No. _____

In The

SUPREME COURT OF THE UNITED STATES

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

vs.

MICHAEL A. NEWDOW,
Respondent,

_____

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the policy of Petitioner ELK GROVE UNIFIED SCHOOL DISTRICT 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 to the United States Constitution?

2) Whether a non-custodial parent of a minor child has standing in federal court to challenge the policies of a public school district that require teachers to lead willing students in reciting the Pledge that includes the words "under God," when the non-custodial parent does not have legal authority to direct either the education or the religious education of the child?

List of Parties

1) MICHAEL A. NEWDOW, Plaintiff and Respondent;

2) UNITED STATES CONGRESS, Defendant;

3) UNITED STATES OF AMERICA, Defendant;

4) GEORGE W. BUSH,* President of the United States, Defendant;

5) STATE OF CALIFORNIA, Defendant;

6) ELK GROVE UNIFIED SCHOOL DISTRICT, Defendant and Petitioner;

7) DAVID W. GORDON, Superintendent, EGUSD, Defendant and Petitioner;

8) SACRAMENTO CITY UNIFIED SCHOOL DISTRICT, Defendant; and

9) JIM SWEENEY, Superintendent, SCUSD, Defendant.

* George W. Bush was substituted for his predecessor, William Jefferson Clinton, as President of the United States, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 2003, is reported at Newdow v. United States Congress, 292 F.3d 597. The original version of the opinion, filed on June 26, 2002, is reported at Newdow v. United States Congress, 292 F.3d 597. Both the amended and original versions are reprinted, respectively, in the Appendix hereto, pp. 1-24 and 25-56.

The order of the Ninth Circuit denying rehearing and rehearing *en banc*, filed February 28, 2003, is reported at Newdow v. United States Congress, 321 F.3d 772, an is reprinted in the Appendix hereto, pp. 57-86.

The opinion of the Ninth Circuit wherein the Court held that Respondent has standing to assert his claims, filed December 4, 2002, is reported at Newdow v. United States Congress, 313 F.3d 500, and is reprinted in the Appendix hereto, pp. 87-96.

The memorandum order of the United States District Court for the Eastern District of California of July 21, 2000, granting Petitioners' Motion to Dismiss, is reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22366, and is reprinted in the Appendix hereto, p. 97.

The memorandum findings and recommendation of United States Magistrate Judge Peter A. Nowinski for the United States District Court for the Eastern District of California of May 25, 2000, are reported at Newdow v. Congress of the United States, 2000 U.S. Dist. LEXIS 22367, and is reprinted in the Appendix hereto, pp. 98-99.

JURISDICTION

On March 8, 2000, Respondent brought suit against Petitioners and other Defendants in the United States District Court for the Eastern District of California, alleging that Petitioners and others had violated the Establishment Clause of the First Amendment to the United States Constitution ("Establishment Clause") by requiring public

school teachers to lead their morning classes in reciting the Pledge of Allegiance ("Pledge"). See App., pp. 3-5. Respondent also alleged that the Pledge, as amended in 1954 to include the phrase "under God," is unconstitutional.

On May 25, 2000, the Honorable Peter A. Nowinski, Magistrate Judge for the United States District Court for the Eastern District of California, filed his findings and recommendations wherein he recommended that the complaint of Respondent be dismissed. See App., p. 98. On July 21, 2000, the District Court adopted the findings and recommendations and dismissed Respondent's complaint. See App., p. 97. On July 26, 2000, Respondent appealed the dismissal of his complaint to the United States Court of Appeals for the Ninth Circuit.

On June 26, 2002, the Ninth Circuit issued an opinion reversing the District Court's Order. See App. pp. 25-56. On June 27, 2002, the Ninth Circuit stayed its judgment, and directed the clerk to stay the mandate. Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc to the Ninth Circuit.

On December 4, 2002, the Ninth Circuit issued an opinion affirming its previous decision that Respondent has standing to pursue his claim in federal court. See App., pp. 87-96.

On February 28, 2003, the Ninth Circuit issued an order denying Petitioners' petition for rehearing and suggestion for rehearing *en banc*. See App., pp. 57-86. In the same order, the Ninth Circuit issued an amended opinion wherein it reversed the District Court's Order. See App., pp. 1-24.

The jurisdiction of this Court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

36 U.S.C. § 1972 (As amended June 14, 1954, now codified at 4 U.S.C. § 4 (1998))

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

California Education Code, Section 52720 (1989)

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

Elk Grove Unified School District Policy AR 6115

Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

An amendment to 36 U.S.C. § 1972, enacted on June 14, 1954, now codified at 4 U.S.C. § 4 (1998) ("the 1954 Act"), added the words "under God" to the Pledge. The recitation of this version of the Pledge is listed as an appropriate patriotic exercise for public elementary school children in California under section 52720 of the California Education Code. See App., p. 3.

Pursuant to a EGUSD policy, elementary school teachers begin each school day by leading their students in reciting the Pledge in conformity with Section 52720 of the California Education Code. In pertinent part, Elk Grove Unified School District's ("EGUSD") policy states that each "class [shall] recite the Pledge of Allegiance to the Flag once each day."

Respondent is an atheist and the non-custodial parent of a minor child who attends a public elementary school in the EGUSD. Respondent objects to his minor child hearing and observing willing students recite the Pledge.[1]

B. The District Court Proceedings

On March 8, 2000, Respondent filed suit against Petitioners and others in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief, but not damages. Respondent alleged that his minor daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's (sic) is 'one nation under God.'" Respondent did

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[1] The Ninth Circuit denied a Motion to Intervene filed by the mother of Respondent's minor child. See App., pp. 87-96. In the Motion to intervene, the mother indicated that the minor child is willing to recite the Pledge.

not allege that Petitioners require his daughter to participate in the recitation of the Pledge. However, he did challenge the constitutionality of Petitioners' policy requiring teachers to lead willing students in reciting the Pledge. See App., p. 5. Respondent also challenged the constitutionality of Section 52720 of the California Education Code as well as the 1954 Act. Id.

Petitioners and other Defendants filed a motion to dismiss Respondent's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Magistrate Judge Nowinski held a hearing on this motion, wherein Petitioners' requested that he issue a ruling concerning the constitutionality of the Pledge, and that the court defer ruling on other issues. Petitioners' were joined in this motion by the United States Congress, the United States, and the President of the United States. Magistrate Judge Nowinski reported his findings and recommended the entry of a judgment of dismissal finding the EGUSD's policy did not violate the First Amendment. See App., pp. 98-99. These findings and recommendations were adopted on July 21, 2000, by District Judge Milton J. Schwartz of the United States District Court for the Eastern District of California. See App., p. 97.

C. The Appellate Court Proceedings

On July 26, 2000, Respondent filed a notice of appeal from the District Court's Order. On June 26, 2002, the Ninth Circuit issued a published opinion, wherein a split panel reversed and remanded the judgment of dismissal. Contrary to the District Court's findings, the majority panel found that the 1954 amendment to the Pledge rendered the Pledge unconstitutional. The majority panel also found that EGUSD's practice of teacher-led recitation of the Pledge was unconstitutional.

On June 27, 2002, the Ninth Circuit stayed its judgment and the issuance of the mandate. Thereafter, Petitioners timely filed a petition for rehearing and suggestion for rehearing en banc.

On December 4, 2002, the Ninth Circuit issued an opinion

affirming its previous decision in this case wherein it found that Respondent, as a non-custodial parent, has standing to challenge the constitutionality of the Pledge and the EGUSD's Pledge recitation policy. See App., pp. 87-96.

On February 28, 2003, the Ninth Circuit issued an amended opinion wherein it denied Petitioners' petition for rehearing and suggestion for rehearing *en banc*. See App., pp. 57-86. The majority panel amended its opinion to hold that EGUSD's policy violates the Establishment Clause. See App., pp. 1-24. The majority's amended opinion does not expressly hold that the 1954 Act violates the First Amendment; however, this conclusion is implicit in the decision. Id.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

Review Is Warranted Because The Opinion By The Majority Panel of the Ninth Circuit Conflicts With An Opinion Of The Seventh Circuit As Well As Affirmations Contained in Opinions Of This Court.

On February 28, 2003, in a split opinion, the Ninth Circuit issued an opinion holding that the EGUSD's policy of teacher-led recitation of the Pledge is unconstitutional. See App., pp. 1-24. In reaching this decision, the majority panel impliedly found that the Pledge is unconstitutional as it determined that reciting the Pledge with the phrase "one Nation under God" is a religious act. Review of the majority opinion is necessary and appropriate since the opinion conflicts with a decision of the Seventh Circuit and also conflicts with affirmations of this Court regarding the constitutionality of the Pledge. Moreover, because the Majority panel's error is so clear, Petitioners respectfully submit that the Court may wish to summarily reverse the Ninth Circuit's decision.

In Sherman v. Community Consolidated School District 21 of Wheeling Township, 980 F.2d 437, 444-48 (7th Cir. 1992), the Seventh Circuit held that the Pledge does not violate the establishment clause. This Court had an opportunity to review the decision, but denied certiorari. Sherman v. Community Consolidated School District 21 of Wheeling Township, 508 U.S. 950 (1993).

In reaching its decision, the Sherman Court considered whether the Founding Fathers deemed ceremonial references to a deity to be understood as a prayer. 980 F.2d at 445. Using history as a guide, the Sherman court reviewed references to God by Presidents George Washington and James Madison, the author of the First Amendment, references to the opening of court sessions with the cry "God save the United States and this honorable Court," and references to God contained in the Declaration of Independence.[2] Id. at 445-446. The Sherman Court also noted that the Pledge tracks Abraham Lincoln's Gettysburg Address which ended with the statement, "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." Id. at 446.

After reviewing this Court's decisions wherein the constitutionality of the Pledge has been discussed, the Sherman Court held that the school district's policy was constitutional because the reference to God contained in the pledge is a form of ceremonial deism. Id. at 447-448. In so holding, the Sherman Court relied heavily on statements made by Justices of this Court over the years in various opinions wherein they have acknowledged the constitutionality of the Pledge.

Thus, by concluding that the EGUSD's policy of requiring elementary school teachers to lead willing students in the recitation of

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[2] One such example of a reference to God in the Declaration of Independence is the statement, "We hold these truths to be self-evident , that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."

the Pledge is unconstitutional, the majority opinion of the Ninth Circuit in this case is in direct conflict with the Seventh Circuit's decision in Sherman.

In addition to conflicting with the Sherman opinion, the majority panel of the Ninth Circuit also runs afoul of this Court's affirmations regarding the constitutionality of the Pledge. For example, in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602-03, (1989), this Court noted that "previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." A number of other decisions issued by this Court also contain explicit references to the Constitutionality of the Pledge. See Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962) (signaling no constitutional violation in encouraging school children to recite historical documents which contain references to "the Deity" or to sing anthems which include the composer's professions of faith); School Dist. Of Abington Township v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J. concurring)(stating that the reference to God in the Pledge is merely a constitutional recognition of the historical fact that our Nation was believed by its founders to have been created under God); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, L., concurring) ("[T]he words 'under God' in the Pledge . . .serve as an acknowledgment of religion."); Lynch v. Donnelly, 465 U.S. 668, 676 (1984) (Burger, C.J., for the court)("Other examples of reference to our religious heritage are found . . .in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That Pledge is recited by many thousands of public school children – and adults–every year."); County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989) (Blackmun, J., for the court) ("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.)

Therefore, the majority's opinion in this case is in direct conflict with Sherman and is also in direct conflict with statements made by this Court in the decisions noted above. A review of the Sherman case and

this Court's affirmations regarding the Pledge reveal that the Pledge is constitutional as currently codified and, consequently, EGUSD's policy regarding willing recitation of the Pledge in its schools, is constitutional. As a result, Petitioners respectfully submit that the conflicting opinion by the majority panel of the Ninth Circuit is in error and that summary reversal of the majority's decision is appropriate. Assuming arguendo this Court does not summarily reverse the majority's decision, Petitioners respectfully submit that review by this Court is warranted.

II.

Review Is Warranted Because the Majority's Decision Conflicts With This Court's Holding in West Virginia State Board of Education v. Barnette.

In the amended opinion, the majority failed to consider the import of this Court's decision in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). In Barnette, this Court held that a West Virginia regulation that required schoolchildren in the state to recite the Pledge[3] or be considered insubordinate was unconstitutional. Id. at 1187. The Plaintiffs in Barnette were Jehovah's Witnesses who refused to salute the flag in accordance with their religious beliefs. Id. at 1181. In deciding the case, this Court noted that compulsory recitation of the Pledge "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks." Id. at 1183. This Court also noted that "[F]ree public education, if faithful to the idea of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." Id. at 1185.

In spite of concerns that compelling students to recite the Pledge violated students' free speech rights by compelling political

[3] Petitioners understand that the Pledge did not contain the phrase "under God" when Barnette was decided.

ideology in violation of the First Amendment, this Court did not outlaw the recitation of the Pledge in public schools. Instead, this Court determined that states (and school districts) cannot compel students to recite the Pledge. Nevertheless, this Court continued to allow the Pledge to be recited by willing students.

Contrary to this Court's teaching in Barnette, the majority in the instant case found that the recitation of the Pledge has a coercive effect which is "particularly pronounced in the school setting given the age and impressionability of school children." Tellingly, in Barnette, this Court did not find that hearing other students recite the Pledge has a coercive effect on students so as to constitute a violation of that student's rights under the First Amendment. Thus, even if a student feels that certain content of the Pledge violates his or her First Amendment rights, that student's rights are sufficiently protected by not being required to recite the Pledge. Therefore, summary reversal is warranted in that the majority's decision cannot be reconciled with the holding in Barnette. Alternatively, Petitioners respectfully submit that review is warranted so the majority's decision can be reconciled with this Court's decision in Barnette.

III.

Review Is Warranted Because The Majority Improperly Found That The Pledge Is A Profession Of Religious Belief.

The majority panel of the Ninth Circuit held that in the context of the Pledge, the statement that the United States is a nation "under God" is a profession of religious belief. See App. pp. 11-12. In so holding, the majority determined that the statement is not a "mere acknowledgment that many Americans believe in a deity. Nor is it merely descriptive of the undeniable historical significance of religion in the founding of the Republic." Id. On that basis, the majority found that EGUSD's policy places students in the position of having to choose to participate in an exercise with religious content or to protest. Unfortunately, the majority assumed the statement "under God" is a profession of religious belief rather than analyzing whether the recitation of the Pledge is a religious act..

The majority's rationale regarding the Pledge being a profession of religious belief is based on the faulty presumption that the Pledge takes a position with respect to the existence of God. What is clear from a thorough examination of the legislative history of the 1954 Act is that in amending the Pledge to include the phrase "under God," Congress only intended to acknowledge the role of God in the history of our country. Specifically, the House Report reveals:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper. H.R. Rep. No. 83-1693, at 2 (1954).

The House Report further reflected on references to God in the Declaration of Independence, the inscription of "In God We

Trust" on currency and coins, and references to God in the Gettysburg Address. Id. Representative Louis C. Rabaut, in testifying at the subcommittee hearing, described the need for the legislation as follows:

> "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government."

Id. at 3. He further stated that "the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. " Id. These remarks establish that Representative Rabaut felt the amendment would help teach children about the role of religion in the history of the United States.

Most important in evaluating whether the amendment to the Pledge takes a position with respect to the existence of God is an opinion authored by the Legislative Reference Service of the Library of Congress. The Legislative Reference Service determined that the phrase "under God" was a modifier to the phrase "one Nation" because the addition was intended to affirm that the United States was founded on a fundamental belief in God. This analysis underscores the idea that the addition of the phrase "under God" to the Pledge was done for a secular purpose – the affirmation of the concept that the United States was founded on a fundamental belief in God.

The phrase does not compel anyone to believe in the existence of God or recognize religion in general. Instead, it merely reflects the role of religion in the history of the United States.

Further, as stated by Justice O'Scannlain in his dissent from the denial of rehearing *en banc* in this matter, recitation of the Pledge is a patriotic act – not a religious act. See App., pp. 78-79. This is confirmed by noting that the California statute under which EGUSD created its policy that is at issue herein is entitled "[d]aily performance of patriotic exercises in public schools. On the other hand, a religious expression takes the form of prayer. In contrast, patriotic invocations

of God do not attempt to establish a state religion, nor suppress the exercise or non-exercise of religion.

As noted by Justice O'Scannlain, if the statement "under God" in the Pledge constitutes a religious act, then historical works such as the Constitution, the Declaration of Independence, and the Gettysburg Address, to name a few, as well as the National Anthem and the National motto would also violate the Establishment Clause. See App., p. 80. As the Sherman Court asked, were the "founders of the United States . . . unable to understand their own handiwork[?]" Sherman, 980 F.2d at 445.

Based on the legislative history of the Pledge and the affirmations of this Court, it is clear that the Pledge is not a religious act and therefore does not violate the Establishment Clause. Since the majority's finding that the Pledge is a religious act is in conflict with prior affirmations of this Court regarding the constitutionality of the Pledge, Petitioners respectfully submit that summary reversal of the decision is warranted. Petitioners respectfully submit that, at the least, review is warranted as the Pledge as currently codified is not a religious act nor does it convey a religious belief.

IV.

Review Is Warranted Because The Majority Failed To Recognize This Court's Flexible Approach To Deciding Establishment Clause Cases.

While the Ninth Circuit majority recognized that this Court has utilized three tests over the years to analyze violations of the Establishment Clause, it failed to recognize the analytical flexibility inherent in this Court's decisions in Establishment Clause cases. The three tests considered by the majority were (1) the Lemon test named for Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), (2) the "endorsement test" proposed by Justice O'Connor in her concurring opinion in Lynch, and (3) the "coercion test" promulgated in Lee v. Weisman, 505 U.S. 577 (1992). See App., pp. 8-11. The majority did not, however, consider the fact that this Court has not limited its evaluation of the Establishment Clause to these three tests. In fact, in Lynch, this Court stated, ". . . we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." Lynch, 465 U.S. at 679, citing, Tilton v. Richardson, 403 U.S. 672, 677-678 (1971).

The flexibility of this Court's analysis is best exemplified in Marsh v. Chambers, 463 U.S. 783, 792 (1983). In Marsh, this Court held that the Nebraska Legislature's practice of opening its daily sessions with a prayer led by a Chaplin who was paid by the state did not violate the Establishment Clause. In reaching this decision, this Court reviewed the history of legislative prayer at both the national and state levels and affirmed legislative prayer based upon the historical acceptance of the practice which had become "part of the fabric of our society." Id.

This Court's discussion of ceremonial references to God in Marsh, Engle, Schempp, Lynch, Wallace and Allegheny underscores the need for courts to maintain flexibility in analyzing Establishment Clause cases because the historical significance and ceremonial nature of the practice at issue may render the practice constitutional. It is this

flexibility that this Court utilized in Marsh to create an Establishment Clause analysis premised on a practice being constitutional because it is a "fabric of our society."

As evidenced by the national uproar caused by the majority's decisions in this case as well as the fact that the Pledge has been recited in its current form by millions of people both in school and outside the school context for forty-eight consecutive years, the reference to God in the Pledge is interwoven into the "fabric of our society." Thus, utilizing a flexible test such as Marsh, when considered in conjunction with historical references to God and the affirmations of this Court, the Pledge does not violate the Establishment Clause. Therefore, review of the majority opinion is warranted by this Court.

V.

Review Is Warranted Because Of The National Importance In Determining Whether The Pledge Of Allegiance, As Recited By Millions of Public School Children Over The Last Half Of The Century, Is Constitutional

As noted above, a two judge panel of the Ninth Circuit has effectively banned the recitation of the Pledge of Allegiance by all school children in the nine western states. At a minimum, this decision effects over 9.6 million students. See App., p. 67. Significantly, this decision will result in substantial disruption of the daily lives of the school children in the EGUSD, as well as those attending public schools within the jurisdiction of the Ninth Circuit. These school children will find it necessary to reconcile why they are prohibited from willingly reciting the Pledge as a daily patriotic exercise when the public school children in the rest of the country are permitted to say the Pledge. This decision will also cause confusion on the part of the children in the Ninth Circuit as to why they, along with all of the adults living in the Ninth Circuit can recite the Pledge at almost any time or place other than in their public school. Petitioners respectfully submit that the majority's decision in which it effectively restricts school

children in the nine western states from willingly reciting the Pledge on a daily basis at their public school presents a substantial issue of national importance which merits review by this Court.

This Court has recognized that a legislative prayer may have received such widespread historical acceptance that it becomes a patriotic exercise which is part of the fabric of our society. Marsh, 463 U.S. at 792. The Pledge as adopted in the 1954 Act clearly falls within that category. Introduced to the nation, and its school children, by proclamation of President Eisenhower, scores of citizens of the United States have been raised and attended school with the Pledge as an integral part of our national fabric. The population of the Untied States has increased by over 120 million citizens since 1954 and a substantial number of those citizens were introduced to the Pledge when they attended public schools.[4] Moreover, the citizenry beyond school age at the time of the 1954 Act have adopted and embraced the Pledge by reciting it at public gatherings, ceremonies, commencement of court proceedings, little league games, scouting events and fraternal organizations, to name a few.

The decision by the majority in this case has affected all of our citizenry as demonstrated by the public and political outcry throughout our country when this decision was published.[5] Not only has there been an adverse reaction to the fact that the school children in the nine western states will be banned from willingly reciting the Pledge in public schools, this decision implies that the Pledge itself is unconstitutional. See App., p. 67. Petitioners respectfully submit that this implied finding that the Pledge is unconstitutional is of national

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[4] The National Population Estimates prepared by the US Census Bureau estimates the national population of the United States as of July 1, 1954 to be 163,025,854 compared with an increase on July 1, 2001 to an estimated 284,796,887. See U.S. Census Bureau website; http://eire.census.gov/popest/data/national/tables/NA-EST2001-01.php

[5] See also, Church of the Holy Trinity v. United States, 143 U.S. 457, 465-471 (1892) (citing numerous examples of expressions that ours is historically a religious nation.

importance because it affects citizens throughout the United States who have known and respected the Pledge over the past forty-eight years.[6]

Review of this case is also warranted because of the need for this Court to clarify the difference between the traditional role of religion in our national life and what constitutes the establishment of religion or interference with the free exercise or non-exercise of religion. Our country has myriad examples of the historical importance of religion on the daily lives of our ancestors. The historical role of God is reflected in our national motto of "IN GOD WE TRUST", our National Anthem and other patriotic songs such as "GOD BLESS AMERICA", "AMERICA THE BEAUTIFUL" and "MY COUNTRY TIS OF THEE", the Declaration of Independence, the Gettysburg Address, the Constitutions of numerous states, the formal announcement of this Court and other Courts throughout our nation, numerous inaugural addresses of Presidents of these United States and as engraved in the monuments to Presidents of this nation. See, App., pp. 23, 68-69, 80-81. Certainly the founding fathers of our country did not expect that we would one day be called upon to eliminate the numerous references to the historical role of religion in one or all of our patriotic exercises in public schools. As correctly pointed out by Justice O'Scannlain, interpretations of the establishment clause must take into consideration our 200 year history and tradition of patriotic references to God. See App., p. 79. The Ninth Circuit's opinion is one of national importance because it expands interpretation of the Establishment Clause to create an unacceptable wall of separation between God and state that has no historical foundation.

Review of the decision by the Ninth Circuit is also warranted to avoid a need for unnecessary and costly litigation. First, this decision may be a springboard for piecemeal litigation in the other Federal

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[6] There were 10 judges on the Ninth Circuit Court of Appeals who expressed their view that this case was sufficiently important that it merited review by an en banc panel. See App., pp. 65 and 86.

Courts throughout the country. Second, the decision by the majority panel may result in civil actions for damages or other relief against school districts, their administrators and teachers throughout the nine western states because reciting the Pledge is now considered by the Ninth Circuit to be a violation of a student or parent's constitutional rights. At a time when most school districts are facing severe budget crises, particularly in California, the most effective way to prevent this unnecessary and expensive litigation would be for this Court to either summarily reverse the decision by the Ninth Circuit in this case or to grant review because of the potential impact on the nation by this decision.

The Pledge is a symbol of national pride and one of the most important patriotic exercises performed by citizens of the United States. This Court previously resolved the issue of permitting recitation of the Pledge by willing students in public schools in Barnette and there is no reason to alter the result in that decision as attempted by the majority in this case. A need for a uniform Pledge throughout the United States, which may be learned and recited by willing students in public schools, is fundamental in establishing and preserving a sense of national unity and identity. It is of national importance the Pledge be taught and recited by willing students so that the Pledge may be uniformly recited by all citizens who choose to do so.

For each of those reasons, Petitioners respectfully submit that the issues raised by the decision of the majority panel in the Ninth Circuit in this case are of national importance because of the substantial impact this decision will have on the citizens of the nine western states as well as citizens throughout the United States. Therefore, Petitioners respectfully request that this Court either summarily reverse the Ninth Circuit decision or grant review of this important issue.

VI.

Review Is Warranted Because The Ninth Circuit Erroneously Found That Respondent Has Standing To Bring Suit.

The Ninth Circuit concluded that Respondent has standing, as a parent, to challenge a practice that interferes with his right to direct the religious education of his daughter, even though Respondent does not have legal custody of his daughter. See App., pp. 87-96. No California court has addressed whether an award of sole legal custody to one California parent deprives the non-custodial California parent of his ability to affect decisions concerning the health, education or welfare of a child. However, California statutes addressing custody dictate that a non-custodial parent, such as Respondent, does not have the ability to affect decisions relating to the child's health, education or welfare. See Cal. Family Code § 3003 (defining "joint legal custody" as both parents *sharing* the right to make decisions regarding the health, education and welfare of their child) [emphasis added]; Cal. Family Code § 3006 [defining "sole legal custody" as *one parent* having the sole right and responsibility to make such decisions] [emphasis added]. Thus, Respondent does not have the legal right under California law to direct matters related to his minor child's health, education or welfare.

Because Respondent does not have legal custody of his daughter, he also lacks the authority to decide what religious education she shall receive. In Re: Marriage of Murga, 103 Cal. App.3d 498, 505 (1980). Thus, to the extent the Pledge is considered to be "religious education," Respondent does not have any legal right under California law to determine his daughter's religious education. Consequently, Respondent has not suffered an injury in fact and does not have standing to challenge the constitutionality of the Pledge recited by his daughter's classmates.

In reaching a conclusion to the contrary, the Ninth Circuit has inappropriately enlarged the pool of potential plaintiffs who may now file similar and meritless lawsuits in California and other states with child-custody schemes resembling those of California. Indeed, such

non-custodial parents may now maintain such suits even in instances where the custodial parent supports the policies or statutes in question. Petitioners respectfully submit that, as a matter of national importance, review of the Ninth Circuit's decision regarding respondent's standing in this case is warranted because the decision makes moot a state's custody determinations if a noncustodial parent can bring suit in contradiction of decisions made by the custodial parent.

CONCLUSION

Based on the foregoing, Petitioners respectfully submit that this Petition for Writ of Certiorari should be granted. The Court may wish to consider summary reversal of the decision of the Ninth Circuit Court of Appeals.

Dated: April 30, 2003

Respectfully submitted,

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