IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 00-16423

MICHAEL A. NEWDOW,

Plaintiff-Appellant,

v.

U.S. CONGRESS, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PETITION OF THE UNITED STATES FOR REHEARING AND REHEARING EN BANC

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INTRODUCTION

The United States respectfully petitions the Court to rehear this case en banc. The panel majority struck down the federal Pledge of Allegiance statute, 4 U.S.C. 4, holding that Congress's addition of the words "under God" to the Pledge is an unconstitutional establishment of religion. That ruling conflicts with County of Allegheny v. ACLU, 492 U.S. 573 (1989), and Lynch v. Donnelly, 465 U.S. 668 (1984). In those cases, the Supreme Court specifically concluded that the words "under God" in the Pledge are one of many ceremonial "reference[s] to our religious heritage," Lynch, 465 U.S. at 676, that do not "establish a religion or a religious faith, or tend to do so." Id. at 678. See also id. at 676 (noting with approval reference to God on our coins and currency); County of Allegheny, 492 U.S. at 602-603 (noting with approval reference to "God" in the Pledge and National Motto).

The panel's decision also conflicts with Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), where this Court upheld the references to God in the National Motto and on our coins and paper currency based on largely the same reasons Lynch and County of Allegheny approved the Pledge. As this Court explained, use of the term "God" in these contexts "is of a patriotic or ceremonial character and bears no resemblance to a governmental sponsorship of a religious exercise." Id. at 243.

En banc review is also warranted here because the panel's decision conflicts with Sherman v. Community Consolidated Sch. Dist. No. 21, 980 F.2d 437 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993), where the Seventh Circuit rejected an Establishment Clause challenge to the words "under God" in the Pledge.

Finally, the Court should grant rehearing en banc because Mr. Newdow clearly lacks standing to challenge 4 U.S.C. 4 on its face, since the statute does not require anyone to recite the Pledge and since its mere enactment does not aggrieve him in any constitutionally cognizable sense.

The United States also requests the panel to grant rehearing because, as we explain below, see p. 17, supra, the Court has recently been provided with evidence that calls into question whether Mr. Newdow has standing to challenge the recitation of the Pledge in his daughter's school.

STATUTORY BACKGROUND

In 1954, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Pub. L. No. 396, ch. 297, 68 Stat. 249 (1954). As so amended, the Pledge, which is currently codified at 4 U.S.C. 4, states as follows: "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."

STATEMENT

Plaintiff Michael Newdow filed this action against the United States, the President, the U.S. Congress, the State of California, and two California school districts and their superintendents. He sought a declaration that Congress violated the Establishment Clause by adding the words "under God" to the Pledge in 1954, and injunctive relief requiring Congress and the President to remove those words from the Pledge and prohibiting use of the Pledge in California public schools.

The district court dismissed the complaint for failure to state a claim, and a panel of this Court affirmed in part and reversed in part. The majority (Goodwin, Reinhardt, JJ.) began by holding that the district court properly dismissed the Congress and the President as defendants, see Slip op. at 9112-9113, as well as the Sacramento City Unified School District and its Superintendent. See id. at 9115. The majority also held that Mr. Newdow has standing to challenge Congress's addition of the words "under God" to the Pledge, as well as recitation of the Pledge in his daughter's school, on the theory that "[t]he mere enactment of the 1954 act . . . interferes with Newdow's right to direct the religious education of his daughter." Id. at 9118. Regarding the merits, the majority held that Congress's addition of the words "under God" to the Pledge violates the Establishment Clause facially and as applied to public schools because it is a "profession of a religious belief," it constitutes

government endorsement of "monotheism," and it has a "coercive effect" on children who are required to listen to the Pledge in school. Id. at 9122, 9125.

Judge Fernandez agreed that Mr. Newdow has standing to bring this action, although he expressed "serious misgivings" about whether Mr. Newdow has standing to challenge 4 U.S.C. 4 itself. See Slip op. at 9131-9132 & n.1. Judge Fernandez dissented on the merits, however, because the Supreme Court has specifically approved Congress's addition of the words "under God" to the Pledge, id. at 9133, and because those words have "no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion . . ." Id. at 9134. See also id. at 9135 (noting that majority's holding would preclude use of many patriotic songs, such as "God Bless America," "America the Beautiful," "The Star Spangled Banner," and "My Country 'Tis of Thee," in public ceremonial occasions).

ARGUMENT

I. THE PANEL OPINION CONFLICTS WITH SUPREME COURT DECISIONS SPECIFICALLY APPROVING THE REFERENCE TO GOD IN THE PLEDGE OF ALLEGIANCE.

A. As Judge Fernandez correctly noted, see Slip op. at 9133, the Supreme Court in two majority opinions has specifically stated that Congress's inclusion of the words "under God" in the Pledge of Allegiance statute is constitutional. The panel's failure to follow those cases warrants en banc review by this Court.

1. In the first case, Lynch v. Donnelly, 465 U.S. 668 (1984), the Supreme Court held that a city did not violate the Establishment Clause by including a nativity scene as part of its Christmas display. In upholding the Christmas display, the Court explained that ceremonial acknowledgments of our nation's religious heritage, including the reference to God in the Pledge of Allegiance, do not "establish a religion or religious faith, or tend to do so." Id. at 678.

The Lynch Court observed, "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." 465 U.S. at 687. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Id. at 675. For example, "[t]he day after the First Amendment was proposed, Congress 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.'" Id. at 675 n.2 (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). See also Sherman v. Community Consolidated Sch. Dist. No. 21, 980 F.2d 437, 446 (7th Cir. 1992)

(noting that the Declaration of Independence contains multiple references to God, including the following: "'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, and that among these are Life, Liberty, and the pursuit of Happiness'"), cert. denied, 508 U.S. 950 (1993).

In light of these and other ceremonial references to God in our founding documents, Lynch observed, it is reasonable to conclude that ceremonial acknowledgments of our nation's religious heritage do not violate the Establishment Clause. See 465 U.S. at 676-677. On that ground, the Supreme Court specifically approved of the references to God in our national Motto ("In God We Trust") (36 U.S.C. 186), on our currency (31 U.S.C. 324), and in the Pledge of Allegiance (4 U.S.C. 4). Similar references to God are found in numerous other patriotic expressions, including the National Anthem, see Engel v. Vitale, 370 U.S. 421, 449 & n.5 (1962) (Stewart, J., dissenting); the Gettysburg Address, Sherman, 980 F.2d at 446; the opening pronouncement with which the Supreme Court begins its public sessions ("God save the United States and this Honorable Court"), see Zorach v. Clauson, 343 U.S. 306, 313 (1952); and the Constitution itself. See U.S. Const. art. VII (referring to the "Year of our Lord").

In the second case, County of Allegheny v. ACLU, 492 U.S. 573 (1989), 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). Then, using the Pledge and the Christmas display approved in Lynch as benchmarks as to what is constitutional, the Court in County of Allegheny held the Christmas display at issue there unconstitutional because, unlike the Pledge and the Christmas display at issue in Lynch, it gave "praise to God in [sectarian] Christian terms." See id. at 598.

2. The panel majority here declined to follow the Supreme Court's statements in Lynch and County of Allegheny regarding the constitutionality of the federal Pledge statute because "the Court has never been presented with the question directly." Slip op. at 9130 n.12. However, "[a] lower federal court cannot responsibly decline to follow a principle directly and explicitly stated by the Supreme Court as a ground of decision and subsequently applied by the Supreme Court as an integral part of a systematic development of constitutional doctrine." United States v. Underwood, 717 F.2d 482, 486 (9th Cir. 1983), cert. denied, 465 U.S. 1036 (1984). The Supreme Court's references to the Pledge in Lynch and County of Allegheny fall squarely within this rule. As explained above, in both cases, the Supreme Court

clearly used its approval of the Pledge as a baseline with which to adjudicate the constitutionality of other government actions. Thus, Lynch and County of Allegheny both "directly and explicitly" approved Congress's inclusion of "under God" in the Pledge as a "ground of decision." Underwood, 717 F.2d at 486.

Lynch and County of Allegheny also approved the words "under God" in the Pledge "as an integral part of a systematic development of constitutional doctrine." Underwood, 717 F.2d at 786. As noted above, those cases hold that ceremonial acknowledgments of our country's religious heritage are not an establishment of religion. That principle, which is rooted in the original understanding of the First Amendment, is an important part of the Supreme Court's development of Establishment Clause doctrine, and as explained above, has been used by the Court to evaluate the constitutionality of numerous other ceremonial religious references.

Thus, rehearing en banc is necessary here because the majority erred by refusing to follow Lynch and County of Allegheny. As the Seventh Circuit observed, the Supreme Court's proclamations in Lynch and County of Allegheny that the Pledge does not violate the Establishment Clause must be taken "seriously." Sherman, 980 F.2d at 448. "If the Justices are just pulling our leg, [the court of appeals should] let them say so." Ibid.

B. The majority also held that Lynch and County of Allegheny are not controlling because neither case evaluated the Pledge's constitutionality according to certain Establishment Clause tests (the "endorsement test," the "Lemon" test, and the "coercion test") that the Court uses in various contexts. See Slip op. at 9130 n.12. This holding cannot stand for a number of reasons.

1. To begin, the majority ignored the fact that the Supreme Court has applied a different test (the historical test) in evaluating the constitutionality of government acknowledgments of our nation's religious heritage. The Supreme Court first used that test in Marsh v. Chambers, 463 U.S. 783 (1983), which upheld Nebraska's practice of employing members of the clergy to give opening prayers at sessions of the state legislature. To support that holding, the Court relied exclusively upon what history reveals about the original understanding of Establishment Clause, and declined to apply any of the Establishment Clause tests the Court has used in other contexts. See Lynch, 465 U.S. at 679 (noting Marsh's exclusive reliance upon historical test).

As explained above, Lynch relied principally on Marsh's historical test in approving the Pledge. See Lynch, 465 U.S. at 675, 677 (concluding that the words "under God" in the Pledge 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). The Supreme Court has never repudiated use of the historical test where it is relevant, such as in Marsh and Lynch, and the panel majority had no authority to reject Lynch's approval of the Pledge of Allegiance because of the panel's apparent disapproval of that test.

2. The panel majority was wrong to hold that it need not follow Lynch and County of Allegheny because those decisions failed to apply the "endorsement" test.[1] This Court is not free to disregard the Supreme Court's clear dictates merely because a panel of this Court believes the Supreme Court did not fully think through an issue, or because the panel disapproves of the Supreme Court's mode of analysis in a particular case.

Moreover, in County of Allegheny, the Supreme Court specifically noted that Congress's addition of the words "under God" to the Pledge satisfies the endorsement test. As the Court explained, "[o]ur previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at

[1] Under the "endorsement" test, government action violates the Establishment Clause if it "convey[s] or attempts to convey a message that religion or a particular religious belief is *favored* or *preferred*." County of Allegheny, 492 U.S. at 593.

602-603 (emphasis added), citing Lynch, 465 U.S. at 693 (O'Connor, J., concurring); id. at 716-717 (Brennan, J., dissenting).[2]

3. The panel also was wrong to ignore Lynch and County of Allegheny because those cases did not apply the Lemon v. Kurtzman test in approving the words "under God" in the Pledge.[3] As explained above, the Court in those cases concluded that the historical and endorsement tests are the relevant tests for evaluating the constitutionality of the Pledge, and the panel simply had no authority to disregard those cases because it thought a different test should apply.

Even if the Lemon test were relevant in this context, however, the Pledge would satisfy that test for precisely the reasons the Supreme Court upheld the Pledge

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[2] With respect to the endorsement test, the majority also was wrong to hold that the words "under God" in the Pledge are "identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god . . .'" Slip op. at 9123. The Supreme Court specifically rejected this notion in County of Allegheny, where the Court struck down a Christmas display at a county courthouse because it included a "patently Christian message: Glory to God for the birth of Jesus Christ." 492 U.S. at 601. The Court recognized an "obvious distinction" between that reference and the "references to God in the motto and the pledge," id. at 603, which the Court regarded as being, in this context, a "nonsectarian reference[] to religion by the government." Ibid. See also id. at 630-631 (O'Connor, J., concurring) (references to "God" in ceremonial acknowledgments of our country's religious heritage permissible because of their "nonsectarian nature" and longstanding existence).

[3] The Lemon test, as modified by the Supreme Court in Agostini v. Felton, 521 U.S. 203 (1997), provides that government action must have a secular purpose and effect in order to be consistent with the Establishment Clause. See id. at 222-223.

in Lynch and County of Allegheny. The court's conclusion in those cases that the reference to God in the Pledge is a permissible acknowledgment of our nation's religious heritage identifies a secular purpose and effect for that reference, which is all the Lemon test requires. See County of Allegheny, 492 U.S. at 625 (O'Connor, concurring) ("government acknowledgments of religion in American life . . . 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").

The relevant legislative history confirms that Congress added the words "under God" to the Pledge of Allegiance for the permissible, secular purpose of acknowledging our nation's religious heritage. For example, the House Report accompanying Congress's 1954 revision of the Pledge explains 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," referring to many of the same historical references to God the Supreme Court noted in Lynch. H.R. Rep. No. 83-1693, reprinted in 1954 U.S. Code Cong. & Admin. News 2339, 2340.

4. Finally, for the same reasons the words "under God" to the Pledge are consistent with the above tests, those words also would satisfy the "coercion" test. In Engel v. Vitale, 370 U.S. 421 (1962), the Supreme Court held that a public school

district violated the Establishment Clause by requiring teachers to lead students in reciting a government-composed prayer at the beginning of the school day. See id. at 422, 436. However, the Court was careful to point out that nothing in its ruling was "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." Id. at 435 n.21. "Such patriotic or ceremonial occasions," the Court held, "bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." Ibid.

These principles apply equally to the words "under God" in the Pledge. Since those words are a permissible acknowledgment of our nation's religious heritage, reciting the Pledge is a permissible "patriotic" act, like reciting the Declaration of Independence, not an act of religious devotion, like repeating a government-composed prayer. See Engel, supra. Indeed, Justice Brennan made precisely this point in School Dist. of Abington v. Schempp, 374 U.S. 203 (1963):

> It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve 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 of between the spheres of religion and government.

Id. at 281 (Brennan, J., concurring) (emphasis added; footnote omitted). See also Lynch, 465 U.S. at 676 (noting that the Pledge "is recited by thousands of public school children – and adults – every year").

Thus, it is clear that the Supreme Court considers recitations of texts such as the Pledge, the Declaration of Independence, and the Gettysburg Address, all of which contain references to God, to be patriotic acts, as opposed to the kinds of religious exercises the Court disallowed in Engel, Schempp, Lee v. Weisman, 505 U.S. 707 (1992) (holding unconstitutional city's practice of allowing clergy members to offer graduation prayers), and Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional school district's practice of allowing student-initiated, student-initiated prayer before football games). The panel majority's ruling to the contrary conflicts with the Supreme Court's pronouncements on this issue, and this conflict plainly warrants en banc review.

II. THE PANEL OPINION CONFLICTS WITH THIS COURT'S DECISION IN ARONOW AND WITH THE SEVENTH CIRCUIT'S DECISION IN SHERMAN.

The panel opinion conflicts with Aronow v. United States, 432 F.2d 242, 243-244 (9th Cir. 1970), which upheld the references to God in the National Motto and on our currency. Using the same reasoning the Supreme Court later adopted in Marsh

and Lynch, Aronow held that those references are "of a patriotic or ceremonial character," and consequently bear "no true resemblance to a governmental sponsorship of a religious exercise." Id. at 243. As explained above, the same principles apply to the words "under God" to the Pledge.

The panel opinion also conflicts with Sherman v. Community Consolidated Sch. Dist. No. 21, supra, where the Seventh Circuit rejected an Establishment Clause challenge to the words "under God" in the Pledge. Noting that the Supreme Court specifically approved those words in Lynch and County of Allegheny, the Seventh Circuit held that the lower courts must "take [the Supreme Court's] assurances seriously." 980 F.2d at 448.

Rehearing en banc is thus appropriate to resolve the conflict between the panel opinion and both Aronow and Sherman.

III. MR. NEWDOW LACKS ARTICLE III STANDING TO CHALLENGE 4 U.S.C. 4 ON ITS FACE

Because Mr. Newdow failed to allege any cognizable personal injury caused by the federal Pledge statute, the majority should never have reached the merits of Mr. Newdow's facial challenge to 4 U.S.C. 4.[4] The law is clear that standing cannot

[4] Mr. Newdow also lacks standing to challenge the Pledge statute on its face because he cannot demonstrate that the court can provide him with any meaningful relief in that regard. See generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). The only relief he seeks regarding the statute itself is an injunction requiring

be supported by a claim that the Pledge statute makes Mr. Newdow feel like an "outsider." Even in the Establishment Clause context, "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 485-486 (1982).

Plainly, the statute's "mere enactment" does not cause Mr. Newdow the kind of individualized, direct, and concrete injury that is required for Article III standing. See Allen v. Wright, 468 U.S. 737, 755-756 (1984).The panel majority cited Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000), and Wallace v. Jaffree, 472 U.S. 38 (1985), for the proposition that Mr. Newdow has standing to challenge the Pledge statute because "the mere enactment" of a statute may constitute an Establishment Clause violation. See Slip op. at 9116. Neither of those cases holds that a party can challenge the "mere enactment" of a statute without a cognizable Article III injury, however, and in fact, neither case contains any discussion of standing at all. The

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Congress and the President to remove the words "under God" from the Pledge. As the panel correctly held, however, the federal courts lack jurisdiction to order such relief. See Slip op. at 9112-9113; id. at 9131 (Fernandez, J., concurring and dissenting).

Supreme Court's failure to discuss standing in a case does not mean the Court found standing to exist. The Supreme Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." Lewis v. Casey, 518 U.S. 343, 352 n.2 (1996). Accord Federal Election Comm'n v. NRA Political Victory Fund, 513 U.S. 88, 97 (1994).

At best, Mr. Newdow can only have standing to bring this case, if at all, based on his claimed right "to direct the religious education of his daughter." Slip op. at 9114. That is a claim that is, however, properly directed at state defendants, and does not provide any basis for striking down the federal statute. As Judge Fernandez correctly noted, 4 U.S.C. 4 merely sets forth the words of the Pledge; it does not compel anyone to do anything. See Slip op. at 9131 n.1.

Finally, as to Mr. Newdow's "parental" standing, we note that on August 5, 2002, Sandra Banning, mother of Mr. Newdow's daughter, moved to intervene in this case and submitted a declaration advising the Court that she has sole legal custody of the daughter, that she wishes for the daughter to recite the Pledge in school, and that the daughter wishes to recite the Pledge in school. This evidence may call into question whether Mr. Newdow has standing to challenge a policy allowing his daughter to recite the Pledge in school. See generally Michael H. v. Gerald D., 491 U.S. 110, 118-119 (1989).

CONCLUSION

For the foregoing reasons, the Court should grant rehearing or rehearing en banc.[5]

Respectfully submitted,

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AUGUST 2002

[5] If the Court grants rehearing or rehearing en banc, we believe the Court would benefit from requiring the parties to submit new briefs.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. 32(a)(7)(C) and Ninth Circuit Rule 40-1, the attached petition is proportionally spaced, has a typeface of 14 points or more and contains 4184 words (which does not exceed the applicable 4,200 word limit).

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Lowell V. Sturgill, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 2002, I served the foregoing Petition for Rehearing and for Rehearing En Banc on the following persons by causing two copies of the Petition to be delivered to Federal Express for next-day delivery:

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