeldt, *"I Pledge . . ."*, Childhood Educ. 308 (May/June 1982) ("Children reveal [various] misconceptions about the Pledge. 'Well, I think it's like a prayer to God,' explains one girl."). Hess & Torney reported that children

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[4] *E.g.*, US Br. 41 ("The Pledge's reference to a 'Nation under God,' in short, is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing democratic character); *id.* at 36 ("under God" signifies "the Framers' *political philosophy* concerning the sovereignty of the individual—a philosophy with roots . . . in religious beliefs"); *id.* at 33 ("under God" signifies that "the Constitution's protection of individual rights and autonomy" reflects the Framers' religious convictions); NEA Amicus Br. 12 ("by reciting the Pledge, students declare their commitment to the principles of freedom and human dignity that have traditionally been conveyed by characterizing our nation as one that exists 'under God'").

are often confused about the meaning of the Pledge but that, insofar as they form an understanding of its meaning, they focus on terms that are recognizable and meaningful to them, such as "God." Hess & Torney at 16, 29-30.[5]

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[5] Hess & Torney (p. 16) quote this Q&A with "Billy, age 7":

Q. *What do you do here at school when you see the flag*?

A. Oh, we say the pledge.

Q. *The pledge. Do you know what a pledge is?*

A. Well, it's a kind of prayer.

Q. *A prayer. And who are you speaking to when you say the pledge?*

A. To God.

Q. *To God. I see. And what are you asking Him to do?*

A. Take care of people.

Freund & Givner similarly reported that some younger children solve "the meaning problem" by finding a familiar word and building their interpretations around it. "Most noticeable," the researchers found, "was the mention of God, thus the Pledge had a prayer-like quality for some children":

Kdg. pupil: "It means to help God to love us."

Kdg. pupil: "The most important part is . . . talking about God.

1st grader: "We better be good cause God is watching over us even if He is invisible."

1st grader: "I think it's about God. He's glad to see you went to school."

Eugene H. Freund and Donna Givner, *Schooling, The Pledge Phenomenon and Social Control* 12 (paper prepared for Annual Meeting of Am. Educ. Research Ass'n, Session on Adult Roles in Schools (Wash., D.C., 1975)), available at http://www.edrs.com/Webstore/AddToCart.cfm?ProductID=ED106186.

For public school teachers to lead schoolchildren in ritual recital of the Pledge impermissibly communicates, as far as the children are concerned, a message of government endorsement of religion; and, as an exercise in which religious belief is declared and affirmed, the ritual also is forbidden, even if participation is not formally required, because of the risk of indirect religious coercion.

That the exercise does not take the form of a prayer (see US Br. 41-43; EGUSD Br. 30-31) is irrelevant, for "[t]he government may not compel affirmation of religious belief." *Employment Div.* v. *Smith*, 494 U.S. 872, 877 (1990). The Court has "previously rejected the attempt to distinguish worship from other religious speech, saying that 'the distinction has [no] intelligible content,' and further, no *'relevance'* to the constitutional issue." *Good News Club*, 533 U.S. at 126 (Scalia, J., concurring)) (emphasis in original) (quoting *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) and citing *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109 (1943)); cf. *Bd. of Educ.* v. *Grumet*, 512 U.S. 687, 709 (1994) ("the First Amendment reaches more than classic, 18th-century establishments"). The Establishment Clause, moreover, bars government endorsement of religion, not just government-sponsored prayer. The Clause "prohibits government from appearing to take a position on questions of religious belief." *County of Allegheny* v. *ACLU*, 492 U.S. 573, 593-94 (1989). "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

The fact that "under God" is included in a patriotic text (see US Br. 34-38) does not diminish but compounds the constitutional violation. Far from imbuing the phrase with redeeming "secular purposes," *Allegheny*, 492 U.S.

at 625 (O'Connor, J., concurring in part and concurring in judgment), the phrase impermissibly conditions an expression of patriotism on affirmation of religion and religious belief. Cf. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961) (state may not require declaration of belief in God as condition of public office). As the Court has emphasized, the Establishment Clause prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community." *Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). The pressure on a child to affirm religion and religious belief by reciting the Pledge is only magnified by the fact that refraining from reciting it can be construed by teacher and classmates as lack of patriotism.[6]

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[6] The United States asserts that the coercion test "has no basis in Establishment Clause jurisprudence and is unworkable in the public school environment." US Br. 44. The United States, however, does not support this assertion but instead argues against the application of the test to the Pledge, a tacit concession that applying the test would be fatal. Its arguments, however, are unpersuasive.

First, the United States asserts that ritual classroom recitation of the Pledge does not amount to a religious exercise akin to prayer. *Id.* at 41-44. As discussed *supra* at p. 15, however, the Establishment Clause does not forbid only sponsorship of formal prayer, and the religious character of the Pledge is one of the central issues in the case. Inevitably, therefore, the United States is forced into making a far broader argument—that the Pledge should be treated as exempt from traditional Establishment Clause analysis because it is "so engrained in the national psyche." *Id.* at 46; see also EGUSD Br. 42-43.

The Court has emphasized, however, that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire na-

(continued)

Nor can the Establishment Clause violation be ignored by considering the Pledge "as a whole." US Br. 39; EGUSD Br. 33. Analogizing "under God" to the crèche in *Lynch* and the Menorah in *Allegheny*, and "indivisibility," "liberty," and "justice" to Santa Claus, his reindeer, and a Christmas tree, the United States and EGUSD argue that, as in those cases, the "overall message" of the Pledge is not religious. *Id.* The analogy fails, however,

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tional existence and indeed predates it." *Allegheny*, 492 U.S. at 630 (O'Connor, J., joined by Brennan & Stevens, JJ., concurring in part and concurring in judgment) (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970)). Recognizing that "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress," *Lawrence* v. *Texas*, 123 S. Ct. 2472, 2484 (2003), the Court has invalidated many other practices that were "engrained in the national psyche" far longer than the 1954 version of the Pledge. See, *e.g.*, *Califano* v. *Goldfarb*, 430 U.S. 199 (1977); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954).

Finally, the United States argues that, if applied to the Pledge, the coercion test would logically apply to any subject of instruction that has religious content. US Br. 46-48; see also EGUSD Br. 31. This *ad absurdum* argument ignores the fact that the Pledge is unique. Unlike other historical and cultural texts, it declares the personal belief and commitment of whoever recites it, and its ritual classroom recitation is intended to be inculcative. That EGUSD's policy violates the Establishment Clause does not imply that schoolchildren may not learn, study, or recite historical documents containing religious references. To the contrary, "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government." *Barnette*, 319 U.S. at 631 (internal quotation marks omitted); see also *Stone* v. *Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225; *Engel* v. *Vitale*, 370 U.S. 421, 435 n.21 (1962).

because the Pledge is no mere passive display of objects but an active profession of personal belief. The Establishment Clause does not permit the government to pressure schoolchildren to profess religious belief even as one element of a broader affirmation of patriotism.

2. Children are likely to perceive the Pledge as affirming monotheism.

Minutes after President Eisenhower signed the 1954 legislation adding "under God" to the Pledge, members of Congress, including the sponsors of the legislation and members of the Congressional leadership, gathered on the Capitol steps to commemorate the occasion. As the flag was raised to the top of the Capitol dome, the sponsors recited the revised Pledge and a bugler played "Onward Christian Soldiers." See Religious Scholars and Theologians Amicus Br. 3-4.

The recital of a militant Christian hymn at the ceremony highlights a further flaw in the revised Pledge: not only does it favor religion over irreligion; it favors monotheistic religions over others. See *Torcaso*, 367 U.S. at 495 n.11 ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); Buddhist Amicus Br. 19-26. Cf. *Lee*, 505 U.S. at 588-90.

By its very terms the Pledge embraces and celebrates monotheism as the defining religious feature of American national identity. But "[o]urs is a Nation of enormous heterogeneity in respect of . . . religious persuasions," *Gillette* v. *United States*, 401 U.S. 437, 457 (1971), and "the central meaning of the Religion Clauses of the First Amendment . . . is that all creeds must be tolerated and none favored." *Lee*, 505 U.S. at 590; accord *Larson* v. *Valente*, 456 U.S. 228, 244 (1982). Because the Pledge fa-

vors monotheistic religions, EGUSD's policy violates the Establishment Clause for this reason as well.

C. Congress added "under God" to the Pledge so that schoolchildren would daily declare religious belief and affirm religion.

Although the way in which schoolchildren would reasonably perceive the Pledge ritual is dispositive, Congress's purpose in adding "under God" to the Pledge is also relevant. See, *e.g.*, *Jaffree*, 472 U.S. at 56-61; *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring). The meaning that schoolchildren would reasonably ascribe to "under God" is not accidental; it is precisely what Congress intended. To make schoolchildren daily proclaim faith in "God," and to make religious devotion an official element of national identity, were the "preeminent" and "predominant" purposes of Congress, *Aguillard*, 482 U.S. at 590, in revising the Pledge.

1. Congress enacted the Pledge in 1942 as part of legislation "[t]o codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America." Pub. L. No. 77-623, 56 Stat. 377 (1942). Although bills to codify a flag protocol began to be introduced in 1925,[7] it was not until wartime—"this

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[7] Composed in 1892 to celebrate the four hundredth anniversary of Columbus's first voyage to the Americas, the Pledge was incorporated into a "Flag Code" endorsed by a broad spectrum of philanthropic and patriotic organizations at Flag Conferences in 1923 and 1924. See John W. Baer, *The Pledge of Allegiance: A Centennial History, 1892-1992* 46-48, 57 (1992). In 1925, the first bill was introduced in Congress to define the official salute to the flag, S. 80, 69th Cong. (1925), and in 1927, the first bills were introduced to recognize the Flag Code as the "official flag code of the United States," *e.g.*, H.R.J. Res. 349, 69th Cong. (1927). These bills, however, did not include

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hour of our nation's crisis"[8]—that legislation was enacted. As enacted in 1942, the Pledge included no reference to "God" or any other religious reference.[9]

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the Pledge. See *id.*; H.R.J. Res. 378, 69th Cong. (1927). Over the next 15 years, other bills were introduced defining the flag salute or setting forth the Flag Code, but these bills similarly omitted the Pledge. *E.g.*, S. 1499, 72d Cong. (1931); S. 3381, 75th Cong. (1938); S. 1166, 76th Cong. (1939); S. 481, 77th Cong. (1941).

[8] *Resolutions to Codify the Pledge of Allegiance to the Flag of the United States: Hearing before the House Comm. on the Judiciary*, 77th Cong. 1 (March 5, 1942) (Rep. Hobbs).

[9] As enacted, the Pledge provision read:

> That the pledge of allegiance to the flag, "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", be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words "to the flag" and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute.

Pub. L. No. 77-623, § 7, 56 Stat. 377, 380 (1942) (originally codified at 36 U.S.C. 172; codified as amended at 4 U.S.C. 4).

As introduced in and passed by the House, the legislation did not set forth the text of the Pledge. See H.R.J. Res. 303, 77th Cong. (1942). The Pledge was added and made part of the official flag ceremony by the Senate Judiciary Committee. See S. Rep. No. 77-1477, at 2 (1942). The legislative history reveals no discussion of the Pledge, and Rep. Hobbs, the House sponsor, did not mention the Pledge when he described "[t]he only amendments of any consequence" made in the Senate. 88 Cong. Rec. 5245 (1942). The measure was signed by President

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2. By 1951, a campaign to add "under God" to the Pledge was underway, spearheaded by the Knights of Columbus, the American Legion, and the Hearst newspapers.[10] The first bill was introduced in Congress in 1953,

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Roosevelt on June 22, 1942. *Id.* at 5696. Congress amended the Pledge provision shortly thereafter to substitute hand-over-heart for the raised palm associated with the fascist salute. Pub. L. No. 77-829, 56 Stat. 1074, 1077 (1942). In 1945, Congress again amended the Pledge provision to give "official recognition" to the Pledge, changing the beginning of the provision to state "The following is designated as the pledge of allegiance to the flag." Pub. L. No. 79-287, 59 Stat. 668 (1945).

[10] In 1951, the Knights added "under God" to the Pledge as recited in their meetings. In 1952 and 1953, they adopted resolutions urging Congress to so amend the Pledge. 100 Cong. Rec. A5037-38 (1954). The Knights considered religion "integral to American patriotism." Christopher J. Kauffman, *Patriotism and Fraternalism in the Knights of Columbus: A History of the Fourth Degree* 94 (2001). In their view, "only by the application of Christian principles, in private and public affairs will there be eliminated . . . the distress and suffering upon which these forces [of Communism] thrive." *Id.* at 95 (alteration in original) (citing *Knights' Crusade for Social Justice: Council Schedule and Organization* (1937)). They believed that "[o]ne of the major reasons for the advancement of communism . . . was 'the de-Christianized conscience and paganized heart of modern man.'" Christopher J. Kauffman, *Faith and Fraternalism: The History of the Knights of Columbus 1882-1982* 368 (1982) (quoting Supreme Knight John Swift). The American Legion, as part of its "Back to God" campaign, sponsored an event, attended by President Eisenhower and members of Congress, at which Bishop Fulton Sheen stated: "If we are to keep our rights and liberties, then we must also keep our God." 100 Cong. Rec. at 7759 (quoted by Rep. Oakman). See also *'Under God' Oath Sworn at Capitol*, N.Y. J.-Am., June 15, 1954, at 13 ("The Hearst Newspapers had successfully campaigned under

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and 18 such bills were introduced in 1954.[11] Congress was moved to action after President Eisenhower attended services at the New York Avenue Presbyterian Church in Washington, D.C. on February 7, 1954. In his sermon, Rev. Docherty commented on the Pledge, stating that he "could hear little Muscovites repeat a similar pledge to their hammer and sickle flag with equal solemnity," because the Pledge "ignores a definitive factor in the American way of life and that factor is belief in God." 100 Cong. Rec. 1700 (1954) (statement of Rep. Rabaut).

In 1953, Rep. Rabaut introduced H.R.J. Res. 243, later enacted as Pub. L. No. 83-396, 68 Stat. 249 (1954).[12] In explaining his bill, Rep. Rabaut stated:

> [T]he fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God.
>
> . . . Unless we are willing to affirm our belief in the existence of God and His creator-creature rela-

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the direction of William Randolph Hearst Jr., to have the new pledge adopted by Congress and written into law.").

[11] See H.R.J. Res. 243, 83d Cong. (1953). The 1954 bills included H.R.J. Res. 303, 334, 345, 371, 383, 479, 497, 502, 506, 513, 514, 518, 519, 521, 523, 529, and 531, and S.J. Res. 126.

[12] On May 5, 1954, a subcommittee of the House Judiciary Committee held a hearing on H.R.J. Res. 243 and similar measures, at which many of the sponsors testified. *H.R.J. Res. 243 and Other Bills on Pledge of Allegiance: Hearing Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 83d Cong. (1954) ["*1954 House Hearing*"]. The House passed H.R.J. Res. 243 on June 7, 1954. 100 Cong. Rec. at 7766. The Senate passed the House measure the following day. *Id.* at 6348, 7834. President Eisenhower signed the legislation in a public ceremony on Flag Day, June 14, 1954. *Id.* at 8752.

> tion to man, we drop man himself to the significance of a grain of sand and open the floodgates to tyranny and oppression.

100 Cong. Rec. at 1700. "An atheistic American," Rep. Rabaut stated, "is a contradiction in terms." *Id.*

Along these lines one of the Hearst newspapers stated:

> [I]t seems to us that in these times of godless Communism it becomes more necessary than ever to affirm the faith of America and Americans in God, and what better place to affirm it than in the Pledge of Allegiance to our beloved flag?

Editorial, *Under God*, N.Y. J.-Am., June 10, 1954, at 22.

Rep. Brooks of Louisiana echoed this sentiment, stating that "[o]ne thing separates free peoples of the Western World from the rabid Communist, and this one thing is a belief in God." 100 Cong. Rec. at 7758. Rep. Bolton, the author of a like measure, stated that, by adding "under God" to the Pledge, "we are officially recognizing once again this Nation's adherence to our belief in a divine spirit, and that henceforth millions of our citizens will be acknowledging this belief every time they pledge allegiance to our flag." *Id.* at 7757. In the view of its supporters, the amended Pledge would be more effective in the fight against communism precisely because it identified belief in God as an essential element of patriotism.

Senator Ferguson, the Senate sponsor, stated that he had proposed "under God" because the Pledge "should recognize the Creator who we really believe is in control of the destinies of this great Republic." *Id.* at 6348. In asserting that "[t]his is not an attempt to establish a religion," Senator Ferguson explained:

> It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be de-

> fended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation.

Id. Senator Ferguson stated that "[t]he words 'under God' were inserted after the word 'nation' to give the vow religious value and to acclaim to the Communists who deny the existence of God that the United States lives under His guidance." William P. Flythe, *'God' Pledge Goes to White House*, N.Y. J.-Am., June 9, 1954, at 4.

As the House Judiciary Committee stated:

> The inclusion of God in our pledge . . . would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.

H.R. Rep. No. 83-1693, at 2 (1954).[13]

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[13] Like Senator Ferguson, the House and Senate Judiciary Committees asserted that "the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. This is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3; S. Rep. No. 83-1287, at 2 (1954) (same). But the Committees misunderstood the Establishment Clause, for they asserted that "under God" is constitutional because it does no more than express "belief in the sovereignty of God" and recognize "the guidance of God in our national affairs." *Id.*

Only this Court, "the ultimate expositor of the constitutional text," *U.S.* v. *Morrison*, 529 U.S. 598, 616 n.7 (2000), can determine whether an act of Congress violates the Constitution, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 172 (1803). "This is particularly true where the Legislature has concluded that its product does not violate the First Amendment. 'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'" *Sable Comm., Inc.* v.

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Some members of Congress warned that failing to acknowledge God's guiding role would lead to ruin. Rep. Rabaut stated that "Our country was born under God, and only under God will it live as a citadel of freedom." 99 Cong. Rec. A2063 (1953). Rep. Forrester stated:

> from the very beginning to the end of [the Holy Bible] we learn that any nation that is not under the leadership of God will perish. . . . Nations perish just as individuals perish when we do not accept God Almighty as our leader and our director.
>
> . . . [W]e do need God and we have to have God if we survive.

1954 House Hearing, *supra* note 12, at 39. Rep. Wolverton stated that the revised Pledge reminds us "not only of our dependence upon God but likewise the assurance of security that can be ours through reliance upon God." 100 Cong. Rec. at 14,918.[14]

FCC, 492 U.S. 115, 129 (1989) (quoting *Landmark Comm., Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978)). "Were it otherwise . . . the function of the First Amendment as a check on legislative power would be nullified." *Landmark*, 435 U.S. at 844.

[14] Contemporary press accounts make apparent the general understanding that "under God" was an affirmation of religion and religious belief. "All of the various sponsors, as well as the Rev. Mr. Docherty, agree on one thing: the wide-spread support the bill is receiving must bear testimony to a religious revival of significance." Clayton Knowles, *Big Issue in D.C.: the Oath of Allegiance*, N.Y. Times, May 23, 1954, at E7. In a letter to the editor, Gridley Adams, the Founder and Director General of the U.S. Flag Foundation, opposed "under God" as contrary to the Establishment Clause and "tend[ing] to break that long-written law of separation of Church and State." N.Y. J.-Am., June 7, 1954, at 10.

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3. "Under God" was specifically added to the Pledge so that schoolchildren would "daily proclaim . . . the dedication of our nation and our people to the Almighty." *Statement by the President Upon Signing Bill To Include the Words "Under God" in the Pledge to the Flag*, 1954 Pub. Papers 563 (June 14, 1954) ["*President's Statement*"]. "What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their belief . . . in the all-present, all-knowing, all-seeing, all-powerful Creator." 100 Cong. Rec. at 5915 (statement of Sen. Wiley). Rep. Rodino, author of a similar measure, urged adoption to ensure that "every day that our children go to school and make their pledge of allegiance to the flag they recall that they do so with recognition of God." *1954 House Hearing*, *supra* note 12, at 37. "The important thing," he stated, "is that we re-affirm our recognition of the Creator." *Id.* at 27.

4. On signing the measure, President Eisenhower described the addition of "under God" as "strengthen[ing] those spiritual weapons which forever will be our country's most powerful resource, in peace or in war." *President's Statement*, *supra*. Dr. Frederick Brown Harris, the

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Abraham Barnett, the New York State Commander of the Jewish War Veterans, was quoted as saying, "The insertion of the words 'under God' in the Pledge of Allegiance would serve as a reminder to every American of our freedom which can only live on through a continued belief in God." *JWV for 'God' Pledge*, N.Y. J.-Am., June 6, 1954, at 27L. Another supporter was quoted as similarly approving "under God" because "[f]ailure to acknowledge a Supreme Being is one of the principal causes of world unrest," while another stated that "[t]he nation's strength will grow by this fuller acknowledgement of its faith in almighty God." Knowles, *supra*.

Senate Chaplain, stated: "To put the words 'under God' on millions of lips is like running up the believer's flag as the witness of a great nation's faith." 100 Cong. Rec. at 8617 (quoted by Sen. Ferguson). And the N.Y. Journal-American editorialized the next day:

> Henceforth school children and all others throughout the nation will signify their respect for their Deity and Flag at the same time. . . .

Editorial, *For God and Country*, N.Y. J-Am., June 15, 1954, at 20; *President Hails Revised Pledge*, N.Y. Times, June 15, 1954, at 31 ("The Pledge of Allegiance . . . hereafter will give recognition to God as well as country.").

5. The religious nature of the Pledge continues to be officially acknowledged fifty years later. As President Bush stated in a letter to an American Buddhist leader:

> As citizens recite the words of the Pledge of Allegiance, we help define our Nation. In one sentence, we affirm our form of government, our belief in human dignity, our unity as a people, and our reliance on God.
>
> * * * *
>
> When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.

Letter from President George W. Bush to Mitsuo Murashige, President, Haw. State Fed'n of Honpa Hongwanji Lay Ass'ns (Nov. 13, 2002).[15]

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[15] President Murashige's letter to President Bush, and President Bush's letter, are reproduced as Appendix A. Amici have lodged copies of the letters with the Clerk.

D. Other arguments for reversal lack merit.

1. Holding EGUSD's Pledge policy invalid would not be inconsistent with *Barnette*.

The conclusion that ritual classroom recitation of the Pledge is forbidden even if participation is not formally required is not inconsistent with *Barnette*. See EGUSD Br. 23-24. "The First Amendment protects speech and religion by quite different mechanisms." *Lee*, 505 U.S. at 591. The option of allowing schoolchildren to remain silent cures the free speech problem but not the Establishment Clause problem. No Establishment Clause issue was raised in *Barnette* because the Pledge had not yet been amended to include "under God." The "indirect coercion" principle, recognized in *Engel, Schempp, Lee*, and *Santa Fe*, applies where religion is involved because of the Establishment Clause's specific bar against government promotion of religion. "Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion," *id.* at 604 (Blackmun, J., joined by Stevens & O'Connor, JJ., concurring), and "[t]he Establishment Clause proscribes public schools from conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*," *id.* at 604-05 (internal quotation marks omitted). Accordingly, the Court has repeatedly held that the Establishment Clause problem is not cured by allowing children to "opt out" of a school-sponsored ritual promoting religion.

2. The 1954 Pledge cannot be likened to the legislative prayer upheld in *Marsh*.

EGUSD asserts that, like the legislative prayer upheld in *Marsh*, the 1954 version of the Pledge has become part of the "fabric of our society," EGUSD Br. 41, and the United States implicitly likens the 1954 version of the

Pledge to statements and practices dating to the earliest years of the Republic, US Br. 24-25. The Court, however, upheld the legislative prayer challenged in *Marsh* as a practice with an "unambiguous and unbroken history of more than 200 years," 463 U.S. at 792, specifically approved by the Framers themselves, *id.* at 788. The Pledge, by contrast, was not written until 1892, and the words "under God" were not added until 1954, a contemporary revision within living memory. See also *supra* note 6. Unlike the practice upheld in *Marsh*, the Pledge is a statement of personal belief and commitment, and it is challenged here "in the special context of the public elementary and secondary school system," *Aguillard*, 482 U.S. at 583, which "was virtually nonexistent at the time the Constitution was adopted," *id.* at 583 n.4. As the Historians and Law Scholars Amicus Brief shows, the Framers would have *disapproved* EGUSD's Pledge policy.

3. Holding EGUSD's Pledge policy invalid is not precluded by this Court's cases.

Nor is a holding that the Pledge policy violates the Establishment Clause barred by statements concerning the Pledge by the Court or individual Justices. See US Br. 31-33; EGUSD Br. 34-39. In *Barnette* itself, the Court invalidated the compulsory flag salute even though "every Justice—thirteen in all—who has hitherto participated in judging the matter has at one or more times found no constitutional infirmity" in that practice. *Barnette*, 319 U.S. at 664-65 (Frankfurter, J., dissenting).

The Court has never held that the Establishment Clause permits ritual recitation of the Pledge in public elementary and secondary schools, and the Court's *dicta* do not preclude a holding of its unconstitutionality in the circumstances presented here. Indeed, the dissent in *Lee* recognized that the Court's Establishment Clause analy-

sis in that case foretold the result reached by the court below. 505 U.S. at 638-39 (Scalia, J., joined by Rehnquist, C.J., and White & Thomas, JJ., dissenting).

In *Lynch* and *Allegheny* the Court did not confront the issue of ritual classroom recitation of the Pledge, with its special issues of indirect coercion. See *Lee*, 505 U.S. at 596-97. The Court's discussion of the Pledge was not necessary to the result in these cases; indeed, in *Allegheny* the Court disclaimed the need to address issues raised by the Pledge, see 492 U.S. at 602-03, and inculcative classroom recitation of the Pledge *fails* the test outlined by Justice O'Connor in her concurring opinion in *Lynch*, see 465 U.S. at 689-94. Such ritual recitation is not a device for achieving the "secular purposes" identified by Justice O'Connor in her opinion, *id.* at 693, and cannot be defended on the ground that it conveys no message of religious endorsement and coerces no affirmation of religious belief. Compare *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in judgment), and *Jaffree*, 472 U.S. at 78 n.5 (O'Connor, J., concurring in judgment). Inculcative classroom recitation of the Pledge does both.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed. Alternatively, the Ninth Circuit's judgment should be vacated and the case remanded with a direction to certify to the California Supreme Court the question whether California law gives Newdow the right to object on constitutional grounds to EGUSD's Pledge policy notwithstanding custody orders giving the mother final decision making authority with respect to the child.

Respectfully submitted,

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February 13, 2004

* Mr. Handley is admitted only in New York, Mr. Knott only in North Carolina, Mr. Monick and Ms. Silverman only in Maryland, and Mr. Rana only in Virginia. None is admitted in the District of Columbia; each is supervised by principals of the firm.

Appendix

Hawaii State Federation of Honpa Hongwanji Lay Associations

September 2002

The Honorable George W. Bush
President of the United States
1600 Pennsylvania Avenue N.W.
Washington, DC 20500

Dear President Bush,

Over 125 delegates and observers from the 37 Honpa Hongwanji Buddhist temples throughout the State of Hawaii assembled in Hilo, Hawaii on September 13-15, for its 41st State Federation of Honpa Hongwanji Lay Associations Convention. The assembly deliberated on current issues and concerns relevant to the mission of the organization. In the plenary session, one of the resolutions discussed was the "Resolution to Support the 9th Circuit Court's Ruling on the Pledge of Allegiance." The resolution was unanimously passed.

The 9th Circuit Court of Appeals ruled 2 to 1 that the reference to God, which was added in 1954, amounts to an official endorsement of mono-theism. In addition, the court ruled that both the 1954 amendment to the pledge and a California school district's policy requiring teachers to lead children in the pledge violate the First Amendment prohibition against the establishment of a state religion.

A copy of the resolution is enclosed, along with additional historical facts in support of the resolution.

We hope you have the courage, as our founding fathers did, keeping in mind the articles of the U.S. Constitution and the Bill of Rights, to support the correct decision of the 9th Circuit Court of Appeals, to educate others, and to remind the members of the Congress who may have forgotten and may not be cognizant of the history of the Pledge of Allegiance and its amendments up to 1954. Some members of the Congress may need to be reminded that their most important job is to protect and preserve the articles of the U.S. Constitution and the Bill of Rights, the foundation of the United States of America.

Sincerely,
In gassho,

Mitsuo Murashige, President
212 Alnalako Road
Hilo, Hawaii 96720-3705

THE WHITE HOUSE

WASHINGTON

November 13, 2002

Mitsuo Murashige and Associates
President
Hawaii State Federation of
Honpa Hongawanji Lay Associations
212 Ainalako Road
Hilo, Hawaii 96730-3725

Dear Mitsuo Murashige and Associates:

Thank you for your letter regarding the Pledge of Allegiance. I appreciate hearing your views and concerns.

As citizens recite the Pledge of Allegiance, we help define our Nation. In one sentence, we affirm our form of government, our belief in human dignity, our unity as a people, and our reliance on God. During these challenging times, we are determined to stand for these words.

For more than two centuries, our flag has stood for a unified country. When we pledge allegiance to our flag, Americans feel a renewed respect and love for all it represents. We are thankful for our rights to life, liberty and the pursuit of happiness. We are also grateful for our freedoms, which were protected by our Founding Fathers and defended by subsequent generations of brave Americans.

When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition

of humbly seeking the wisdom and blessing of Divine Providence. Our Declaration of Independence proclaims that our Creator endowed us with inalienable rights, and our currency says, "In God We Trust." May we always live by that same trust, and may the Almighty continue to watch over the United States of America.

Thank you again for writing, and best wishes.

Sincerely,

George W. Bush