No. 02-1624

IN THE
SUPREME COURT OF THE UNITED STATES

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT,
Petitioners,
vs.
MICHAEL A. NEWDOW,
Respondent.

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

BRIEF *AMICUS CURIAE* OF ANTI-DEFAMATION LEAGUE IN SUPPORT OF RESPONDENT

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MISCELLANEOUS

INTEREST OF *AMICUS*[1]

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat religious, ethnic, and racial prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations dedicated to fighting hatred, bigotry, and discrimination. ADL's mission is "to stop . . . the defamation of the Jewish people[,] . . . to secure justice and fair treatment to all citizens alike[,] and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE CHARTER (1913). ADL believes that the vigorous defense of our Nation's rights of religious liberty and freedom of conscience are critical in achieving this mission.[2]

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[1] *Amicus* has obtained and lodges herewith the written consents of the parties to the submission of this brief, and affirms that no counsel for a party authored this brief in whole or in part, and that no person, other than *amicus* and its counsel, made a monetary contribution to its preparation or submission. SUP. CT. R. 37.3(a); SUP. CT. R. 37.6.

[2] ADL has accordingly participated as *amicus* in this Court's major church-state cases over the last 56 years. *See* ADL briefs *amicus curiae* filed in *Locke v. Davey*, No. 02-1315 (U.S. filed 2003); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Lee v. Weisman*, 505 U.S. 577 (1992); *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481 (1986); *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v.*

(Continued…)

In recent decades, our Nation's public schools have unfortunately become a principal battleground in the contest over the meaning of religious establishment. In this contest, ADL has long believed, and has long argued, that government-sponsored religious activity in our schools poses a particular threat to the continued vitality of religious liberty. It submits this brief in furtherance of that belief.

STATEMENT

The Pledge of Allegiance is a central patriotic declaration of the American people. The original text of the Pledge, promulgated by private citizens in 1892, carried a purely patriotic, and secular, message. *See* John W. Baer, THE PLEDGE OF ALLEGIANCE: A CENTENNIAL HISTORY, 1892-1992, at 1-3. That version of the Pledge existed, essentially unaltered, for 62 years, and Congress codified it in 1942. Act of June 22, 1942,Pub. L. No. 77-623, §, 56 Stat. 380. In 1954, the Knights of Columbus called on Congress to include a religious message in the Pledge, and Congress amended the Pledge to include in its text the words "under God" after its reference to "one Nation." Act of June 14, 1954, Pub. L. No. 83-386, § 7, 68 Stat. 249. Thus, since 1954, the full text of the Pledge 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 (1998).

Chambers, 463 U.S. 783 (1983); *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Engel v. Vitale*, 370 U.S. 421 (1962); and *McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

California requires that public elementary schools conduct patriotic exercises at the beginning of each school day. CAL. EDUC. CODE § 52720 (West 1989). Schools may satisfy the requirement by the giving of the Pledge. *Id.* In furtherance of that state law, petitioners adopted a policy requiring their district's elementary school classes to recite the Pledge each school day. Pet. App. 1.

Respondent, a parent of a child attending school in the Elk Grove Unified School District, challenged this policy. The district court dismissed his complaint. The court of appeals reversed, holding that the policy violated the Establishment Clause. The court noted that the "*sole* purpose" of the 1954 Act of Congress adding the words "under God" to the Pledge was to "advance religion," *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2003), and held that the Pledge was 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 607. The panel later filed an amended opinion limiting its holding to invalidation of the Pledge as daily recited in the classroom. *Newdow v. United States Congress*, 328 F.3d 466, 487-90 (9th Cir. 2003). The court found that daily recitation of the Pledge has a "coercive effect," and "places students in the untenable position of choosing between participating in an exercise with religious content or protesting." *Id.* at 488.

SUMMARY OF ARGUMENT

1. For over four decades, in an unbroken line of cases, this Court has invalidated various forms of state-prescribed or state-approved religious expression and teaching in primary and secondary public schools. Those controlling

precedents compel the invalidation of the state-prescribed religious affirmation in this case as well. There is accordingly no occasion for the Court to revisit or resolve difficult Religion Clause questions that arise outside the public-school context, including questions concerning other forms of government-approved religious expression.

2. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992). This principle has special force in the public-school setting, where there is subtle coercive pressure for primary and secondary school students to embrace as truth the views, beliefs, and norms that they learn from their teachers and peers. The school setting places undue coercion on students to join their fellow students in state-prescribed religious expression, or to engage in silent protest that may well be misperceived as silent approval. This places the objecting student in an untenable position, and thereby exacts religious conformity in a manner that the Constitution forbids.

3. Such constitutional concerns are even more pronounced in this case than they were in *Lee*. Although the Pledge does not involve prayer as such, it does include "an essential and profound recognition of divine authority," *id.* at 594, namely, affirmation of a religious creed recognizing a single God. Moreover, the Pledge is a regular patriotic ritual of unique importance, recited with precisely the same words, every morning, year after year, prescribed by school authorities and led by students' classroom teachers – thus powerfully conveying to students that its recitation is the norm to which they are expected to conform. When first introduced to this daily rite, students are young and highly impressionable, and are captive audiences. The vast

majority of students, therefore, either will feel compelled to recite the Pledge, or will recite it as a matter of rote, in which case it will become second nature before a student even has the opportunity to reflect critically on its substance. Coercion and inculcation in such a setting, with such an audience, are unavoidable. In addition, daily recitation conveys to dissenters and nonbelievers, and to polytheistic and nontheistic religious students and their families the unmistakable, but unconstitutional, message that those who do not believe in the single God to which the Pledge refers are outsiders, rather than full members of the political community that otherwise consists of "one Nation . . . indivisible."

4. The right of students to "opt out" of reciting the Pledge, although sufficient to ameliorate the problem of compelled speech that this Court recognized in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), does not suffice to satisfy the Establishment Clause. As this Court explained in *Lee*, although a school may constitutionally attempt to persuade even objecting students of the truth of nonreligious precepts, the same is not true with respect to matters of religious conscience: "[T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 505 U.S. at 591.

5. Contrary to the argument of the United States, the words "under God" are not a mere acknowledgement of historical fact. Indeed, such a characterization trivializes the solemn nature of the Pledge. Instead, these words were designed by the Congress, and understood by the President, to induce children on a daily basis to proclaim "the dedication of our Nation and our people to the Almighty," and to affirm "the transcendence of religious faith" in

America and a "belief in the sovereignty of God." There is no reason to think that schoolchildren understand those words any differently than was contemplated by those who designed them – namely, as an affirmation that our "one Nation" is, indeed, "under God."

6. The other justifications that petitioners and their *amici* offer do not legitimize the practice of daily classroom recitation of the words "under God." Although these words may serve to solemnize public functions, the remainder of the Pledge is wholly adequate to that task, and this Court has explained that there is no constitutional justification for the State to prefer, let alone to prescribe, a religious means of such solemnization. Recitation of the Pledge of Allegiance is not analogous to the practice of legislative prayer that the Court has approved. The words "under God" do not share the "unique history" of the use of invocations to open legislative sessions, and, more importantly, the coercive potential of a religious recitation in the classroom is far greater than that of legislative prayer. The constitutional violation here is not "*de minimis*" – the words "under God" are recited daily in a highly impressionable and coercive setting. Finally, removal of the words "under God" from the Pledge in the classroom would not bespeak any hostility to religion nor undermine Establishment Clause values; it would, instead, protect the essential postulates of religious liberty that are the underpinnings of this Court's decisions in cases involving religious expression in public schools.

* * *

ARGUMENT

I. PUBLIC SCHOOLS MAY NOT, CONSISTENT WITH THE CONSTITUTION, COERCE STUDENTS TO PLEDGE ALLEGIANCE TO THE CREDO THAT OUR "ONE NATION" IS "UNDER GOD"

In a series of cases spanning almost a half-century, this Court has considered the constitutionality of various forms of state-initiated, or state-approved, religious expression and teaching in primary and secondary public schools. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). In *each* of those cases, the Court has held that the Religion Clauses of the First Amendment prohibited the public schools from teaching students religious precepts, or inducing students to engage in prayer.

The explanation for this unbroken line of decisions involving state-initiated religious expression in public schools is straightforward – namely, that young students are impressionable, and are susceptible to embracing the views, beliefs, and norms that their schools (and their teachers) prescribe. Outside the context of *religious* expression and teaching, the likelihood that students will embrace much of what they are taught is constitutionally tolerable, and generally does not call into question the State's attempt to persuade its charges to learn certain truths, or to adopt certain values or lessons – at least as long as the students are not required to affirm the State's preferred beliefs and ideas, *see West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624,

642 (1943), and are permitted to seek their education outside the public schools, *see Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Indeed, it is one of the principal functions of public schools to inculcate in students certain knowledge, skills, and civic values. Thus, "[b]y the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these." *Lee*, 505 U.S. at 590-91.

The constitutional problem is fundamentally different, however, and the possibility of constitutional harm more pronounced, when it comes to a school's inculcation of *religious* beliefs and values, for, as this Court explained in *Lee*, "[t]he First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id*. at 589. For that reason, it is a "timeless lesson" of the Religion Clauses "that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Id*. at 592. Just as in *Lee*, the present case implicates state-prescribed religious affirmation in public primary and secondary schools. Accordingly, as in *Lee*, the "controlling precedents" of this Court's public-school cases lead inexorably to the conclusion that the religious affirmation that the Elk Grove School District prescribes, as an integral part of a daily patriotic exercise, violates the Religion Clauses – and such a holding follows straightforwardly from the Court's school cases "without reference to [the Court's Religion Clause] principles in other contexts." *Id.* at 586.

Therefore, this case, like *Lee*, "does not require [the Court] to revisit the difficult questions dividing [the Justices]

in recent cases" involving Religion Clause questions *outside* the public-school context. *Id.* Thus, for example – and contrary to what the United States implies, *see* Brief for the United States as Respondent Supporting Petitioners ("U.S. Br.") at 26-31 – this case does *not* require the Court to resolve difficult issues concerning *other* official governmental invocations of God or religion outside the school context (such as the currency notation "In God We Trust" or this Court's tradition of beginning each session with the words "God Save the United States and this Honorable Court"), let alone official acknowledgments of the role of religion in the Nation's history, or other historical facts. Indeed, this case does not even present any broader questions concerning the Pledge itself, such as whether it is constitutional when recited by government officials with an adult audience *outside* the public schools; nor does the case require the Court to opine on the constitutionality of the federal statute, 4 U.S.C. § 4, codifying (but not requiring anyone to recite) a particular version of the Pledge.

A. School-Initiated Or School-Approved Religious Activity In Formal School Settings Is Inevitably Coercive And Therefore Effectively, And Unconstitutionally, Compels Students To Violate Their Religious Conscience.

In *Lee*, this Court emphasized the "central principle" that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. at 587. The Court reiterated what it had "observed before," namely, "that there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id.* at 592. Applying these time-honored principles in the context of a *secondary*-school setting, the Court in *Lee* held that a policy of prayer by

invited religious personnel at high school graduation ceremonies was unconstitutional.

Those defending the graduation prayer policy in *Lee* argued that no religious coercion was present because recitation of the prayers at the ceremony would do no more than "offer a choice," *id.*, that a high school student was free to accept or reject. The Court rejected that "freedom of choice" argument in no uncertain terms:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593.

The Court described the constitutional dangers present where the State is responsible for such pressure with respect to matters of religious conscience. A student who does not believe in the religious sentiments of the graduation prayer, or who for any other reason does not wish to engage in that particular religious expression in that setting, has three choices: (i) she can join the assemblage in prayer, against the dictates of her conscience, in order to avoid conflict and peer pressure; (ii) she can visibly protest or dissent, such as by sitting; or (iii) she can stand in respectful silence. Although the latter two options would not involve any direct violation of the student's conscience regarding religious matters, the Court explained that in those cases "the injury is no less real" because, absent a conspicuous objection on her part, and "given our social conventions, a reasonable dissenter in

this milieu could believe that the group exercise signified her own participation or approval of it." *Id.* The "dilemma" of choosing among these options placed an objecting student "in an untenable position," *id.* at 590, "in effect requir[ing] participation in a religious exercise." *Id.* at 594. "The Constitution," the Court concluded, "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation." *Id.* at 596.

Moreover – and especially in the case of a rare student who could voluntarily and effectively dissent from the school's religious exercise – the prayer would violate the Establishment Clause for yet another reason, namely, that it would send an "ancillary" message from the State that nonadherents and other dissenters "are outsiders, not full members of the political community," as well as "an accompanying message to adherents that they are insiders, favored members of the political community." *Santa Fe Indep. School Dist.*, 530 U.S. at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). The Establishment Clause forbids the government from conveying to students these messages of insider and outsider status on the basis of religion. *See also Lee*, 505 U.S. at 606 n.9 (Blackmun, J.) (citing *Wallace v. Jaffree*, 472 U.S. 38, 69 (O'Connor, J., concurring in judgment)).

B. The Daily Practice of Teacher-Led Religious Affirmation In This Case Poses Constitutional Dangers Even Greater Than Those Present In The Graduation Setting In *Lee*.

The Court's holding and rationale in *Lee* – and in the Court's long line of cases involving state-prescribed religious expression in public schools – are directly apposite here, and suffice to explain why Petitioners' instruction to

students to affirm daily that we are "one Nation under God" is unconstitutional. Indeed, some aspects of the petitioners' practice make it *more* objectionable from the perspective of the Religion Clauses than was the policy at issue in *Lee* itself.

To be sure, *Lee* involved formal prayer, such as religious invocations and benedictions, *see Lee*, 505 U.S. at 581-82, and this case does not involve prayer, as such. But in the context of public schools, this Court has not limited its Religion Clause scrutiny to expression that takes the form of prayer. The Court has "repeatedly recognized," for instance, that "government *inculcation of religious beliefs* [in public schools] has the impermissible effect of advancing religion." *Agostini v. Felton*, 521 U.S. 203, 223 (1997) (emphasis added); *see also Mitchell v. Helms*, 530 U.S 793, 840-43 (2000) (O'Connor, J., concurring in the judgment) (direct government aid may not be used for "religious indoctrination," to "inculcate religion," or for "religious teaching"); *Edwards v. Aguillard*, 482 U.S. at 614. In this case, as in *Lee*, and as in the Court's *per curiam* decision concerning the Ten Commandments in *Stone v. Graham*, 449 U.S. 39 (1980), the expression in question is "an essential and profound recognition of divine authority." *Lee*, 505 U.S. at 594. Surely, such a core religious creed is as worthy of the protections of the Religion Clauses as is formal prayer.[3]

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[3] Presumably, for example, public school teachers could not instruct students, as part of the standard curriculum, that we are, in fact, "one Nation under God." Conversely, a private individual's own affirmation to the same effect would be entitled to the fullest protection of the Free Exercise Clause, whether or not in the form of prayer.

What is more, petitioners' practice of daily recitation of the Pledge raises concerns about the coercion of religious belief and expression that are much more acute than when a school official expresses a religious view or instructs students on a matter of faith. We must not forget, after all, that it is a pledge we are considering here – indeed, a pledge of *allegiance*. Those who recite the Pledge are swearing, or promising ("pledging"), fealty to a specific, particularized conception of our Flag and to "the Republic for which it stands." For instance, a student reciting the Pledge is affirming the credo that "liberty and justice" are, and ought to be, "for all." Similarly, one reciting the Pledge, with hand on heart, standing at attention, is most reasonably viewed as professing fealty to the conviction that we are "one Nation under God." Thus, in order to be able to affirm allegiance to Flag and Republic in the manner prescribed by the state, elementary school children must, in effect, profess that we are "one Nation under God," a commitment of belief concerning important questions of faith. In simplest terms, a schoolchild's recital of the government-prescribed Pledge affirms a belief in the existence of God, indeed, of a *single* God, and of that single God's superintendence over our one, indivisible, Nation. This affirmation is elicited, not only from nonreligious students, but also from countless students whose religions do not recognize a god, from those who believe in more than one god, and even from many students who believe in a single god but who do not think it proper to affirm publicly a religious creed.

There are other important distinctions, as well, that make this case more constitutionally troubling than *Lee*. The policy in *Lee* was for prayer to be recited by a person from outside the school, on a single occasion at the conclusion of the students' many years in public school. The content of

those graduation prayers would vary, and was subject to some individual discretion. The Pledge, by contrast, is recited, with precisely the same words, *first thing every morning*, year after year – for a typical student, more than 2000 times over the course of her tenure in public school. It is, in other words, a ritual of unique importance and regularity, having a manifest pride of place in the classroom, no matter what else might be on a particular day's curriculum. *See Lee*, 505 U.S. at 596 (risk of compulsion in the classroom setting "is especially high"). Indeed, the Elk Grove School District *requires* that each *elementary school* class recite the Pledge each day. Petitioners' Brief on the Merits ("Pet. Br.") at 3. And it is the students' classroom teachers – their principal mentors and role models – who ordinarily lead the assembled class in the Pledge. The school district's requirement that each class recite the Pledge, and the fact that teachers lead its recital, convey to the students that this is the norm to which they are expected to conform their conduct. Moreover, whereas attendance at high-school graduation in *Lee* was mandatory only in a practical sense (because few students would want to miss it), *see* 505 U.S. at 589, the students reciting the Pledge in the Elk Grove School District are captive audiences in a literal sense: They are required by law to attend class.

Finally, students affected by the policy in *Lee* were graduating high school seniors whose views and beliefs had already been formed over many years, and whose intellectual fortitude and capacity for nonconformity presumably were substantially developed. By contrast, the Pledge in the Elk Grove School District is recited daily by highly impressionable children beginning as early as kindergarten. It ought to go without saying that the vast majority of students, from a very young age, either will feel

compelled to recite the Pledge, or recite it as a matter of rote, in the manner learned from one's teachers and fellow students – in which case its recitation will become second nature before a student even has the opportunity to reflect critically on its substance. The coercion, the *inculcation*, in such a setting with such a young and impressionable audience is unavoidable. As Judge Goodwin, writing for the court of appeals panel, noted, "[t]he coercive effect of the policy here is particularly pronounced in the school setting given the age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their schools, their teacher and their fellow students." *Newdow v. United States Congress*, 328 F.3d 466, 488 (9th Cir. 2003).

In the mine run of cases, therefore, the school's daily recitation of the Pledge will, in fact, violate the central constitutional precept that a state may not "force [an individual] to profess a belief or disbelief in any religion." *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947). If, as this Court held in *Lee*, the Constitution "forbids the State to exact religious conformity from a student as the price of attending her own high school graduation," *Lee*, 505 U.S. at 596, then it follows *a fortiori* that the Constitution also forbids the State to invite and, in effect, to exact a profession of religious belief from a child in order for the child to be present in the classroom each day of his K-12 education.

Perhaps, as in *Barnette*, a school district on rare occasion will be met with an exceptional student – presumably of older years – who has the breadth of understanding and the courage to dissent from the district's daily ritual. But *Lee* teaches that the options of the dissenting student to stand in silence, or to sit, are themselves constitutionally unacceptable. All the more so in the primary-school setting

involving the Pledge: A child who elects not to participate would, as a practical matter, be required to dissent from the norm each and every day, in the crucible of a social setting in which virtually all of his or her peers willingly conform to a collective patriotic affirmation. Compelled to explain her principled disobedience to teachers, school authorities, and peers, the nonconforming student can expect to pay a high price of opprobrium and ostracism for this exercise of conscience.

Thus, for children "who do not wish to participate for any reason based upon the dictates of conscience," the option of opting out "in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request." *Schempp*, 374 U.S. at 289-90 (Brennan, J., concurring). As this Court held in *Lee*, 505 U.S. at 590, 593, the State may not, consistent with the Religion Clauses, place public school students in such an untenable position with respect to matters of religious conviction, belief, and expression.

Finally, the daily recital of the Pledge in public schools also conveys an unconstitutional government message to dissenters and nonbelievers, and to polytheistic and nontheistic religious students and their families. For by declaring, in a solemn, daily oath of "allegiance," that our "one Nation" – and an "indivisible" one, at that – is "under God," the state-prescribed Pledge sends the unmistakable message that those who do not publicly affirm belief in the single God to which the Pledge refers are "outsiders," rather than full members of the "political community" – a community that otherwise consists of "one Nation . . .

indivisible." *See Santa Fe Indep. School Dist*., 530 U.S. at 309-10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

This message of exclusion – with respect not only to nonbelievers who feel obliged or coerced to recite the Pledge in order to participate as full members in their community's central, and daily, patriotic exercise, but also (indeed, especially) to those rare students who dissent conspicuously from that patriotic exercise – could not be plainer: As Justice Kennedy has noted, notwithstanding that no one is technically obligated to recite the words "under God" in the Pledge, nevertheless "it borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a "full membe[r] of the political community" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." *County of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *id.* at 595, 620 (majority opinion) (internal citations omitted)).

C. The Right To "Opt Out" Of Reciting The Pledge Does Not Cure The Constitutional Violation Inherent In The Classroom Setting.

Responding to the undue coercion rationale that the court of appeals properly adopted from this Court's decision in *Lee*, petitioners contend that any coercion present in this case is sufficiently allayed by the ability of students to opt out of reciting the Pledge – a freedom to refrain from speaking that the First Amendment protects. Pet. Br. at 23-24 (citing *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). Petitioners argue that, because the Court in *Barnette* "implicitly authorized the voluntary recitation of

the Pledge by students in public schools," the "logical result" is that the ability to opt out of such recitation sufficiently addresses any constitutionally troubling coercion: "There is simply no logical reason to differentiate between the rights at stake in this case and those in *Barnette*." *Id.* at 24.

The Court rejected this very argument in *Lee*, explaining that it "overlooks a fundamental dynamic of the Constitution." 505 U.S. at 591. Of course, even if the Pledge did not include the words "under God" (as, at the time of *Barnette*, it did not), *Barnette* holds that a student must be provided a right to decline to recite the Pledge, in order to prevent the state from impermissibly compelling verbal assent to its orthodoxy. *Id.*, 319 U.S. at 642. But simply because such an opt-out is required in order to cure what would otherwise be a compelled-*speech* violation does not mean that a school may, consistent with the *Establishment Clause*, have teachers lead students in recitation of the phrase "under God" daily in primary and secondary school classrooms, as an integral part of a collective patriotic pledge of allegiance.

Justice Kennedy, speaking for the Court in *Lee*, explained that the type of "coercion" that the Free Speech Clause enjoins is fundamentally distinct from the coercion the Establishment Clause forbids. 505 U.S. at 590-92. This is because the Speech Clause permits government, especially in the public school setting, to participate as a speaker and to attempt to persuade young hearts and minds. *See Barnette*, 319 U.S. at 640 ("National unity as an end which officials may foster by persuasion and example is not in question"). By contrast, "[t]he method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the

government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. . . . [T]he Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 505 U.S. at 591.

Thus, just as in this Court's school prayer cases, the fact that a school permits students to be voluntarily excused from attendance or participation in the religious proclamations "d[oes] not shield those practices from invalidation." *Id.* at 596 (citing *Engel*, 370 U.S. at 430, and *Schempp*, 374 U.S. at 224-25). The fact that participation "is voluntary in a legal sense does not save the religious exercise." *Id*.

II. RECITATION OF THE PLEDGE IN PUBLIC SCHOOL CLASSROOMS CANNOT BE DEFENDED ON GROUNDS THAT HAVE SERVED TO JUSTIFY OTHER GOVERNMENT INVOCATIONS OF RELIGION

Petitioners and their *amici* attempt in several ways to distinguish this Court's unbroken line of cases invalidating school-initiated religious activity and expression. None of those purported distinctions withstands analysis.

A. The Words "Under God" In The Pledge Are Not A Mere Acknowledgement Of Historical Fact.

The United States, acknowledging that the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools," U.S. Br. at 33-34 (quoting *Edwards*, 482 U.S. at 583-84), appears to concede that *if* recitation of the words "under God" in the daily Pledge *were* a "religious exercise" akin to

the prayers in *Lee*, or the "profession of a religious belief," then the practice would be unconstitutional in the primary and secondary school setting. *See, e.g.*, *id.* at 41-45. The Government argues at great length, however, that the Pledge's reference to "under God" is a mere "historical" or "factual" statement, akin to a teacher's history lesson, that serves only to acknowledge the religious heritage of our Nation and the religious inspiration for the Founders' democratic ideals. *See id.* at 32-33, 40-48. Petitioners likewise assert that that is how a "reasonable" observer (presumably including a first-grade student expected daily to recite the Pledge, led by her teacher, in a classroom, with her peers) would understand the words "under God." *See* Pet. Br. at 28. This argument has its origin in Justice Brennan's concurrence in *Schempp*, 374 U.S. at 304, in which he surmised that "[t]he reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'"

If the United States' and petitioners' contention about the meaning of "under God" were correct, or even reasonable, it might have some force. Certainly, our public schools may teach students of the religious, as well as the non-religious, sources of our Nation's ideals and beliefs, and of the role of religion in American (and world) history. *See generally* Kent Greenawalt, *Teaching About Religion in the Public Schools*, 18 J.L. & Pol. 329 (2003); Jay D. Wexler, *Preparing for the Clothed Public Square: Teaching About Religion, Civic Education, and the Constitution*, 43 Wm. & Mary L. Rev. 1159 (2002). No one would dispute the United States' argument that the Constitution does not require this Court to "sweep away all government recognition and acknowledgement of the role of religion in the lives of our citizens," U.S. Br. at 27, citing

County of Allegheny, 492 U.S. at 623 (O'Connor, J., concurring), or to hold that public schools "must studiously ignore" a significant aspect of our Nation's history," U.S. Br. at 31. Obviously, public schools need not and should not fail to teach students "that there are many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, such as in the Declaration of Independence, the Gettysburg Address, and Madison's Memorial and Remonstrance; nor should schools pretend as though religious faith has not played an influential role in the Nation's founding and in other epochal events in our history.

It does not follow, however, that schools may instruct students, in an inherently coercive setting, to recite a daily "pledge" that includes a profession of religious belief. It is neither the office nor the effect of "under God" in the Pledge to teach *anything*. To be sure, the Pledge as a whole may inculcate patriotic values, but that only underscores that the addition of "under God" cannot reasonably be understood as anything other than a required profession of allegiance to a belief in a monotheistic conception of God superintending our "one Nation" – to a notion of patriotism dependent upon belief in divine provenance and supremacy.

In this connection, the United States strains to argue (as do other *amici*) that the words "under God" have no such religious function or effect. "A reasonable observer," the Government asserts,

> 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.*

U.S. Br. at 43 (emphasis added). With all respect, this characterization misconstrues, indeed trivializes, the solemn nature of the Pledge. It is difficult to imagine that anyone, let alone the average primary-school student, would conclude that the final three clauses of the Pledge are merely "descriptive," rather than normative. U.S. Br. at 40. It would, to say the least, be unnatural to construe the Pledge as though the first 20 words are the substance of the pledge to Flag and Republic, with (as the Government would have it) the eleven words thereafter merely identifying the "Republic" in question by certain of its particular characteristics, namely, "one Nation, 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." *Id.*

To the contrary, a reasonable person – particularly a reasonable young student – would understand the second half of the Pledge to be enumerating the ideals, the characteristics of the Republic, *to which allegiance is being pledged*. As the Court itself stated in *Barnette*, the Pledge "requires affirmation of a belief and an attitude of mind." 319 U.S. at 633. And, as to the words "under God" in particular, there can be little if any doubt that a person reciting those words is thereby *affirming* a belief that our "one Nation" is, indeed, "under God" – "an essential and profound recognition of divine authority." *Lee*, 505 U.S. at 594.

Although the United States now denies this manifest truth, it was clearly President Eisenhower's understanding, and intent, when he signed the bill adding the words "under God" to the Pledge: "From this day forward," he declared,

> the millions of our schoolchildren will daily proclaim in every city and town, every village and rural schoolhouse, *the dedication of our Nation and our people to the Almighty*. . . . To anyone who truly loves America, nothing could be more inspiring than to contemplate this rededication of our youth, on each school morning, to our country's true meaning. . . . In this way, we are *reaffirming the transcendence of religious faith* in America's heritage and future, in this way *we shall constantly strengthen those spiritual weapons* which forever shall be our country's most powerful resource, in peace or in war.

100 Cong. Rec. 8618 (1954) (statement of Sen. Ferguson incorporating President's signing statement).

The congressional sponsors of the amendment to the Pledge shared this understanding of the meaning, and the desired and inevitable impact, of the additional phrase. The Senate sponsor, for instance, thought that "under God" would "remind" the "young people of America" that it is "a pledge not only of words, but also of belief." *Id.* at 6348 (statement of Sen. Ferguson). The House sponsor, likewise, envisioned that recitation of the additional words would "affirm our belief in the existence of God and His creator-creature relation to man." *Id.* at A1115 (statement of Rep. Rebaut). According to the House Report, addition of "under God" would convey "a belief in the sovereignty of God:" "The phrase 'under God' recognizes only the guidance of God in our national affairs." H.R. Rep. No. 83-1693, at 3

(1954).[4] There is simply no reason to think that the schoolchildren who daily recite "under God" understand the meaning of that phrase any differently than was contemplated by those who designed the phrase precisely in order to induce students to affirm (in the President's words) the "dedication" of the Nation "to the Almighty."[5]

Indeed, the United States' view that a reasonable observer would understand "under God" as merely descriptive of historical fact is belied by many of petitioners' own *amici*, who insist in their briefs to this Court that the function of "under God" is to affirm belief in God, and to teach children of the Nation's divine provenance and superintendence.[6] And Petitioners themselves argue, Pet.

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[4] For further examples of the effect that the Legislature expected "under God" would have, *see generally* Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2118-22 (1996); Steven G. Gey, "*Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. Rev. 1865, 1876-81 (2003))

[5] If Congress had intended merely that the Pledge describe the place of religion in our Nation's history, surely it would have amended the Pledge to say that in so many words, rather than to prescribe that our "one Nation" is "under" God.

[6] *See, e.g.*, Claremont Institute Center for Constitutional Jurisprudence Br. at 25 (Pledge "[a]cknowledges [a] [b]elief In God" and "[f]oster[s] an [a]ppreciation of God as the [s]ource of [a]ll [o]ur [r]ights"); Common Good Foundation, *et al.* Br. at 9-10 ("addition of the phrase 'under God' to the Pledge was an affirmation by the American public of a unique monotheistic doctrine"; "the inclusion of God in our pledge of allegiance rightly

(Continued…)

Br. at 37-38, that the phrase "solemniz[es] public occasions" – an assertion in considerable tension with the notion that "under God" merely recites historical fact. If this is how the phrase is understood by learned adult observers, can there be any serious argument that young and impressionable students would not think likewise? Petitioners and the United States may not simply define away the constitutional problem by denying the manifest religious function and effect of reciting the phrase "one Nation under God," or by pretending as though those words do not mean what they plainly say.[7]

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and most appropriately acknowledges the dependence of our people and our Government upon that divinity that rules over the destinies of nations as well as individuals"); National Jewish Commission on Law and Public Affairs Br. at 5-6 (declining to "dismiss the reference in the Pledge of Allegiance to 'one nation under God' as *de minimis* or as devoid of its literal meaning"; phrase reflects the "guiding principle that "the Nation has prospered . . . because it has been blessed by the Almighty"; declaration that we are "one nation under God" is "the expression of what has always been acknowledged by humankind – that man's destiny is shaped by a Supreme Being"); Christian Legal Society Br. at 4 (inclusion of "under God" "asserts that government is not the highest authority in human affairs"); National Lawyers Association Foundation Br. at 2-3 ("Congress may express our country's theistic philosophy in the Pledge of Allegiance"; "the First Amendment does not deny any public school the ability to recognize and honor the existence of God").

[7] Recital of the Pledge thus is in no way comparable to curricular requirements that students recite other famous works that contain

(Continued…)

B. Petitioners' Other Justifications For Their Practice Do Not Cure The Constitutional Infirmity.

Petitioners also argue that the words "under God" are constitutionally permissible because they serve the "legitimate secular purpose of solemnizing public occasions." Pet. Br. at 37-38 (citing *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (internal citation omitted)). This Court has never held that a "solemnization" function can serve to sustain state religious expression that otherwise violates the First Amendment. Indeed, such a holding would prove too much, because in theory it would serve to justify most cases of religious expression that this Court has invalidated in the public-school setting. As the Court recently noted, *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 306-07, n.18, there is nothing suspect about a state interest in solemnizing a school function; but secular means are wholly adequate to that task – as they were in the Pledge itself in the

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references to the Deity, such as the Declaration of Independence or the Gettysburg Address. *See Engel*, 370 U.S. at 435 n.21; U.S. Br. at 42. In such curricular contexts, the recital is required in order to teach students historical facts (and rhetorical skills). No one would think that a student reciting the Gettysburg Address is professing allegiance to all of Lincoln's sentiments or ideas. The Pledge, however, is an affirmation of allegiance to the Republic as it is described therein, not a learning exercise. Similarly, the coercion problem is not raised by other instances of so-called "ceremonial" religion in our public lives. No one is asked to affirm "In God We Trust" in order to spend money. Nor is counsel encouraged, let alone required, to intone "God Save this Honorable Court" in order to argue before it.

62 years before insertion of "under God" in its text – and there is no constitutional justification for the state to prefer, let alone prescribe, a religious means of solemnization. *See also id.* at 309 ("regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes prayer sponsored by the school").

Petitioners also argue that the Pledge is analogous to the legislative prayer that the Court approved in *Marsh v. Chambers*, 463 U.S. 783 (1983). Pet. Br. at 41-43. But the history of the phrase "under God" in the Pledge bears no resemblance to the "unique history" of the use of invocations to open legislative sessions. *Marsh*, 463 U.S. at 791. More importantly, and as the Court's school prayer cases demonstrate, historical pedigree is a much weaker constitutional determinant in the context of state-sanctioned religious expression in public schools. As the Court explained in *Lee*, there are "inherent differences" between the public school system and a session of a state legislature. 505 U.S. at 596. "The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons," this Court explained, "cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*." *Id.* at 597. As explained above, the "influence and force" of the daily recital of the Pledge in primary school classrooms are even more pronounced. Accordingly, *Marsh* is of even less relevance here than it was in *Lee*.

Nor is the constitutional problem ameliorated by the suggestion that the words "one Nation under God" pose only a minimal threat to freedom of religious conscience and belief. For one thing, the threat is hardly minimal. Although the objection is with respect to only two words, they are words recited daily – words that become second nature to, and uncritically accepted by, most students. In any event, even relatively minor encroachments on the First Amendment are impermissible. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'" *Schempp*, 374 U.S. at 225; *accord Stone v. Graham*, 449 U.S. 39, 42 (1980). Moreover, to suggest that the religious component of the Pledge is "*de minimis*" would be an affront to all who take seriously that daily religious affirmation as "an essential and profound recognition of divine authority." *Lee*, 505 U.S. at 594. And, the fact that "the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." *Id.*

Finally, the United States suggests that a declaration by this Court that "under God" is unconstitutional in schools would itself "bespeak a level of hostility to religion that is antithetical to the very purpose of the Establishment Clause." U.S. Br. at 46. The Government envisions "a generation of school children" that would be required "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." This is unwarranted hyperbole. This Court's decision would

require no one to "unlearn" anything, let alone to "banish the reference to God from their memory." (Indeed, children would be completely free to use the words "under God" in the Pledge whenever they saw fit outside the public school setting.) Schoolchildren would remain free to express their views about God, to speak about religion in or outside of school, to pray, to read religious texts, and to practice their religion. A declaration of unconstitutionality would in no way impede the free exercise of religion, or undermine any values of the Establishment Clause; and it would no more bespeak "hostility" to the Establishment Clause than has any of this Court's other decisions involving state-prescribed religious expression in public schools.

* * *

In certain respects, this is not an easy case. The court of appeals' judgment is not a popular one. Most Americans revere the Pledge of Allegiance, and treat it very seriously; thus, judicial invalidation of even two words of that Pledge in our elementary schools is sure to be met with bitter opposition. Indeed, such a reaction can be expected precisely *because* those words are, to most who recite them, an important affirmation of religious fidelity and belief.

But such opposition also was inevitable on most of the other occasions in which this Court has invalidated state-sanctioned religious expression in public schools - yet those decisions have engendered healthy debate, and did not in the long run cause any permanent harm to the Nation or to the Court. The Court should in this case follow the lights of those prior opinions. State-sanctioned recitation of the words "under God" as part of the Pledge in the public school classroom endorses religion, and in effect compels young and impressionable students to pledge fidelity to a

single conception of religious truth – or to be identified by the State as outsiders to one of the Nation's central rites of patriotic identification. "The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee*, 505 U.S. at 589. Our Constitution commands that choices concerning religion must remain the province of private conscience, not public orthodoxy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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