IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION

David Wallace Croft	§	
and	§	
Shannon Kristine Croft,	§	
As Parents and Next	§	
Friend of their minor	§	
Children;	§	Civil Action No. 3:07-CV-1362-K
John Doe	§	ECF
and	§	
Jane Doe	§	
As Parents and Next	§	
Friend of their minor	§	
Children,	§	
Plaintiffs	§	
	§	
v.	§	
	§	
Rick Perry, Governor of	§	
the State of Texas	§	
	§	

TABLE OF AUTHORITIES

For Plaintiff's Plaintiff's Brief Setting Forth Their Contentions of Fact and Law,Argument, and Authorities on Plaintiff's Motion for Summary Judgment Against Defendant Rick Perry

Statute/Case……Brief page No.

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Children,	§	
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	§	
v.	§	
	§	
Rick Perry, Governor of	§	
the State of Texas	§	
	§	

TABLE OF CONTENTS

For Plaintiff's Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authoritiesv on Plaintiff's Motion for Summary Judgment Against Defendant Rick Perry

Section of Plaintiff's Brief.....Plaintiff's Brief Page Number

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Friend of their minor	§	
Children,	§	
Plaintiffs	§	
	§	
v.	§	
	§	
Rick Perry, Governor of	§	
the State of Texas	§	
	§	

Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry

I. Plaintiff's Contention of Facts

Prior to 6/15/2007, Texas Government Code § 3100.101 said, in relevant part: "The pledge of allegiance to the state flag is: 'Honor the Texas flag; I pledge allegiance to thee, Texas, one and indivisible.'" On 6/15/2007, Governor of Texas Rick Perry signed into law an amendment of Texas Government Code § 3100.101 passed by the legislature to read, in relevant part: "Honor the Texas flag; I pledge allegiance to thee Texas, **one state under God**, one and indivisible." (Emphasis added.) Texas Education Code, §25.082(b) says, in relevant part: "The board of trustees of each school district shall require students, once during each school day at each school in the district, to recite:…the pledge of allegiance to the state flag in accordance with

Subchapter C, Chapter 3100, Government Code." Plaintiffs have minor children attending Texas public schools. As such, they are subject to Texas Government Code §3100.101 through Texas Education Code §25.082(b). Plaintiffs have brought this First Amendment[1] suit on behalf of themselves and on behalf of their minor children, alleging that the above-mentioned statutes violate the Establishment of Religion clause.

II. Standard of Review

Summary judgment is proper in any case where there is no genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 US 317, 106 S.Ct. 2548, 2552 (1986). A plaintiff moving for summary judgment satisfies its burden by submitting summary judgment proof that establishes all elements of its cause of action as a matter of law. San Pedro v. US, 79 F.3d 1065, 1068 (11th Cir. 1996). Plaintiff must show that no reasonable trier of fact could find other than for plaintiff. Calderone v. US, 799 F.2d 254, 259 (6th Cir. 1986).

III. Plaintiff's Contentions of Law and Argument and Authorities

A. Establishment Clause Jurisprudence

Although the courts have described and used several, sometimes interrelated, tests in judging whether a statute violates the Establishment clause of the Constitution, there is one test that can be considered a basic threshold criterion for judging a statute's constitutionality under the Establishment clause. This standard should be considered even before applying any other test, such as the test found in Lemon[2]. Furthermore, the courts indicate that this basic threshold test should always be applied in establishment clause challenges. This is the "no-sect-

[1] Amendment I to the US Constitution says, in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..."
[2] Lemon v. Kurtzman, 403 US 602, 612-613 (1971)

preference" test set forth in Larson v. Valente.[3] This test is a recognition of the fact that if the Establishment clause stands for anything, it stands for the principle that the government may not discriminate amongst religious groups, unless such discrimination is closely fitted to a compelling state purpose.[4][5]

After determining whether a statute violates the "no-sect-preference" test of Larson v. Valente, several other tests are available for consideration, and have been used by the courts at various times and under varying circumstances. The traditional, and most widely-used, test for determining whether a statute violates the Establishment clause was set forth in Lemon v. Kurtzman. This three-part test says:

(1) The statute must have a secular legislative purpose;

(2)The statute's principal or primary effect must be one that neither advances nor inhibits religion, **and**

(3)The statute must not create an excessive government entanglement with religion. (See Lemon v. Kurtzman, 403 US 602, 612-613 (1971))

This so-called "Lemon test" is still widely used by the courts today in determining whether a statute violates the Establishment clause, although it has been modified in certain contexts[6].

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[3] "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." (Larson v. Valente, 456 U.S. 228, 244 (1981).)

[4] "Moreover, [in addition to the Lemon Test] the Court has held that a statute or practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive constitutional challenge. See Larson v. Valente, 456 U.S. 228 (1982)." (O'Conner, Concurrence, Lynch v. Donnely, 465 U.S. 668, 689 (1984))

[5] The logical conclusion to draw regarding the "no-sect-preference" test of Larson v. Valente, in light of the Lemon test, is that a statute can discriminate amongst religions, even if the statute has a secular legislative purpose. Since the first prong of the Lemon test requires a secular legislative purpose, it would be redundant to have a separate "no-sect-preference" test, if such religious discrimination had to be intentional, since intentional discrimination amongst religious sects would have to be motivated by the non-secular legislative purpose of advancing one religion over other religions.

[6] "..in Agostini we modified Lemon for purposes of evaluating aid to schools and examined only the first and second factors [the purpose and effect prongs]. We acknowledged that our cases discussing excessive

In addition to the Lemon test, two other tests are possibly relevant in the context of the US Pledge of Allegiance, and its "under god" language, and therefore also possibly relevant in the context of this case. The first alternative test is the "endorsement test" described by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668 (1984).

O'Connor asserts in Lynch that the basic purpose of the Establishment Clause in the Constitution is to prohibit "…government from making adherence to a religion relevant in any way to a person's standing in the political community…" (See Lynch v. Donnelly, 465 U.S. 668, 687 (1984).) She then goes on to say that government can run afoul of the Establishment clause prohibition "…in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines…The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message…" (See Id at 688.) In other words, the Establishment clause can be violated in two ways:

(1) Excessive entanglement with religious institutions; **or**

(2) Government endorsement or disapproval of religion.

The first standard described above, the "excessive entanglement" part, is the third prong of the Lemon test, discussed earlier in this brief. The second form of Establishment clause violation described above is the so-called "endorsement test". O'Connor then goes on to say in

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entanglement had applied many of the same considerations as had our cases discussing primary effect, and we therefore recast Lemon's entanglement inquiry as simply one criterion relevant to determining a statute's effect.." (Mitchell v. Helms 530 U.S. 793, 807-08 (2000)

her Lynch concurrence that there are two ways that government can "endorse or disapprove of religion": "…[t]he purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." (See Id at 690). In other words, the first two prongs of the Lemon test (secular legislative purpose and principal or primary effect of the statute) are two factors to be considered in the "endorsement test".[7]

Additionally, O'Connor incorporated the "no sect preference" rule found in Larson v. Valente, 456 U.S. 228, 244 (1981), into the "endorsement test" by saying that such sect preference gives rise to a presumption of government endorsement of religion that must be overcome by the government showing a compelling interest and a "close fit".[8]

In addition to the Lemon test and the Endorsement test, one other test is possibly relevant in this context. This can be described as the "coercion test": "…[i]t is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." (See Lee v. Weisman, 505 U.S. 577, 587 (1992).) Even Justice Scalia acknowledged that if the Establishment clause says anything, it says that government cannot coerce non-believers regarding religion: "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty." (Lee v. Weisman, 505 U.S. 577, 587, 640 (1992), Scalia Dissent.)[9] However, the majority in Lee said that the coercion prohibited by the

[7] Since all three factors of the Lemon test are still considered in some manner under the "Endorsement test", it is doubtful that there will be any practical difference in the outcome, regardless of which of these two tests is used.
[8] "The Larson standard, I believe, may be assimilated to the Lemon test in the clarified version I propose…" (See Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).)
[9] Scalia still seems to acknowledge that government action that coerces no one can be an establishment of religion (at least for the sake of argument): "The Establishment Clause was adopted to prohibit such an establishment of

Establishment clause went beyond the two types of coercion described by Justice Scalia in his dissent (coercion by financial support from government or coercion by force of law and threat of penalty). The majority recognized that coercion could be entirely psychological in nature, at least in the public school context, and still violate the Establishment clause:

"…As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. See, e. g., School Dist. of Abington v. Schempp, 374 U.S. 203, 307, 10 L. Ed. 2d 844, 83 S. Ct. 1560 (1963) (Goldberg, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987);Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens, 496 U.S. 226, 261-262, 110 L. Ed. 2d 191, 110 S. Ct. 2356 (1990) (KENNEDY, J., concurring). Our decisions in Engel v. Vitale, 370 U.S. 421, 8 L. Ed. 2d 601, 82 S. Ct. 1261 (1962), and School Dist. of Abington, supra, recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. at 661 (KENNEDY, J., concurring in judgment in part and dissenting in part). **What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context**

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religion at the federal level… I will further acknowledge for the sake of argument that…by 1790 the term "establishment" had acquired an additional meaning -- "financial support of religion generally, by public taxation" -- that reflected the development of "general or multiple" establishments, not limited to a single church. *Id.*, at 8-9. But that would still be an establishment coerced *by force of law*. And I will further concede that our constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, quoted earlier, down to the present day, has, with a few aberrations, see *Church of Holy Trinity v. United States, 143 U.S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1892),* ruled out of order government-sponsored endorsement of religion -- **even when no legal coercion is present**, and indeed even when no ersatz, "peer-pressure" psycho-coercion is present -- where the endorsement is sectarian…"(Lee v. Weisman, 505 U.S. 577, 587, 641 (1992), Scalia Dissent, emphasis added.) In other words, even Scalia admits that when an endorsement of religion is sectarian in nature, i.e., favors one religion over another, it violates the Establishment clause, probably under the "no-sect-preference" test set forth in Larson v. Valente, 456 U.S. 228, 244 (1981), that was discussed earlier.

may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.…"(See Lee v. Weisman, 505 U.S. 577, 592 (1992), emphasis added.)

It is helpful to consider the facts in Lee to understand what the Court meant regarding the type of psychological coercion that could still violate the Establishment clause. Principals of public middle and high schools in Providence, Rhode Island would invite members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. Petitioner Lee, a middle school principal, invited a rabbi to offer such prayers at the graduation ceremony for Deborah Weisman's class, and gave the rabbi a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and advised the rabbi that the prayers should be nonsectarian. (See Id. at 580-583.) Attendance at the graduation ceremony was not mandatory because students would still get their diploma if they chose not to attend.[10] Despite the fact that students would not be penalized academically if they chose not to attend the graduation ceremony and the religious invocation, the court still found coercion, albeit psychological in nature, that ran afoul of the Establishment clause. (See Id at 592-597.) The Court in Lee did note that this form of "psychological coercion" is probably limited to the public school context, which distinguishes it from a religious invocation by clergy at the beginning of a session of the legislature, which had already been held constitutional.[11]

[10] "Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma."(See Lee v. Weisman, 505 U.S. 577, 586 (1992).)

[11] "Inherent differences between the public school system and a session of a state legislature distinguish this case from Marsh v. Chambers, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983). The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in Marsh. But there are also obvious differences. 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 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. The Marsh majority in fact gave specific recognition to this distinction and placed particular reliance on it in

It should also be noted that there are problems with requiring a showing of coercion, whether psychological or otherwise, in the Establishment clause context. First, the Court has long recognized that the "…Establishment Clause, unlike the Free Exercise Clause [of the First Amendment], does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." (See Engel v. Vitale, 370 U.S. 421, 430 (1962).) Second, requiring a showing of coercion before an Establishment clause violation could be found would tend to make the Free Exercise of Religion[12] portion of the First Amendment redundant. (See County of Allegheny v. ACLU, 492 U.S. 573, 628 (1989), "To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy.") Using coercion as a standard of what does and does not violate the Establishment clause is therefore potentially problematic.

B. The United States Pledge of Allegiance and the Establishment Clause

This is the first, and, to Plaintiff's knowledge, the only, case to challenge the constitutionality of the post-6/15/2007 version of Texas Government Code § 3100.101, which added the Texas Pledge's "under god" language. As such, no other Federal district or circuit court has addressed its constitutionality under the Establishment Clause, much less the US

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upholding the prayers at issue there. 463 U.S. at 792. Today's case is different. **At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students**. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986). **In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit**. This is different from Marsh and suffices to make the religious exercise a First Amendment violation." (See Lee v. Weisman, 505 U.S. 577, 596-597 (1992), emphasis added.)

[12] For the sake of clarity, the reader should understand that the First Amendment prohibits two distinct things with regard to religion. First, it prohibits laws respecting an establishment of religion (the Establishment Clause), and second, it prohibits laws prohibiting the free exercise thereof (The Free Exercise Clause): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (See US Const. amend. I.)

Supreme Court. However, there have been challenges to the United States Pledge of Allegiance, which has contained similar "under god" language since at least the 1950's.[13] An examination of these cases may be helpful in reaching a decision in this case, although it should be noted that since they address a different, Federal statute, with a different and longer history of acceptance in the nation, they should not be regarded as binding or dispositive in this case.

Three Federal Circuit courts have addressed the "under god" language found in the US Pledge. The 9th Circuit Court of Appeals addressed the issue of "under god" language in the US Pledge of political allegiance that the state of California required public school children to recite. (See Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. Cal., 2002).) The 9th Circuit in Newdow eventually held that the 1954 Act of Congress adding the words "under God" to the United States Pledge of Allegiance, and the public school district's policy and practice of teacher-led recitation of the US Pledge of Allegiance, with the added words included, violated the Establishment Clause to the US Constitution.[14]

The Seventh Circuit also has considered "under god" language in the United States Pledge of Allegiance, and whether it violated the Establishment clause. Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992). While the Seventh Circuit did uphold the "under god" language found in the **US Pledge**, it is not certain that it would uphold the "under god" language in the US pledge if it had been recently inserted into that pledge. In fact, the concurring judge in Sherman criticized the majority's opinion because its "ceremonial deism" rationale "…implies that phrases like 'in God we trust' or 'under God', when initially used on

[13] See 4 U.S.C. § 4: "The Pledge of Allegiance to the Flag: '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.'..." See also Newdow v. Elk Grove Unified School District, 292 F.3d 597, 600-601 (9th Cir. 2002), for the history of the United States Pledge of Allegiance.

[14] The US Supreme Court eventually held that the Plaintiff in that case, Dr. Newdow, a non-custodial parent, lacked standing to bring the case, and therefore reversed the 9th Circuit Court of Appeals on that limited standing ground alone. (See Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).)

American coinage or in the Pledge of Allegiance, violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use…"(See Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992).)[15] Therefore, the Seventh Circuit would likely agree that the insertion of "under god" into the Texas Pledge of Allegiance so recently is not mere "ceremonial deism", and therefore violates the Establishment Clause.

The 4th Circuit has also considered whether "under god" in the US Pledge violates the Establishment clause. (See Myers v. Loudon, 418 F.3d 395 (4th Cir. 2005).) Admittedly, the 4th Circuit did say that "under god" language in the US Pledge was constitutional. Also admittedly, the 4th Circuit would probably find a rationalization to uphold the "under god" language inserted into the Texas Pledge of Allegiance, if it had jurisdiction. However, the basis of the 4th Circuit's opinion appears to be based on two misguided rationales. First, the 4th Circuit relies on US Supreme Court orbiter dictum[16] allegedly showing that it would uphold the under god language in the US pledge. The Fourth Circuit also noted that "…we are not bound by dicta or separate opinions of the Supreme Court…"(See Myers v. Loudon, 418 F.3d 395, 406 (4th Cir. 2005).) Since the 4th Circuit does not consider itself bound by dicta, its citation of dicta should not be considered particularly persuasive. The 4th Circuit also refers to the history of the nation as justifying under god language in the US Pledge, particularly legislative prayer, presidential pronouncements of days of thanksgiving, and the Declaration of Independence:

[15] Justice Thomas made a similar criticism of the ceremonial deism rational in another case: "But words such as 'God' have religious significance. For example, just last Term this Court had before it a challenge to the recitation of the Pledge of Allegiance, which includes the phrase 'one Nation under God.'…This phrase is thus anathema to those who reject God's existence and a validation of His existence to those who accept it. Telling either nonbelievers or believers that the words 'under God' have no meaning contradicts what they know to be true. Moreover, repetition does not deprive religious words or symbols of their traditional meaning. Words like 'God' are not vulgarities for which the shock value diminishes with each successive utterance." (Van Orden v. Perry, 545 U.S. 677, 696-697 (2005).)

[16] "The history of our nation, coupled with repeated dicta from the Court respecting the constitutionality of the Pledge guides our exercise of that legal judgment in this case."Myers v. Loudon, 418 F.3d 395, 402 (4th Cir. 2005)

"If the founders viewed legislative prayer and days of thanksgiving as consistent with the *Establishment Clause*, it is difficult to believe they would object to the Pledge, with its limited reference to God. The Pledge is much less of a threat to establish a religion than legislative prayer, the open prayers to God found in Washington's prayer of thanksgiving, and the Declaration of Independence."(See Myers v. Loudon, 418 F.3d 395, 405 (4th Cir. 2005))

However, the 4th Circuit reliance on legislative prayer as justifying the US Pledge's "under god" language in the public school context is completely misplaced. The US Supreme Court has made it clear that establishment clause concerns in the public school context are heightened due to the fact that children are forced to attend school, and due to their youthful impressionability:

"Inherent differences between the public school system and a session of a state legislature distinguish this case from Marsh v. Chambers, 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330 (1983). The considerations we have raised in objection to the invocation and benediction are in many respects similar to the arguments we considered in Marsh. But there are also obvious differences. 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 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..." (See Lee v. Weisman, 505 U.S. 577, 596-597 (1992).)

Declarations of thanksgiving by the President can be distinguished from the present case, and from cases involving the US Pledge in the public schools on a couple of grounds. First, declarations of thanksgiving by the President, whether Constitutional or not, are probably not

subject to a Federal court injunction.[17] The President, under our Constitution, represents a separate but equal branch of government. For this reason, the US Supreme Court, and all subsidiary Federal courts, have no authority under the Constitution to issue injunctions against the President. Presidential declarations of thanksgiving would need to be redressed through Congress' impeachment power or through the ballot box, at the next Presidential election, not through the courts. Additionally, a declaration of thanksgiving by the President does not involve a captive audience, such as public school children, who are required by law to attend public schools, and such a declaration is not aimed primarily at impressionable children, making it more like legislative prayers upheld in Marsh, discussed earlier. References to "nature's god"[18] in the Declaration of Independence cannot justify the US Pledge's "under god" language in public

[17] See Miss. v. Johnson, 71 U.S. 475, 500 (1866), "The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." See also, Newdow v. Bush, 2002 U.S. Dist. LEXIS 27758 (E.D. California 2002), "Whether the issue is restraining the President, or the Congress, or both, the same point applies as made earlier about the courts' lack of authority to adjudicate the propriety of the internal procedures of the other branches -- the courts lack such authority under our system of government.")

[18] "When, in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation…" (The Declaration of Independence) It should be noted that this document's reference to "the laws of nature" and of "nature's god" reflects the rationalistic deism of the founding fathers, and the spirit of the Enlightenment:

"Since the golden age of Greece, there has been only one era of reason in twenty-three centuries of Western philosophy. During the final decades of that era, the United States of America was created as an independent nation. This is the key to the country –to its nature, its development, and its uniqueness: the United States is *the nation of the Enlightenment.*" (The Ominous Parallels, Leonard Peikoff, Chapter 5: *The Nation of the Enlightenment*, pg. 100)

"The Enlightenment was grounded in a brilliant series of scientific discoveries that had made the preceding century –the 1600's- perhaps the greatest epoch in the history of the human mind…" (The Meaning of The American Revolution, Dan Lacy, Chapter 1, *The 18th Century* World, pg. 24)

"Deism": The belief, based solely on reason, in the existence of God as the creator of the universe who after setting it in motion abandoned it, assumed no control over life, exerted no influence on natural phenomena, and gave no supernatural revelation. (The American Heritage Dictionary (Second College Edition), 1985)

The point of this is that The Declaration of Independence shows that America was not founded on "Christian principles", but on Enlightenment principles of reason and a scientific search for the truth.

schools because, once again, the document does not directly involve impressionable public school children.

Even if the US Supreme Court were to eventually uphold the US Pledge's reference to god in public schools, it would probably do so on the "ceremonial deism" rationale that was the basis of the 7th Circuit's opinion[19], discussed earlier in this brief. Since this 7th Circuit "ceremonial deism" rationale would only apply to long-standing references to god on coins and the US Pledge, it wouldn't apply to the very recent insertion of "under god" into the Texas Pledge. The 4th Circuit also claimed that "under god" language in the US Pledge isn't religious in nature. (See Myers v. Loudon, 418 F.3d 395, 408 (4th Cir. 2005).) However, this appears to be another way of saying that the "under god" language is just "ceremonial deism". For this reason, this rationale also wouldn't appear to apply to the *recent* insertion into the Texas Pledge of the same language.

C. The Legislative History of the post-6/15/2007 version of Texas Government Code § 3100.101 Shows that The Statute Has No Secular Legislative Purpose and that Any Alleged Secular Purpose is a Sham

There are differences between the US Pledge circuit court cases discussed above[20], and the current case regarding the Texas State Pledge. First the 9th, 7th, and 4th Circuit cases mentioned were dealing with a pledge of allegiance that had contained "under god" language since at least the 1950's. The current case deals with a pledge that contained no "under god" language until June 15, 2007. Furthermore, none of these circuit court cases contained a legislative record similar to the legislative record found in the post-6/15/2007 version of Texas Government Code § 3100.101.

[19] Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992)
[20] See Newdow v. U.S. Cong., 292 F.3d 597 (9th Cir. Cal., 2002), Myers v. Loudon, 418 F.3d 395 (4th Cir. 2005), and Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) discussed above.

The legislative history of the 6-15-07 amendment to Texas Government Code § 3100.101 clearly demonstrates that the author and supporters of the addition of "one state under god" language to the Texas State Pledge of Allegiance were motivated by a non-secular intent when they enacted the statute. House Bill 1034 of the Texas House of Representatives, which would eventually insert "one state under god" into Texas Government Code § 3100.101, was authored and sponsored by Representative Debbie Riddle. Representative Riddle claimed that her purpose in authoring and sponsoring the bill was to make the Texas State Pledge of Allegiance "mirror" the US Pledge of allegiance:

[REPRESENTATIVE BURNAM] Ms. Riddle, what is the purpose of this bill?

[REPRESENTATIVE RIDDLE] The purpose of this bill is very simple. It is to simply have our state pledge mirror, if you will, or reflect our national pledge. (See Appendix Pg. 19-20, "TRANSCRIPT OF AUDIO FILE OF PROCEEDINGS RELATING TO HOUSE BILL 1034 TEXAS HOUSE OF REPRESENTATIVES May 3, 2007; May 4, 2007; May 23, 2007 ", Pg. 10-11, lines 21-1.)

In essence, Representative Riddle claimed that her purpose in introducing the phrase "one state under god" into the Texas Pledge was to make it more like the US Pledge, which says: "one nation under god". Since the Lemon and Endorsement tests for judging a statute's constitutionality under the Establishment clause both require that a statute be enacted with a secular purpose, the purpose behind the introduction and passage of HB 1034 is relevant. Furthermore, the mere fact that the supporters of HB 1034 may have verbally claimed to have a secular purpose only matters if that secular purpose can be shown to be "sincere" and not a "sham". (See Wallace v. Jaffree, 472 US 38, 64 (1985), "The first inquiry under Lemon is whether the challenged statute has a 'secular legislative purpose.'…this secular purpose must be

'sincere'; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a 'sham.'") Assuming, for a moment, that "mirroring" the US Pledge is a secular legislative purpose, the legislative history of HB 1034 reveals that this alleged purpose was not sincere, and was a sham.

It should first be noted that HB 1034 author Debbie Riddle has admitted on the floor of the Texas State Legislature that she repudiates the US Supreme Court on the issue of separation of church and state:

[REPRESENTATIVE BURNAM] Are you aware that the governor has recently said, quote, freedom of religion should not be taken as freedom from religion? Do you agree with that statement, Ms. Riddle? [REPRESENTATIVE RIDDLE] Would you repeat that? I didn't hear you. [REPRESENTATIVE BURNAM] Are you aware that Governor Perry has recently said, and I quote, freedom of religion should not be taken as freedom from religion? And my question is, Do you agree with that statement, Ms. Riddle? [REPRESENTATIVE RIDDLE] I would say amen. (See Appendix Pg. 18, "TRANSCRIPT OF AUDIO FILE OF PROCEEDINGS RELATING TO HOUSE BILL 1034 TEXAS HOUSE OF REPRESENTATIVES May 3, 2007; May 4, 2007; May 23, 2007 ", Pg. 9, lines 10-22.)

This belief is contrary to the law as stated by the US Supreme Court: "…the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith **or none at all**." (See Wallace v. Jaffree, 472 US 38, 41 (1985), emphasis added.) This mistaken attitude of Representative Riddle should be remembered by this court when judging whether her comments regarding the purpose behind HB 1034's "one state under god" language are sincere or a sham.

During legislative debate on HB 1034, Representative Riddle's stated purpose of "mirroring" the US Pledge was eventually revealed to be a sham. The sham nature of this "mirroring" rationalization first became clear in a discussion between Representative Riddle and Representative Scott Hochberg:

"[REPRESENTATIVE HOCHBERG] Will the lady yield for a question? [THE SPEAKER] Do you yield, Ms. Riddle? The lady yields. [REPRESENTATIVE RIDDLE] Yes. [REPRESENTATIVE HOCHBERG] Thank you, Ms. Riddle. Thank you, Mr. -- thank you, Mr. Speaker. Thank you, Ms. Riddle. I'm just trying to get clear in my own mind because I'm going to have constituents ask me about my vote, of course, one way or another. And I voted with you last night. [REPRESENTATIVE RIDDLE] Thank you. [REPRESENTATIVE HOCHBERG] And I expect to vote with you today. Tell me -- tell me why you picked out --you said last night that you were trying to essentially conform our pledge to the national pledge. And if I'm misstating what you said, please clarify that for me. [REPRESENTATIVE RIDDLE] No, that, I think, is what I made very clear, that in our national pledge we say "one nation under God." I felt like it was altogether right and appropriate for us to have in our state pledge that we would say 'one state under God.' [REPRESENTATIVE HOCHBERG] We also in the national pledge, if I'm not mistaken, say 'with liberty and justice for all.' You didn't include that in your bill, I don't believe. Was there some reason that you didn't include that but you did include the 'under God' part? [REPRESENTATIVE RIDDLE] No. [REPRESENTATIVE HOCHBERG] No? Would you --would you -- would you take a third reading amendment to add "with liberty and justice for all"? [REPRESENTATIVE RIDDLE] No. [REPRESENTATIVE HOCHBERG] Because? [REPRESENTATIVE RIDDLE] I think that the way we have it now, it reads smoothly. It says what we wanted it to say. And I think that -- we voted on it yesterday, and I

think that we have a consensus that it basically says what we want it to say, sir. [REPRESENTATIVE HOCHBERG] Okay. So you're trying -- but you're basically trying to pick up the religious piece from the national pledge and just move it down to our state pledge; is that fair? [REPRESENTATIVE RIDDLE] What I said yesterday is that it simply mirrors -- mirrors the national pledge in that area. [REPRESENTATIVE HOCHBERG] It mirrors the religious part of the pledge. [REPRESENTATIVE RIDDLE] This pledge is in fact unique to Texas, and we're -- we're not trying to replicate the entire pledge, but there are parts of the pledge that I thought that we could put in it. [REPRESENTATIVE HOCHBERG] And why did you think that that particular part was appropriate to replicate rather than the other? [REPRESENTATIVE RIDDLE] That is the – that is the part that I thought of. I didn't even think about the other, sir. [REPRESENTATIVE HOCHBERG] And so why would you be opposed to the "with liberty and justice for all" part? Isn't that important, too? [REPRESENTATIVE RIDDLE] We're in the third reading, and -- [REPRESENTATIVE HOCHBERG] I just thought of it. [REPRESENTATIVE RIDDLE] You just now thought of it? [REPRESENTATIVE HOCHBERG] I did, ma'am. [REPRESENTATIVE RIDDLE] You just now thought of it? [REPRESENTATIVE HOCHBERG] I did, ma'am. I really did, just then. It was a little late last night, ma'am. It really was. Had I thought of it then, I really would have brought it up to you then, but I didn't. And so -- and so I guess what I'm trying to understand, because I don't want to -- I don't want to mess with the purpose of your bill, and I don't want to put a point of order on your bill, or I don't want to do any of that stuff. I'm just trying -- if you're just -- if the purpose of your bill is you're just trying to do the religious part of it, I understand that. If the purpose of your bill was to mirror the federal pledge to the --the pledge to the national flag, to the Star Spangled Banner, then it's not getting that because you're

missing an important part. And so I just -- I want it to serve whatever purpose you said that you think it's supposed to serve. [REPRESENTATIVE RIDDLE] Well, I didn't think of the other, but our pledge is unique to Texas, and I think that we -- we have it the way we want it. But next session, if you would like to put that in it, then I welcome you to do that. [REPRESENTATIVE HOCHBERG] Okay, but why was this part a priority? [REPRESENTATIVE RIDDLE] I think I shared that last night. [REPRESENTATIVE HOCHBERG] Well, I'm sorry. It was late last night, and it's hard to hear back here and it's hard -- you have a -- you have a soft voice and sort of a smooth voice. It makes it very hard for me to hear back here, so – [REPRESENTATIVE RIDDLE] Well, I'll tell you what. I'm a horse woman. I live on 16 acres. I can holler from my house to the barn and have all the horses hear me. So I can raise my voice. [REPRESENTATIVE HOCHBERG] We should probably -- we should probably do this without microphones. I'd probably hear you better than with the sound -- [REPRESENTATIVE RIDDLE] It kind of – it kind of tends to echo; does it not? [REPRESENTATIVE HOCHBERG] I'm sorry. [REPRESENTATIVE RIDDLE] Yes. [REPRESENTATIVE HOCHBERG] Okay. [REPRESENTATIVE RIDDLE] I think I made my point very clear last night, and I think I've made my point clear today. [REPRESENTATIVE HOCHBERG] And your point is that the "under God" part is what you think is important to move over? [REPRESENTATIVE RIDDLE] That is what that we put in there, sir. It mirrors the national pledge. It's a very simple concept, and I really feel like that it's being redundant to have to say that over and over. [REPRESENTATIVE HOCHBERG] Thank you. I never mean to make anybody be redundant. Thank you, ma'am." (See Appendix Pg. 34-40"TRANSCRIPT OF AUDIO FILE OF PROCEEDINGS RELATING TO HOUSE BILL 1034 TEXAS HOUSE OF

REPRESENTATIVES May 3, 2007; May 4, 2007; May 23, 2007 ", Pg. 25-40, lines 20-31, emphasis added; see also, Appendix Pg. 52-54.)

This exchange clearly demonstrates that "mirroring" the US Pledge was not the sincere purpose behind HB 1034 because the bill's author didn't want to include "with liberty and justice for all" in the Texas State Pledge just, "under god". If making the State Pledge conform to the national pledge were the true purpose behind HB 1034, then the Texas State Legislature should have amended it to say: "Honor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible, **with liberty and justice for all**." Such an amendment would have made the Texas Pledge conform to the US Pledge: "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.**" However, because the supporters of HB 1034 in the Texas State Legislature only cared about the religious, "under god", part of the US Pledge of Allegiance, the thought of including the clearly secular message of "with liberty and justice for all" in the Texas Pledge did not even occur to the bill author or its supporters. Furthermore, as the passage quoted above reveals, when it was proposed that "with liberty and justice for all" be added to the Texas State Pledge of Allegiance, they rejected it as unimportant.

At points during the legislative debate over HB 1034, Representative Riddle and her supporters even dropped the pretense that the bill had a secular legislative purpose and admitted that they were attempting to advance a Judeo-Christian agenda:

"[REPRESENTATIVE BURNAM] Do you know that in the bill analysis it's stated that your bill will acknowledge our -- quote, our Judeo-Christian heritage? [REPRESENTATIVE RIDDLE] Yes, sir. [REPRESENTATIVE BURNAM] I'm sorry? [REPRESENTATIVE RIDDLE] Yes, uh-huh." (See Appendix Pg. 15, "TRANSCRIPT OF AUDIO FILE OF PROCEEDINGS

RELATING TO HOUSE BILL 1034 TEXAS HOUSE OF REPRESENTATIVES May 3, 2007; May 4, 2007; May 23, 2007 ", Pg. 6, lines 1-3.)

D. Texas Government Code § 3100.101 has a Principal or Primary Effect That Advances some Religions and Inhibits other Religions

In addition to having no secular legislative purpose, which is prong one of the "Lemon Test", Texas Government Code §3100.101 also fails prong two of the rule from Lemon. Requiring a declaration from school children that Texas is "one state under god", or requiring school children who are not monotheists to sit and listen while teachers and other students recite that Texas is "one state under god", advances monotheistic religion and inhibits polytheistic or non-theistic religions.

E. Texas Government Code § 3100.101 and the Endorsement Test

The State of Texas' practice of requiring students to recite the Texas Pledge in public schools aims to inculcate in students a respect for the ideals set forth in the Texas Pledge. For this reason it is a state endorsement of those ideals. One of those ideals, as of 6/15/2007, is that Texas is "one state under god". Although students cannot be forced to participate in recitation of the Texas Pledge, the State of Texas is nonetheless conveying a message of endorsement of a religious belief when it requires the board of trustees of each school district to require students, whose parents haven't allowed their children to opt out, once during each school day at each school in the district, to recite the Texas Pledge[21], and when it requires students whose parents have allowed them to opt out, to sit and listen while other students recite the Texas State Pledge. As was noted by the 9th Circuit Court of Appeals:

[21] See Texas Education Code, §25.082(b).

"The Supreme Court recognized the normative and ideological nature of the Pledge in Barnette, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178. There, the Court held unconstitutional a school district's wartime policy of punishing students who refused to recite the Pledge and salute the flag. Id. at 642. The Court noted that the school district was compelling the students 'to declare a belief,' id. at 631, and 'requiring the individual to com-municate by word and sign his acceptance of the political ideas [the flag] ... bespeaks,' id. at 633. 'The compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind.' Id. The Court emphasized that the political concepts articulated in the Pledge 6 were idealistic, not descriptive: ''Liberty and justice for all,' if it must be accepted as descriptive of the present order rather than an ideal, might to some seem an overstatement.' Id. at 634 n. 14."(See Newdow v. U.S. Cong., 292 F.3d 597, 608 (9th Cir. 2002).)

The "under god language" in the Texas State Pledge is an impermissible government endorsement of religion. It "…sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.' *Lynch, 465 U.S. at 688* (O'Connor, J., concurring)." (See Newdow v. U.S. Cong., 292 F.3d 597, 608 (9th Cir. 2002).)

By statute, the Texas Pledge of Allegiance describes Texas as "one state under God", and although no student is required to recite the Pledge, if their parents write a note to the school[22], "…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" (See Allegheny v.

[22] See Texas Education Code, §25.082(c).

ACLU, 492 U.S. 573, 672 (1989) (Kennedy, J., dissenting).)[23] It also borders on sophistry to suggest that the "reasonable" **polytheist** public school child**,** whether that polytheist be a Native American practicing his people's original religion, or an immigrant from the Far East or Africa[24], would not feel less than a full member of the political community every time his fellow Texas classmates recited, as part of their expression of patriotism and love for state, a phrase he also believed to be false.

A profession that we are a state "under God" "…is identical, for *Establishment Clause* purposes, to a profession that we are a nation [or state] 'under Jesus,' a nation [or state] 'under Vishnu,' a nation [or state] 'under Zeus,' or a nation [or state] 'under no god,' because none of these professions can be neutral with respect to religion." (See Newdow v. U.S. Cong., 292 F.3d 597, 607-608 (9th Cir. 2002).)

F. Texas Government Code §3100.101 and the No-Sect-Preference Test

As was mentioned earlier, the US Supreme Court has said that if the Establishment clause stands for anything, it stands for the principle that the government may not discriminate amongst religious groups, unless such discrimination is closely fitted to a compelling state purpose. (See Larson v. Valente, 456 U.S. 228, 244 (1981).) Texas Government Code §3100.101, by proclaiming that Texas is "one state under god" violates this non-discrimination principle. Even if, at one time, in this state's past, the citizenry were mostly Judeo-Christian, and certainly all monotheistic, this simply isn't the case today. The April 2008 edition of Texas Monthly,

[23] As was noted in Newdow v. U.S. Cong., 292 F.3d 597, 608, footnote 7 (9th Cir. 2002), for Justice Kennedy, this result was a reason to reject the endorsement test.

[24] The 2008 New York Times Almanac estimates that there are over 3 million Buddhist Americans, and that there are 800 Hindu and 100 Jain-centers in the US. (See Appendix Pg. 8.) The same 2008 New York Times Almanac describes Hinduism as "…a complex of **polytheistic** religion and philosophy that evolved from Vedism, an ancient Indian religion of Indo-European origin dating from the second millennium B.C." (See Appendix Pg. 7, emphasis added.) The 2008 New York Times Almanac describes Jainism as "…a **polytheistic** religion established in India…in the 6th century B.C…" (See Appendix Pg. 9, emphasis added.)

describes the recent opening of "Baps Shri Swaminarayan Mandir Hindu Temple" near Houston, Texas. The article goes on to note that this temple is "…the first traditional Hindu shrine of its kind in the country…It's turrets, arches, and flags outside and carved likenesses of Hindu **gods** bedecked in pounds and pounds of shimmering colored stones inside…" (See Appendix Pg. 2, emphasis added.) Hindu school children are not allowed to proclaim that Texas is "one state under **gods**" under Texas Government Code §3100.101 and Texas Education Code, §25.082. They are therefore forced to choose between not saying the Texas Pledge at all, thereby risking the chance they will be seen as unpatriotic or "un-American", or making a statement that goes against their own religious beliefs. This is precisely the sort of religious discrimination that the First Amendment seeks to avoid.

Respectfully Submitted,

By:_____s/W. Dean Cook____

W. Dean Cook
Texas Bar No. 24036393
PO BOX 260159
Plano, Texas 75026
214-336-7440 (phone)
972-767-3920 (fax)
dean@deancook.net
ATTORNEY IN CHARGE FOR PLAINTIFFS