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; JOHN DOE AND JANE DOE AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN	§	
Plaintiffs,	§	
	§	Civil Action No. 3:07 CV-1362-K
v.	§	
RICK PERRY, GOVERNOR OF THE STATE OF TEXAS	§	
Defendant.	§	

DEFENDANT'S BRIEF IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General

SUSANNA DOKUPIL
BRANTLEY STARR
Assistant Solicitors General

MARINA GRAYSON
Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 936-1700
[Fax] (512) 370-9191

COUNSEL FOR DEFENDANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rules and Constitutional Provisions:

Other Authorities:

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TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS:

Plaintiffs ask this Court to hold that the words "under God" in a pledge violate the Constitution. Such a holding would run counter to virtually every other court in the history of the United States that has ever considered the issue squarely or mentioned it in dicta. If the words "under God" in the Texas pledge violate the Constitution, then they also are unconstitutional in the national pledge, and, indeed, in Abraham Lincoln's Gettysburg Address. Neither the precedent of the United States Supreme Court nor any other authority binding on this Court compels such a conclusion—on the contrary, the Supreme Court has

repeatedly stated that acknowledgments of God in our country's heritage are consistent with the Establishment Clause of the First Amendment. Moreover, reciting the pledge is a patriotic exercise, not a religious one. Defendant Governor Rick Perry requests that the Court deny Plaintiffs' motion for summary judgment and grant his cross-motion for summary judgment declaring that Texas Government Code §3100.101—which prescribes the language of the Pledge of Allegiance to the Texas Flag—is constitutional.

STATEMENT OF FACTS

In 2007, the Texas State Legislature amended the Pledge of Allegiance to the Texas Flag to read: "Honor the Texas flag; I pledge allegiance to thee, Texas, *one state under God*, one and indivisible." TEX. GOV'T CODE §3100.101. (emphasis added)[1] The legislative history unequivocally indicates that the intent behind this act—like the intent underlying the addition of the words "under God" in the national pledge—is to acknowledge that a belief in a Supreme Being was historically important to the founders of our nation and of the State of Texas.

Bill sponsor Representative Debbie Riddle indicated her intent to "make[] our state pledge consistent with the national pledge." Hearing on Tex. H.B. 1034 Before the House Comm. on Culture, Recreation, and Tourism, 80th Leg. R.S. (March 20, 2007) (testimony

1. The Pledge of Allegiance to the Texas Flag was first adopted in 1933 as part of an effort to establish a set of guidelines for the proper display of the Texas Flag. Act of April 19, 1933, 43d Leg., R.S., ch. 87, §3, 1933 Tex. Gen. Laws 186, 187 (amended 1965) (current version at TEX. GOV'T CODE §3100.101). As initially written, the Pledge read: "Honor the Texas Flag of 1836; I pledge allegiance to thee, Texas, one and indivisible." *Id.* In 1965, the Pledge was amended to delete the previous reference to Texas's Flag of 1836. Act of April 2, 1965, 59th Leg., R.S., ch. 55, 1965 Tex. Gen. Laws 138 (amended 1989) (current version at TEX. GOV'T CODE §3100.101).

from State Rep. Debbie Riddle) (tape available from House Media Services) [*hereinafter* Riddle testimony], App. at 3. The national pledge reads 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." 4 U.S.C. §4 (emphasis added).

The statement of legislative history in the United States Code explains at length that the insertion of "under God" in the national pledge was to acknowledge that

> [o]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

H.R. Rep. No. 1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340, App. at 42. The United States Code indicates that the words "under God" in the national pledge merely

> reflect[] the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forbears recognized the inherent truth that any government must look to God to survive and prosper. In the year 1620, the Mayflower compact, a document which contained the first constitution in America for complete self-government, declared in the opening sentence "In the name of God. Amen."

Id. The legislative statement of intent further cites examples from William Penn,[2] the United States Supreme Court,[3] the Declaration of Independence,[4] and the Gettysburg Address,[5] all

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2. "It was William Penn who said: 'Those people who are not governed by God will be ruled by tyrants.'" *Id.* at 2340, App. at 42.

3. "The Supreme Court ruled in 1892 that 'this is a religious nation.' . . . [and that] 'We are a religious people whose institutions presuppose a supreme being.'" *Id.* (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)), App. at 42.

4. The Statement quotes from the Declaration of Independence at length, noting that it references God four times:

'When in the course of human events, it becomes necessary for one people to dissolve the political

demonstrating that acknowledging of the role of God in the founding of our country has a long and continuous history. *Id.*

Significantly, the framers of the amendment to the national pledge drew a specific distinction

> between the existence of religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs. The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment.

Id. at 2341-42, App. at 43-44. Congress stated its intent to comply fully with the Supreme Court's view of the First Amendment and, just as importantly, its intent not to "establish[] a religion" or "interfer[e] with the 'free exercise' of religion." *Id.* at 2341, App. at 41.

In a parallel vein, Representative Riddle indicated in her statement to the House Committee on Culture, Recreation, and Tourism that she believed

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> bands 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.
>
> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are Life, Liberty, and the pursuit of Happiness.'

Id. at 2341, App. at 43. It also notes that "[T]his same document appeals to 'the Supreme Judge of the World' that this Nation will be free, and pledges our Nation to support the Declaration 'with a firm reliance on the protection of divine Providence.'" *Id.*

5. "Later at Gettysburg on November 19, 1863, Lincoln said:

> That we here highly resolve that these dead shall not have died in vain; that this Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth."

Id.

> that our State, even when it was its own nation, was founded on the belief that we should have the right to acknowledge God. The seventh page of the Texas Declaration of Independence says that Mexico, quote, denies us the right of worshiping the Almighty according to the dictates of our own conscience by the support of a national religion calculated to promote the temporal interest of its human functionaries rather than the glory of a true and living God. End quote.

Riddle testimony, App. at 3.[6]

When the bill was called for second reading on the House floor, Representative Riddle repeatedly indicated that the bill "simply replicates, mirrors our national pledge." H.J. of Tex., 80th Leg., R.S. 3055, 3056 (May 3, 2007), App. at 14. And again on third reading, Representative Riddle stated "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.'" H.J. of Tex. 80th Leg., R.S. 3145, App. at 22.

Senate sponsor Dan Patrick, speaking before the Senate Committee on State Affairs, indicated that his legislative intent was based on the same precepts as the addition of the identical words in the national pledge:

> [S]ince the time of our founding fathers through current times, the presence and influence of God has been intrinsically associated with political and social culture in the United States. The Declaration of Independence, for example, contains two [*sic*] references to God including the concept that all men are endowed by their Creator. The Emancipation Proclamation refers to the gracious favor of Almighty God. FDR often referred to God in his fireside chats during the war. Furthermore, on June 14th, 1954, President Dwight D. Eisenhower affirmed a similar sentiment when he signed legislation adding the words "under God" to the pledge of allegiance. House Bill 1034 will acknowledge our Judeo-Christian heritage by placing the words "under God" in the state pledge.

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6. The full text of the Texas Declaration of Independence (March 2, 1836) may be found at http://www.tarlton.law.utexas.edu/constitutions/text/CdDecl.htm (last visited May 19, 2008), App. at 34-38. For the section from which Representative Riddle quotes, see App. at 36.

Hearing on Tex. H.B. 1034 Before the Senate Comm. on State Affairs, 80th Leg., R.S. (May 14, 2007) (Testimony from State Sen. Dan Patrick) (tape available from Senate Staff services office), App. at 25. On second reading, Senator Patrick reaffirmed this intent. Debate on Tex. H.B. 1034 on the Floor of the Senate, 80th Leg., R.S. (May 16, 2007) (tape available from Senate Staff Services Office), App. at 30.

No statements in either House or Senate transcripts indicated that any members disputed this stated purpose of acknowledging our heritage, though some attempted to distinguish between the act of mirroring the national pledge and of acknowledging our nation's heritage, and others believed the bill wrongheaded. Moreover, the Bill Analyses prepared by the House and Senate Research Committees plainly reiterated the sponsors' intent to "acknowledge the [S]tate's Judeo-Christian heritage." House Comm. on Culture, Recreation, and Tourism, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007); *see also* Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007), App. at 47-48. It also emphasized the intent to reflect the "natural and indefeasible right to worship Almighty God according to the dictates of their own consciences" enumerated in the Texas Constitution. *Id.*[7] Similarly, the Senate Research Center explained the author's intent as follows: "Since the founding of the United States through modern times, there has been

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7. Indeed, Stephen F. Austin himself saw the cause of Texas independence as subordinate to a Supreme Being: "With these claims to the approbation and moral support of the free of all nations, the people of Texas have taken up arms in self-defence, and they submit their cause to the judgement of an impartial world, and to the protection of a just and omnipotent God." Stephen F. Austin, *Address of the Honorable S. F. Austin, Delivered at Louisville, Kentucky, March 7, 1836, available at* The Avalon Project, Yale Law School, http://www.yale.edu/lawweb/avalon/texind01.htm (last visited May 19, 2008), App. at 64.

a link to God in the political and social culture of the United States. . . . Placing the phrase 'under God' in the Texas state pledge may best acknowledge this heritage." Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007), App. at 48.

Plaintiffs challenge the amended pledge, asserting that it violates the Establishment Clause of the First Amendment to the United States Constitution and its incorporation to the States under the Fourteenth Amendment. *See* Plaintiffs' Original Complaint & Application for Injunctive Relief ("Complaint") at 4, App. at 69. Their sole argument is that the statute is unconstitutional because their children, whom they are raising as atheists, are injured when the pledge is recited in accordance with Texas Education Code §25.082(b), which says in relevant part: "The board of trustees of each school district shall require students, once during each school day . . . to recite: (1) the pledge of allegiance to the United States flag . . . . and (2) the pledge of allegiance to the state flag in accordance with Subchapter C, Chapter 3100, Government Code." TEX. EDUC. CODE §25.082(b).

Significantly, Plaintiffs have not challenged the recitation of the national pledge, which contains identical language. For the first time in their Motion for Summary Judgment, they raise a challenge the recitation statute in addition to the pledge amendment statute. Pl. Br. Supporting MSJ at 1 ("Plaintiffs contend that Texas Government Code § 3100.101 and/or Texas Education Code, §25.082 [*sic*] violate the Establishment Clause of the First Amendment."); *see also* Complaint at 4-5, App. at 69-70; Plaintiffs' Brief Setting Forth Their Contentions of Fact and/or Law and Argument and Authorities on Plaintiff's Motion for Preliminary Injunction at 4-5 (not challenging the recitation statute), App. at 75-76.

The recitation statute contains an opt-out provision: "On written request from a student's parent or guardian, a school district shall excuse the student from reciting a pledge of allegiance under Subsection (b)." TEX. EDUC. CODE §25.082(c). Plaintiffs argue that the recitation statute, despite the opt-out provision, "convey[s] a message of endorsement . . . when it requires . . . 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, and when it requires students whose parents have allowed them to opt-out, to sit and listen while other students recite the Texas pledge." Pl. Br. in Support of MSJ at 20.[8] Plaintiffs have not, however, alleged any facts indicating that their children sought benefit of the opt-out provision and were denied it, or that the opt-out provision as applied in their school district was insufficient to cure their specific injury they have asserted. They have not raised any other facts indicating the manner in which their school handled the required state-pledge recitation. Thus, they effectively challenge the amended state pledge only on its face.

This Court denied Plaintiffs' request for preliminary injunctive relief on August 28, 2007 after a hearing. Order, App. at 78. No disputed facts have come to light since that time. Defendant therefore requests judgment as a matter of law under Federal Rule of Civil Procedure 56(c) and requests that the Court deny Plaintiffs' motion.

SUMMARY OF THE ARGUMENT

8. The statutory language does not require students opting out to sit and listen—they could also stand just outside the classroom or report to the principal's office. The statute leaves these choices to the discretion of school officials.

For nearly fifty years, schoolchildren have begun the day reciting the Pledge of Allegiance to "one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. §4. The Texas Pledge uses the identical phrase "under God," and virtually every single reference to the Pledge—by the United States Supreme Court, by the federal courts of appeal, and repeatedly by individual Justices—has confirmed its constitutionality. Moreover, the United States Supreme Court has repeatedly affirmed that historical and patriotic acknowledgments of our religious and cultural heritage are constitutional. Plaintiffs have not challenged the constitutionality of the national pledge or its recitation by public school children, yet they have failed to draw any meaningful distinction between the national pledge and the state pledge. They have not demonstrated—as they must to prove a facial challenge—that the amended Texas Pledge or its recitation is unconstitutional in every conceivable application.

Accordingly, Plaintiffs cannot prove that the Texas Pledge as amended violates the First and Fourteenth Amendments of the United States Constitution, and—given the absence of a genuine issue as to any material fact—Defendants are entitled to summary judgment under Federal Rule of Procedure 56(c).

ARGUMENT

I. VIRTUALLY EVERY COURT TO CONSIDER THE ESTABLISHMENT CLAUSE IMPLICATIONS OF THE WORDS "UNDER GOD" IN THE NATIONAL PLEDGE HAS FOUND THEM CONSTITUTIONAL.

The Plaintiffs' facial challenge fails in the face of centuries of tradition and precedent recognizing and approving the acknowledgment of America's heritage.[9] In order to prevail on a facial challenge, the "plaintiffs must show that under no circumstances could the law be constitutional." *Barnes v. State of Mississippi*, 992 F.2d 1335, 1343 (5th Cir. 1993). Courts are "obliged to presume that state officials will act in accordance with the law." *Id.* (citing *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 513 (1990)). Given the virtual unanimity of American jurisprudence pointing to the clear constitutionality of the United States Pledge of Allegiance—which uses the identical phrase "under God"—Plaintiffs cannot demonstrate that the Texas Pledge of Allegiance violates the Constitution, much less in every conceivable application.

A. The Supreme Court, and Individual Justices, Have Commented Favorably on the Constitutionality of the Words "Under God" in the Pledge of Allegiance.

The Supreme Court has never ruled directly on the constitutionality of the words "under God" in the national pledge, but the Court and individual justices have indicated that the pledge—like other public acknowledgments of God in the national anthem and motto—would not violate the Establishment Clause. Although it faced this question in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), the Court declined to resolve

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9. Although Plaintiffs did not specifically classify their challenge as facial, in order to bring an as-applied challenge, they would have to offer evidence of the specific manner in which the challenged statute has been administered against them. An as-applied challenge is determined by whether a particular application of a statute runs afoul of the Constitution. *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988). In other words, the Court must look not only to the language of a statute, but also to the "manner in which it ha[s] been administered in practice." *Id.* Here, the Plaintiffs have offered no allegation of any specific manner in which the challenged statute has been administered against them. As a result, they cannot now bring an as-applied challenge.

the issue on the merits, holding that the petitioner lacked standing to assert his claim. *Id.* at 17. But Justice Stevens, writing for the Court, noted that

> [t]he very purpose of a national flag is to serve as a symbol of our country, and of its proud traditions of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations. As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a *patriotic exercise* designed to foster national unity and pride in those principles.

Id. at 6 (emphasis added, internal citations and quotation marks omitted). Thus, the six-member majority of the Court implied what the concurring justices expressed—that the recitation of the national pledge is simply not a religious exercise.

Three justices concurred, writing separately to opine that the pledge recitation was constitutional. Chief Justice Rehnquist observed that "[t]he phrase 'under God' seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances." *Id.* at 26. He specifically noted that

> [t]he phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the . . . traditional concept that our Nation was founded on a fundamental belief in God. Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

Id. at 30-31 (internal quotations omitted).

Justice O'Connor wrote that the recitation of the national pledge would not endorse religion—not because its religious content was *de minimus*, but because it, like other acknowledgments of religion in the national motto and anthem, are constitutional based on their history and ubiquity, the absence of worship or prayer, the absence of reference to a particular religion, and a minimal religious content. *Id.* at 37-42. She explained that "[j]ust

as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses, . . . it should not deny that our history has left its mark on our national traditions." *Id.* at 35. Justice O'Connor—the architect of the endorsement test often used to adjudicate the constitutionality of government-sponsored speech or displays—found that the historical context in which these public ceremonial references to God arose prevents them from creating a perception that "these acknowledgments . . . signify[] a government endorsement of any specific religion, or even of religion over nonreligion." *Id.* at 36.

Justice Thomas also would have found the pledge recitation constitutional. Even though he would reject the Establishment Clause's incorporation to the States entirely, *id.* at 45, he would still uphold the pledge because "the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge . . . does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue." *Id.* at 54.

Elsewhere, the Supreme Court has repeatedly noted with particularity that the reference to God in the United States Pledge of Allegiance withstands Establishment Clause scrutiny. Illustrating the existence of "an unbroken history of official acknowledgment . . . of the role of religion in American life from at least 1789," the Court in *Lynch v. Donnelly*, for example, listed—with no hint of criticism—"the language 'One nation under God' . . . [in] the Pledge of Allegiance to the American flag." 465 U.S.668, 674-76 (1984). This language, like the national motto "In God We Trust" on United States currency and the frieze

of the Ten Commandments in the Supreme Court, serves as an "illustration[] of the Government's acknowledgment of our religious heritage" that "help[s] explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Id.* at 676-78.

The Supreme Court repeated its view that the United States Pledge of Allegiance survives constitutional scrutiny in *County of Allegheny* v. *ACLU*, 492 U.S. 573, 602-03 (1989). The Court stated that "[o]ur previous opinions have considered in dicta the [national] motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* (citing *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *see also Lynch*, 465 U.S. at 716-17 (Brennan, J., dissenting)).

Individual justices have also indicated that the words "under God" in the national pledge are constitutional. As Justice Brennan wrote in concurrence in *School District of Abington Township v. Schempp*:

> The reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

374 U.S. 203, 304 (1963). Even though Justice Brennan later retreated from his position in *Schempp* in *Marsh v. Chambers*, he did there reiterate that if

> features of our public life such as . . . "One Nation Under God" [were challenged] . . . . I might well adhere to the view expressed in *Schempp* that such mottos are consistent with the Establishment Clause, not because their import is *de minimis*, but because they have lost any true religious significance.

463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (citing *Schempp*, 374 U.S. at 203-04 (Brennan, J., concurring)).

Likewise, well before *Newdow*, Justice O'Connor expressed her view that the reference to God in the Pledge of Allegiance "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) (citation omitted).

Other instances abound in which individual Justices have alluded to the obvious constitutionality of the words "under God" in the national pledge. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 633-30 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); *Wallace*, 472 U.S. at 88 (Burger, J., dissenting); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring and dissenting, joined by Rehnquist, C.J., and White & Scalia, JJ.); *Engel v. Vitale*, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting); *see also Schempp*, 374 U.S. at 307-08 (Goldberg, J., concurring, joined by Harlan, J.).

All together, fourteen Justices have indicated that the words "under God" in the national pledge are constitutional: Chief Justice Burger, Chief Justice Rehnquist, and Justices Brennan, Goldberg, Harlan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Kennedy, Scalia, and Thomas.

Given that virtually every reference to the United States Pledge by the Supreme Court or by an individual Justice of the Supreme Court has confirmed its constitutionality,[10] the Texas Pledge, which uses the identical phrase "under God," is also constitutional. Both Pledges serve as patriotic statements and acknowledgments of our nation's and State's rich heritage—a long tradition that the Supreme Court has indicated is consistent with the Establishment Clause.

B. Two Circuit Courts Have Upheld the Constitutionality of the Words "Under God" in the National Pledge, and the Third Was Reversed by the Supreme Court.

The United States Court of Appeals for the Fourth Circuit recently found constitutional the words "under God" in a pledge-recitation statute. *Myers v. Loudon County Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005). The statute in question, like Texas's, mandated the recitation of the United States Pledge of Alliance but allowed exceptions for parents who object. *Id.* at 398. The Fourth Circuit held that the recitation of the pledge is not unconstitutional because it is a "patriotic activity," not a state-sponsored prayer. *Id.* at 407-08. As it opined:

> The Establishment Clause works to bar sponsorship, financial support, and active involvement of the sovereign in religious activity. The Pledge, which is not a religious exercise, poses none of these harms and does not amount to an establishment of religion.

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10. *But see Engel*, 370 U.S. at 437 & n.1, 440 n.4, 441 (Douglas, J., concurring) (explaining that, in Justice Douglas's opinion, legislative chaplains, the use of the Bible for administration of oaths, the use of the GI Bill funds in denominational schools, the national motto "In God We Trust," federal tax exemptions for religious organizations, the cry "God save the United States and this Honorable Court," and the Pledge of Allegiance, *inter alia*, are all equally unconstitutional).

Id. at 408 (citations omitted). Just as various Supreme Court Justices have observed, the Fourth Circuit found that

> the Pledge is by its nature a patriotic exercise, not a religious exercise .... Moreover, as the history of our nation makes clear, acknowledgments of religion simply do not threaten to establish religion in the same manner that even voluntary school prayer does.

Id.

The United States Court of Appeals for the Seventh Circuit has reached the same conclusion. *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 439 (7th Cir. 1992). That court made clear that while a state cannot compel anyone to recite the Pledge of Allegiance, an objecting pupil cannot prevent his classmates from doing so. *Id.* at 439. The court concluded that "schools may lead the Pledge of the Allegiance daily, so long as pupils are free not to participate." *Id.*

The only federal circuit to conclude otherwise is the United States Court of Appeals for the Ninth Circuit, which at one point—in a widely criticized decision—held that a school district's policy of pledge recitation was unconstitutional. *Newdow v. U.S. Congress*, 328 F.3d 466, 490 (9th Cir. 2003). That opinion was reversed on standing grounds by the United States Supreme Court. *Newdow*, 542 U.S. at 17-18. Indeed, both the United States and *all 50 States* urged the reversal of the Ninth Circuit's decision,[11] and the Supreme Court's reversal of that aberrant Ninth Circuit judgment was unanimous.

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11. Brief for the United States in Opposition, 2003 WL 22428408 (U.S., Aug. 4, 2003); Brief for the United States as Respondent, Supporting Petitioners, 2003 WL 23051994 (U.S., Dec. 19, 2003); Brief for Texas, et al., as Amici Curiae in Support of Petitioners, 2003 WL 23011472 (U.S. Dec. 18, 2003).

Significantly, the Ninth Circuit's original panel decision found the insertion of the words "under God" in the pledge itself unconstitutional, *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002), but that decision was withdrawn and amended by a subsequent iteration that did not so hold, 328 F.3d 466. Even the one Ninth Circuit panel that declared the recitation of the Pledge of Allegiance unconstitutional in public schools ultimately did not go so far. Yet, Plaintiffs essentially ask this court to reach a parallel result by declaring the identical amendment to the Texas Pledge unconstitutional on its face both as recited in public schools and in every other context.

The Fifth and Eleventh Circuits have also indicated the constitutionality of patriotic references to God in the national Pledge of Allegiance in dicta. The Fifth Circuit noted that "[r]eferences to God in a motto or pledge, for example, have withstood constitutional scrutiny . . . and do not give an impression of government approval. *Doe v. Tangiapahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (2006); *see also Murray v. City of Austin*, 947 F.2d 147, 154-55 (5th Cir. 1991) ("[G]overnment use of religious acknowledgment, if not religious belief, is allowed: *e.g.*, . . . the pledge of allegiance . . . ."). The Eleventh Circuit similarly distinguished between an unconstitutional Ten Commandments display before it and the national pledge and other patriotic references to God in the motto and anthem. *Glassroth v. Moore*, 335 F.3d 1282, 1301 (11th Cir. 2003) (noting the Supreme Court's approval of such acknowledgments).

Four other circuits have recognized the constitutionality of patriotic references to God in other contexts without mentioning the national Pledge of Allegiance specifically. *See*

Freethought Soc'y v. Chester County, 334 F.3d 247, 264 (3d Cir. 2003) (noting the constitutionality of the official use of "God Save the United States and this Honorable Court" and "In God We Trust"); *ACLU v. Capitol Sq. Rev. & Adv. Bd.*, 243 F.3d 289, 291 (6th Cir. 2001) (upholding the constitutionality of the Ohio state motto: "With God, All Things Are Possible"); *ACLU v. City of Plattsmouth*, 419 F.3d 772, 777 (8th Cir. 2005) (en banc) (listing "patriotic invocations of God and official acknowledgments of religion's role in our Nation's history" as an example of the Supreme Court's acceptance of passive religious acknowledgments) (internal quotation marks omitted); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (upholding the constitutionality of the motto "In God We Trust" and its inscription on currency and coins).

Accordingly, not only the United States Supreme Court's references to the words "under God" indicate that the phrase's presence is fully constitutional, but a majority of the federal circuits—and all but one panel that has opined on the issue directly—agree. Thus, the identical words in the Texas Pledge are equally constitutional.

II. THE SUPREME COURT HAS HELD HISTORICAL AND PATRIOTIC ACKNOWLEDGMENTS OF OUR RELIGIOUS AND CULTURAL HERITAGE—SUCH AS THE WORDS "UNDER GOD" IN THE STATE AND NATIONAL PLEDGE—AS CONSTITUTIONAL UNDER THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

Without challenging the constitutionality of the national Pledge of Allegiance, Plaintiffs contend that their children should not have to view or hear others recite the Texas Pledge because it contains the words "under God." Even leaving aside the practical quandary that the Plaintiffs have created by asserting an injury from exposure to the words "under

God" in one pledge but not the identical words in the other, this exposure is entirely different from the sort the Supreme Court has found unconstitutional in the context of school prayer. Rather, it falls squarely within the tradition of the sort of public historical acknowledgments of our heritage that the Supreme Court has consistently approved.

A. Acknowledgments of Religion in Patriotic or Historical Contexts Are Fundamentally Different from Government-Endorsed Religious Ceremony.

In deciding Establishment Clause cases, the Supreme Court has been careful to distinguish between government-sponsored religious ceremonies—which it has found at times to run afoul of the First Amendment—and historical and patriotic references to religion by government institutions—which it has repeatedly found to be entirely constitutional. *See County of Allegheny*, 492 U.S. at 603 (noting the "*obvious distinction*" between unconstitutional religious displays "and *references to God in* the motto and *the pledge*" (emphases added)). The words "under God" in the Texas Pledge are no different than the words in the national Pledge of Allegiance that the Supreme Court and virtually every other court has found constitutional.

The Court has observed that the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" demonstrates that the Constitution has long been understood to permit public recognition of religious traditions. *See Van Orden v. Perry*, 545 U.S. 677, 686-87 (2005) (quoting *Lynch*, 465 U.S. at 674). The Court has recognized that "religion has closely been identified with our history and government," *Schempp*, 374 U.S. at 212, and that "[t]he history of man is

inseparable from the history of religion." *Engel*, 370 U.S. at 434. Indeed, as Justice O'Connor has observed, historical and patriotic acknowledgments of religion, such as the "government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable Court'":

> serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Lynch, 465 U.S. at 693 (O'Connor, J., concurring). Justice Brennan agreed, writing that "government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." *See County of Allegheny*, 492 U.S. at 625 (Brennan, J., concurring in part and concurring in judgment).

In drawing a distinction between permissible acknowledgments and unconstitutional endorsements of religion, the Court has observed that our country's historical tradition of including not only religious language and representations, but even ceremonial prayer in public life dates back to the time of the drafting of the Establishment Clause itself: "[T]he very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. And among the "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage," *id.* at 677, is the reference found in the "statutorily

prescribed national motto 'In God We Trust,'" *id.* at 676. Such references are an undeniable part of our nation's rich cultural history.

Most recently, the Supreme Court reaffirmed the distinction between acknowledgment and endorsement in *Van Orden*, upholding a public display of the Ten Commandments where the display comported with the historical tradition of acknowledging our heritage and where the display did not cause political divisiveness. *See* 545 U.S. at 687-90; *id.* at 702-03 (Breyer, J., concurring). Carefully distinguishing between a religious acknowledgment and a religious exercise, the plurality noted that the Ten Commandments monument was "quite different than the prayers involved in *Schempp* and *Lee v. Weisman* [, 505 U.S. 577 (1992)]." *Id.* at 691. The plurality opinion cited with approval several prominent examples of official acknowledgments of our heritage, including George Washington's Thanksgiving Day proclamation asking citizens to thank God for the country's successes, the practice of legislative prayer, and prevalent religious displays on buildings throughout the Nation's capital. *Id.* at 686-88. Indeed, it cited several uses of scripture itself, including the representation of Moses holding tablets inscribed with a portion of the Ten Commandments in the Supreme Court's own courtroom and a quotation from Micah 6:8 in the Library of Congress's Jefferson Building's Great Reading Room. *Id.* at 688-89 & n.9. The plurality also recognized that nontextual representations of the Moses and the Ten Commandments abound on public buildings, as do patriotic invocations of God in public settings. *Id.* & n.7. All of these, the Court explained, "bespeak the rich American traditions of religious acknowledgments," and are unquestionably constitutional. *See Van Orden*, 545 U.S. at 690;

see also id. at 699 (Breyer, J., concurring) ("But the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.").

Indeed, the Court has even upheld government-sponsored religious ceremony as a part of this historical tradition of acknowledging religion. In *Marsh*, 463 U.S. at 792-95, the Supreme Court, relying primarily on historical guidance, held that the Nebraska Legislature's practice of opening its legislative sessions with a prayer was not an unconstitutional establishment of religion. The Supreme Court wrote:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

Marsh, 463 U.S. at 792 (citation omitted).

Even taking into account the historical context that supported the constitutionality of the legislative prayer in *Marsh* or the Ten Commandments monument in *Van Orden*, the Pledge of Allegiance is a far more "obvious distinction" from an unconstitutional religious exercise or display than either. Unlike a prayer, the Pledge is a patriotic, not a religious exercise. *Newdow*, 542 U.S. at 6; *Myers*, 418 F.3d at 407-08. Unlike a prayer, the Pledge does not require anyone to affirm a belief in God, but merely to recognize the historical fact

that our nation was founded on a belief in God.[12] Unlike a Ten Commandments display, the Pledge does not reference any specific religious tradition or encourage any specific religious practices.

Accordingly, reciting the Texas Pledge cannot seriously be described as government-sponsored religious ceremony. Rather, the Texas Pledge's acknowledgment of our nation's and State's heritage falls well within the tradition of "the long and unbroken history of public religious acknowledgments by all three branches of government since 1789" that the United States Supreme Court has consistently understood not to run afoul of the Establishment Clause of the First Amendment.

B. Centuries of Historical and Patriotic Acknowledgment of our Heritage—Like That in the Texas Pledge—Have Not Threatened the First Amendment's Prohibition on Established Religion.

Our nation's acknowledgments of its religious heritage have never posed any real threat to the dangers the Establishment Clause was intended to prevent, *see Lynch*, 465 U.S. at 686, and this case prevents no exception. As the Supreme Court has recognized:

> the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is far-fetched indeed.

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12. The national motto, "In God We Trust" arguably requires more affirmation of belief than the pledge, yet four circuits and one state supreme court have specifically upheld its constitutionality. *Lambeth v. Bd. of Comm'rs of Davidson Cty.*, 407 F.3d 266 (4th Cir. 2005); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979); *Aronow*, 432 F.2d at 243; *Opinion of the Justices*, 228 A.2d 161, 164 (N.H. 1967). Similarly, the Sixth Circuit has affirmed the Ohio state motto, "With God, All Things Are Possible." *ACLU v. Capitol Square Rev. & Adv. Bd.*, 243 F.3d 289 (6th Cir. 2000).

Id. (internal citation omitted). This Court should likewise conclude that the recitation of the Texas Pledge would not create an establishment of religion.

III. THE TEXAS PLEDGE IS CONSTITUTIONALLY INDISTINGUISHABLE FROM THE NATIONAL PLEDGE.

The language challenged in the Texas Pledge is identical to that in the national pledge. If the national pledge is constitutional, the Texas Pledge is also constitutional. Indeed, the Court has said, "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent limits on the states than the draftsmen imposed upon the federal government." *Van Orden*, 545 U.S. at 688 (quoting *Marsh*, 463 U.S. at 790-91 (1983) (upholding a state legislature's practice of maintaining a chaplain to open sessions with prayer)).

Plaintiffs' only distinction between the national Pledge of Allegiance, whose constitutionality they do not dispute, and the Texas Pledge is that the inclusion of "under God" in the latter was recently passed. That distinction makes no sense, particularly when the two are recited in tandem. At least forty-three state statutes provide for the recitation or use of the national pledge by public schoolchildren.[13] Regardless of when the "under God"

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13. *See* ALA. CODE §16-43-5 (2001); ALASKA STAT. §14.03.130 (2000); ARIZ. REV. STAT. §15-506 (2002); ARK. CODE §6-16-122 (2003); CAL. EDUC. CODE §52720 (1989); COLO. REV. STAT. tit. 22, §22-1-106 (2003); CONN. GEN. STAT. §10-230(c) (2003); DEL. CODE tit. 14, §4105 (2003); FLA. STAT. ch. 1003.44(1) (2002); GA. CODE §20-2-310(c)(1) (2001); IDAHO CODE §33-1602(4) (2001); 105 ILL. COMP. STAT. 5/27-3 (2002); IND. CODE §20-10.1-4-2.5 (2003); KAN. STAT. §72-5308 (2002); KY. REV. STAT. §158.175(2) (2001); LA. REV. STAT. §17:2115(B) (2001); MD. CODE EDUC. §7-105(c) (2001); MASS. GEN. LAWS ch.71, §69 (2003); MINN. STAT. §121A.11 (2003); MISS. CODE §37-13-7(1) (2001); MO. STAT. §171.021(2) (2003); MONT. CODE §20-7-133 (2001); NEV. REV. STAT. §389.040 (2002); N.H. REV. STAT. §194:15-c (2002); N.J. STAT. §18A:36-3(c) (1999); N.M. STAT. §22-5-4.5 (2001); N.Y. EDUC. LAW §802(1) (2000); N.C. GEN. STAT. §115C-47(29a) (1999); N.D. CENT. CODE §15.1-19-03.1(4) (2001); OHIO REV. CODE §3313.602(A) (1999); OKLA. STAT. tit. 70, §24-106 (2003); OR. REV. STAT. §339.875 (2001); 24 PA. CONS. STAT. §7-771 (1992); R.I. GEN. LAWS §16-22-11 (2001); S.C. CODE §59-1-455 (2000); S.D. CODIFIED LAWS §13-24-17.2 (2002); TENN. CODE §49-6-1001(c)(1) (2002); TEX. EDUC. CODE §25.082 (2003); UTAH CODE §53A-13-101.6 (2000); VA. CODE §22.1-202(C) (2002); WASH. REV. CODE §28A.230.140 (1997); W. VA. CODE §18-5-15b (1999); WIS. STAT. §118.06 (2003).

language was inserted, the intent behind the insertion and the effect of its present recitation are the same for both the state and national pledges. If schoolchildren across the nation reciting the phrase "under God" at the beginning of each school day does not offend the Constitution, then surely a State's amending its pledge to reflect the identical phrase does not either.

IV. THE PLEDGE IS CONSTITUTIONAL UNDER ANY TEST THE SUPREME COURT HAS EMPLOYED TO ANALYZE RELIGIOUS DISPLAYS OR EXERCISES.

Reciting the words "under God" in a pledge, along with the motto, is a distinct constitutional category not readily susceptible to the tests applied to religious exercises or displays. Even so, were those tests applied, the pledge would pass each of them.

A. The Words "Under God" Do Not Express an Unconstitutional Sectarian Preference.

Plaintiffs rightly note that the Supreme Court has held that the government may not discriminate among religious sects. *See Larson v. Valente*, 456 U.S. 228, 244 (1981) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); Pl. Br. in Support of MSJ at 2-3. Neither the national Pledge of Allegiance nor the Texas Pledge, however, so discriminates. The Supreme Court has specifically noted that the words "under God" in the pledge are nonsectarian:

> [T]here is an obvious distinction between creche displays and references to God in the motto and the pledge. However history may affect the constitutionality of *nonsectarian* references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.

County of Allegheny, 492 U.S. at 603 (emphasis added) (holding that the creche display at issue was unconstitutional).[14] Thus, as the Supreme Court has opined that the words "under God" in the pledge do not express a sectarian preference, Plaintiffs reliance on the no-preference test in *Larson* is immaterial.

B. The Words "Under God" Do Not Unconstitutionally Endorse Religion.

Plaintiffs also suggest that the words "under God" in the state pledge unconstitutionally endorse religion. Pl. Br. in Support of MSJ at 4-5. Again, the United States Supreme Court has found the exact contrary:

> Our 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.

County of Allegheny, 492 U.S. at 602-03 (distinguishing the reference to God in the motto and national pledge from the creche display that it found unconstitutional).[15]

Moreover, Justice O'Connor, the architect of the endorsement test, explained in her concurrence in *Newdow* that the words "under God" in the national Pledge of Allegiance would not be unconstitutional under that test:

> For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer . . . fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.

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14. Although the opinion in *County of Allegheny* was fractured, this quotation comes from section V.A., which represents the opinion of five justices: Blackmun, Brennan, Marshall, Stevens, and O'Connor.

15. *See supra* n.14.

542 U.S. at 36 (O'Connor, J., concurring). Nothing the Supreme Court has ever stated about the national pledge suggests a contrary result.

As explained above,[16] acknowledging our heritage is a longstanding tradition that dates back to the founding of this country. *See, e.g.*, *Van Orden*, 545 U.S. at 678 (citing *Lynch*, 465 U.S. at 674) ("From at least 1789, there has been an unbroken history of official acknowledgment by all three branches of government of religion's role in American life."). Whether a religious acknowledgment crosses a line into an unconstitutional endorsement "turns on its setting." *County of Allegheny*, 492 U.S. at 598.

Here, the setting of the Texas Pledge amendment specifically mirrors and incorporates the context of the national pledge. The words "under God" were added to the national pledge to underscore the fact that people in this country historically believed "that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. at 2340, App. at 42. The United States Supreme Court, and individual justices, with full knowledge of this setting, still has repeatedly approved the reference to God in the national pledge. The Texas Pledge was amended in a parallel setting of acknowledging our heritage. Thus, inserting the identical language into the Texas Pledge is also constitutional.

C. The Words "Under God" Do Not Have an Impermissible Purpose.

Because the Supreme Court has indicated that the words "under God" in the national pledge are constitutional, it has by implication concluded that the addition of those words had

16. *See supra* Part II.A.

a permissible purpose. Certainly, the Court has affirmed the importance of a secular purpose for government acknowledgments of religion. *See McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) ("When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality . . . ."); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). But if the purpose of recognizing our religious heritage in adding the words "under God" to the national Pledge of Allegiance is constitutional, then mirroring that purpose in adding the identical words to the Texas Pledge must also be constitutional.

Plaintiffs allege, however, that this stated purpose was a sham because Representative Riddle chose to mirror only the religious part of the national pledge and had an actual intent to acknowledge our religious heritage.[17] Pl. Br. in Support of MSJ at 16-20. In fact, the intent to acknowledge our heritage *itself* mirrors the national pledge, which had the identical intent in 1954. Not only does the avowed purpose match the actual purpose, but the United States Supreme Court has implicitly approved the very purpose of which the Crofts now complain by repeatedly affirming the constitutionality of the national pledge in dicta. Thus, the sincere and openly stated purpose behind the Texas Pledge amendment is constitutional. Whether the Crofts cast that purpose as sincere or sham is immaterial.

D. The Remaining Prongs of *Lemon* Do Not Apply.

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17. Plaintiffs assert that Rep. Riddle "repudiates the United States Supreme Court on the issue of separation of church and state" because she agreed that "freedom of religion should not be taken as freedom from religion." Pl. Br. in Support of MSJ at 15. The United States Supreme Court has never held that freedom of religion equals freedom from religion. Indeed, the Court has repeatedly held, as explained *supra* Part II.A, that acknowledgments of religion may be perfectly constitutional.

The *Lemon* test looks to whether a government action has a secular purpose, a primary effect that neither advances nor inhibits religion, and does not foster excessive governmental entanglement with religion. 403 U.S. at 612-13. After *Van Orden* and *McCreary*, it is not clear that the second two prongs of *Lemon* have any continuing application to religious display cases.

McCreary reaffirmed the importance of *Lemon*'s purpose prong, 545 U.S. at 859-60, but it did not discuss the other prongs, even so much as to mention that it did not need to reach them. *Van Orden*'s plurality, along with Justice Breyer's controlling concurrence, flatly rejected *Lemon* as an analytical rubric for passive religious acknowledgments: "Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history." *Van Orden*, 545 U.S. at 686; *id.* at 699-700 (Breyer, J., concurring) (noting that "legal judgment" governs the analysis rather than any one test). Similarly, Supreme Court dicta indicates that the pledge would be analyzed by its special nature and in light of our Nation's history. *See Myers*, 418 F.3d at 402 ("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."). Thus, *Lemon* would not likely apply. Even if it did, the Court's repeated assumptions that the words "under God" in the national Pledge of Allegiance are constitutional suggest that the same words in the Texas

Pledge would not violate these second two prongs, as they would have the identical effect or potential to foster government entanglement with religion.

E. The Words "Under God" Do Not Coerce a Religious Exercise.

Plaintiffs also assert that adding the words "under God" to the Texas Pledge unconstitutionally coerce the affirmation of a religious belief. Br. in Support of Pl. MSJ at 5; *see Lee v. Weisman*, 505 U.S. 577, 587 (1992) ("[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise."). Again, this is a facial challenge, and plaintiffs must demonstrate that there is no possible way to apply the statute constitutionally in order to prevail. *See Barnes*, 992 F.2d at 1343. Thus, for plaintiffs to prove that the statute amending the state pledge is facially unconstitutional under this test, they would have to demonstrate that it coerces participation in a religious exercise in every single possible instance, even with the opt-out provision in the recitation statute. And again, the plaintiffs have challenged only the Texas Pledge, and not the national Pledge of Allegiance, which by implication means that Plaintiffs believe that the recency of the change to the former somehow creates greater coercion than the recitation of the national pledge containing the identical language. They have offered no justification for drawing this distinction between the coercive effect of one and not the other.

Even if they had challenged both pledges as unconstitutionally coercive, however, the recitation of neither the state nor national pledge is a religious exercise; rather, it simply acknowledges a historical fact about our heritage. The United States Supreme Court has repeatedly distinguished between acknowledgments of God and religious exercises. In the

landmark case *Engel v. Vitale*, which found a public school's daily prayer recitation unconstitutional, the majority explained this demarcation:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

370 U.S. at 435 n.21. Similarly, in *Schempp*, the Court found unconstitutional a daily public school Bible reading and recitation of the Lord's Prayer, but did not indicate that anything was improper about reciting the pledge, which was also a part of the opening exercises. 374 U.S. at 205-08, 222. Indeed, in *Lee* itself, "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers," yet the Court found the latter unconstitutional without commenting on the former. 505 U.S. at 583.

Acknowledging our religious heritage in a patriotic context, therefore, is fundamentally different from a school-sponsored prayer. As Judge O'Scannlain observed in his dissent from the denial of rehearing en banc in *Newdow v. United States Congress*,

> If reciting the pledge is truly 'a religious act' in violation of the Establishment Clause, then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem. Such an assertion would make hypocrites out of the Founders and would have the effect of driving any and all references to our religious heritage out of our schools and eventually out of our public life.

328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting).

The Supreme Court has relied on the coercion test to invalidate a government action only in the context of state-sponsored school prayers. *See Lee*, 505 U.S. 577; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). Because the Court does not believe that patriotic references to our religious heritage are religious exercises, the coercion test does not apply to them.

F. The Fact that Schoolchildren Are Involved Does Not Change the Analysis.

In *Lynch*, the Court listed the national pledge as one of a number of acceptable public religious acknowledgments. In the next sentence, it observed that "[t]hat pledge is recited by thousands of public school children—and adults—every year." 465 U.S. at 676. Plainly, the Court did not think that the recitation of the words "under God" in the national pledge in or out of public schools made any constitutional difference. Similarly, the recitation of the identical words in the Texas Pledge in public schools does not change the constitutional analysis.

V. PLAINTIFFS CANNOT DEMONSTRATE THAT THE STATUTE PRESCRIBING THE TEXAS PLEDGE WOULD BE UNCONSTITUTIONAL IN ALL APPLICATIONS.

Even if the Court were to disregard the great weight of Supreme Court and circuit court jurisprudence, Plaintiffs nonetheless cannot overcome the hurdle of their facial challenge: They cannot demonstrate that there are no circumstances under which §3100.101 would be considered constitutional. *Cf. Barnes*, 992 F.2d at 1343. Indeed, Plaintiffs' sole purported injury—that their children might view and hear other students reciting the pledge—could be easily remedied by a school district policy permitting their children to

leave the room during the pledge recitation. Such a policy would be consistent with the statutory opt-out provision, as it is neither expressly permitted or precluded. *See* TEX. EDUC. CODE §25.082(c). Because such an application of the statute would altogether eliminate Plaintiff's hypothetical injury, Plaintiffs' facial challenge to the Texas Pledge statute fails as a matter of law.

PRAYER

For the foregoing reasons, the Court should grant Defendant's request for summary judgment and deny Plaintiffs' request for summary judgment.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DAVID S. MORALES
Deputy Attorney General for Civil Litigation

JAMES C. HO
Solicitor General

SUSANNA DOKUPIL
BRANTLEY STARR
Assistant Solicitors General

MARINA GRAYSON
Texas Bar No. 24042098
Assistant Attorney General

Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
[Tel.] (512) 463-2120
[Fax] (512) 320-0667

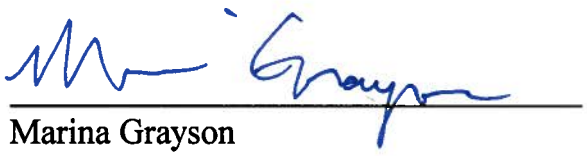
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that pursuant to the court's electronic filing procedures, a true and correct copy of the foregoing document was sent on May 20, 2008 via ECF notification to:

W. Dean Cook
Post Office Box 260159
Plano, Texas 75026

Counsel for Plaintiffs



Marina Grayson