

Appeal Nos. 05-17257, 05-17344, 06-15093
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROECHILD-2 and JAN ROE,

Plaintiffs-Appellees,

- against -

JOHN CAREY, ADRIENNE CAREY, BRENDEN CAREY,
THE KNIGHTS OF COLUMBUS, *ET AL.*

Defendant-Intervenor-Appellants,

- and -

RIO LINDA UNION SCHOOL DISTRICT,

Defendant-Appellant,

- and -

THE UNITED STATES OF AMERICA,

Defendant-Intervenor-Appellant.

Appeal from the United States District Court
for the Eastern District of California
Case No. 05-cv-00017

BRIEF OF DEFENDANT-INTERVENOR-APPELLANTS
JOHN CAREY *ET AL.*

Kevin J. Hasson
Anthony R. Picarello, Jr.*
Derek L. Gaubatz (C.B.N. 208405)
Eric Rassbach
Jared N. Leland
Attorneys for Defendant-
Intervenor-Appellants

The Becket Fund for Religious Liberty
1350 Connecticut Ave., N.W., Ste. 605
Washington, DC 20036
Telephone: (202) 955-0095
Facsimile: (202) 955-0090
*Counsel of Record

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants John Carey *et al.* state that none of the Appellants John Carey *et al.* has a parent corporation, nor does any Appellant issue any stock.

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JURISDICTIONAL STATEMENT

(a) The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4); and under 42 U.S.C. §§ 1983.

(b) The District Court's order of November 18, 2005, which dismissed plaintiffs Jan Doe, Pat Doe, and DoeChild, and entered a permanent injunction in favor of the remaining Plaintiffs, disposed of all of Plaintiffs' claims that had not been dismissed previously. This Court has jurisdiction over the appeal of those decisions under 28 U.S.C. § 1291.

(c) Defendant-Intervenors appeal from the judgment and order entered on November 18, 2005, and the order entered on September 16, 2005, both in favor of Plaintiffs Jan Roe and RoeChild-2. Appellants John Carey *et al.* filed a notice of appeal on November 21, 2005. On December 9, Appellant Rio Linda Union School District filed a notice of appeal, and on January 13, 2006, Appellant the United States filed a notice of appeal. These notices were timely filed under FRAP 4(a). Neither of the remaining Plaintiffs (Jan Roe and RoeChild-2) nor any of the previously dismissed Plaintiffs (Michael Newdow, Jan Poe, PoeChild, Jan Doe, Pat Doe, DoeChild, and RoeChild-1) have filed cross-appeals.

STATEMENT OF THE ISSUES

Whether a public school may lead children in voluntary recitation of the Pledge of Allegiance, which contains the two words “under God,” without violating the Establishment Clause.

STATEMENT OF THE CASE

On January 3, 2005, various anonymous Plaintiffs and Plaintiff Michael Newdow (who is also Plaintiffs' attorney) sued various governmental entities claiming that the constitution is violated whenever public school teachers lead willing students in the Pledge of Allegiance, simply because the Pledge contains the two words "under God." R-261-262.¹

The original Plaintiffs were Michael Newdow, Pat Doe, Jan Doe, DoeChild, Jan Poe, PoeChild, Jan Roe, RoeChild-1, and RoeChild-2. The original defendants were the Congress of the United States of America, the United States of America, the State of California, the Lincoln Unified School District, the Sacramento City Unified School District, the Rio Linda Union School District, the Elk Grove Unified School District, the Elverta Joint Elementary School District, Arnold Schwarzenegger, Richard Riordan, Steven Ladd, Janet Petsche, Magdalena Mejia, Dianna Mangerich, and Frank Porter. R-255-261.

On April 11, 2005, Plaintiffs amended their complaint, dropping Jan Poe and PoeChild as Plaintiffs, and the Lincoln Unified School District and its Associate Superintendent Janet Petsche as Defendants. R-264.

Plaintiffs' 142-page First Amended Complaint contains no formal counts, but includes claims under the Establishment and Free Exercise Clauses of the First

¹ All record citations are to the Joint Excerpts of Record filed concurrently with this Brief.

Amendment, Equal Protection, Due Process, the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, “the fundamental constitutional rights of privacy and parenthood,” and cognate claims under the California Constitution. R-14-15, R-26.

For all of these claims, Plaintiffs sought the same relief. First, they sought a declaration that the enactment and text of 4 U.S.C. § 4 (the official text of the Pledge) were unconstitutional. Second, they sought an injunction (a) ordering Congress and Peter LeFevre, Law Revision Counsel, to remove “under God” from the Pledge of Allegiance, as set forth in the text of 4 U.S.C. § 4; (b) ordering Governor Arnold Schwarzenegger and Secretary for Education Richard Riordan to alter or stop enforcing CAL. EDUC. CODE § 52720, so that schoolchildren did not have to say the Pledge; and (c) ordering the School Districts and their Superintendents forbid use of the Pledge in all schools. R-40.

On May 9, 2005, Defendant-Intervenors John, Adrienne and Brenden Carey; Albert, Anita and Adam Araiza; Craig, Marie and Michaela Bishop; Rommel, Janice, Teresa, Darien and Ryanna Declines; Dan, Karen and Anthony Doerr; Fred, Esterlita, Sean and Tiffany Forschler; and Robert, Sharon and Mary McKay (schoolchildren attending the Defendant school districts, and the parents of those children, all of whom want to keep saying “under God” as part of the daily recitation of the Pledge), along with the Knights of Columbus (a fraternal

organization that helped introduce the phrase “under God” into the Pledge) – collectively, the “Carey Defendants” – all moved to intervene and filed an Answer to the Amended Complaint. R-143-167.² On May 16, 2005, the United States of America also moved to intervene. R-265.

Also on May 16, 2005, all Defendants and Defendant-Intervenors filed motions to dismiss. R-265-266.

On July 18, 2005, the District Court held a hearing on the pending motions. At the hearing, the District Court granted the Carey Defendants’ and the United States’ motions to intervene, and reserved ruling on the three motions to dismiss. R-268-269.

On September 14, 2005, the District Court granted in part and denied in part the various motions to dismiss. R-227. The District Court first held that Plaintiff Newdow did not have standing and dismissed all of his remaining claims, including all claims against SCUSD. R-216. The District Court also dismissed all claims against the federal and state defendants, as well as Plaintiffs’ abandoned claims against the school district superintendents of the school districts. *Id.*; R-199 n.3.

But the Court refused to dismiss the claims of Plaintiffs Jan Doe, Pat Doe, and DoeChild, Jan Roe, RoeChild-1, and RoeChild-2 against the school districts,

² Other Defendant-Intervenors withdrew one month after intervention. R-267.

stating that their policy of leading willing students in a daily recitation of the Pledge of Allegiance violated the Establishment Clause, because it contained the two words “under God.” Construing all allegations in favor of the Plaintiffs, the Court concluded that the School Districts’ Pledge policies were “an unconstitutional violation of the children’s right to be free from a coercive requirement to affirm God.” R-218. The Court also stated that “upon proper motion it will issue an appropriate injunction.” R-224.

On September 19, 2005, the Carey Defendants petitioned the District Court for certification of the September 14 order for interlocutory appeal. R-269. On October 5, 2005, the District Court convened a status conference at which it denied the motion for certification of the September 14 order, stating that it would order the parties to supply affidavits in support of the promised injunction that would resolve all remaining claims, bringing the case to final judgment. R-270. On October 11, the District Court ordered Plaintiffs to file affidavits by October 26, and Defendants any responses by November 16. *Id.*

On October 28, 2005, the District Court signed a stipulated order dismissing all claims against the Elverta Joint Elementary School District, including all claims by RoeChild-1. R-270.

Based on the affidavits filed by the parties on October 26 and November 16, the District Court the District Court on November 18, 2005, issued an order and

permanent injunction forbidding the Rio Linda Union School District from enforcing its policy of leading children in the Pledge to meet California's requirement of daily patriotic exercises. R-271.

As part of the same order, the District Court also stayed execution of the injunction pending appeal, and dismissed all claims by Jan Doe, Pat Doe and DoeChild against the Elk Grove Unified School District, leaving the Rio Linda Union School District as the only remaining school district defendant, and Jan Roe and RoeChild-2 as the only remaining plaintiffs. Thus, the November 18, 2005 order resolved all outstanding claims in the litigation. *Id.*

On November 21, 2005, the Carey Defendants filed a notice of appeal. *Id.* On December 9, 2005, the School District filed a notice of appeal, and on January 13, 2006, Defendant-Intervenor the United States filed a notice of appeal. R-272. No Plaintiff cross-appealed. On February 24, 2006, this Court consolidated the three appeals.

STATEMENT OF FACTS

The Rio Linda Union School District (the “School District”) has a policy regarding recitation of the Pledge of Allegiance, which provides in its entirety:

Patriotic Exercises

Each school shall conduct patriotic exercises daily. At elementary schools, such exercises shall be conducted at the beginning of each school day. The Pledge of Allegiance to the flag will fulfill this requirement. (Education Code 52720).

Individuals may choose not to participate in the flag salute for personal reasons.

(cf. 5145.2 – Freedom of Speech/Expression: Publications Code)

R-190-191.

Jan Roe “is an Atheist who denies the existence of a God.” R-18. Jan Roe is also the parent of RoeChild-2 who attends an elementary school in the School District. *Id.* Jan Roe and RoeChild-2 are the sole Appellees in this appeal, and the only remaining Plaintiffs from the original complaint.

Pursuant to the School District’s policy, public school teachers have led RoeChild-2’s classes in daily recitation of the Pledge of Allegiance. *Id.* Also pursuant to that policy, the Roes admit that RoeChild-2 has not “been actually compelled to say the words, ‘under God,’ in the Pledge of Allegiance.” R-16. RoeChild-2 has, however, been present when other children have voluntarily recited the Pledge in “RoeChild-2’s classrooms and at school assemblies.” R-19.

This, the Roes allege, “[c]oerce[s]” RoeChild-2 “to unwillingly confront religious doctrine.” R-27.

RoeChild-2 is the only Plaintiff whose personal religious beliefs were not described in the First Amended Complaint, and there is no allegation that RoeChild-2 has any personal objection to reciting the Pledge. Indeed, there is no allegation that RoeChild-2 has ever exercised his right to opt out of saying some or all of the Pledge. Jan Roe therefore seeks only to prevent her child from being exposed to what she believes to be a viewpoint different than her own “Atheistic beliefs.” R-22.

SUMMARY OF ARGUMENT

If there is one thread that runs continuously throughout the tapestry of American political thought, it is that Americans have “certain inalienable rights,” and that their government has been instituted to “secure these rights.” THE DECLARATION OF INDEPENDENCE, preamble. *See also infra* Sections II.B.1.c. (tracing nation “under God” concept back to Bracton, Coke, and Blackstone); II.B.1.d. (consistent statements of all three branches of government); II.B.1.e. (consistent constitutional provisions).

The question presented by this lawsuit and appeal is *not* whether this concept of inalienable rights and limited government is the only legitimate one within the American tradition. The Carey Defendants believe that it is the best political philosophy on offer, but this is a much stronger claim than they need to make in order to defeat Plaintiffs’ claim. Instead, the question is whether government is even *permitted* to espouse this view at all—whether the Establishment Clause forbids any American government from conceiving of itself as subject to some higher power that is the source of human rights, and then urging that self-concept on its citizens (including, in this case, the students in its own public schools). In other words, the Carey Defendants do not (and need not) claim that American governments *must* view themselves this way, but simply that they *may*, consistent with the Establishment Clause.

And this is a modest claim indeed. The political philosophy of natural right that is distilled in the concept of a Nation “under God” is so deeply engrained in American law and culture that the Establishment Clause cannot fairly be read to forbid it – whether as “endorsing,” “coercing,” or otherwise impermissibly advancing religion. That concept does not just appear in the Pledge of Allegiance since 1954, but before that in Lincoln’s Gettysburg Address, and before that in Washington’s orders to his troops on the eve of the Founding, and, ultimately, in the most influential legal writings that shaped the generations before the Founding. The Declaration of Independence includes this very same concept – worded somewhat differently but in no less religious terms – that human beings are “endowed by their Creator with certain unalienable rights.”

And this idea did not suddenly disappear with the Founding. The Constitution itself states as one of its purposes to “*secure* the Blessings of Liberty,” not to *create* them in the first place, and similarly affirms, in the Ninth and Tenth Amendments, the existence of natural rights that precede the positive law. And ever since the Founding, all three branches of government have frequently and consistently used the term “God” to encapsulate these same ideas.

To declare in this context that the Constitution forbids retaining the two words “under God” to the Pledge of Allegiance, or leading public school students in reciting that version of the Pledge, smacks of both historical revisionism and

hostility to religion that cannot be attributed to the “reasonable observer,” and should not be adopted by this (or any) Court.

Indeed, this Court should recognize this lawsuit for what it is – part of Newdow’s personal Crusade to purge the word “God” from all government expression.³ The Supreme Court has never adopted such an extreme interpretation of the Establishment Clause and, indeed, has repeatedly rejected it.⁴ This Court should do the same and reverse the decision below.

³ In addition to the present suit, Newdow has challenged the phrase “under God” in the Pledge twice before. *Newdow v. United States*, No. 98-CV-6585 (S.D. Fla. 1998), *aff’d*, 207 F.3d 662 (11th Cir. 2000) (table case); *Newdow v. Congress of the U.S.*, No. 00-CV-045, (E.D. Cal. 2000), *rev’d*, 328 F.3d 466 (9th Cir. 2003), *rev’d sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 527 U.S. 1 (2004).

Newdow has recently sued to remove “In God We Trust” from U.S. currency, *Newdow v. United States Congress*, No. 05–CV–02339 (E.D. Cal., filed Nov. 18, 2005), even after telling Justice O’Connor at oral argument that the Court could “easily distinguish” use of “In God We Trust” on currency from recitation of the Pledge. Transcript of Oral Argument at 47, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

Newdow has also sought court orders prohibiting the President from saying “So help me God” at the end of the inaugural oath, *Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C.), *emergency motion for injunction pending appeal denied*, 2005 WL 89011 (D.C. Cir.), *application for injunction pending appeal denied*, No. 04A623 (2005) (regarding 2005 inauguration), banning any invocation or benediction at inaugural ceremonies, *see id.*; *Newdow v. Bush*, 89 Fed. Appx. 624, 625 (9th Cir. 2004) (regarding 2001 inauguration), and stopping Congress from hiring legislative chaplains and engaging in legislative prayer. *Newdow v. Eagen*, 309 F.Supp.2d 29 (D.D.C.), *dismissed for want of prosecution*, 2004 WL 1701043 (D.C. Cir. 2004) (claiming right to observe government without being forced to “confront religious dogma he finds offensive.”).

⁴ *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (“It has never been thought either possible or desirable to enforce a regime of total separation [of

church and state]’’) (quoting *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973)).

ARGUMENT

I. THIS COURT IS NOT BOUND BY ITS PRIOR DECISION IN *NEWDOW* v. *ELK GROVE UNIFIED SCHOOL DISTRICT*.

The District Court enjoined the School District's policy based solely on its conclusion that it was bound by the decision of a panel of this Court in *Newdow* v. *Elk Grove Unified School District*, 328 F.3d 466 (9th Cir. 2003) ("*Newdow 2003*"), even though it was later reversed by the U.S. Supreme Court. R-221.

The District Court first argued that, because the Supreme Court reversed but did not vacate the panel decision, those portions of the panel decision unaddressed by the Supreme Court's decision remained binding precedent. R-219. This argument might bear some weight, if not for the additional fact that panel the decision was reversed on standing grounds. As the Supreme Court has recently reiterated, when a plaintiff lacks standing, courts have "no business deciding [the merits], or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. ____, Nos. 04-1704 and 04-1724, slip op. at 5 (May 15, 2006). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (court must determine Article III standing before reaching merits). Here, because *Newdow* lacked standing to challenge Elk Grove USD's policy regarding the Pledge back in 2003, "the lower courts erred by considering their claims against it on the merits." *DaimlerChrysler*, slip op. at 18. And such an erroneous determination cannot bind the court below or this Court today.

The District Court attempts to avoid this general rule by manufacturing an exception. It argues that, because lower courts sometimes assume prudential standing in order to reach the merits, and thereby generate decisions that represent binding precedent, a merits ruling may be valid in the absence of prudential standing. R-220-221 (citing *American Iron & Steel Inst. v. OSHA*, 182 F.3d 1261 (11th Cir. 1999) and *Environmental Protection Information Ctr. v. Pacific Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001)). To begin with, in light of the Supreme Court’s clear and repeated statement that courts should not decide merits questions where a plaintiff lacks standing, the precedential force of merits rulings made in the absence of standing is dubious indeed.

But in *American Iron*, the Eleventh Circuit **assumed** but did not decide prudential standing, only in order to **reject** a claim on the merits that was clearer or otherwise easier to decide. *American Iron*, 182 F.3d at 1274 n.10. And in *Pacific Lumber*, the Ninth Circuit found that merits review would be possible **only if** the plaintiff actually had prudential standing. *Pacific Lumber*, 257 F.3d at 1076 (“this route to prudential standing is powerful **because** it allows for review of the merits”) (emphasis added). The lower court’s analogy to *American Iron* might hold here if the *Newdow 2003* panel had assumed prudential standing in order to reject Newdow’s claim on the merits. But instead, the panel in *Newdow 2003* **actually decided** the standing question and got it wrong, which enabled it to rule **in**

the plaintiff's favor on the merits. Notably, the court below cites no case where a court finds standing (of any sort), reaches the merits, is reversed only on standing, and later has its merits decision deemed precedential. Thus, even if the cases that resolve merits issues without first finding prudential standing could create binding precedent on those issues, those cases are distinguishable.

II. THIS COURT SHOULD REVERSE THE LOWER COURT'S DECISION THAT THE SCHOOL DISTRICT'S POLICY OF LEADING WILLING CHILDREN IN RECITING THE PLEDGE VIOLATES THE ESTABLISHMENT CLAUSE.

Although it is unclear after the Supreme Court's recent decisions in *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), and *Van Orden v. Perry*, 125 S.Ct. 2854 (2005), which Establishment Clause test should control this case, the School District's pledge policy satisfies any potentially applicable test.⁵ First,

⁵ The Courts of Appeal struggled to reconcile *McCreary* and *Van Orden* with each other and with *Lemon*, the Sixth Circuit declaring that “we remain in Establishment Clause purgatory.” *ACLU v. Mercer County*, 432 F.3d 624, 636 (6th Cir. 2005). The Second, Sixth and Tenth Circuits have held that, despite doubts about *Lemon*'s continued vitality, they must continue to apply *Lemon* until it is explicitly overruled. *See Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006); *Mercer County*, 432 F.3d at 636; *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005). The Seventh Circuit has held that *McCreary* “reaffirmed the utility of the test set forth in [*Lemon*.]” *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005). But the Fourth Circuit and an *en banc* Eighth Circuit have relied on *Van Orden* in refusing to apply *Lemon*. *See ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (*en banc*) (“taking [its] cue” from *Van Orden*); *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395, 402 (4th Cir. 2005) (applying the “legal judgment” standard from Justice Breyer's *Van Orden* concurrence to deny challenge to Pledge). The Ninth Circuit

Plaintiffs have failed to show that policy offends the “purpose” prong of the *Lemon* test. Second, Plaintiffs have failed to show that the policy has the impermissible effect of advancing or inhibiting religion, either by “endorsing” or “coercing” it.⁶ Third, Plaintiffs have failed to show that the policy does not excessively entangle government and religion.

A. The School District’s Policy Does Not Have the Primary Purpose of Advancing or Inhibiting Religion.

In *McCreary*, the Supreme Court explained that its earlier precedent requiring a “legitimate secular purpose”⁷ meant that the “ostensible and predominant purpose” of a government action must not be to “advance[] religion.” *McCreary*, 125 S.Ct. at 2733. The Court looked to the history and context of *McCreary* County’s actions in placing the display, and stated that no “objective observer” seeing the County’s actions could perceive a legitimate secular purpose for them. *Id.* at 2737.

has mentioned *McCreary* and *Van Orden* only in passing. *Berry v. Dep’t of Soc. Servs.*, — F.3d —, 2006 WL 1133316 at *5 n.9 (9th Cir., May 1, 2006).

⁶ Both “endorsement” and “coercion” are properly viewed as parts of the effect prong of *Lemon*. See *Separation of Church & State Comm. v. City of Eugene*, 93 F.3d 617, 620-21 (9th Cir. 1996) (“the ‘effect’ prong of the *Lemon* test ‘asks whether, irrespective of government’s actual purpose, the practice ... in fact conveys a message of endorsement or disapproval.’”); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312 (2000) (ruling that pre-game prayers had “improper effect of coerc[ion]”).

⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984). See also *Mayweathers v. Newland*, 314 F.3d 1062, 1068 (9th Cir. 2002) (purpose prong inquiry satisfied by “a secular legislative purpose”).

The decision below striking down the School District’s policy of leading willing students in reciting the Pledge did not rely on a finding that the policy was animated by a predominantly (or, indeed, any) religious purpose. Nor could it have, because the Plaintiffs put no evidence before the court to that effect.

Instead, the only evidence of purpose before the court was the text of the policy of the School District (R-190-191) and the pleadings (R-1-167, R-229-237). And although it is not Defendants’ burden, these materials conclusively establish an “ostensible and predominant purpose” that is secular in the eyes of a “reasonable observer”: implementing CAL. EDUC. CODE § 52720, which requires that public schools begin the school day with “appropriate patriotic exercises,” and specifies that “[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy” this requirement.

Importantly, only the purpose of the School District’s policy could be relevant here. The court below rejected the Plaintiffs’ constitutional challenges to the federal statute codifying the Pledge, 4 U.S. § 4, and to CAL. EDUC. CODE § 52720 and Plaintiffs have not cross-appealed those decisions. Accordingly, there is no need or reason for this Court to examine the purposes of either statute on this appeal.

Thus, there is no basis at all for striking down the School District’s Pledge based on *Lemon*’s purpose prong.

B. The School District’s Policy Does Not Have the Primary Effect of Advancing or Inhibiting Religion.

Governmental action does not violate *Lemon*’s effect prong unless “advancing religion is [its] principal or primary effect.” *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 976 (9th Cir. 2004); *see also Van Orden*, 125 S.Ct. at 2861 n.6 (plurality) (“principal or primary effect”).

First, like directing public school children to recite the Declaration of Independence or the Gettysburg Address, the primary effect of reciting the Pledge of Allegiance—including the phrase “under God”—is not to endorse religious beliefs or advance religion more generally. To the contrary, as discussed below, the primary effect of the Pledge policy is to teach and reaffirm the political philosophy that American government—even acting with the support of a great majority—must be limited by certain inalienable human rights, precisely because the state is accountable to a source of those rights that lies beyond the state.

Indeed, to rule that the Establishment Clause now suddenly forbids our government from espousing this self-concept—particularly one that tends to promote respect for human rights and limit the reach of government—would be to overturn not just a single patriotic exercise, but literally hundreds of years of law and practice that lie at the very foundation of our system of government. Accordingly, the Supreme Court has refused to find that the phrase “under God” in the Pledge impermissibly endorses religion, instead repeatedly using it as an

example of permissible government expression that includes some reference to God.

Second, voluntary recitation of the Pledge does not have the effect of “coercing” religion. Unlike the prayers at issue in *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the Pledge is not a religious observance, but instead a patriotic exercise that happens to contain the word “God.” And in any event, School District policy specifically allows students not to recite that word or, indeed, any part of the Pledge at all.

1. The School District’s Policy Does Not Have the Primary Effect of Endorsing Religion.

The endorsement test under the Establishment Clause asks the question whether the “reasonable observer” of a particular government religious expression, who is fully informed of all relevant history and context of that expression, would consider the expression to “endorse” a religion or religion generally. *See McCreary*, 125 S.Ct. at 2737 (“[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears”). Here, as detailed further below, the “reasonable observer” would not perceive an “endorsement” of religion in the School District’s policy of leading public school students in the Pledge of Allegiance including the two words “under God.”

The Supreme Court has repeatedly rejected such a claim in *dicta* – and little wonder. The phrase “under God” does not endorse religion, but instead represents a highly distilled expression of the political philosophy that government is bound to respect the inalienable rights of all human persons, because they are “endowed by their Creator” with those rights. This fundamental principle of limited government is extraordinarily deeply engrained in American law and culture – it is reflected in the Declaration of Independence, the Gettysburg Address, and other monumental statements of American political philosophy; in the consistent practice of all three branches of the federal government since the Founding; and even elsewhere in the text and structure of Constitution itself.

In this context, to declare that the Constitution somehow forbids the government from espousing this concept of limited government and inalienable rights – the very concept that the Constitution and Bill of Rights exist to secure – would be at once revolutionary and absurd. This Court should decline this invitation by Plaintiffs to step through the looking-glass.

- a. The Supreme Court has often cited the use of the two words “under God” in the Pledge as an example of government expression that does not endorse religion.**

Far from declaring “under God” in the Pledge to be an “endorsement” of religion, the Supreme Court has repeatedly referred to the Pledge in *dicta* as the

standard for evaluating the permissibility of other government expression that employs religious imagery.

For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Supreme Court described the Pledge and its recitation as one of the many permissible “reference[s] to our religious heritage,” both historical and contemporary, that create the context of any Establishment Clause analysis. *Id.* at 676. The Court then used the Pledge and other acknowledgments of religious heritage as a baseline of permissible government expression in the course of rejecting the Establishment Clause challenge at issue in *Lynch*. *See id.* at 686 (“If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of ... our religious heritage, are equally offensive to the Constitution.”).

Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court used the Pledge to locate the boundary line between constitutional and unconstitutional references to religion. The Court noted that the Pledge was a “nonsectarian reference[] to religion by the government” that the Court had “characteriz[ed] ... as consistent with the proposition that government may not communicate an endorsement of religious belief.” *Id.* at 602-03 (citations omitted). Accordingly, the Court used the Pledge to contextualize the practice of displaying a Christmas crèche in a certain way at the County’s courthouse as

“sectarian” and therefore impermissible, while allowing other, non-sectarian displays. *Id.*

These Supreme Court decisions endorsing the constitutionality of the Pledge are binding on this Court, because the discussion of the Pledge in those cases was “necessary” to the result in those cases.⁸ In addition to this binding language, many of the individual Justices have stated in various opinions that the Pledge does not violate the Establishment Clause.⁹

In sum, these Supreme Court *dicta* should suffice alone to resolve for this Court whether the phrase “under God” in the Pledge of Allegiance impermissibly endorses religion.

⁸ See *Seminole Tribe v. Florida* 517 U.S. 44, 66-67 (1996) (“When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.”). See also *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) (rejecting Establishment Clause challenge to Pledge because “[i]f the [Supreme Court] proclaims that a practice is consistent with the establishment clause, we take its assurance seriously”).

⁹ See *Elk Grove*, 542 U.S. at 32 (Rehnquist); *id.* at 33 (O’Connor); *id.* at 45 (Thomas); *Lee*, 505 U.S. at 638-639 (Scalia, Rehnquist, White and Thomas); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, Rehnquist, White and Scalia); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O’Connor); *id.* at 88 (Burger); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 304 (Brennan); *Engel*, 370 U.S. at 449 (Stewart).

- b. The Pledge of Allegiance does not endorse any religion, but instead endorses a venerable political philosophy of inalienable rights and limited government that courts should hesitate to forbid.**

The concept of a nation “under God” encapsulates the idea, longstanding in the Anglo-American legal tradition, that the power of government is limited by universal, inalienable rights. On this account, those rights are universal and inalienable precisely because they proceed from something or someone outside of—and logically prior to—government itself. Thus, human rights are not subject to the whims of shifting majorities—not for the state to create or destroy at will, but to recognize and respect according to some ultimate standard. It is immaterial to the validity of that political statement that the someone or something setting that standard is personal or impersonal, alone or accompanied, an abstract notion or a real entity. The point of the phrase is political, not theological.

But by fixating on the word “God” in the Pledge, Plaintiffs here attempt to generate a *theological* challenge to the *political* principle of limited government embodied in the phrase “one Nation under God” in the Pledge. It is the mere mention of God that is “offensive” to Plaintiffs. R-33. If this Court were to rule that this mere mention in a patriotic exercise is enough to violate the Establishment Clause, it would undermine in at least four ways the ability of government to declare itself limited and the rights of its citizens inalienable.

First, a ban on the mere mention of God by those in government would silence the “mystic chords of memory” that bond Americans present to Americans past. ABRAHAM LINCOLN, First Inaugural Address, March 4, 1861, *reprinted in ABRAHAM LINCOLN - GREAT SPEECHES* 61 (Dover Thrift Eds. 1991). Government actors (including the courts) could no longer recall past statements of the founders, presidents, Congresses or courts that mentioned God. Since history is not within the power of any court to change, the only thing a court can stop is the recounting of that history. But no court should enforce a rule that would require studied ignorance of the long history of American political statements that refer to God.

Second, anathematizing the phrase “one nation under God” would deprive government of perhaps the most potent rationale it has for declaring human rights to be inalienable. Government could, of course, continue to make a natural rights argument by claiming that those rights inhere in the individual as such. But that argument ultimately reduces to a bald assertion.¹⁰ Reference to God ties individual human rights into a narrative that all Americans can at least understand, even if they may disagree with it. The most important aspect of *referring to* (rather than adopting) this narrative is that “presuppos[ing] a Supreme Being” is not the same

¹⁰ See, e.g., Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL’Y 81, 88-89 (2003) (describing “the inability of the [1946 UNESCO Committee on the Theoretical Bases of Human Rights] to establish a basis for human rights”).

thing as proclaiming one.¹¹ Government does not state any theological proposition—not even that “there exists a God” (R-25)—merely by referring to God in a political statement. Instead, by merely referring to God, government can make a powerful statement that it understands itself to be limited.

Third, not allowing government to make a natural rights argument keeps it from appealing to “the better angels of our nature.” LINCOLN, First Inaugural Address, March 4, 1861, *reprinted in* GREAT SPEECHES at 61. Allowing government to espouse only positive law theories of human rights means that we are stuck with the Constitution we’ve got. Any injustice in the Constitution could not be removed by government because its powers would proceed only from that same document. If, however, rights come from somewhere else, then, like any other act of government, the Constitution can be held to account.

Fourth, and perhaps most importantly, government should not be unnecessarily hampered in finding ways to declare its own limitations. The history of totalitarianism is a history of governments claiming the power to give rights to people and take them away at will. No court should lightly deny the government the latitude to espouse a political philosophy that affirms the priority of individual rights.

¹¹ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J., concurring). It is difficult to attribute to Justice Douglas the view that American institutions make a theological statement by presupposing a Supreme Being.

Affirming Plaintiffs' challenge would thus make it very difficult for government to proclaim the traditional American view that the people are endowed with rights by their Creator, and that the government exists to protect those rights. This sea-change in our nation's self-understanding should not be imposed by judicial order.

- c. **The two words “under God” in the Pledge no more endorse religion than numerous other monumental expressions within the Anglo-American legal tradition of a political philosophy of inalienable rights and limited government that includes a concept of “God.”**

The first use of the phrase “under God” is in the earliest known compendium of English law, dating from the 13th Century. Bracton states that “[t]he king must not be under man but under God and under the law, because law makes the king.” BRACTON, 2 DE LEGIBUS ET CONSUEUDINIBUS ANGLIÆ 33.¹² Since the King embodied the government in his person at that time, this first English legal writer was already limiting government by declaring it to be “under God and the Law.”

In 1607, Sir Edward Coke cited Bracton's phrase to justify his power as Chief Justice of the Court of Common Pleas to overrule the King's findings with respect to the common law:

With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To

¹² A variation of this phrase is carved into the pediment of the Harvard Law School Library: “*non sub homine sed sub deo et lege.*”

which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed sub Deo et Lege*.

Prohibitions del Roy, 12 COKE’S REPORTS 63, 65 (emphasis added). Thus Coke used Bracton’s “under God and the Law” formulation to limit the King’s power to rule unilaterally.

Blackstone, whom the Supreme Court continues to cite to this day to plumb the Framers’ intent,¹³ held that the “law of nature” had its source in a “Supreme Being” and that this law was “impressed” into every human being. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Introduction, Section 2 at 38-39 (1765). Blackstone observed that

This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Id. Blackstone’s formulation thus puts human laws “under God,” denying their validity if they run contrary to the law of nature. At the same time his understanding of the sources of law gave fodder to the Revolutionaries when they pleaded their case to a “candid world.”

¹³ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 413-14 (2004) (citing Blackstone for the proposition that “[t]he Framers would not have thought it too much to demand” a jury finding for sentence enhancements); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (Blackstone’s “works constituted the preeminent authority on English law for the founding generation”); *Reid v. Covert*, 354 U.S. 1, 26 (1952) (Blackstone “exerted considerable influence on the Founders”).

Blackstone’s understanding of the nature and limits of governmental power suffused the intellectual world of the Founders. In arguing for defiance of British oppression, an 18-year-old Alexander Hamilton wrote in February 1775 that: “The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power.” ALEXANDER HAMILTON, *THE FARMER REFUTED* (1775), *quoted in* RON CHERNOW, *ALEXANDER HAMILTON* 60 (2004).

In the Declaration of Independence itself, Jefferson’s defense of the American Revolution proceeds from the “self-evident” truth that all persons “are endowed by their Creator with certain unalienable rights.” THE DECLARATION OF INDEPENDENCE, para. 2. Proceeding from this premise, the Declaration explains to a “candid world” that these God-given rights provided a basis for Americans to reject a tyrannical government and assume the “equal station to which the Laws of Nature and of Nature’s God entitle them.” *Id.* para. 1.¹⁴

¹⁴ Of course, Jefferson and the other Founders were not writing on a blank slate in declaring a political philosophy that held that the State was subservient to the God-given, inalienable rights of its people. Their ideas drew not only on the religious faith that informed many of the Founders, *see, e.g., Abington Sch. Dist. 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”), but also on Blackstone, *see supra*, and Classical political philosophy that recognized the universality and inalienability of individual rights.

The phrase “under God” reappears in the writings of the Revolutionaries, who were firm in their belief that the Revolution was to be carried out “under God.” Washington used the phrase “under God” itself to describe the predicament of the nation just then being born. In his General Orders issued on July 2, 1776, (when the Declaration had been agreed but not published), Washington stated that

The fate of unborn Millions will now depend, *under God*, on the Courage and Conduct of this army—Our cruel and unrelenting Enemy leaves us no choice but a brave resistance, or the most abject submission; this is all we can expect—We have therefore to resolve to conquer or die

For example, when Jefferson wrote in the Declaration of the “equal station to which the Laws of Nature and of Nature’s God entitle[d]” Americans, he was expressly alluding not only to Blackstone’s formulation, but also to Cicero’s famous distillation of the *lex naturae*:

True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself, and does violence to the very nature of man.

MARCUS TULLIUS CICERO, DE RE PUBLICA III, xxii. Notably, Cicero’s concept of “God” was neither Christian nor monotheistic.

Seven days later, Washington used the phrase “under God” again in his General Orders of July 9, 1776, when he ordered the Declaration of Independence to be read to all the troops: “The 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”¹⁵

At the conclusion of the peace, the Continental Congress commissioned James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth to draft an “Address to the States, by the United States in Congress Assembled.” The Address, written in Madison’s hand, ended with a resounding statement of the idea of that rights inhere in human nature and proceed from an “Author”:

Let it be remembered, finally, that it has ever been the pride and boast of America, that *the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights* on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states.

1 ELLIOT’S DEBATES 100 (2d ed. 1854) (emphasis added). Madison and Hamilton thus agreed that the American Revolution was a fight for “the rights of human nature,” rights which had an “Author.”

¹⁵ GEORGE WASHINGTON, July 9, 1776, General Orders, *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3g/gwpage001.db&recNum=308> (emphasis added).

Two years after working to draft this statement, Hamilton in 1785 helped found the nation's first abolitionist society, the New York Society for Promoting the Manumission of Slaves. At its opening meeting the following statement was read: "The benevolent creator and father of men, having given to them all an equal right to life, liberty, and property, no sovereign power can deprive them of either." CHERNOW at 214. Thus, at its very outset, the anti-slavery movement relied on the argument that government was wrong when it tried to take inalienable rights away from slaves.

In fact, the entire abolitionist movement was premised on the idea that slaves, like other human beings, had rights bestowed by God, and that the government, and even the United States Constitution itself, had no right to take them away. At each stage of the abolitionist movement, its leaders called on those inalienable rights as a justification for their attacks on the Constitutional order. For example, later Chief Justice Salmon P. Chase argued in his briefing on behalf of John Van Zandt, who had been charged with violating the Fugitive Slave Act, that "The law of the Creator, which invests every human being with an inalienable title to freedom, cannot be repealed by any interior law which asserts that man is property." Argument for the Defendant, *Jones v. Van Zandt*, 2 McLean 597 (Ohio Cir. Ct. 1843). When the case reached the Supreme Court, Chase argued: "No court is bound to enforce unjust law; but to the contrary every court is bound, by

prior and superior obligations, to abstain from enforcing such laws.” Argument for the Defendant, *Jones v. Van Zandt*, 46 U.S. 215 (1847).¹⁶

The Great Emancipator, Abraham Lincoln, would have been aware of the abolitionist argument from natural law, as well as Washington’s statements and Coke’s opinion, when he wrote in the Gettysburg Address 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 this earth.” LINCOLN, Gettysburg Address (Nov. 19, 1863), *reprinted in* GREAT SPEECHES at 104 (emphasis added). Lincoln consistently subordinated government interests to human rights and the ultimate Author of those rights. For example, in the Emancipation Proclamation he had written:

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

LINCOLN, First Emancipation Proclamation, Jan. 1, 1863, *reprinted in* GREAT SPEECHES at 100.

But the idea that slavery violated the inalienable rights of enslaved human beings found its highest expression in Lincoln’s Second Inaugural Address. The Address, perhaps the greatest oration in American history, turns on Lincoln’s

¹⁶ The Court denied the claim on positive law grounds. *Id.*

suggestion that both North and South were being punished for the crime of chattel slavery:

If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bondsman’s two hundred and fifty years of unrequited toil be sunk, and until every drop drawn with the lash, shall be paid by another drawn with the sword, as it was said three thousand years ago, so still it must be said “the judgments of the Lord, are true and righteous altogether.”

LINCOLN, Second Inaugural Address, March 5, 1864, *reprinted in* GREAT SPEECHES at 107.

It may be incomprehensible to us today that Lincoln would suggest, in the middle of the most terrible war in American history, that the nation deserved the terrors of that war as punishment for violating the inalienable rights of others. But that is precisely what he did, relying on references to God to make the political point that both sides were being justly punished for the crime of slavery, and that the war should therefore be prosecuted “[w]ith malice toward none, with charity for all, with firmness in the right as God gives us to see the right” *Id.*

Yet the logic of Plaintiffs’ challenge here would require us to view Lincoln’s references to God as violations of the Establishment Clause. In Plaintiffs’ world,

stripped of all God-talk by government officials, it would have been impossible for Lincoln to call both North and South to account for the crime of slavery. Lincoln's references to God within the context of a political statement did not impermissibly advance religion, and neither does the Pledge.

From this history, it is incontestable that since even before the Declaration of Independence, it has been an important part of our national ethos that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. In this way, the Pledge, like the Declaration and the Gettysburg Address, is a statement of political philosophy, not of theology. Nevertheless, it is a statement of political philosophy that depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by its "Creator."

Thus the words "under God" were not a newly minted phrase or idea that Congress added to the Pledge in 1954 to achieve the effect of steering individuals to religion. Instead, they were added as a self-conscious effort to echo and reaffirm a political philosophy that has animated this country throughout its history, and that is reflected in seminal documents like the Declaration and Gettysburg Address. For example, Representative Rodin stated that "These two words ['under God' in the amended Pledge] are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers

today in our imaginations as typical of all that is best in America.”¹⁷ In other words, the primary effect of the words “under God” in the Pledge is to evoke and conform the Pledge to the quintessential American political philosophy that recognizes the subservience of the State to the God-given, inalienable rights of individual citizens.

- d. **The two words “under God” in the Pledge no more endorse religion than the consistent affirmations by all three branches of government since the Founding of a political philosophy of inalienable rights and limited government that includes a concept of “God.”**

Viewing the 1954 Amendment of the Pledge in the context of the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789,” *Lynch*, 465 U.S. at 674, makes especially clear that the primary effect of the phrase “under God” in the Pledge is not to endorse religion, but to reaffirm a political philosophy of inalienable rights and limited government.

¹⁷ 100 CONG. REC 7764 (1954) (statement of Rep. Rodin). *See also Schempp*, 374 U.S. at 303 (Brennan, J. concurring) (“the reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded ‘under God.’ Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln’s Gettysburg Address, which contains an allusion to the same historical fact.”).

i. The executive branch has consistently affirmed a political philosophy of inalienable rights and limited government using the term “God,” just as the Pledge does.

The Executive Branch has led the way in affirming the political philosophy of inalienable rights and limited government by reference to the concept of “God,” most notably in the speeches of our Presidents. For example, with one exception (Washington’s brief, second inaugural in 1793), every single presidential inaugural address includes some reference to God—whether as the source of rights, of blessing to the country, or of wisdom and guidance. Examples include the following:

- “[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation” John Adams, Inaugural Address (Mar. 4, 1797), *reprinted in* DAVID NEWTON LOTT, *THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS FROM GEORGE WASHINGTON TO GEORGE WALKER BUSH*, 10, 15 (M. Hunter & H. Hunter eds. 2002).
- “We admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality” William Henry Harrison, Inaugural Address (Mar. 4, 1841), *reprinted in* LOTT, *supra*, at 81, 82.
- “The American people stand firm in the faith which has inspired this Nation from the beginning. We believe that all men have a right to equal justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that all men are created equal because they are created in the image of God.” Harry S. Truman, Inaugural Address (Jan. 20, 1949), *reprinted in* LOTT, *supra*, at 280, 289.

- “[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God.” John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.
- “We are a nation under God, and I believe God intended for us to be free.” Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* LOTT, *supra*, at 340, 344.
- “When our founders boldly declared America’s independence to the world and our purpose to the Almighty, they knew that America, to endure, would have to change.” William Jefferson Clinton, First Inaugural Address (Jan. 20, 1993), *reprinted in* LOTT, *supra*, at 362, 362.

The Carey Defendants have also attached a complete list of references to God in the official text of presidential inaugural addresses from 1789 to the present. *See* Addendum.

This history demonstrates that the Executive Branch has repeatedly drawn upon religious language and imagery to reaffirm the political philosophy that our government is a limited one, bound to respect the inalienable rights of its people because they are God-given. For that reason, it is not surprising that President Eisenhower viewed the addition of the words “under God” to the Pledge as falling squarely within this tradition:

“The[] words [‘under God’] will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded.”

Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus, Aug. 17, 1954, *reprinted in* “*Under God*” *Under Attack*,

COLUMBIA, Sept. 2002, at 9. Thus, to find that the Pledge’s reference to God has the primary effect of advancing religion would also be a judgment that every President since the Founding who has acknowledged God as the source of our citizens’ inalienable rights has erred in interpreting the Establishment Clause.

ii. The legislative branch has consistently affirmed a political philosophy of inalienable rights and limited government using the term “God,” just as the Pledge does.

In 1789, when the first Congress submitted the Establishment Clause and the rest of the Bill of Rights to the States for ratification, it also established the office of legislative chaplain, *see Marsh v. Chambers*, 463 U.S. 783, 790 (1983), and called upon President Washington to “recommend to the People of the United States, a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God.” ANNALS OF CONGRESS, 90, 92, 949-50, 958-59 (Joseph Gales ed., 1789). The practice begun by the first Congress of acknowledging that the State is not the final guarantor of the inalienable rights of its citizens has continued throughout this country’s history.¹⁸

¹⁸ *See, e.g.*, 36 U.S.C. § 302 (making “In God we trust” the national motto); *Elk Grove*, 542 U.S. at 30 (noting Congress’ adoption of the Star Spangled Banner as the National Anthem, which includes religious language) (Rehnquist, C.J., concurring).

The Congress that inserted the words “under God” into the Pledge stood squarely within this tradition. As Congressman Wolverton observed in urging the inclusion of “under God” in the Pledge:

Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual....

100 CONG. REC. 7336 (1954) (statement of Rep. Wolverton).

The proponents of adding the phrase “under God” to the Pledge were conscious not only of that tradition generally, but also of the exigencies of their historical moment. As discussed above, a prime reason the words “under God” were inserted into the Pledge was to distinguish this country from the Soviet Union.¹⁹ But this was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different visions of human nature—and therefore of human freedom—that underlay the two systems.

The House Report explained Congress’ intent:

At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system

¹⁹ The legislative history is replete with references to “times such as these,” 100 CONG. REC. 7336 (1954) (statement of Rep. O’Hara); “communism,” *id.* at 7332 (statement of Rep. Bolton); “the conflict now facing us,” *id.* at 7333 (statement of Rep. Rabaut); “a time in the world,” *id.* at 7338 (statement of Rep. Bolton); and “this moment in history,” *id.* at 5750 (statement of Rep. Rabaut).

whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying 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. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.²⁰

In short, the political philosophy through which the Congress viewed the world when it amended the Pledge was traditionally and quintessentially Jeffersonian.²¹ It contended simply that people who recognize a higher power than the State live in greater freedom.²² By adopting the phrase “under God” in the

²⁰ H.R. REP. NO. 83-1693, at 1-2 (1954); *see also* S. REP. NO. 83-1287, at 2 (1954) (describing similar sentiments of Senator Ferguson, author of the Senate proposal); 100 CONG. REC. 7332 (1954) (statement of Rep. Bolton).

²¹ The Declaration of Independence is not the only evidence of Jefferson’s consistent argument that God is the source of inalienable rights. For example, shortly before drafting the Declaration of Independence, Jefferson wrote: “The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them.” THOMAS JEFFERSON, ON THE INSTRUCTIONS GIVEN TO THE FIRST DELEGATION OF VIRGINIA TO CONGRESS, IN AUGUST, 1774, *reprinted in* 1 THE WRITINGS OF THOMAS JEFFERSON 181, 211 (Albert Ellery Bergh ed., 1904). Later, he questioned: “Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?” THOMAS JEFFERSON, NOTES ON VIRGINIA, Query XVIII (1782), *reprinted in* 2 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 1, 227.

²² The House Report also quotes from two other men who helped shape this country early in its history. William Penn said, “Those people who are not governed by God will be ruled by tyrants.” H.R. REP. NO. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7333 (statement of Rep. Oakman (quoting William Penn)). George Mason explained: “All acts of legislature apparently contrary to

Pledge, Congress achieved the permissible effect of bringing the Pledge within the “natural rights” philosophy of Washington, Hamilton, Jefferson, Madison, and Lincoln, on which the American system is based, and rejecting the Soviet view that rights, such as they are, are conferred at the pleasure of the State.²³

iii. The judicial branch has consistently affirmed a political philosophy of inalienable rights and limited government using the term “God,” just as the Pledge does.

The Supreme Court has joined its sister branches in reflecting and reinforcing the traditional American political philosophy that the State is subservient to the God-given inalienable rights of its citizens. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas: Our “institutions” do indeed “presuppose a Supreme Being,” *Zorach v. Clauson*, 343 U.S. at 313, because they presuppose the existence of a source of rights that is prior to the State.²⁴ For the same reason, Chief Justice Marshall established the

the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on earth.” H.R. REP. 83-1693, at 2 (1954); *see also* 100 CONG. REC. 7333 (statement of Rep. Oakman (quoting George Mason)).

²³ The Soviet Union, happily, is a threat no more. And the particular urgency the Congress perceived in the Cold War has passed. Nonetheless, the underlying principle of the inalienability of rights remains fundamental to our tradition. Moreover, the present moment is not without its own exigencies, as we engage entirely different enemies who deny, for different reasons, that liberty is a right given us by the Creator.

²⁴ Since *Zorach*, the Court has repeatedly reaffirmed that “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Lynch*, 465 U.S. at 675;

tradition of opening Supreme Court for business with the words “God save the United States and this Honorable Court.” *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

The Supreme Court has also recounted in detail how the Framers did not view references to or invocations of God, such as the foregoing, as an “establishment” of religion.²⁵ Government expression may *acknowledge* or *reflect* the broader culture, including its religious elements, *Marsh*, 463 U.S. at 792 (permitting government religious expression as “acknowledgment of beliefs widely held among the people of this country”), so long as it does not *establish* religion. That is, government may freely recognize the role of religion in society, so long as it does not advocate for or “endorse” it. *Santa Fe*, 530 U.S. at 306-08.

Justice Goldberg put the matter succinctly forty years ago:

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings.²⁶

Marsh, 463 U.S. at 792; *Walz v. Tax Comm’n*, 397 U.S. 664, 672 (1970); *Schempp*, 374 U.S. at 213.

²⁵ See, e.g., *County of Allegheny*, 492 U.S. at 671-73 (opinion of Kennedy, J.); *Lynch*, 465 U.S. at 675-78 (1984); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

²⁶ *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring, joined by Harlan, J.). See also *McGowan v. Maryland*, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting) (“The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.”).

Plaintiffs’ attack on the Pledge in this case is war with this principle. If voluntarily reciting the Pledge is now suddenly unconstitutional because it refers to a nation “under God,” then voluntarily reciting the Declaration of Independence or the Gettysburg Address (as schoolchildren have done for generations) must also be unconstitutional since those documents similarly refer to the Creator as the source of our rights. That turns the American theory of rights exactly on its head. To grant Plaintiffs the relief they seek by striking down the Pledge would effect a drastic change in our national ethos. Instead, the courts should respect not only that ethos, but the consistent interpretation of the Establishment Clause reflected in the expression and conduct of both coordinate branches.

e. The endorsement test under the Establishment Clause should not be applied to undermine the political philosophy of inalienable rights and limited government that is reflected in other provisions of the U.S. Constitution.

Like the history of Anglo-American political and legal thought described above, the text of the Constitution itself presupposes a framework of pre-existing inalienable rights and limited government. The Preamble to the Constitution describes one of the purposes of the Constitution as “secur[ing] the Blessings of Liberty to ourselves and our Posterity forever.” U.S. CONST., preamble. The Ninth Amendment provides that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

U.S. CONST., amend. IX. And the Tenth Amendment states that “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST., amend. X. All three of these texts imply a pre-existing body of rights and powers that the Constitution is allocating among the people, the three branches of the federal government, and the state governments.

These pre-existing rights are “secure[d],” “retained,” and “reserved” by the Constitution – not “created” by it. None of those words make sense unless they refer to pre-existing rights and powers that “We, the People” already possess and are allocating to government through the Constitution. What the Supreme Court recently said of statutory interpretation holds true for constitutional interpretation as well: “Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.” *Dolan v. U.S.P.S.*, 126 S.Ct. 1252, 1257 (2006). Here, a reading of the “whole [Constitutional] text” invites an understanding that rights precede the government, and the government is merely instituted by the people to secure those rights.

The historical context of the Constitution bears out this interpretation. Not only was the Constitution written by people steeped in a natural law philosophy of rights, *see* Section II.B.1.c-d *supra*, the ratification debate itself reflected a natural

law approach. For example, one of the main arguments against the Constitution was that it contained no Bill of Rights. Defenders of the Constitution argued that there was no need for a Bill of Rights, because the Constitution indicated that the people had retained their rights. In THE FEDERALIST NO. 84, Alexander Hamilton argued that a Bill of Rights was unnecessary because the Preamble made clear that: “the people surrender nothing; and as they retain every thing they have no need of particular reservations.” *Id.* Although the two sides to the ratification debate disagreed over how to protect the status of the people’s pre-existing rights, both agreed that the people had them, and that the government was instituted to secure and protect them.

Since these provisions of the Constitution clearly presuppose pre-existing rights and a limited government to secure them, the Establishment Clause should not be read to prohibit the Pledge from affirming those same ideals. If the Constitution is based on a presupposition that rights come from a source outside and prior to government, then the Establishment Clause can hardly prevent restating that argument. In short, the endorsement test under the Establishment Clause should not be read so broadly that it contradicts the central notion of natural rights embedded within the Preamble and the Ninth and Tenth Amendments.

- f. In applying the endorsement test, this Court should examine the two words “under God” from the objective perspective of a “reasonable observer” who**

is aware of all relevant context, not from the subjective perspective of the present Plaintiffs.

In her concurrence in *Elk Grove*, Justice O'Connor reaffirmed two principles that govern application of the endorsement test. First, the “the endorsement test ... assumes the viewpoint of a reasonable observer.” *Elk Grove*, 542 U.S. at 34 (O'Connor, J. concurring) (internal citation omitted). “Second, because the ‘reasonable observer’ must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation’s cultural landscape.” *Id.* at 2322 (internal citation omitted).

In applying these principles, the Court should view the fact that the Supreme Court and numerous Justices have “characteriz[ed] [the Pledge] as consistent with the proposition that government may not communicate an endorsement of religious belief,” as virtually determinative of the endorsement inquiry. *See County of Allegheny*, 492 U.S. at 602-03; *see supra* Section II.B.1.a. In other words, the Supreme Court is the “rational observer” *par excellence*, and unlike the typical application of the endorsement test, the Supreme Court has already addressed the specific practice in question and observed that the Pledge is “consistent with” that test. *Id.* at 602-03. Therefore, the Court need only incorporate the Supreme

Court's observations into its own examination, and thereby find that the Pledge and its recitation pass the endorsement test.

But if the Court were to approach the endorsement test *de novo*, an “objective observer” would not find voluntary recitation of the Pledge to endorse religion in light of the Pledge’s “origins and context” and “its place in our Nation’s cultural landscape.” *Elk Grove*, 542 U.S. at 35 (O’Connor, J., concurring). As demonstrated throughout, the Pledge is a patriotic and political statement rather than a prayer or an affirmation of a religious belief. A reasonable observer would understand the words “under God,” taken in the context of both the entirety of the Pledge and its origins and historic uses, to be a statement that the government of the United States is subordinated to the “Laws of Nature and Nature’s God.” The words are, in essence, a daily mini-declaration of the thoughts expressed in the Declaration of Independence itself.

This Court must likewise reject Plaintiffs’ attempt to convert the endorsement test into a subjective one by alleging that hearing the word “God” is “offensive” and “significantly distasteful” to their “religious beliefs.” R-20. This is because the meaning and import of the Pledge under the endorsement test does not rest in the subjective eyes of the Plaintiffs, but in the eye of an objective, reasonable observer. Were it otherwise, “[n]early any government action could be overturned as a violation of the Establishment Clause if a ‘heckler’s veto’ sufficed

to show that its message was one of endorsement.” *Elk Grove*, 542 U.S. at 34-35 (O’Connor, J., concurring) (internal citation omitted); *see also id.* at 2321 (Rehnquist, C.J. and O’Connor, J., concurring).

Indeed, the Supreme Court has held that “the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.” *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968). Courts have consistently rejected claims based on religious persons’ objections to government speech,²⁷ including objections specifically to the Pledge.²⁸

Here, Plaintiffs ask specifically that the School District tailor the Pledge to the principles of their religious dogma. The First Amended Complaint describes at length “the offensiveness the words ‘under God’ in the Nation’s Pledge of Allegiance hold for Plaintiffs and their religious brethren.” R-29. *See also* R-34

²⁷ *See, e.g., Crowley v. Smithsonian Inst.*, 636 F.2d 738, 742 (D.C. Cir. 1980) (“Although neither a State nor the Federal Government can constitutionally ‘pass laws which aid one religion, aid all religions, or prefer one religion over another,’ it does not follow that a statute violates the Establishment Clause because it ‘happens to coincide or harmonize with the tenets of some or all religions.’”) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947); *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir.1994) (allowing objecting students to be taught about what parents believed to be witchcraft).

²⁸ *See Myers*, 418 F.3d at 408 (rejecting claim that Pledge violated plaintiff’s Anabaptist Mennonite beliefs); *Keplinger v. United States*, 2006 WL 1455747 (M.D. Pa. May 23, 2006) (rejecting claim that Pledge violated plaintiff’s “non-Christian” belief that the “true name of worship” was “Yahweh”).

(“‘under God,’ inflicted upon a child who holds religious beliefs offended by such a statement is a blatant violation of the Free Exercise Clause.”).

However, whether under the Establishment or Free Exercise Clause, “the state has no legitimate interest in protecting any or all religions from views distasteful to them” *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952). It simply is not the job of the School District (or this Court) to keep RoeChild-2 from coming into contact with religious beliefs different from his parent’s atheistic religious beliefs. If the School District were forced to tailor its teaching to conform to the manifold religious beliefs of its students, it could teach little other than math. Many students’ parents may not believe in evolution, or learning about war, or the equality of the sexes, or the roundness of the earth. But this is no reason for the School District to change what it teaches.

Moreover, the Court should reject Plaintiffs’ assertion (R-20) that the word “God” as used in the Pledge is ineluctably a statement of a belief in monotheism. Again, Plaintiffs may not simply impose their subjective understanding of the word “God” on the Court. To Plaintiffs, “God” is specifically the “Christian” God. R-20. Yet a reasonable observer would view the term “God” as a far more ambiguous term—a kind of metaphysical Rorschach test that connotes a multitude of meanings in various philosophical and religious traditions. All that “God” necessarily means in the context of the Pledge is a source of cosmic accountability

for the actions of the State. This is consistent with those who speak of “God” as an impersonal force, or even the “sequence of causes clinging one to the other.”²⁹ Others view “God” as the “void,” as in the Buddhist concept of *sunyata* or *ku*. In fact, the term “God” is at least as ambiguous and multivalent as the terms “liberty” and “justice” that also appear in the Pledge and may be affirmed in the presence of objectors. In order to take offense at the words “under God” (or “liberty” or “justice”), an observer must impose a particular meaning and definition on a term where none is given.

Finally on this point, it is inconsequential that RoeChild-2 is a child. The “reasonable observer” standard does not become the “reasonable schoolchild” standard when those observing the governmental practice happen to be children. If a child does not understand what they are witnessing, the remedy is an explanation of the practice, not its termination. *See Good News Club v. Milford Central Sch.*,

²⁹ *See, e.g.,* SENECA, DE CONSOLATIONAE AD HELVIAM, VIII, 2-6. (“Wherever we betake ourselves, two things that are most admirable will go with us -- universal Nature and our own virtue. Believe me, this was the intention of the great creator of the universe, whoever he may be, whether an all-powerful God, or incorporeal Reason contriving vast works, or divine Spirit pervading all things from the smallest to the greatest with uniform energy, or Fate and an unalterable sequence of causes clinging one to the other – this, I say, was his intention, that only the most worthless of our possessions should fall under the control of another. All that is best for a man lies beyond the power of other men, who can neither give it nor take it away.”). *See also* ARISTOTLE, METAPHYSICS at 12.7 (1072b), reproduced in INTRODUCTION TO ARISTOTLE 321 (Richard McKeon, ed., 2d. ed. 1973) (using the term “God” to describe his famous “first mover” that, he reasoned, “exists of necessity, and in so far as it exists by necessity, its mode of being is good.”)

533 U.S. 98, 119 (2001) (“We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”)

Thus, this Court should conclude that the phrase “under God” in the context of the Pledge “represents a tolerable attempt to acknowledge religion . . . without favoring any individual religious sect or belief system.” *Elk Grove*, 542 U.S. at 42 (O’Connor, J., concurring).

g. Purging the two words “under God” from the Pledge would have the effect of inhibiting religion by reflecting as least as much hostility to religion, and threatening as least as much divisiveness, as the removal of the monument in *Van Orden*.

One of the principles guiding Justice Breyer in his outcome-determinative concurring opinion in *Van Orden* was his concern that “the relation between government and religion” be “one of separation, but not of mutual hostility and suspicion” *Van Orden*, 125 S.Ct. at 2869. Rejecting a test in “difficult borderline cases,” Justice Breyer wrote that “I see no test-related substitute for the exercise of legal judgment.” *Id.* Judges must evaluate whether their “conclusion[s]” would “lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions,” or if a holding would “encourage disputes thereby creat[ing] the very kind of religiously based divisiveness that

the Establishment Clause seeks to avoid.” *Id.* at 2871 (citing *Zelman*, 536 U.S., at 717-729) (Breyer, J., dissenting).

Since the courts are just as capable of creating hostility and divisiveness as the other branches of government, they must be equally vigilant to avoid it. Both options before this Court—allowing recitation of the Pledge to be enjoined or leaving it alone—have the potential to create division. But on balance, leaving the Pledge as it is will create less.

Another “determinative” factor indicating that the Pledge is not “divisive” in Justice Breyer’s view is the fact that reciting the Pledge has gone largely “unchallenged” during the 52 years it has included the words “under God.” *Van Orden*, 125 S.Ct. at 2870. It is hardly surprising that a practice of such ubiquity has resulted in some litigation, but approximately four lawsuits brought in 52 years is a very low number. The ratio of litigation to the frequency and ubiquity of the activity is exceptionally low, and certainly lower than the Ten Commandments monument at issue in *Van Orden*. Indeed, one can easily apply the text of Justice Breyer’s opinion to the Pledge itself:

Those [52] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their belief systems, are likely to have understood the [Pledge] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to “engage in” any “religious practic[e],” to “compel” any “religious practic[e],” or to “work deterrence” of any “religious belief.”

Id. at 2870 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)) (internal citation omitted) (third and fourth alterations in original).

Like the monument in *Van Orden*, reasonable observers are likely to have seen the Pledge “as part of what is a broader moral and historical message reflective of a cultural [and political] heritage,” not as an attempt to establish a particular religion. As demonstrated in Section II.B.1.c-d *supra*, this “heritage” is one bequeathed by the Founders that should not be spurned lightly.

2. The School District’s Policy Does Not Have the Primary Effect of Coercing Religious Observance.

This Court should reject any claim that Plaintiffs have been subject to religious “coercion” of the sort that violated the Establishment Clause in *Lee v. Weisman* and *Santa Fe*. Unlike here, those cases involved government-sponsored prayer. Indeed, the Supreme Court majority stated that “recitation [of the Pledge] is a *patriotic exercise* designed to foster national unity and pride” *Elk Grove*, 542 U.S. at 6 (emphasis added). And Justice O’Connor concluded that the patriotic nature of the Pledge was fatal to Newdow’s previous coercion claim. *See Elk Grove*, 542 U.S. at 44 (O’Connor, J., concurring) (finding that Pledge passes coercion and endorsement tests).

And in *Myers*, the Fourth Circuit Court of Appeals rejected the plaintiff’s coercion challenge on the same grounds:

The Pledge is a statement of loyalty to the flag of the United States and the Republic for which it stands; it is performed while standing at attention, facing the flag, with right hand held over heart. A prayer, by contrast, is “a solemn and humble approach to Divinity in word or thought.” It is a personal communication between an individual and his deity, “with bowed head, on bended knee.”

Myers, 418 F.3d at 408 (citations omitted).

Moreover, the School District policy at issue here makes clear that neither RoeChild-2, nor any other student in within the district, is “coerced” to say “under God” as part of the Pledge, or even to say the Pledge at all. R-190-191. And Plaintiffs admit that RoeChild-2 was never “actually compelled” to say the words “under God.” R-16. In this context, this Court should reject any claim that mere exposure to religious ideas contrary to Plaintiffs’, or any other merely subjective “feeling” of Plaintiffs’, can amount to legally cognizable “coercion” within the meaning of the Establishment Clause.

C. The School District’s Policy Does Not Excessively Entangle Government and Religion.

The third prong of the *Lemon* test forbids excessive entanglement of government and religion, which is characterized by “comprehensive, discriminating, and continuing state surveillance” of religious exercise. *See Lemon*, 403 U.S. at 619. No such entanglement is present here. Voluntary recitation of the Pledge in public schools does not require pervasive (or, indeed, any) monitoring of religious affairs by public authorities. Because there is no

entanglement here at all, least of all an “excessive” one, there can be no basis for finding that the Pledge this final element of the *Lemon* test. See *Cholla Ready Mix*, 382 F.3d at 977 (citing *Agostini v. Felton*, 521 U.S. 203, 233 (1997))(emphasizing that entanglement must be “excessive” to be prohibited).

CONCLUSION

Thousands of schoolchildren visit the Lincoln Memorial every year. Their teachers lead them up the steps to see the statue of Lincoln and to read the words carved into the walls of the Memorial. On the left is the Gettysburg Address, with its reference to a “nation under God.” On the right is the Second Inaugural Address, with its claim that the carnage of the Civil War was punishment for American law’s transgression against the laws of nature and nature’s God. As they look up at Lincoln’s words, these schoolchildren are being taught certain values. But the values they are learning are not those of any religion, they are the values of the Republic. They are receiving a political, not a theological, education.

The Court should make no mistake: Plaintiffs claim that RoeChild-2 should not have to hear teachers and classmates voluntarily recite a political statement solely because it mentions God. The logic of their claim threatens to require that similar words of Lincoln be chiseled out of the walls of his Memorial, muting perhaps the greatest voice for freedom this country has ever known. To avoid saying the “offensive” word “God,” teachers would have to remain silent about the

natural law underpinnings of the American Revolution, the Constitution, and the movement to abolish slavery.

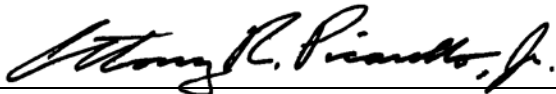
But this Court need not accept Plaintiffs' claim or its logic. Whatever test may apply here, the Court should declare that the Establishment Clause does not bar the government from proclaiming a political philosophy merely because it refers to God.

Therefore, the District Court's decision to issue a permanent injunction preventing the School District from leading schoolchildren in the Pledge of Allegiance should be reversed and vacated.

Respectfully submitted,

Dated: June 1, 2006

THE BECKET FUND FOR RELIGIOUS LIBERTY

By:  _____

Anthony R. Picarello, Jr.*

Derek L. Gaubatz (C.B.N. 208405)

Eric Rassbach

Jared N. Leland

1350 Connecticut Avenue, NW, Suite 605

Washington, DC 20036

Phone: (202) 955-0095

Fax: (202) 955-0090

* *Counsel of Record*

*Attorneys for Defendant-Intervenor-
Appellants John Carey et al.*

CERTIFICATE OF SERVICE

I, Anthony R. Picarello, Jr., attorney for Defendant-Intervenor-Appellants, hereby certify that on the 1st day of June, 2006, two (2) true and correct copies of Brief of Defendant-Intervenor-Appellants John Carey, *et al.* were placed in the United States Mail, postage pre-paid, addressed to the following:

Michael A. Newdow
FIRST AMENDMIST CHURCH OF TRUE SCIENCE
P.O Box 233345
Sacramento, CA 95823

Theodore Hirt
Department of Justice
Civil Division/Appellate Staff
10th & Pennsylvania Ave., NW
Washington, DC 20530

Terrence John Cassidy
PORTER SCOTT WEIBERG AND DELEHANT
P O Box 255428
350 University Avenue
Sacramento, CA 95865

Dated: June 1, 2006

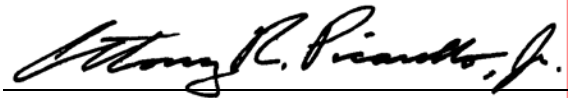


Anthony R. Picarello, Jr.
Counsel of Record

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to FED. R. APP. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the foregoing Appellants' Brief is proportionally spaced, has a typeface of 14 points or more, and contains [] words, as calculated by Microsoft Word.

Dated: June 1, 2006




Anthony R. Picarello, Jr.
Counsel of Record

STATEMENT OF RELATED CASES

There are no related cases.

Dated: June 1, 2006


Anthony R. Picarello, Jr.