No. 02-1624

IN THE

Supreme Court of the United States

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

v.

MICHAEL A. NEWDOW,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* is submitted, with the consent of the parties, on behalf of the National Education Association ("NEA"), a nationwide employee organization with more than 2.7 million members.[1] Most NEA members are employed as teachers in public school districts throughout the United States, and, as such, regularly are called upon to conduct patriotic observances, including "lead[ing] willing students in reciting the Pledge of Allegiance." 124 S. Ct. 384.

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

NEA strongly believes in the principle of strict separation between church and state, and this belief is reflected in the policies that have been adopted by its highest governing body—the NEA Representative Assembly. These policies provide, *inter alia*, that:

> The Association also believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program. The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same.

Consistent with this and other similar policies, NEA has regularly participated in this Court's Establishment Clause cases—from the early school aid and school prayer cases to the most recent case involving publicly-funded vouchers for religious schools.[2] In each of those cases, NEA argued that

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[2] Cases in this Court in which NEA has participated as an *amicus curiae* or as a member of an *amicus curiae* coalition include *Epperson v. State of Arkansas*, 393 U.S. 97 (1968); *Committee For Public Ed. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Mueller v. Allen*, 463 U.S. 388 (1983); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1986); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Lee v. Weisman*, 505 U.S. 577 (1992); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); *Agostini v. Felton*, 521 U.S. 203 (1997); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); and *Locke v. Davey*, (No. 02-1315) (2003). In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), NEA's General Counsel was lead counsel for the respondents.

the challenged practice breached the constitutional wall of separation between church and state.

Although in the instant case NEA is for the first time taking the position that a challenged practice does *not* violate the Establishment Clause, this in no sense reflects any slackening of NEA's long-held belief that religious activities have no place in the public schools. To the contrary, we take this position because NEA—whose members are in a prime position to assess at first hand the implementation of policies that provide for the recitation of the Pledge in public schools—does not consider such a recitation to be a sectarian activity, but rather a patriotic observance that serves the secular purpose of promoting an understanding of and appreciation for our nation's heritage and founding principles.

NEA's official position with regard to the recitation of the Pledge in public schools is set forth in the following policy, which was adopted by the NEA Board of Directors:

> NEA supports the Pledge of Allegiance as it is now written. NEA does not believe that the inclusion of the words "under God" in the Pledge of Allegiance poses a threat to the principle of separation of church and state that is embodied in the Establishment Clause to the First Amendment or to the personal freedoms that the Establishment Clause is designed to protect.

NEA submits this brief *amicus curiae* in support of the above position.[3]

STATEMENT

California law requires each public elementary school in the State to "conduct[] appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720. The

[3] We hasten to point out that NEA would view this case very differently if either students or teachers were compelled to recite or lead the Pledge, but that question is not presented here. *See infra* at 20-22.

law provides further that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." *Id.* In order to comply with this statutory requirement, petitioner Elk Grove Unified School District ("Elk Grove") has adopted a policy that mandates the recitation of the Pledge in all of its elementary schools once each day.

Respondent Michael Newdow is the noncustodial father of a child enrolled in one of Elk Grove's elementary schools. The teacher of his child's class leads the students in a daily recitation of the Pledge.

In March 2000, Newdow filed suit against the President of the United States, the United States Congress, the United States of America, the State of California, and two California school districts and their superintendents, seeking a declaration that the 1954 statute adding the words "under God" to the Pledge is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment. He also sought injunctive relief requiring the President and Congress to remove those words from the Pledge and prohibiting California schools from leading students in reciting the Pledge as it is now written.

The district court dismissed the complaint for failure to state a claim. However, a divided panel of the Ninth Circuit reversed the district court's decision in part, holding that inclusion of the words "under God" in the Pledge of Allegiance violates the Establishment Clause. *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002). The majority held that Newdow's claim succeeded under all three of the Establishment Clause tests that have been adopted by this Court: the three-prong test outlined in *Lemon v. Kurtzman*, 403 U.S. 602 (1971); the "endorsement test," *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989); and the "coercion" test, *Lee v. Weisman*, 505 U.S. 577 (1992). Judge Fernandez dissented, arguing

that "such phrases as 'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." 292 F.3d at 614 (Fernandez, J., dissenting).

Upon motions for rehearing and rehearing en banc, the original panel issued an amended opinion and denied the motions for rehearing. *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003). In its amended opinion, the court limited its Establishment Clause holding to Elk Grove's use of the Pledge in its schools. *Id.* at 490. With regard to Newdow's challenge to the facial constitutionality of the Pledge, the court below vacated the district court's decision in favor of the United States and remanded for further proceedings. *Id.* In addition, the court's amended opinion holds only that Elk Grove's policy violates the "coercion" test, and does not address either the *Lemon* test or the "endorsement" test. *Id.* at 487.

Judge Fernandez again dissented from the court's Establishment Clause holding, largely for the reasons set forth in his initial dissenting opinion. *Id.* at 490-93 (Fernandez, J., dissenting).

Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, dissented from the court's denial of rehearing en banc. Judge O'Scannlain stressed that this Court consistently has distinguished between "patriotic invocations of God on the one hand," and public school "prayer, an 'unquestioned religious exercise,'" on the other. *Id.* at 474 (O'Scannlain, J., dissenting from rehearing en banc).

This Court granted *certiorari* on the question "[w]hether 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." 124 S. Ct. 384 (2003).[4]

SUMMARY OF ARGUMENT

I.

In pledging allegiance to the "Flag of the United States of America" and "to the Republic for which it stands," public school students engage in a patriotic observance, not a religious exercise.

The fact that the Pledge, in describing the character and history of that Republic, refers to the nation as "under God" does not convert the Pledge into a state-sponsored profession of religious belief such as would violate the Establishment Clause. Rather, the words are best understood as a reflection of the simple historical fact that the Founders believed in a supreme being, and that their belief led them to dedicate the nation to the fundamental secular precept that all men have unalienable rights to liberty and justice.

That is the message Congress intended the Pledge to convey when it added the words "under God" in 1954: Congress believed that the amended Pledge would indicate to the world, and to our own citizens as well, that this nation was "founded on the concept of the individuality and the dignity of the human being," in contrast to the "subservience of the individual" that characterized the Communist nations.

The Pledge's reference to God is of a piece with similar references in documents that are central to the founding of the

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[4] This Court also granted *certiorari* on the threshold question "[w]hether 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." 124 S. Ct. 384. NEA expresses no view as to that question.

United States and the preservation of its ideals, including, among others, the Declaration of Independence and Lincoln's Gettysburg Address. So too, the laws and customs of the federal government have long been replete with ceremonial references to a supreme being, from the National Motto "In God we trust," which has been inscribed on United States coins since 1865 and is quoted in the National Anthem, to the practice, dating back to the tenure of Chief Justice Marshall, of having the Supreme Court crier open this Court's sessions with the proclamation "God save the United States and this honorable Court."

These ceremonial references to our nation's religious heritage—which consistently appear as isolated and elliptical references to a supreme being, made without elaboration of religious precepts, and without any express or implied exhortation to observe any religious customs—have long coexisted with the principles of religious freedom. And in numerous decisions, albeit in *dictum*, this Court has concluded that the Pledge is fully consistent with the Establishment Clause.

That conclusion comports with a rigorous application of the Establishment Clause—and rigorous application is essential here, in view of "the particular concerns that arise in the context of public elementary and secondary schools." *Edward v. Aguillard*, 482 U.S. 578, 585 (1987).

The *purpose* of the Pledge unquestionably is secular and patriotic, not religious. And, as for the Pledge's *effects*, a reasonable observer acquainted with the relevant history and context of the inclusion of the words "under God" in the Pledge—as well as the history and context of similar references to God in our laws and customs—would understand the Pledge for what it is intended to be: a potent statement of patriotic observance, loyalty, and devotion to the principles on which the nation was founded, *not* a state-sponsored profession of religious belief.

That being so, recitation of the Pledge by willing students and teachers in the public schools does not violate the Establishment Clause.

II.

Although Elk Grove mandates the recitation of the Pledge in each classroom, there is nothing in the record to indicate that the school district *requires* students or teachers to participate in the recitation. If it did, such an "inva[sion of] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control," *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), would put this case in an entirely different posture.

Barnette holds that public school *students* cannot constitutionally be compelled to recite the Pledge. And this Court's decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), and *Shelton v. Tucker*, 364 U.S. 479 (1960), suggest that the same should be true as to *teachers*. But the question is complicated by the fact that leading students in the recitation of the Pledge might be seen, at least in part, as a matter of *curriculum*, and the law is unsettled regarding the nature and extent of a public school teacher's right to object to curricular decisions of school authorities that involve matters of public concern.

The question whether public school teachers may be required to lead the recitation of the Pledge need not and should not be confronted in this case. Consideration of the constitutionality of such a requirement should be left for a case in which the question is squarely presented.

ARGUMENT

I. IT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE FOR PUBLIC SCHOOLS TO PROVIDE FOR THE RECITATION OF THE PLEDGE OF ALLEGIANCE BY WILLING STUDENTS AND TEACHERS.

A. Elk Grove provides for recitation of the Pledge of Allegiance in order to comply with California law requiring that each public elementary school "conduct[] appropriate *patriotic* exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (emphasis added). And, in reciting the Pledge, students pledge allegiance, not to any religious belief or supreme being, but to the "Flag of the United States of America," and "to the Republic for which it stands." 4 U.S.C. § 4. Thus, recitation of the Pledge is clearly intended to be a patriotic observance, and is not in any way undertaken as a "religious exercise" or a "state-sponsored religious activity." *Lee v. Weisman*, 505 U.S. 577, 586 (1992).[5]

Although this fact is necessary to the conclusion that no Establishment Clause violation is present in this case, it is not sufficient: it certainly would be possible for the government to insert impermissibly religious content into a patriotic observance. The dispositive question is whether that is the situation here. As we now demonstrate, the text of the Pledge itself, the basis on which Congress acted in adding the words "under God" to the Pledge in 1954, and the use of similar words in other patriotic contexts from the time of the

[5] Title 4 of the United States Code, under which the Pledge statute is now codified, is devoted entirely to rules governing patriotic observance of the Flag. *See, e.g.*, 4 U.S.C. §§ 1-2 (providing for the stars-and-stripes design of the Flag); *id.* § 4 (establishing posture to be assumed during recitation of the Pledge); *id.* § 6 (providing for time and occasion of Flag's display); *id.* § 7 (dictating position and manner of Flag's display); *id.* § 9 (establishing conduct during hoisting, lowering, or passing of Flag).

Framers to the present, all indicate that the answer to this question is "no."

1. After declaring that the speaker is pledging allegiance to the Flag and to the Republic, the remainder of the Pledge describes the character and history of that Republic: a unified nation, composed of individual States, yet indivisible as a whole; a nation founded for the purposes of promoting liberty and justice for all; and a nation that is "under God." 4 U.S.C. § 4. In this context, the single reference in the Pledge to the Republic as one that exists "under God"—unaccompanied by any further elaboration—cannot reasonably be viewed as an impermissible governmental promotion of religion.

The inclusion of those two words in the Pledge is best understood, *not* as a profession of support for any religious belief or observance, but as a reflection of the simple historical fact that the Founders believed in a supreme being, and that their belief led them to dedicate the nation to the fundamental secular precept that all men have unalienable rights to liberty and justice. *See, e.g.*, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 213 (1963) ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

2. That is the message Congress intended the Pledge to convey when it added the words "under God" in 1954. The purpose of these words was to differentiate the United States from its Cold War enemies, and to demonstrate the United States' commitment to human dignity and freedom. Declaring that "[a]t this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own," H.R. Rep. No. 1693, 83d Cong., 2d Sess. 1 (1954), Congress believed that the amended Pledge would textually reject the "communis[t] [philosophy] with its

attendant subservience of the individual," *id.* at 2, thereby highlighting a foundational difference between the United States and Communist nations.

In this connection, the Senate Report reasoned that "[t]he spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon." S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954). In contrast to the Communist philosophy, the House Report explained, "[o]ur American Government is founded on the concept of the individuality and the dignity of the human being," and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693 at 1-2; *see also* S. Rep. No. 1287 at 2.

Plainly, Congress was not saying that the way to win "the struggle for men's minds" around the world, S. Rep. No. 1287 at 2, was by a profession of religious belief. Rather, what Congress wanted to communicate in that struggle was that ours is a nation "founded on the concept of individuality and the dignity of the human being," which rejects the "subservience of the individual" that characterized the Communist nations. H. Rep. No. 1693 at 2. It was in furtherance of that entirely *secular* message that Congress used the words "under God" as a shorthand for the belief in God that, *as a matter of historical fact*, was understood by the Founders to be the source of the nation's commitment to the fundamental secular precept that all men have certain unalienable rights. *See id.* (Pledge reflects the "traditional concept that our nation was founded on a fundamental belief in God").

In addition to providing those around the world with a better understanding of the ideals that inform our nation, the amendment to the Pledge was also designed to inculcate the

values of freedom and democratic participation in future generations of Americans. As the House Report put it, through "daily recitation of the pledge in school," "the children of our land . . . will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us." *Id.* at 3. In other words, 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"; they do not thereby profess their personal adherence to any religious belief or observance.

3. As the 1952 Congress recognized, the Pledge's reference to God is of a piece with similar references in documents that are central to the founding of the United States and the preservation of its ideals. *See id.* at 2; S. Rep. No. 1287 at 2.

In the Declaration of Independence, the Founders claimed that the right to "dissolve the political band" with Great Britain was based on "the Laws of Nature and of Nature's God." And, of course, in the Declaration's most famous passage, they professed that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights." Similarly, the Constitution's immediate predecessor, the Articles of Confederation, paid homage to "the Great Governor of the World."[6]

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[6] Such invocations of God are commonplace in the historical documents evidencing the political heritage of the States as well. *See, e.g.*, N.C. Const. of 1776, Declaration of Rights, § XIX, reprinted in 5 *The Federal and State Constitutions* 2788 (Francis N. Thorpe ed., 1909) (referring to the "natural and unalienable right to worship Almighty God"); N.J. Const. of 1776, art. XVIII, reprinted in 5 *The Federal and State Constitutions*, *supra*, at 2597 (referring to the "inestimable privilege

Congress's amendment to the Pledge partakes of this historical tradition. Indeed, the words "under God" trace back to identical language in Lincoln's Gettysburg Address—a speech that public school students commonly are called upon to memorize and recite. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 446 (7th Cir. 1992); *see also Capitol Square Review & Advisory Bd.*, 243 F.3d at 301 n.10 ("Congress, taking a leaf from the Gettysburg Address, amended the Pledge of Allegiance by inserting the phrase 'under God' between 'one Nation' and 'indivisible.'").

In that address, Lincoln spoke from the site of a bloody and decisive Civil War battle, and identified 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 here 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, for the people, shall not perish from the earth." Abraham Lincoln, Address at Gettysburg, Pennsylvania (Nov. 19, 1863), reprinted in *Selected Speeches and Writings of Abraham Lincoln* 405 (Library of America ed. 1992) (emphasis added). The use of the words "under God" in Lincoln's Address is not an exhortation to conform to any religious faith, but rather a call to uphold the secular values of freedom and self-government—and the linkage to

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of worshipping Almighty God"). Indeed, the preambles to the constitutions of forty-four states currently refer in one way or another to a supreme being. *See, e.g.*, Md. Const. pmbl. (referring to "We, the People of the State of Maryland, grateful to Almighty God for our civil and religious liberty"); Calif. Const. pmbl. (referring to "We, the People of the State of California, grateful to Almighty God for our freedom"); *see also American Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 2296 n.6 (6th Cir. 2001) (en banc) (listing states with such constitutional provisions).

that Address serves to reinforce the secular patriotic character of the Pledge.[7]

So too, the laws and customs of the federal government have long been replete with ceremonial references to a supreme being. The National Motto is "In God we trust," 36 U.S.C. § 302, and since 1865, Congress has authorized the placement of this phrase on United States currency. *See* Act of March 3, 1865, ch. 100, § 5, 13 Stat. 517, 518; *see also* 31 U.S.C. § 5112(d)(1) (requiring inscription of the motto on coins of the United States); *id.* § 5114(b) (same with regard to printed currency of the United States). The Motto is also engraved directly above the Speaker's dias in the Chamber of United States House of Representatives. Likewise, the National Anthem, "The Star-Spangled Banner," 36 U.S.C. § 301, contains the couplet: "Then conquer we must, when our cause it is just / And this be our motto: 'In God is our trust.'" And, the Supreme Court crier, since the tenure of

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[7] Indeed, the history and patriotic lineage of the words "under God" go back even further, for Lincoln, a student of George Washington's leadership in the Revolutionary War, was likely invoking earlier uses of the words by Washington in his wartime orders. For example, in the midst of the Revolutionary War, Washington proclaimed that "[t]he fate of unborn Millions will now depend, *under God*, on the Courage and Conduct of this army." George Washington, General Orders (July 2, 1776), reprinted in *Writings of George Washington* 225-26 (Library of America ed. 1997) (emphasis added). Similarly, following the first reading of the Declaration of Independence to his troops on Manhattan Island, New York, Washington stated, "[t]he General hopes this important Event will serve as a fresh incentive to every officer, and soldier, to act with Fidelity and Courage, as knowing that now the peace and safety of his Country depends (*under God*) solely on the success of our arms." George Washington, General Orders (July 9, 1776), reprinted in *Writings of George Washington*, *supra*, at 227-28 (emphasis added). As with Lincoln's Address, the words "under God" were invoked by Washington, not to demand or encourage religious observance, but to inspire patriotic loyalty to the cause of upholding the values of freedom and self-government.

Chief Justice Marshall, has opened this Court's sessions with the proclamation God save the United States and this honorable Court." *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

These ceremonial references to our nation's religious heritage—which consistently appear as isolated and elliptical references to a supreme being, made without elaboration of religious precepts, and without any express or implied exhortation to observe any religious customs—have long coexisted with the principles of religious freedom. The "history and ubiquity" of these ceremonial references prevent them being "understood as conveying an endorsement of particular religious beliefs." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring); *see also* Lawrence H. Tribe, *American Constitutional Law* § 14-15, at 1294-96 (2d ed. 1988) ("Clearly, practices can outgrow their religious roots, in the common understanding of non-adherents as well as adherents."). Such expressions instead are properly understood as "'solemnizing public occasions' [and] expressing confidence in the future," *County of Allegheny*, 492 U.S at 625 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring)).

In sum, the brief governmental references to God in our public life are best understood *not* as affirmation of any religious belief, but as references to beliefs which, as a matter of history, underlie the prime *secular* values to which the nation is dedicated.

B. The foregoing lessons have not escaped the notice of this Court. It has accepted these examples of ceremonial piety as non-controversial and tolerable recognition of beliefs widely held by the Founders and the people of this nation, that comport with a rigorous application of the Establishment Clause.

In its first decision striking down a public school's prayer policy, this Court observed that:

> 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 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 v. Vitale, 370 U.S. 421, 435 n.21 (1962).

Since this pronouncement in *Engel*, various opinions of this Court have made similar observations, particularly with respect to the constitutionality of the Pledge. For example, in *Lynch*, this Court noted that "[o]ther 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." 465 U.S. at 676. In *County of Allegheny*, this Court declared: "Our previous opinions have considered in dicta . . . the pledge, characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. *See also id.* at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.) (explaining that the Court "will not proscribe" "the reference to God in the Pledge of Allegiance" and similar acknowledgments of religious culture); *Lee*, 505 U.S. at 638-39 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.) (noting that the Court's invalidation of graduation prayer did not extend to invalidate the practice of saying the Pledge

of Allegiance at graduations); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) ("[T]he words 'under God' in the Pledge . . . serve as an acknowledgment of religion with the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.") (citations and quotation marks omitted); *id.* at 88 (Burger, C.J., dissenting) (stating that the argument that the Pledge of Allegiance, with its reference to God, violates the Establishment Clause "would of course make a mockery of our decisionmaking in Establishment Clause cases"); *Schempp*, 374 U.S. at 304 (Brennan, J., concurring) ("[R]eciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address."); *Engel*, 370 U.S. at 440 n.5 (Douglas, J., concurring) ("[The Pledge] in no way run[s] contrary to the First Amendment") (quoting H.R. Rep. No. 1693 at 3); *id.* at 449 (Stewart, J., dissenting) (citing as consistent with the Establishment Clause the Pledge of Allegiance, the National Motto "In God We Trust," and the National Day of Prayer).

C. This Court's consistent recognition of the constitutionality of the Pledge (even if in *dictum*) reflects a proper application of Establishment Clause standards.

Application of those standards to a case such as this must reflect "the particular concerns that arise in the context of public elementary and secondary schools." *Edward v. Aguillard*, 482 U.S. 578, 585 (1987). Families entrust the public schools with the education of their children, and the Establishment Clause ensures that such trust will not be violated by the use of the classroom to advance religious views. As a consequence, this Court has exercised particularly heightened vigilance in monitoring compliance with the Establishment Clause in elementary and secondary

schools.[8] *See id.* at 583-84. But what we have said to this point leaves little doubt that the recitation of the Pledge in public schools passes muster even under the heightened scrutiny that is warranted in this context.

An inquiry into both the purposes and effects of a challenged practice has long been a touchstone of this Court's Establishment Clause jurisprudence. Such inquiries comprise the first two prongs of the tripartite *Lemon* test, *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (asking whether a policy passed has "a secular . . . purpose," and whether its "principal or primary effect" is one that "neither advances nor inhibits religion"), and subsequent cases have clarified that the third *Lemon* prong—"excessive government entanglement with religion," *id.*—has largely been collapsed into the effects inquiry, *see Agostini v. Felton*, 521 U.S. 203, 205-06 (1997). Moreover, evaluation of a policy's purpose and effect is also central to determining whether it passes the "endorsement" test adopted by a majority of this Court in *County of Allegheny*. *See* 492 U.S. at 593-94 ("The [Establishment] Clause, at the very least, prohibits government from

[8] The reasons for additional scrutiny are clear. First, and most strikingly, elementary and secondary school children are legally compelled to attend school, thus permitting the State to "exert[] great authority and coercive power over students." *Edward*, 482 U.S. at 584. Second, the classroom is a setting in which parents are not present to counter "students' emulation of teachers as role models" or their "susceptibility to peer pressure." *Id.* Unlike adults with fully formed opinions and beliefs, "children of tender years, whose experience is limited," are far more likely to be prone to such coercive pressures, be they subtle or overt. *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985); *see also Lee*, 505 U.S. at 593. Finally, public schools play a pivotal role in "educating our youth for citizenship," and therefore must "teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). It is vitally important in achieving this task to guard against the divisive forces of social conflict potentially created when government mixes religious activity with classroom instruction.

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.") (citations and quotation marks omitted).

It is perfectly clear that the *purpose* of the Pledge is secular and patriotic, not religious. *See supra* at 9-15. And, as for the Pledge's *effects*, a reasonable observer acquainted with the relevant history and context canvassed above would not be impressed with the notion that recitation of the Pledge sends the "message to members of the audience who are nonadherants 'that they are outsiders, not full members of the political community, and an accompanying message to adherants that they are insiders, favored members of the political community.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)). Instead, a reasonable observer would understand the Pledge for what it is intended to be: a potent statement of patriotic observance, loyalty, and devotion to the principles on which the nation was founded.[9]

Thus, consideration of the factors to which this Court has looked in its prior cases leads inexorably to the conclusion that voluntary classroom recitation of the Pledge impinges upon no rights protected by the Establishment Clause of the First Amendment.

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[9] The court below rested its decision on the conclusion that the practice of reciting the Pledge is unconstitutionally "coercive." But coercion is a relevant consideration in this context only if what is being coerced is "support or participat[ion] in *religion* or its exercise." *Lee*, 505 U.S. at 587 (emphasis added). Because the Pledge is neither intended nor reasonably perceived to convey a religious message, it can hardly be said to work an unconstitutional coercion of support of, or participation in, religion.

II. THE PRESENT CASE DOES NOT PRESENT—AND THIS COURT SHOULD NOT DECIDE—WHETHER PUBLIC SCHOOL TEACHERS MAY BE FORCED TO LEAD OR RECITE THE PLEDGE OF ALLEGIANCE.

Our argument has proceeded on the understanding that, although Elk Grove mandates the recitation of the Pledge to be "conducted" in each classroom, *see* Cal. Educ. Code §52720, the school district does not require individual students or teachers to participate in the recitation.

As to *students*, this Court held in *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), that compulsory recitation of the Pledge unconstitutionally "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." That holding—rendered before the words "under God" had been added to the Pledge—has itself become a "fixed star in our constitutional constellation." *Id.*

The *Barnette* Court had no occasion to consider whether the holding announced in that case would apply to public school *teachers* as well. Nor does this case afford such an occasion. Although the question presented is phrased in terms of "a public school district policy that *requires* teachers to lead willing students in reciting the Pledge of Allegiance," there is nothing in the record to suggest that the policy at issue would require an *unwilling* teacher to lead the recitation of the Pledge. The California statute requires only that each school "conduct[] . . . appropriate patriotic exercises," and this can be accomplished without requiring the involvement of each individual classroom teacher. (It is not uncommon, for example, for a school to conduct the recitation of the Pledge by having an administrator recite the Pledge over the intercom, or by having an instructional aide or a student lead the Pledge if the classroom teacher does not wish to do so.) There is no indication that Elk Grove has gone further so as to

require that each teacher must take part in the recitation—and, indeed, any such requirement would present a serious constitutional question.

On the one hand, this Court consistently has recognized that teachers may not constitutionally be required to declare their beliefs or to profess their loyalty to the government. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1968). As this Court put it in *Keyishian*, "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." 385 U.S. at 603. And, in *Shelton*, this Court declared that, "in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation." 364 U.S. at 487.

On the other hand, leading students in the recitation of the Pledge might be seen, at least in part, as a matter of *curriculum*, and some may argue that teachers are not free to disobey the curricular decisions of school authorities. However, the nature and extent of a teacher's rights when curricular decisions involve *matters of public concern* has never been addressed by this Court, and has deeply divided the lower courts.[10]

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[10] *Compare Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364 (4th Cir.) (*en banc*) (holding that public school teachers have no First Amendment rights in choosing what will be taught), *cert. denied*, 525 U.S. 813 (1998); *Edwards v. California University of Pennsylvania*, 156 F.3d 488, 491 (3d Cir. 1998) (agreeing with *Boring*), *cert. denied*, 525 U.S. 1143 (1999); and *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794 (5th Cir. 1989) (similar holding), *with Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1051-55 (6th Cir. 2001) (rejecting *Boring* and holding that, where a teacher's instructional speech involves a matter of

Developing the proper First Amendment rule to govern teachers' rights and responsibilities with respect to leading students in the recitation of the Pledge is made all the more difficult by the fact that the act of "leading" the recitation necessarily involves "taking" the Pledge. For that reason, to whatever extent the recitation of the Pledge may be characterized as involving a matter of curriculum, *see Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979) (upholding termination of teacher for refusing to teach "the prescribed curriculum concerning patriotic matters," of which the Pledge was one component), it certainly is *more* than that, *see Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972) (holding that a school may not condition a teacher's employment on her willingness to recite the Pledge).

In light of the foregoing, any consideration by this Court of the question whether public school teachers may be required to recite the Pledge, or (if there is a difference) to lead students in reciting the Pledge, should await a case in which the question is squarely presented.

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public concern, the balancing test of *Pickering v. Board of Education*, 391 U.S. 503 (1968), is applicable); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 723-24 (2d Cir. 1994) (holding that the standard articulated in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) to govern restrictions on students' speech concerning curricular matters, which requires that the restriction must be "reasonably related to legitimate pedagogical concerns," is "the appropriate measure of the school administration's authority to restrict [a teacher's] speech"); *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1148-49 (9th Cir. 2001) (assuming *arguendo* that "instructional speech receives First Amendment protection" and that any infringement must satisfy the *Hazelwood* standard).

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted,

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