No. 02-1624

IN THE SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT and
DAVID W. GORDON, SUPERINTENDENT, PETITIONERS

v.

MICHAEL A. NEWDOW, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether respondent Newdow has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance.

2. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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OPINIONS BELOW

The amended opinion of the court of appeals on rehearing (Pet. App. 1-24), and the opinions concurring in and dissenting from the denial of rehearing en banc (Pet. App. 57-86), are reported at 328 F.3d 466. The original opinion of the court of appeals (Pet. App. 25-56) is reported at 292 F.3d 597, and the court's opinion on standing (Pet. App. 87-96) is reported at 313 F.3d 500. The order of the district court (Pet. App. 97), adopting the findings and recommendation of the magistrate judge that the case be dismissed (J.A. 78-80), is unreported.

JURISDICTION

The court of appeals entered its original judgment on June 26, 2002. The court issued an amended opinion on rehearing on February 28, 2003. The petition for a writ of certiorari was filed on April

30, 2003. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).[1]

CONSTITUTIONAL, STATUTORY, AND POLICY PROVISIONS INVOLVED

The relevant constitutional, statutory, and policy provisions are reproduced in Appendix A, infra.

STATEMENT

1. a. In 1942, as part of an overall effort to "codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a pledge of allegiance to the United States flag. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 1 (1942). It read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, ch. 435, § 7, 56 Stat. 380.[2]

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[1] As a party-defendant below, the United States is a respondent supporting petitioners before this Court. As explained in the United States' petition for a writ of certiorari (02-1574 Pet. 2 & nn. 1-2), no apparent jurisdictional basis exists for respondent Newdow's suit against the United States. This Court's jurisdiction is not affected, however, because the government is exercising its statutory right to intervene to defend the constitutionality of the Pledge of Allegiance. See 28 U.S.C. 2403(a). Moreover, this Court invited the Solicitor General to file a brief on behalf of the United States.

[2] The United States was the first country to have a Pledge of Allegiance to its national flag. S. Guenter, The American Flag, 1777-1924 22 (1990). The text of the Pledge originated as part of a nationwide celebration of the quadricentennial of Columbus Day on October 19, 1892. J. Baer, The Pledge of Allegiance: A Centennial History, 1892-1992 at 1 (1992). The largest weekly national

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. Accordingly, the Pledge of Allegiance now reads: "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." 4 U.S.C. 4. Both the Senate and House Reports expressed the view that, under this Court's precedent, the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 3 (1954) (citing Zorach v. Clauson, 343 U.S. 306 (1952)); see S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954).

Following the decision below, Congress passed legislation that (i) made extensive findings about the historic role of religion in the political development of the Nation, (ii) reaffirmed the text of the Pledge as it has "appeared * * * for decades", and (iii) repeated Congress's judgment that the legislation is constitutional both facially and as applied by school districts whose teachers lead willing students in its recitation. Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-2, 116 Stat. 2057, 2060.[3]

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magazine of the time, The Youth's Companion, proposed a pledge to be recited by schoolchildren, which read: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." Id. at 1, 3.

[3] Two States (Louisiana and Mississippi) also have flag pledges that refer to God. See

b. California law requires that each public elementary school in the State "conduct[] * * * appropriate patriotic exercises" at the beginning of the school day, and that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Cal. Educ. Code § 52720 (West 1976). To satisfy that requirement, petitioners adopted a policy that requires "[e]ach elementary school class [to] recite the pledge of allegiance to the flag once each day." Pet. App. 3. No child is compelled to join in reciting the Pledge. Id. at 4.

2. Respondent Michael Newdow (Newdow) is the non-custodial father of a child who is enrolled in a public elementary school within the jurisdiction of petitioner Elk Grove Unified School District. Pet. App. 2-3, 88-89, 94. The child's teacher leads willing students in reciting the Pledge of Allegiance daily. Id. at 3-4 & n.2. The child's mother, who was never married to Newdow, has "sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child. Id. at 89. Newdow retains limited visitation rights, a right of access to the child's school and medical records, and the right to "consult" on "substantial" decisions pertaining to the child's "educational needs," but if the parents disagree, the

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<http://www.crwflags.com/fotw/flags/us-la.html>; <http://www.crwflags.com/fotw/flags/us-ms.html>.

child's mother "may exercise legal control of" the child as long as it "is not specifically prohibited or inconsistent with the physical custody order." Ibid.[4]

In March 2000, Newdow filed suit, on behalf of himself and as next friend of his child, against the United States Congress, the United States of America, the President of the United States, the State of California, and two California school districts and their superintendents, seeking a declaration that the 1954 statute adding the words "under God" to the Pledge of Allegiance is "facially unconstitutional" under the Establishment and Free Exercise Clauses of the First Amendment, and requesting injunctive relief. J.A. 25-26, 30, 69-70; Pet. App. 5-6. Newdow asserts that recitation of the Pledge in the child's school "results in the daily indoctrination" of his child "with religious dogma," J.A. 47, which "infringe[s]" upon Newdow's asserted "unrestricted right to inculcate in his daughter -- free from governmental interference -- the atheistic beliefs he finds persuasive," J.A. 48. The district court dismissed the complaint for failure to state a claim, relying

[4] At a hearing on September 11, 2003, the state court judge expanded Newdow's visitation time with the child and denominated the new arrangement "joint legal custody." J.A. 127. However, according to the transcript, the mother of the child still retains final control over and final say in decisions concerning the child's education, religious upbringing, and participation in litigation. Ibid.; J.A. 128 ("She makes the final decisions if the two of you disagree."); cf. J.A. 121 ("I'm not going to grant 50/50 which is, I know, Dr. Newdow, what you wanted."). No order formalizing the results of the hearing has been entered yet.

on numerous decisions of this Court expressly addressing the Pledge and describing it as consistent with the Establishment Clause. Pet. App. 97; J.A. 79.

3. A divided panel of the Ninth Circuit affirmed in part and reversed in part. Pet. App. 25-56. The court first held that Newdow has standing to challenge petitioners' policy of reciting the Pledge "because his daughter is currently enrolled in elementary school" in Elk Grove. Ibid.[5] The majority then ruled that the addition of the phrase "under God" to the Pledge of Allegiance violates the Establishment Clause. Pet. App. 36-49. The majority determined that the "sole purpose" of the 1954 Act was to "advance religion," and characterized the Pledge as "a profession of a religious belief, namely, a belief in monotheism," which "impermissibly takes a position with respect to the purely religious question of the existence and identity of God." Id. at 40-41, 45-46. The majority then concluded that "the mere fact that a pupil is required to listen every day to the statement 'one nation under God' has a coercive effect." Id. at 44.

Judge Fernandez dissented. Pet. App. 51-56. In his view, phrases like "'In God We Trust,' or 'under God' have no tendency to establish a religion in this country or to suppress anyone's

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[5] The court affirmed the district court's dismissal of the President, Congress, the Sacramento City Unified School District, and its superintendent from the lawsuit. Pet. App. 29-32; id. at 51 (Fernandez, J., concurring and dissenting).

exercise, or non-exercise, of religion, except in the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." Id. at 53-54.

4. While the case was pending on rehearing, the mother of Newdow's child notified the court that Newdow lacked legal custody of the child and legal control over the child's educational and religious upbringing. She further advised that, as the parent with legal custody and control of the daughter, she "wish[es] for her to be able to recite the Pledge at school exactly as it stands." Banning C.A. Mot. to Intervene 10.

The court of appeals then issued a separate decision reaffirming that Newdow has standing to prosecute his challenge to the Pledge. Pet. App. 87-96. The court concluded that Newdow no longer could prosecute the action on behalf of his child, id. at 94-95, nor could he "disrupt [the mother's] choice of schools for their daughter," id. at 94. The court concluded, however, that Newdow continues to have standing in his own right to challenge "unconstitutional government action affecting his child." Id. at 90. The court reasoned that, because non-custodial parents have a right to "expose" their children to their beliefs and values, id. at 93, Newdow was injured because state law "surely does not permit official state indoctrination of an impressionable child on a daily

basis with an official view of religion contrary to the express wishes of either a custodial or noncustodial parent." Id. at 94.[6]

5. a. The court issued an amended opinion on rehearing, Pet. App. 1-24, in which the court limited its Establishment Clause holding to petitioners' policy of leading willing students in the recitation of the Pledge. Id. at 13-14, 18. The court repeated its view that the reference to God in the Pledge "is a profession of a religious belief, namely, a belief in monotheism," id. at 11-12, and ruled that its daily recitation in school classrooms has a "coercive effect" because it "places students in the untenable position of choosing between participating in an exercise with religious content or protesting." Id. at 13. The court stressed its view that the Pledge "is a performative statement." Id. at 16.

Judge Fernandez again dissented, Pet. App. 18-24, noting that, although the majority "now formally limits itself to holding that it is unconstitutional to recite the Pledge in public classrooms, its message that something is constitutionally infirm about the Pledge itself abides and remains a clear and present danger to all similar public expressions of reverence," id. at 19 n.1.

b. Judge O'Scannlain, joined by Judges Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, filed a lengthy dissent from the

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[6] Judge Fernandez concurred in the judgment on standing, but not in the majority's "allusions to the merits of the controversy." J.A. 148.

court of appeals' denial of rehearing en banc. Pet. App. 65-86. He described the panel opinion as

> wrong, very wrong -- wrong because reciting the Pledge of Allegiance is simply not "a religious act" as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense.

Id. at 66 (footnote omitted).

SUMMARY OF ARGUMENT

I. Respondent Newdow lacks standing to challenge petitioners' policy concerning recitation of the Pledge of Allegiance because he lacks the legal authority to direct and control his child's educational and religious upbringing. While state law affords him a right to expose his daughter to his own atheistic views, he does not have a corresponding right to exclude other influences -- especially those that the mother has chosen for the child. His asserted interest in not having his viewpoint countered by governmental speech with which he disagrees is too generalized an interest to support standing. Finally, Newdow's constitutional challenge is, in its practical effect, a collateral attack on ongoing state custody proceedings. That proceeding provides an adequate forum for Newdow to press any argument that his or the child's interests are being harmed. Federal court litigation should not become a vehicle for obtaining a measure of legal control over the child's upbringing that the state court has denied him.

II. Two decisions of this Court have said without qualification that the Pledge of Allegiance is constitutional. Numerous other opinions, joined in by nine Justices of this Court, have likewise expressly addressed and affirmed the constitutionality of the Pledge of Allegiance with its reference to God. No Justice has expressed the view that the Pledge violates the Establishment Clause. Those consistent and oft-repeated statements stand as a fixed lodestar in this Court's Establishment Clause jurisprudence, demarcating a constitutional baseline that has informed and directed the resolution of a number of the Court's Establishment Clause cases. Whatever else the Establishment Clause may prohibit, this Court's precedents make clear that it does not forbid the government from officially acknowledging the religious heritage, foundation, and character of this Nation. That is precisely what the Pledge of Allegiance does.

That conclusion does not change when the Pledge is said by willing students in a public elementary school classroom. Reciting the Pledge of Allegiance is a patriotic exercise, not a religious testimonial. The reference to God permissibly acknowledges the role that faith in God has played in the formation, political foundation, and continuing development of this Country. Children may be taught about that heritage in their History classes; acknowledging the same in the Pledge is equally permissible.

ARGUMENT

I. RESPONDENT NEWDOW LACKS STANDING BECAUSE HE HAS NO LEGALLY PROTECTED INTEREST IN PREVENTING HIS CHILD'S EXPOSURE TO THE PLEDGE

Article III of the Constitution confines the judicial power to the resolution of actual "Cases" and "Controversies," U.S. Const. art. III, § 2, and one "essential and unchanging" component of the case-or-controversy requirement is the rule that a plaintiff invoking the jurisdiction of the federal courts must have standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). Because standing goes to the power of the Court to adjudicate a case, resolution of the standing question is necessarily antecedent to any decision on the merits. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998).

The "irreducible constitutional minimum of standing" requires that the plaintiff (1) "have suffered an 'injury in fact'" in the form of the "invasion of a legally protected interest," that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) identify a "causal connection between the injury and the conduct" of which he complains, such that the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court"; and (3) show that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Lujan,

504 U.S. at 560-561 (internal quotation marks and citation omitted); see McConnell v. FEC, No. 02-1674, 2003 WL 22900467, at *68 (Dec. 10, 2003). Standing must exist at every stage of the litigation, Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997), and the party invoking the jurisdiction of the federal courts bears the burden of establishing standing, Lujan, 504 U.S. at 561. Newdow has a "substantially more difficult" burden because he challenges not petitioners' regulation of his own activities, but the "allegedly unlawful regulation * * * of someone else" -- his child. Id. at 562.

Newdow has not met that burden. He has no legally protected interest that has been invaded by petitioners' Pledge of Allegiance policy. Furthermore, both the cause of the alleged harm and the ability of the court to redress it depend upon, "the unfettered choices made by [an] independent actor[]" -- the child's mother -- who is "not before the court[] and whose exercise of broad and legitimate discretion the court[] cannot presume either to control or to predict." Lujan, 504 U.S. at 562 (quoting ASARCO Inc. v. Kadish, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.)). Finally, the lower courts lacked jurisdiction because this litigation is, at its core, a collateral attack on orders entered by the state court in the ongoing child custody dispute between Newdow and the child's mother.

A. Newdow Has Not Suffered The Invasion Of Any Legally Protected Interest

Newdow has not suffered an "injury in fact" because the School District's policy does not trench upon any "legally protected interest" that he has concerning the education of his child. McConnell, 2003 WL 22900467, at *68; Lujan, 504 U.S. at 560; see Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 474 (1982) (legal claim must be presented by a party "'whose interests entitle him to raise it'").

1. A number of this Court's Establishment Clause cases have involved lawsuits by parents challenging practices or policies in the public schools that their children attend. See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Zorach v. Clauson, 343 U.S. 306 (1952). In all of those cases, however, it was undisputed that the parents had the legal right to sue as next friend to vindicate their children's interests and to protect the parents' own constitutional right to direct and control the religious and educational upbringing of their children. See Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925).

Newdow has neither right. Under California law, which is controlling on this fundamental question of state law, see Boggs v. Boggs, 520 U.S. 833, 848 (1997), the prerogative of suing to enforce the child's rights rests exclusively with the mother because, in this case, she has the legal authority to make final

and binding decisions concerning the child's "health, education and welfare." Pet. App. 89; see id. at 94-95.[7]

Nor does Newdow enjoy any right to direct the education of his daughter. Under California law, the parent with legal custody alone "direct[s] [the child's] activities and make[s] decisions regarding [the child's] * * * education * * * and religion." Burge v. City & County of San Francisco, 262 P.2d 6, 12 (Cal. 1953); see Pet. App. 94 ("Newdow cannot disrupt Banning's choice of schools for their daughter."). In this case, the mother has selected Elk Grove School District as "the environment in which [she] as [the child's] sole legal custodian wish[es] to have her educated," and she specifically endorses petitioners' policy under which her child may daily "recite the Pledge of Allegiance as it currently stands, including the portion stating that we are 'one Nation under God.'" Banning Decl. 5. The mother's legal control specifically encompasses the right to decide, over the non-custodial parent's objections, whether the child should salute the flag of the United States. See Cory v. Cory, 161 P.2d 385, 388-393 (custodial parent may teach children not to salute the flag), vacated on other

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[7] See Cal. Family Code § 3006 (West 1994) ("sole legal custody" means "that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child"); Burge v. City & County of San Francisco, 262 P.2d 6, 12 (Cal. 1953) (status as custodial parent "embrace[s] the sum of parental rights with respect to the rearing of a child, including its care" and "the right * * * to direct his activities and make decisions regarding his care and control").

grounds, 162 P.2d 497 (Cal. Ct. App. 1945); see Bond v. Bond, 109 S.E.2d 16, 25-27 (W. Va. 1959) (similar).[8]

With respect to the child's religious upbringing, the mother has chosen to raise the child as a "Christian who regularly attends church, and * * * believes in God." Banning Decl. 2.[9] Under California law, moreover, the mother would be free to place the

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[8] See Taylor v. Vermont Dep't of Educ., 313 F.3d 768, 781-782, 792 (2d Cir. 2002) (non-custodial parent lacks standing to challenge an educational assessment of her child under federal law); Mushero v. Ives, 949 F.2d 513, 521 (1st Cir. 1991) (non-custodial parent did not have standing to challenge child support payments law); Mills v. Phillips, 407 So.2d 302, 303-304 (Fla. Ct. App. 1981) (non-custodial parent lacks standing to challenge a school's decision to suspend his child). The court of appeals relied (Pet. App. 90-92) on the Seventh Circuit's decision in Navin v. Park Ridge School District, 270 F.3d 1147 (2001) (per curiam), which held that a non-custodial father might be able to sue to enforce his son's rights under the Individuals with Disabilities Education Act, 20 U.S.C. 1415. But in that case, the father retained, under the divorce decree, a legal interest in ensuring the quality of his child's education. Id. at 1149. The court stressed, moreover, that the father could not use federal law "to upset choices committed to [the mother] by the state court." Id. at 1150.

[9] See Lerner v. Superior Court, 242 P.2d 321, 323 (Cal. 1952) ("The essence of custody is the companionship of the child and the right to make decisions regarding his * * * religion."); Quiner v. Quiner, 59 Cal. Rptr. 503, 513 (Ct. App. 1967) ("[T]he parent having the custody of a child has the right to bring up the child in the religion of such parent."). Indeed, a non-custodial parent cannot force a custodial parent to raise the children in a certain religion even when the parents had a preexisting agreement to do so. See, e.g., In re Marriage of Weiss, 49 Cal. Rptr. 2d 339, 342-343 (Cal. Ct. App.), cert. denied, 519 U.S. 1007 (1996); see also Fisher v. Fisher, 324 N.W.2d 582 (Mich. Ct. App. 1982); Boerger v. Boerger, 97 A.2d 419 (N.J. Super. Ct. 1953).

child in a pervasively religious private school in which daily prayer is an integral aspect of the educational environment.[10]

2. Notwithstanding the clarity of that state law, which leaves Newdow no "legally cognizable right," McConnell, 2003 WL 22900467, at *70, affected by petitioners' policy, the court of appeals discerned three potential sources of injury to Newdow's legal interests. But none of them is sufficient to confer standing. First, the court of appeals noted (Pet. App. 93) that Newdow retains the right to "consult" with the mother on educational decisions and to "inspect" the child's educational records. That is true, but irrelevant. Petitioners' policy concerning recitation of the Pledge in school classrooms does not implicate either of those rights.

Second, the court of appeals relied heavily upon Newdow's residual right, under California law, to "expose" his child to his views. Pet. App. 93a. But, again, petitioners' policy does not prevent or preclude Newdow from exposing his child to his particular viewpoints. The court of appeals was able to discern an

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[10] As the father of a child born out of wedlock, Newdow has no common-law right, beyond the rights afforded him under state law, to direct his child's upbringing. See Michael H. v. Gerald D., 491 U.S. 110, 122-127 (1989). The common law vested no specific rights in the father of a non-marital child. See, e.g., M. Grossberg, Governing the Hearth 197, 207 (1985) (English law recognized "[m]others' custodial rights over their illegitimate children"); J. Hamawi, Family Law 288-289 (1953) (at common law, parental rights over a non-marital child were "concentrated in its mother").

injury to Newdow's legal interests only by transmogrifying Newdow's limited right to expose his child to his views into a right to exclude other viewpoints, including those specifically chosen by the parent with controlling legal custody. Id. at 94. But Newdow has no such right of exclusion. The court of appeals cited no state law authority for such a right. The court simply reasoned that it must "surely" (ibid.") follow from the right of exposure. But it surely does not: any such right of exclusion is flatly inconsistent with the custody determination. The very essence of the mother's legal custody is the right to expose the child to pedagogical practices or viewpoints with which the non-custodial parent disagrees. See id. at 89 (when "mutual agreement is not reached," the mother "may exercise legal control of [the child]").

Indeed, the Ninth Circuit vested Newdow with rights that even a custodial parent does not enjoy. Public schools routinely instruct students about evolution, war, racial integration, gender equality, and other matters with which some parents may disagree on religious, political, or moral grounds, and thus schools may convey indirectly to children that the parent's views "are those of an outsider," Pet. App. 95. What the Constitution protects, in those circumstances, is the parents' right to instill their own views in their children and to place them in a private school that is more consonant with their beliefs. See Pierce, supra. Petitioners have not interfered with Newdow's right or ability to instill his own

views. And a parent like Newdow who lacks the power to move the child because of a state custody determination can have no greater power to dictate the curriculum in the school of the custodial parent's choice.

Because Newdow lacks the necessary control over the child's education, his interest in not having his viewpoint diluted by the government's educational practices is the same generalized interest that could be asserted by a grandparent, nanny, or proselytizing friend. Frustration and dissatisfaction with having another person witness or hear messages with which one disagrees is too diffuse an injury to confer Article III standing. See Valley Forge, 454 U.S. at 485-486; Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

Third, the court of appeals erroneously couched Newdow's Article III injury in terms of a legal right not to have his daughter "subjected to unconstitutional state action." Pet. App. 95 (emphasis added). The court thus attempted to transform Newdow's right to expose his child to his views into a right to prevent her exposure to unconstitutional conduct. E.g., id. at 95 (Newdow "can expect to be free from the government's endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis in that official view"). That approach to standing is flawed at multiple levels.

As an initial matter, that approach conflates the standing inquiry and the ultimate question on the merits. Newdow, just like

concerned grandparents or neighbors, does not have a greater claim to standing if the state action he challenges is ultimately proven to be unconstitutional. Standing "in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." Warth v. Seldin, 422 U.S. 490, 500 (1975). Rather, the plaintiff must identify some action by the opposing party that affects his particularized legal rights concretely and imminently -- regardless of whether that action ultimately is found to be lawful or not. "The requirement of standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.'" Valley Forge, 454 U.S. at 484 (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). Newdow simply has no right to seclude the child from viewpoints that the custodial mother endorses, and that fact does not change just because he alleges that the views are unconstitutional.

Furthermore, by focusing on the mother's supposed lack of a legal right to "consent to unconstitutional government action" (Pet. App. 95), the court of appeals asked the wrong question. Standing turns not upon the absence of a legal right in the mother, but on the presence of a legal injury to Newdow. Once again, the logic of the Ninth Circuit's approach to standing would confer standing not just on the non-custodial parent, but also on any concerned individual who disagreed with the custodial parent's failure to object. Beyond that, the court's supposition that a

parent with controlling legal custody cannot permit a child to endure unlawful state action is wrong. The court of appeals again cited no state law supporting its proposition. And, as a matter of common sense, custodial parents have no obligation to resist through litigation every potential playground tort or constitutional affront (such as locker searches or procedural missteps in disciplinary procedures) that befalls their children.

B. Because Of The Mother's Independent Control Over Education, Newdow Cannot Demonstrate Causation Or Redressability

Even if Newdow has suffered an injury in fact, that injury derives from the independent actions of the mother and cannot fairly be attributed to petitioners' Pledge of Allegiance policy. The court of appeals defined the harm to Newdow's interests as having his daughter taught that "her father's beliefs are those of an outsider, and necessarily inferior to what she is exposed to in the classroom." Pet. App. 95. To establish standing, however, Newdow must show that it is petitioners' Pledge policy, rather than the "independent action" of the mother in raising the child, that caused that harm. Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976); see Steel Co., 523 U.S. at 103.

The mother, the parent with whom the child spends the vast majority of her time (see J.A. 122-123), is raising the child as a "Christian who regularly attends church, and [who] believes in God." Banning Decl. 2; see also J.A. 122 (child attends "Sunday

night church"). Given those substantial and weighty influences, it is "purely speculative," Simon, 426 U.S. at 42, whether any perception on the part of the child that her father's atheistic viewpoint is "inferior" or "outside[]" the mainstream (Pet. App. 95), is the product of reciting the Pledge of Allegiance, rather than of the daily Christian influence of the mother and the child's consistent exposure to church activities. The "remote possibility" that the child's receptivity to Newdow's atheistic beliefs "might have been better" if the child did not say the Pledge is insufficient to confer standing. Warth, 422 U.S. at 507.

For similar reasons, Newdow cannot show that it is "likely," Lujan, 504 U.S. at 561, that his injury will be redressed by a favorable court ruling in a "tangible" way, Valley Forge, 454 U.S. at 477. The mother has made clear her intention that her daughter recite the Pledge of Allegiance daily during her elementary school years. Banning Decl. 5. A ruling in Newdow's favor would not prevent the mother from placing the child in a private school where the official governmental Pledge, with its reference to God, could be said daily. Indeed, the mother retains the right to transfer her daughter to a pervasively sectarian institution that begins the day not just with the Pledge, but also with a prayer and Bible reading. That right, conferred on the mother by a state-court custody determination, demonstrates that Newdow's asserted injury is neither traceable to the petitioners' Pledge policy nor

redressable by the policy's invalidation. The child also remains subject to exposure to the Pledge and similar official acknowledgments of the Nation's religious heritage in a wide variety of other settings, public or private. In short, unless the Establishment Clause compels courts to root out every reference to religion in public life, the relief ordered by the court here is incapable of inoculating Newdow's message of atheism against any perceived dilution.

C. The Lawsuit Is A Collateral Attack On The Pending State Court Child Custody Proceedings

For well over a century, this Court has acknowledged that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." In re Burrus, 136 U.S. 586, 593-594 (1890).[11] In this case, orders entered in the pending state child custody proceeding establish that, where the two parents disagree on an educational practice, such as whether the child should be exposed to the Pledge of Allegiance, the mother's decision controls and Newdow has no right to overturn it. If Newdow believes the

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[11] See Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) ("[T]he domestic relations exception [to federal court diversity jurisdiction] * * * divests the federal courts of power to issue divorce, alimony, and child custody decrees."); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."); cf. Moore v. Sims, 442 U.S. 415, 423-435 (1979) (applying Younger abstention to request for injunction against pending state court custody proceedings).

mother's educational decisions are causing harm to the child, the proper remedy is for him to seek a modification of the custody agreement from the family court. Newdow cannot use federal litigation to circumvent that state-law process or to modify indirectly a state-law custody judgment. See District of Columbia Ct. of App. v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

Under the Rooker-Feldman doctrine, federal district courts lack subject-matter jurisdiction over any action that "in essence, would be an attempt to obtain direct review of the [state court's judicial] decision in the lower federal courts," ASARCO, 490 U.S. at 622-623. The issues presented in state and federal court need not be identical. The Rooker-Feldman doctrine applies as long as the issues are "inextricably intertwined." Feldman, 460 U.S. at 483 n.16.[12] Numerous courts of appeals have invoked the Rooker-Feldman doctrine to bar relitigation of claims related to state divorce and child custody proceedings in the federal courts. See Newman v. Indiana, 129 F.3d 937, 942 (7th Cir. 1997) (dismissing a couple's claims of religious discrimination and due process

[12] The Rooker-Feldman doctrine is rooted both in 28 U.S.C. 1257, which restricts the federal judiciary's direct review of state court judgments, and in notions of comity and federalism, which presume that state courts are willing and able to apply federal law and respect federal rights. See Feldman, 460 U.S. at 483 n.16; Huffman v. Pursue, Ltd., 420 U.S. 592, 610-611 (1975).

violations based on their unsuccessful attempt to adopt children).[13]

Newdow's challenge to petitioners' Pledge policy likewise should be barred because it is inextricably intertwined with the pending child custody proceedings. At bottom, Newdow's challenge reflects a fundamental disagreement with the state court's assignment to the mother of the legal authority to control the child's educational and religious upbringing and to the attendant limitations on his own rights. To the extent that Newdow believes his own rights as a parent or the interests of his child are being harmed, the pending state custody proceedings provide an appropriate forum for those claims. By the same token, a federal court could not enter relief in this case without disrupting the state court's division of decisionmaking authority and control between the two parents. Indeed, disputes over Newdow's conduct of the present litigation and its impact on the child's well-being have already surfaced as part of the child custody proceedings. See J.A. 111-113. In an appeal currently pending with the California Court of Appeal, moreover, Newdow challenges, on

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[13] See, e.g., Mandel v. Town of Orleans, 326 F.3d 267, 270-272, 274 (1st Cir. 2003) (dismissing mother's claims of selective enforcement and other constitutional violations based on her arrest for disobedience of custody order); Ballinger v. Culotta, 322 F.3d 546, 548-549 (8th Cir. 2003) (dismissing a father's claims that the state violated his parental association, due process, and equal protection rights in awarding custody of child to the grandfather); Phifer v. City of New York, 289 F.3d 49, 57-58, 60 (2d Cir. 2002) (dismissing mother's claims that the State violated her substantive due process, Fourth Amendment, and equal protection rights in removing child from her custody).

constitutional grounds, orders of the family court pertaining to the conduct of the present litigation. See Newdow's Opening Br. 41-51, 53, 55, Banning v. Newdow, No. C040840 (Cal. Ct. App. 3d Dist.) (filed Apr. 8, 2003). He specifically cites as error the family court's assessment of (i) the harm to his child of "being inculcated with religious dogma in the public schools," and (ii) the benefit of ensuring that the child does not view atheists as "outsider[s]." Id. at 42, 45. He then argues that the "Pledge of Allegiance litigation" is but one example of "arbitrary risk analyses" made by the family court that should be overturned. Id. at 51. In short, Rooker-Feldman bars this action because it represents Newdow's effort to obtain from the federal courts a measure of control over his child's upbringing that the state court has withheld and the state appeals court is currently reviewing.

II. PETITIONERS' POLICY OF LEADING WILLING ELEMENTARY SCHOOL STUDENTS IN THE DAILY RECITATION OF THE PLEDGE OF ALLEGIANCE IS CONSISTENT WITH THE ESTABLISHMENT CLAUSE

A. Religious Faith Has Played A Defining Role In The History Of The United States

1. Religious Beliefs Inspired Settlement of the Colonies and Influenced the Formation of the Government

"[R]eligion has been closely identified with our history and government." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963). Many of the Country's earliest European settlers came to these shores seeking a haven from religious persecution and a home

where their faith could flourish. In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact in which they announced that their voyage was undertaken "for the Glory of God." Mayflower Compact, 11 Nov. 1620, reproduced in B. Schwartz, 1 The Roots of the Bill of Rights 2 (1980). Settlers established many of the original thirteen colonies, including Massachusetts, Rhode Island, Connecticut, Pennsylvania, Delaware, and Maryland, for the specific purpose of securing religious liberty for their inhabitants.[14] The Constitutions or Declarations of Rights of almost all of the original States expressly guaranteed the free exercise of religion.[15] It thus was no surprise that the very first rights enshrined in the Bill of Rights included the free exercise

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[14] See, e.g., The Fundamental Agreement or Original Constitution of the Colony of New-Haven, June 4, 1639; The Body of Liberties of the Massachusets Collonie in New England, 1641 (both: reproduced in 5 The Founders' Constitution 45-48 (P. Kurland & R. Lerner, eds. 1987)); see generally M. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1422-1426 (1990); S. Cobb, The Rise of Religious Liberty in America (1902).

[15] See Virginia Declaration of Rights, § 16 (June 12, 1776); Delaware Declaration of Rights and Fundamental Rules, § 2 (Sept. 11, 1776); Maryland Const. and Declaration of Rights, §§ 33-36 (1776); New Jersey Const., Arts. 18, 19 (1776); North Carolina Const., arts. 19, 31-32, 34 (1776); Pennsylvania Const. and Declaration of Rights, § II (1776); New York Const., art. 38 (1777); Vermont Const., Ch. I, § 3 (1777); Massachusetts Const., pt. 1, art. 2 (1780); New Hampshire Const., pt. 1, arts. 4, 5 (1784); see also Virginia Act for Establishing Religious Freedom § 1 (Oct. 31, 1785). Those documents are all reproduced in 5 The Founders' Constitution, supra, at 70-71, 75, 77, 81, 84-85.

of religion and protection against federal laws respecting an establishment of religion. U.S. Const., Amend. I.[16]

The Framers' deep-seated faith also laid the philosophical groundwork for the unique governmental structure they adopted. The Framers, "in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people * * * and chosen directly * * * by the people." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821 (1995). In the Framers' view, government was instituted by individuals for the purpose of protecting and cultivating the exercise of their inalienable rights. Central to that political order was the Framers' conception of the individual as the source (rather than the object) of governmental power. That view of the political sovereignty of the individual, in turn, was a direct outgrowth of their conviction that each individual was entitled to certain fundamental rights, as most famously expressed in the Declaration of Independence: "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." 1 U.S.C. p. XLIII. Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God

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[16] Even the short-lived Articles of Confederation included a pledge of mutual assistance between the States "against all force offered to, or attacks made upon them, or any of them, on account of religion * * *." Articles of Confederation, art. III (1781) (reproduced in 1 The Founders' Constitution, supra, at 23).

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." Schempp, 374 U.S. at 213.[17]

Indeed, religious faith was so central to the formation and organization of the Republic as to cause Alexis de Tocqueville to remark that "I do not know if all Americans have faith in their religion -- for who can read to the bottom of hearts? -- but I am sure that they believe it necessary to the maintenance of republican institutions." Alexis de Tocqueville, Democracy in America 280 (H. Mansfield & D. Winthrop ed. & trans., Univ. of Chicago Press 2000) (1835).[18]

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[17] See also Alexander Hamilton, The Farmer Refuted (1775) ("[T]he Supreme Being gave existence to man, together with the means of preserving and beautifying that existence. He endowed him with rational faculties, by the help of which to discern and pursue such things as were consistent with his duty and interest; and invested him with an inviolable right to personal liberty and personal safety.") (quoted in N. Cousins, The Republic of Reason 333 (1988)) (internal quotation marks omitted); R. Vetterli & G. Bryner, In Search of the Republic 59 (rev. ed. 1996) ("The Founders, as a whole, were deeply religious men. * * * The foundation of their modern republican philosophy was based on a belief in God."); A. Jayne, Jefferson's Declaration of Independence: Origins, Philosophy and Theology 59 (1998) (the Declaration of Independence espoused a "theology of equality") (citing John Locke, Second Treatise of Government (1690)); C. Antieau, The Higher Laws: Origins of Modern Constitutional Law 123 (1994); 5 The Founders' Constitution, supra, at 60 (Samuel Adams: "'Just and true liberty, equal and impartial liberty' in matters spiritual and temporal, is a thing that all Men are clearly entitled to, by the eternal and immutable laws Of God and nature.").

[18] The Framers also incorporated into the governmental design aspects of Puritan covenant theology, which advocated, first, a "compact of a group of individuals with God, by which they became

2. The Framers Considered Official Acknowledgments of Religion's Role in the Formation of the Nation to be Appropriate

Many Framers attributed the survival and success of the foundling Nation to the providential hand of God. The Continental Congress itself announced to the nation in 1778 that the Nation's successes in the Revolutionary War had been "so peculiarly marked, almost by direct interposition of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 Journals of the Continental Congress 477 (W. Ford ed., 1908). Likewise, in his first inaugural address, President Washington proclaimed that "[n]o people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States," because "[e]very step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 10, 101st Cong., 1st Sess. 2 (1989).[19]

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a people, and the subsequent compact between this people and their rulers, by which government was created." E. Morgan, "The American Revolution Considered as an Intellectual Movement" (reproduced in Paths of American Thought 11, 28 (A. Schlesinger, Jr. & M. White eds., 1963)); see also A. Adams & C. Emmerich, A Heritage of Religious Liberty, 137 U. Pa. L. Rev. 1559, 1568 & n.32 (1989); J. Hutson, Religion and the Founding of the American Republic 53 (1998); In Search of the Republic, supra, at 35-37.

[19] See also Samuel Adams, Oration on the Steps of the Continental State House (Philadelphia, PA. Aug. 1, 1776) ("[T]he hand of heaven appears to have led us on to be, perhaps, humble instruments and means in the great providential dispensation which

Against that backdrop, from the Nation's earliest days, the Framers considered references to God in official documents and official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of religious autonomy embodied in the First Amendment. Indeed, two documents that this Court has looked to in its Establishment Clause cases -- James Madison's Memorial and Remonstrance Against Religious Assessments (1785), and Thomas Jefferson's Bill for Establishing Religious Freedom (1779) -- repeatedly acknowledge the Creator.[20] The Constitution itself refers to the "Year of our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. U.S. Const. art. I, § 7, art. VII.

The First Congress -- the same Congress that drafted the Establishment Clause -- adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See Marsh

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is completing.") (quoted in D. Davis, Religion and the Continental Congress, 1774-1789: Contributions to Original Intent 60 (2000)). For the similar sentiments of many other Founders, see ibid. (quoting Oliver Wolcott, Samuel Chase, John Adams, Elbridge Gerry, John Witherspoon, and William Williams); In Search of the Republic, supra, at 66-68 (quoting James Madison, John Adams, Thomas Jefferson, John Jay, Alexander Hamilton, and Benjamin Franklin).

[20] See 5 The Founders' Constitution 77, 82; see also Marsh v. Chambers, 463 U.S. 783, 787 n.5 (1983); McGowan v. Maryland, 366 U.S. 420, 437 (1961) (Jefferson's and Madison's statements are "particularly relevant in the search for the First Amendment's meaning"); Everson v. Board of Educ., 330 U.S. 1, 13, (1947) (First Amendment was "intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute").

v. Chambers, 463 U.S. 783, 787 (1983). That Congress, the day after the Establishment Clause was proposed, also urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." Lynch v. Donnelly, 465 U.S. 668, 675 n.2 (1984) (citation omitted). President Washington responded by proclaiming November 26, 1789, a day of thanksgiving to "offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." Ibid. (citation omitted). President Washington also included a reference to God in his first inaugural address: "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the council of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." S. Doc. No. 10, supra, at 2.

Later generations have followed suit. Since the time of Chief Justice Marshall, this Court has opened its sessions with "God save the United States and this Honorable Court." Engel v. Vitale, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting). President Abraham Lincoln referred to a "Nation[] under God" in the historic Gettysburg Address: "That we here highly resolve that these dead

shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth." Every President that has delivered an inaugural address has referred to God or a Higher Power,[21] and every President, except Thomas Jefferson, has declared a Thanksgiving Day holiday.[22] In 1865, Congress authorized the inscription of "In God we trust" on United States coins. Act of March 3, 1865, ch. 102, § 5, 13 Stat. 518. In 1931, Congress adopted as the National Anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto "'In God is our Trust.'" Engel, 370 U.S. at 449 (Stewart, J., dissenting). In 1956, Congress passed legislation to make "In God we trust" the National Motto, see 36 U.S.C. 302, and provided that it be inscribed on all United States currency, 31 U.S.C. 5112(d)(1), above the main door of the Senate,

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[21]See Inaugural Addresses of the Presidents of the United States, supra; First Inaugural Address of William J. Clinton, 29 Weekly Comp. Pres. Doc. 77 (Jan. 20, 1993); Second Inaugural Address of William J. Clinton, 33 Weekly Comp. Pres. Doc. 63 (Jan. 20, 1997); Inaugural Address of George W. Bush, 37 Weekly Comp. Pres. Doc. 209-211 (Jan. 20, 2001).

[22] See S. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2113 & nn.174-182 (1996) (listing Thanksgiving proclamations); but see "Thomas Jefferson to Rev. Samuel Miller, 23 Jan. 1808," reproduced at 5 The Founders' Constitution, supra, at 98-99 (refusing to recommend a "day of fasting & prayer").

and behind the Chair of the Speaker of the House of Representatives. See Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-2, 116 Stat. 2057, 2060. The Constitutions of all 50 States, moreover, include express references to God. See Appendix B, infra. There thus "is an unbroken history of official acknowledgment by all three branches of government," as well as the States, "of the role of religion in American life from at least 1789." Lynch, 465 U.S. at 674.

B. The Establishment Clause Permits Official Acknowledgment Of The Nation's Religious Heritage And Character

That uninterrupted pattern of official acknowledgment of the role that religion has played in the foundation of the Country, the formation of its governmental institutions, and the cultural heritage of its people, counsels strongly against construing the Establishment Clause to forbid such practices. "If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). In fact, this Court's Establishment Clause cases have stated time and again that such official acknowledgments of the Nation's religious history and enduring religious character pass constitutional muster.

At its core, the Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

Beyond that, the Court has long refused to construe the Establishment Clause in a manner that "press[es] the concept of separation of Church and State to * * * extremes" and that thus would condemn as unconstitutional the "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." Zorach, 343 U.S. at 313.[23] That is because "the purpose" of the Establishment Clause "was to state an objective, not to write a statute." Walz, 397 U.S. at 668. That objective was not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," County of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring), or to compel the type of official disregard of or stilted indifference to the Nation's religious heritage and enduring religious character that the Ninth Circuit endorsed. "It is far too late in the day to impose [that] crabbed reading of the Clause on the country." Lynch, 465 U.S. at 687.

Indeed, this Court itself has "asserted pointedly" on five different occasions that "[w]e are a religious people whose institutions presuppose a Supreme Being." Lynch, 465 U.S. at 675;

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[23] See also Walz, 397 U.S. at 671 (the Court "decline[s] to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history"); Schempp, 374 U.S. at 306 (Goldberg. J., concurring) ("untutored devotion to the concept of neutrality can lead to * * * a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.").

Marsh, 463 U.S. at 792; Walz, 397 U.S. at 672; Schempp, 374 U.S. at 213; Zorach, 343 U.S. at 313.[24] The Establishment Clause thus does not deny the Judicial Branch the ability to acknowledge officially both the religious character of the people of the United States and the pivotal role that religion has played in developing the Nation's governmental institutions.

Neither does it compel the Executive and Legislative Branches to ignore that tradition. In Marsh v. Chambers, supra, the Court upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. In so holding, the Court discussed numerous other examples of constitutionally permissible religious references in official life "that form 'part of the fabric of our society,'" ibid., such as "God save the United States and this Honorable Court," id. at 786. Similarly, in Schempp, the Court explained, in the course of invalidating laws requiring Bible-reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending

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[24] See also Schempp, 374 U.S. at 213 ("[O]ur national life reflects a religious people."); McGowan, 366 U.S. at 562 (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.").

with "So help me God." 374 U.S. at 213; see Lynch, 465 U.S. at 676 (referring favorably to the National Motto, "In God we trust").

The opinions of individual Justices have further reinforced the proposition that acknowledgments of the Nation's religious heritage and character, are constitutionally permissible. See Lee, 505 U.S. at 633-635 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.) (noting long historical practice, consistent with Establishment Clause, of official references to God); County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., White & Scalia, JJ.) ("Government policies of * * * acknowledgment, and support for religion are an accepted part of our political and cultural heritage."); Lynch, 465 U.S. at 693 (O'Connor, J., concurring) ("In God We Trust" and "God save the United States and this honorable court" are constitutionally permissible acknowledgments of religion); Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring) ("The endorsement test does not preclude government from acknowledging religion."); Schempp, 374 U.S. at 306 (Goldberg, J., concurring, joined by Harlan, J.) ("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."); id. at 307-308 ("[T]oday's decision does not mean that all

incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause," citing to divine references in the Declaration of Independence and official Anthems); Engel, 370 U.S. at 449 (Stewart, J., dissenting) (citing as consistent with the Establishment Clause the National Motto "In God we trust").

Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678. Indeed, "[a]ny notion" that such measures "pose a real danger of establishment of a state church" would be "farfetched." Id. at 686. Instead, such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," ibid., simply takes note of the historical facts that "religion permeates our history," Edwards v. Aguillard, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of this Nation and in the founding of its government. Furthermore, because of their "history and ubiquity, such government acknowledgments of religion are not reasonably understood as conveying an endorsement of particular religious beliefs." County of Allegheny, 492 U.S. at 625 (O'Connor, J., concurring); see id. at 623 ("government recognition and acknowledgment of the role of religion in the lives of our

citizens" serve the "secular purposes of 'solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society'").

Indeed, even the stalwart separationist Thomas Jefferson found no constitutional impediment to such official acknowledgments of religion. Jefferson, along with Benjamin Franklin, proposed, in a "transparent allegory for America's ordeal," that the Great Seal of the United States depict the scene of God intervening to save the people of Israel by drowning Pharaoh and his armies in the Red Sea, ringed by the motto, "Rebellion to Tyrants is Obedience to God." See Religion and the Founding of the American Republic, supra, at 51 & fig. Thus, even Jefferson's view of the separation between church and State left ample room for official references to God and the Nation's religious heritage. That is because such official acknowledgments reflect the nationally defining and nationally unifying understanding of the Country's history and the role that religion has played in it. To insist that government must studiously ignore that one significant aspect of the Nation's history and character solely because of its religious basis -- while freely acknowledging the other political, philosophical, and sociological influences on American history -- would transform the Establishment Clause from a principle of neutrality into a mandate that religion be shunned. But the First Amendment prohibits only

the "establishment" of religion; it does not command complete estrangement.

C. The Pledge Of Allegiance, With Its Reference To A Nation "Under God," Is A Constitutionally Permissible Acknowledgment Of The Nation's Religious History And Character

For four decades, opinions of this Court and of individual Justices have spoken with unparalleled unanimity in affirming the constitutionality of the Pledge of Allegiance, characterizing its reference to God as a permissible acknowledgment of the Nation's religious heritage and character. That settled understanding has informed the Court's Establishment Clause jurisprudence and is entitled to respect.

In Lynch v. Donnelly, supra, the Court held that the Establishment Clause permits a city to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," 465 U.S. at 680, and noted that similar "examples of reference to our religious heritage are found," among other places, "in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which "is recited by many thousands of public school children -- and adults -- every year." Id. at 676. The words "under God" in the Pledge, the Court explained, are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and

pronouncements of the Founding Fathers" that are "replete" in our nation's history. Id. at 675, 677.

Likewise, in County of Allegheny, supra, the Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed Lynch's approval of the reference to God in the Pledge, noting that all the Justices in Lynch viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-603 (citations omitted). The Court then used the Pledge and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, ibid., and concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." Id. at 598; see id. at 603.

The individual opinions of nine Justices have likewise specifically endorsed the constitutionality of the Pledge, finding it consistent with the Establishment Clause. See Lee, 505 U.S. at 638-639 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.); Wallace, 472 U.S. at 78 n.5 (O'Connor, J., concurring); id. at 88 (Burger, C.J.,

dissenting); Schempp, 374 U.S. at 304 (Brennan, J., concurring); Engel, 370 U.S. at 449 (Stewart, J., dissenting).

As those opinions illustrate, the reference to God in the Pledge is not reasonably and objectively understood as endorsing or coercing individuals into silent assent to any particular religious doctrine. Rather, the Pledge is "consistent with the proposition that government may not communicate an endorsement of religious belief," County of Allegheny, 492 U.S. at 602-603, because the reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation continues as a matter of demographic and cultural fact to be "a religious people whose institutions presuppose a Supreme Being." Zorach, 343 U.S. at 313.

While none of those cases involved direct challenges to the Pledge, the court of appeals fundamentally erred in disregarding (Pet. App. 15) this Court's consistent statements over nearly three decades validating the Pledge. That is because, "[w]hen 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." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996). The Court's analysis of the Pledge and similar official acknowledgments of religion in Lynch and County of Allegheny were not "mere obiter

dicta" that the court of appeals was free to disregard. Id. at 66, They were components of the "well-established rationale upon which the Court based the results of its earlier decisions." Id. at 66-67. Those references articulated the constitutional baseline for permissible official acknowledgments of religion under the Establishment Clause against which the governmental practices at issue in each of those cases were then measured. Indeed, for decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," id. at 67, that the Pledge of Allegiance, and similar references, are constitutional.

D. The Pledge Of Allegiance, With Its Reference To God, May Be Recited In Public School Classrooms

The Establishment Clause inquiry is sensitive to context, see, e.g., Lynch, 465 U.S. at 680, and the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools," Edwards, 482 U.S. at 583-584; see Lee, 505 U.S. at 592. Nevertheless, this Court's Establishment Clause precedent does not require public schools to expunge any and all references to God and religion from the classroom. Rather, in Engel v. Vitale, supra, in the course of invalidating official school prayers, the Court took pains to stress:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the

> Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise [official prayer] that the State of New York has sponsored in this instance.

370 U.S. at 435 n.21.

In determining whether recitation of the Pledge in public school classrooms comports with the Establishment Clause, the Court "ask[s] whether the government acted with the purpose of advancing or inhibiting religion" and whether recitation of the Pledge has the "'effect' of advancing or inhibiting religion." Agostini v. Felton, 521 U.S. 203, 222-223 (1997); see Santa Fe, 530 U.S. at 306-308. Recitation of the Pledge in petitioners' public school classrooms has no such impermissible purpose or effect.

1. The Purpose of Reciting the Pledge is to Promote Patriotism and National Unity

A statute or rule runs afoul of the Establishment Clause's purpose inquiry only if it is "entirely motivated by a purpose to advance religion." Wallace, 472 U.S. at 56; see Lynch, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"). Petitioners adopted their policy of having teachers lead willing students in the daily recitation of the Pledge for the avowed purpose of promoting patriotism, not advancing religion. The single-sentence policy, which directs that "[e]ach elementary school class recite the

pledge of allegiance to the flag once each day," falls right below the heading "Patriotic Observances." Elk Grove Unified Sch. Dist. Policy AR 6115. Petitioners adopted the policy, moreover, to comply with California law, which requires that each public elementary school "conduct[] appropriate patriotic exercises" at the beginning of the school day. Cal. Educ. Code § 52720 (West 1976). The law provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Ibid. The promotion of patriotism and instillation of "a broad but common ground" of shared values in the children attending public schools, Ambach v. Norwick, 441 U.S. 68, 77 (1979), is a "clearly secular purpose," Wallace, 472 U.S. at 56. See also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681, 683 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order.").

"Newdow concedes[] the school district had the secular purpose of fostering patriotism in enacting the policy," Pet. App. 48, and the court of appeals did not find otherwise. Newdow's complaint, however, emphasizes certain statements from the 1954 legislative history accompanying Congress's amendment of the Pledge to include the phrase "under God." J.A. 31-34; Complaint App. B. That analysis is wrong as a matter of both fact and law.

First, as a matter of fact, the 1954 amendment adding the phrase "under God" to the Pledge did not have the single-minded purpose of advancing religion that Newdow portrays. The Committee Reports viewed the amendment as a permissible acknowledgment that, "[f]rom 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." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); see also S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. * * * Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports traced the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to President Lincoln's Gettysburg Address, with the latter having employed the same reference to a "Nation[] under God." H.R. Rep. No. 1693, supra, at 2; S. Rep. No. 1287, supra, at 2.

The Reports further identified a political purpose for the amendment -- it would highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being" and "[u]nderlying this concept is the belief that

the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, supra, at 1-2; see S. Rep. No. 1287, supra, at 2. Congress thus added "under God" to highlight the Framers' political philosophy concerning the sovereignty of the individual -- a philosophy with roots in 1954, as in 1787, in religious belief -- to serve the political end of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, supra, at 2; see S. Rep. No. 1287, supra, at 2 ("The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men's minds and this resolution gives us a new means of using that weapon.").

The House Report further underscored the vital role the amended Pledge would play in educating children about the foundational values underlying the American system of government. Through "daily recitation of the pledge in school," "the children of our land * * * will be daily impressed with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us." H.R. Rep. No. 1693, supra, at 3; see 100 Cong. Rec. 1700 (Rep. Rabaut) (1954) ("From their

earliest childhood our children must know * * * that this is one Nation [where] 'under God' means 'liberty and justice for all.'").

No doubt some Members of Congress might have been motivated, in part, to amend the Pledge because of their religious beliefs. But "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384 (1968). In any event, the Establishment Clause focuses on "the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990); see McGowan v. Maryland, 366 U.S. 420, 469 (1961) (opinion of Frankfurter, J.).

Second, as a matter of law, because Newdow's suit challenges contemporary practices -- petitioners' Pledge-recitation policy and the federal government's continued use of and refusal to amend the Pledge, see J.A. 69-70 -- the purpose inquiry focuses on petitioners' current policy of reciting the Pledge and the federal government's modern-day purpose for retaining it intact.[25] In McGowan, supra, the Court acknowledged that Sunday closing laws originally "were motivated by religious forces," 366 U.S. at 431, but nevertheless sustained those laws against Establishment Clause

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[25] The contemporary federal government's purpose for retaining the Pledge of Allegiance, including its reference to God, also advances the legitimate, secular purpose of "acknowledgment of the religious heritage of the United States." H.R. Rep. No. 659, 107th Cong., 2d Sess. 4 (2002).

challenge because modern-day retention of the laws advanced secular purposes, id. at 434. The Court reasoned that, to proscribe laws that advanced valid secular goals "solely" because they "had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." Id. at 445; see also Freethought Soc'y v. Chester County, 334 F.3d 247, 261-262 (3d Cir. 2003).

2. The Pledge Has the Valid Secular Effect of Promoting Patriotism and National Unity

Petitioners' policy of leading willing students in recitation of the Pledge of Allegiance serves the secular values of promoting national unity, patriotism, and an appreciation for the values that define the Nation. "National unity as an end which officials may foster by persuasion and example is not in question." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); see Sherman v. Community Consol. Sch. Dist., 980 F.2d 437 (7th Cir. 1992) ("Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values."), cert. denied, 508 U.S. 950 (1993).

The "relevant question[]" in analyzing whether recitation of the Pledge also has the effect of endorsing religion is "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy], would perceive it as a state endorsement of prayer" or religion "in public schools." Santa Fe,

530 U.S. at 308. There is no reasonable basis for perceiving such religious endorsement in the Pledge. The Pledge is not a "profession of a religious belief," Pet. App. 11-12, but a statement of allegiance and loyalty to the Flag of the United States, as a representative of the Republic itself. By its common understanding, a "pledge" of "allegiance" is a "promise or agreement" of "devotion or loyalty" "owed by a subject or citizen to his sovereign or government." Webster's Third New Int'l Dictionary 55, 1739 (1993); see American Heritage Dictionary of the English Language 47, 1390 (3d ed. 1992).

The court of appeals, however, trained its focus on the two-word phrase "under God" and concluded that uttering that phrase amounted to "swear[ing] allegiance to * * * monotheism." Pet. App. 12. That conclusion is wrong in three fundamental respects.

a. The Pledge Must Be Considered as a Whole

In divorcing the phrase "under God" from its larger context, the court of appeals "plainly erred." Lynch, 465 U.S. at 680. In Lynch, this Court stressed that the Establishment Clause analysis looks at religious symbols and references in their broader setting, rather than "focusing almost exclusively on the" religious symbol alone. Ibid. The Lynch Court accordingly did not ask whether the government's display of a creche -- a clearly sectarian symbol -- was permissible. The Court analyzed whether the overall message conveyed by a display that included both that religious and other

secular symbols of the holiday season conveyed a message of endorsement, and concluded that it did not. Id. at 680-686.

Likewise, in County of Allegheny, the Court analyzed and upheld the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and Menorah. 492 U.S. at 616. The Court thus looked at the content of the display as a whole, rather than focusing on the presence of the Menorah and the religious message that the Menorah would convey in isolation. Id. at 616-620. That Congress added the phrase "under God" to a preexisting Pledge does not change this analysis. The city government in County of Allegheny had likewise added the Menorah, after the fact, to a preexisting holiday display. Id. at 581-582. Yet this Court focused its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. Id. at 616-620 & n.64.[26]

Read as a whole, the Pledge is much more than an isolated reference to God. Congress did not enact a pledge to a religious symbol, a pledge to God, or a pledge of "belief in God." Individuals pledge allegiance to "the Flag of the United States of

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[26] See also Zelman v. Simmons-Harris, 536 U.S. 639, 656-657 (2002) (Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged); id. at 672-673 (O'Connor, J., concurring) (same); Wallace, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (later addition of "under God" to the Pledge does not run afoul of the Establishment Clause because it "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future'").

America," and "to the Republic for which it stands." 4 U.S.C. 4. The remainder of the Pledge is descriptive, not "normative" (Pet. App. 12) -- delineating the culture and character of that Republic as a unified Country, composed of individual States yet indivisible as a Nation, established for the purposes of promoting liberty and justice for all, and founded by individuals whose belief in God gave rise to the governmental institutions and political order they adopted and continues to inspire the quest for "liberty and justice" for each individual. See J. Baer, The Pledge of Allegiance: A Centennial History, 1892-1992 48-49 (1992) (discussing the "national doctrines or ideals" that inspired the text of the Pledge). The Pledge's reference to a "Nation under God," in short, is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing demographic character -- a statement that itself is simply one component of a larger, more comprehensive patriotic message.

b. Reciting the Pledge is not a Religious Exercise

The court of appeals' decision proceeds from the faulty premise that reciting the Pledge's acknowledgment of the Nation's religious heritage is tantamount to praying or Bible reading. The decisions of this Court and individual Justices outlined above, however, repeatedly admonish that not every reference to God amounts to an impermissible government-endorsed religious exercise,

and they expressly refer to the Pledge and similar ceremonial references in contradistinction to formal religious exercises like prayer and Bible reading. Prayer is a medium for calling upon, invoking, or speaking to God or a divine entity, conveying reverence, thankfulness, or praise to God, and seeking the Deity's blessings, favor, assistance, or forgiveness. Prayer, in short, is an interactive relationship between the person and a Higher Being.[27]

This Court's decisions have long understood the difference between a prayer and a patriotic or ceremonial reference to God. In Engel, supra, the Court struck down the New York public school system's practice of reciting a nondenominational Regents prayer because that formal "invocation of God's blessings" was a religious activity, "a solemn avowal of divine faith and supplication for the blessings of the Almighty." 370 U.S. at 424. The Court contrasted the Regents prayer with the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity," concluding that "[s]uch patriotic or ceremonial

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[27] See Marsh, 463 U.S. at 811 (Brennan, J., dissenting) ("'Prayer is religion in act.' 'Praying means to take hold of a word, the end, so to speak, of a line that leads to God.'"); Encyclopedic Dictionary of Religion, O-Z 2852 (P. Meagher, et al. eds., 1979) ("prayer" is "the free approach of man to God to seek the divine benevolence and the benefits he needs for life, both temporal and eternal"); Cambridge Encyclopedia 971 (D. Crystal ed., 1990) ("prayer" is "[t]urning to God in speech or silent concentration," and "includes petition, adoration, confession, invocation, thanksgiving, and intercession"); Oxford Dictionary of World Religions 762-764 (J. Bowker ed., 1997) ("prayer" is "[t]he relating of the self or soul to God in trust, penitence, praise, petition, and purpose").

occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored." Id. at 435 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York's practice of preceding the prayer with recitation of the Pledge. See id. at 440 n.5 (Douglas, J., concurring).

Likewise, in the course of striking down school prayer in Schempp, the Court noted, without a hint of disapproval, that the students also recited the Pledge of Allegiance immediately after the invalidated prayer. Schempp, 374 U.S. at 207. That is because, as the concurrence explained, "daily recitation of the Pledge of Allegiance * * * serve[s] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." Id. at 281 (Brennan, J., concurring). "The reference to divinity in the revised pledge of allegiance," the concurrence continued, "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'" Id. at 304. Its recitation thus is "no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." Ibid.; see Lee, 505 U.S. at 583 (striking down graduation prayer, without suggesting that the Pledge, which preceded the prayer, was at all constitutionally questionable).

As those cases recognize, describing the Republic as a Nation "under God" is not the functional equivalent of prayer. No communication with or call upon the Divine is attempted. The phrase is not addressed to God or a call for His presence, guidance, or intervention. Nor can it plausibly be argued that reciting the Pledge is comparable to reading sacred text, like the Bible, or engaging in an act of religious worship. The phrase "Nation under God" has no such established religious usage as a matter of history, culture, or practice.

The court of appeals attempted to distinguish the Pledge from other references to God in public life on the ground that the Pledge is "a performative statement," rather than simply "a reflection of [an] author's profession of faith." Pet. App. 16. It is true that the Pledge is a "declar[ation] [of] a belief," Barnette, 319 U.S. at 631, but the belief declared is not monotheism; it is a belief in allegiance and loyalty to the United States Flag and the Republic that it represents. That is a politically performative statement, not a religious one. A reasonable observer, reading the text of the Pledge as a whole, cognizant of its purpose, and familiar with (even if not personally subscribing to) the Nation's religious heritage, would understand that the reference to God is not an approbation of monotheism, but a patriotic and unifying acknowledgment of the role of religious

faith in forming and defining the unique political and social character of the Nation.

Beyond that, the attempted distinction of the Pledge from other permissible acknowledgments of religion in public life makes no sense. With respect to "impressionable young schoolchildren," id. at 15, there simply is no coherent or discernible "performative" difference between having them say the Pledge, rather than sing the "officially espoused" National Anthem ("And this be our motto "In God is our Trust."), Engel, 370 U.S. at 435 n.21, or having them memorize and recite the National Motto ("In God we trust"), 36 U.S.C. 302 (emphasis added), the Declaration of Independence, 1 U.S.C. p. XLIII ("We hold these truths to be self-evident, that all men * * * are endowed by their Creator with certain unalienable Rights.") (emphasis added), or the Gettysburg Address. Indeed, the court of appeals' approach leads to the curious conclusion that the recitation of Bible passages or long-established prayers in public schools, where students "merely * * * repeat the words of an historical document," Pet. App. 16, would trench less upon Establishment Clause principles than the Pledge's two-word acknowledgment of the Nation's religious heritage.

c. The Pledge Recital Policy is not Coercive

The court of appeals ultimately rested its determination that recital of the Pledge by willing students violates the Establishment Clause on the ground that the practice has a

"coercive effect," because it forces students to choose between "participating in an exercise with religious content or protesting." Pet. App. 13. That test has no basis in Establishment Clause jurisprudence and is unworkable in the public school environment.

First, the court of appeals' "coercion" analysis fails because it is based on the false premise that reciting the Pledge is a religious exercise. The test for unconstitutional coercion is not whether some aspect of the public school curriculum has "religious content" (Pet. App. 13), but whether the government itself has become pervasively involved in or effectively coerced a religious exercise. In Lee -- the case on which the court of appeals placed critical reliance (id. at 10-11, 13) -- the Court held that the Establishment Clause proscribes prayer at secondary school graduations. Lee, 505 U.S. at 599. What made those prayers unconstitutionally coercive, however, was their character as a pure "religious exercise" and the government's "pervasive" involvement in institutionalizing the prayer, to the point of making it a "state-sponsored and state-directed religious exercise." Id. at 587. Coercion thus arose because (1) the exercise was so profoundly religious that even quiet acquiescence in the practice would exact a toll on conscience, id. at 588 ("the student had no real alternative which would have allowed her to avoid the fact or appearance of participation"), and (2) the force with which the

government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well, id. at 592-594.

Those concerns have little relevance here. Reciting the Pledge or listening to others recite it is a patriotic exercise. It is not a religious exercise at all, let alone a core component of worship like prayer. Nor has the government, by simply acknowledging the Nation's religious heritage, so intruded itself into religious matters as to pressure or intimidate schoolchildren into violating the demands of conscience. Classroom "exposure to something does not constitute teaching, indoctrination, opposition or promotion of * * * any particular value or religion." Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1063 (6th Cir. 1987), cert. denied, 484 U.S. 1066 (1988). Government does not make "religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Whatever "incidental" benefit might befall religion from government's acknowledgment of the Nation's religious heritage is not of constitutional moment. Capitol Square, 515 U.S. at 768. The Establishment Clause is not violated just because a governmental practice "happens to coincide or harmonize with the tenets of some

or all religions." McGowan, 366 U.S. at 442; see Lynch, 465 U.S. at 683.

Second, any analysis of the coercive effect of voluntary recital of the Pledge must take into account this Court's repeated assurances that the "many manifestations in our public life of belief in God," Engel, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," Marsh, 463 U.S. at 792, including in public school classrooms. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, "has become embedded" in the American consciousness and "become part of our national culture." Dickerson v. United States, 530 U.S. 428, 443 (2000). Public familiarity with the Pledge's use as a patriotic exercise and a solemnizing ceremony for public events ensures both that the reasonable observer, familiar with the context and historic use of the Pledge, will not perceive governmental endorsement of religion at the mere utterance of the phrase "under God," and that petitioners' Pledge policy has no more coercive effect than the use of currency that bears the National Motto "In God we trust." Moreover, the text of the Pledge has become so engrained in the national psyche that declaring it unconstitutional would have its own Establishment Clause costs, as a generation of school children would struggle to unlearn the Pledge they have recited for years and, under the direction of public school teachers, would labor to

banish the reference to God from their memory. That would bespeak a level of hostility to religion that is antithetical to the very purpose of the Establishment Clause.[28]

Finally, the public schools cannot perform their job of educating the next generation of citizens and teaching those values that are "essential to a democratic society," Bethel, 478 U.S. at 681, if they have to expunge all pedagogical "exercise[s] with religious content," because they would perforce compel students to choose "between participating * * * or protesting" (Pet. App. 13). The Declaration of Independence has "religious content"; the Gettysburg Address has "religious content"; many famous works of art, literature, and music have "religious content."[29] To those whose faith demands a purely domestic role for women or opposes racial integration, history lessons about the women's suffrage and civil rights movements have "religious content." See Mozert, 827 F.2d at 1062. "[M]any political issues have theological roots." Id. at 1064. The reality is that the Nation's history and culture

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[28] See Schempp, 374 U.S. at 225 ("[T]he State may not establish a religion of secularism in the sense of * * * preferring those who believe in no religion over those who do believe.") (internal quotation marks omitted); Zorach, 343 U.S. at 314.

[29] Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235-236 (1948) (Jackson, J., concurring) ("But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view.").

have religious content, and "[i]f we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235 (1948).

Thus, public schools may teach not just that the Pilgrims came to this country, but also why they came. They may teach not just that the Framers conceived of a governmental system in which power and inalienable rights resided in the individual, but also why they thought that way. They may teach not just that abolitionists opposed slavery, but also why they did. See Edwards, 482 U.S. at 606-607 (Powell, J., concurring) ("As a matter of history, schoolchildren can and should properly be informed of all aspects of this Nation's religious heritage. I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."). The reference to a "Nation under God" in the Pledge of Allegiance is an official and patriotic acknowledgment of what all students -- Jewish, Christian, Muslim, or atheist -- may properly be taught in

the public schools.[30] Recitation of the Pledge by willing students thus comports with the Establishment Clause.

CONCLUSION

The judgment of the court of appeals should be vacated with directions to dismiss the complaint for lack of standing or lack of jurisdiction. In the alternative, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[30] See, e.g., Our Country, 160-162, 212-213, 273-275 (Silver Burdett Ginn ed. 1995) (elementary school history textbook); Horizons 80-81, 115, 131-132(Harcourt ed. 2003) (same); California State Bd. of Educ., History-Social Science Content Standards for Calif. Public Schools Kindergarten Through Grade Twelve §§ 3.3, 5.4, 8.2, 11.3 (Oct. 1998).