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	§	

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's Electronic Filing Procedures, a true and correct copy of the following:

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3) **TABLE OF CONTENTS** For Plaintiff's Response to "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment"

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Plaintiff's Response to "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment"

I. Perry's "No Standing Argument"

Defendant seems to imply in his "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" that Plaintiff's lack standing in this case.

> "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). As refined by subsequent reformulation, this requirement of a 'personal stake' has come to be understood to require not only a 'distinct and palpable injury,' to the plaintiff, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), but also a 'fairly traceable' causal connection between the claimed injury and the

challenged conduct. *Arlington Heights* v. *Metropolitan Housing Dev. Corp*., 429 U.S. 252, 261 (1977)." (See Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978).)

"A necessary element of a case or controversy is a plaintiff's standing to sue…A Plaintiff must establish an injury in fact…"(See West Virginia Pride v. Wood County, 811 F. Supp. 1142, 1145 (SD West Virginia 1993).)

For instance, Perry seems to assert that the Crofts cannot assert that the statute discriminates against polytheists because they are allegedly atheists "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…"(See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 7) The religious views of the Crofts are irrelevant for the purposes of this case. First, Perry assumes that the John and Jane Doe Plaintiffs are not polytheists or theists.[1] Second, an inquiry by a court into the religious motivation of a Plaintiff in brining an Establishment clause lawsuit for purposes of determining standing is, itself, highly suspect under the Establishment Clause and the Free Exercise Clause of the Constitution. Any government testing of the sincerity of an individual's religious beliefs seems to be disfavored by the courts. For instance, in United States v. Ballard, 322 US 78 (1944), criminal defendants were charged with using the mail to obtain money by fraud. The defendants claimed to be divine messengers of a "Saint Germain", who was a currently living person, and claimed to be faith healers and have other divine powers, which they would use on the faithful for a donation to their church. The district court had submitted to the jury in their trial whether the defendants "…honestly and

[1] Plaintiff's counsel can neither confirm nor deny in this brief whether this is true because it might jeopardize their anonymity. If establishing John and Jane Doe's religious beliefs is relevant to standing, or any other matter before this court, then an arrangement will have to be made to allow the John and Jane Doe Plaintiffs to be questioned by the court on this matter, in a way that won't reveal their identities to the general public.

in good faith believe those things?" The trial judge did not submit to the jury any issue as to the falsity or truth of the defendant's representations. (See Id. at 81.) The Circuit Court of Appeals reversed the judgment of conviction and granted a new trial on the grounds that it was necessary to prove that the representations made by defendants were false before they could be convicted, and it remanded for a new trial. (See Id. at 83.) In reversing the Circuit Court the US Supreme Court said:

> "…we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require, the *First Amendment* precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' *Watson v. Jones, 13 Wall. 679, 728*… Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs." (See United States v. Ballard, 322 US 78, 86 (1944).)

Similarly, any inquiry into the religious beliefs of Plaintiffs by this court for purposes of standing would subject them to a sort of heresy trial, in which their religious beliefs become the basis for whether they are entitled to legal relief.

Perry also seems to assert that no real injury has occurred to Plaintiffs because they have not challenged the recitation of the national Pledge. "Significantly, Plaintiff's have not challenged the recitation of the national pledge…" (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 7) This is not Plaintiff's understanding of "injury in fact" for standing issues, and Plaintiff's counsel notes that Defendant has cited no case law or other authority to suggest that just because only one of two injuries inflicted by the state is challenged by Plaintiffs that the suit cannot go forward. In reality, "injury in fact" is generally loosened in the First Amendment context. For instance, the

courts have granted "taxpayer standing" to sue in certain Establishment clause cases. (See Flast v. Cohen, 392 U.S. 83 (1968).)

The courts are also clear that loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. (See Elrod v. Burns, 427 US 347, 373 (1976).) The injuries from the US Pledge recitation and the Texas Pledge recitation occur at distinct points in time. They are therefore distinct injuries, and just because Plaintiffs have chosen, for various reasons, to leave to other litigants a challenge of the US Pledge's "under god" language, does not mean that they somehow have waived or acquiesced in the distinct injury that occurs at a later point in time, when it is declared that this is "…one state under God…" By way of analogy, nobody doubts that being punched in the nose a second time is somehow less of an injury because one has already been punched in the nose at an earlier point in time.

If this court does determine that the current Plaintiffs lack standing to challenge the Texas Pledge of Allegiance statute, then they should be given leave to add more plaintiffs to the case, or to convert the case to a class action on behalf of all Texas schools students, with the current plaintiffs as lead plaintiffs. Furthermore, if this court determines that Plaintiffs must also challenge the Constitutionality of the US Pledge in order to challenge the Constitutionality of the Texas Pledge, then they should be given leave to amend their petition to so assert.

II. Perry's "Facial" versus "As-applied" Distinction

Defendant claims that in order to prevail, Plaintiffs must show that the statute is "…unconstitutional in every conceivable application." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 9) To

support this assertion, Defendant has cited Barnes v. State of Mississippi, 992 F2d 1335 (5th Cir 1993):

> "…facial challenge will succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional. Webster v. Reproductive Health Services, 492 U.S. 490, 524, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989) (O'Connor concurring)"(See Barnes v. State of Mississippi, 992 F2d 1335, 1342 (5th Cir 1993).)

However, it is doubtful that this limitation on facial challenges applies in the present case. Barnes involved a challenge of a state abortion statute. The Webster opinion cited in Barnes was also a challenge of an abortion statute:

> "Whether some or all of these or other applications of § 188.215 would be constitutional need not be decided here. *Maher, Poelker*, and *McRae* stand for the proposition that some quite straightforward applications of the Missouri ban on the use of public facilities for performing abortions would be constitutional and that is enough to defeat appellees' assertion that the ban is facially unconstitutional. 'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [relevant statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment.' *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)." (See Webster v. Reprod. Health Servs., 492 U.S. 490, 524 (1989).)

It should be noted that in the First Amendment Context, the "overbreadth doctrine" provides an exception to the requirement that a challenge to a statute must apply to the particular challenger of the statute:

> "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court...What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle"(See New York v. Ferber, 458 U.S. 747, 767- 768 (1982).)

An "overbroad statute" is one that is written too broadly, or more broadly than necessary. It is a statute that is designed to burden or punish activities that are not constitutionally protected, but its flaw is that, as drafted, it also includes activities protected by the First Amendment, usually in the Freedom of Speech Context[2]:

> "'An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but [that] includes within its scope activities which are protected by the First Amendment.' **16** An overbroad statute is invalid on its face, not merely as applied, and cannot be enforced until it is either redrafted or construed more narrowly by a properly authorized court. **17** This, in effect, removes the speech-limiting 'sword of Damocles' from over the heads of those who might wish to engage in expression protected by the First Amendment, but who are deterred in their inclination to speak when they learn that what they seek to say is rendered unlawful by the overbroad provisions of the statute." (See Hill v. Houston, 764 F.2d 1156, 1161-1162 (1985).)

Plaintiff's also now reject the notion that this "facial" versus "as-applied" distinction is particularly useful in the context of Establishment clause challenges, especially where they do not involve money or other aid to religious groups. The US Supreme Court seems ambivalent regarding the usefulness of this "facial" versus "as-applied" distinction in the Establishment Clause context:

> "Few of our cases in the Establishment Clause area have explicitly distinguished between facial challenges to a statute and attacks on the statute as applied. Several cases have clearly involved challenges to a statute "on its face." For example, in *Edwards* v. *Aguillard*, 482 U.S. 578 (1987), we considered the validity of the Louisiana "Creationism Act," finding the Act "facially invalid." Indeed, in that case it was clear that only a facial challenge could have been considered, as the Act had not been implemented. *Id.*, at 581,

[2] Plaintiff's cannot find any case law to indicate one way or the other whether this "overbreadth doctrine" applies in all First Amendment cases or just in Freedom of Speech cases. The majority of the cases dealing with this issue seem to be Free Speech cases.

> n. 1. Other cases, as well, have considered the validity of statutes without the benefit of a record as to how the statute had actually been applied. See *Wolman* v. *Walter*, 433 U.S. 229 (1977); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973). In other cases we have, in the course of determining the constitutionality of a statute, referred not only to the language of the statute but also to the manner in which it had been administered in practice. *Levitt* v. *Committee for Public Education & Religious Liberty*, 413 U.S. 472, 479 (1973); *Meek* v. *Pittenger*, 421 U.S. 349 (1975). See also *Grand Rapids School District* v. *Ball*, *supra*, at 377-379; *Aguilar* v. *Felton*, 473 U.S. 402 (1985). In several cases we have expressly recognized that an otherwise valid statute authorizing grants might be challenged on the grounds that the award of a grant in a particular case would be impermissible...There is, then, precedent in this area of constitutional law for distinguishing between the validity of the statute on its face and its validity in particular applications. Although the Court's opinions have not even adverted to (to say nothing of explicitly delineated) the consequences of this distinction between "on its face" and "as applied" in this context, we think they do justify the District Court's approach in separating the two issues as it did here."(See Bowen v. Kendrick, 487 U.S. 589, 600-602(1988).)

Plaintiffs think the court should reject the notion of an "as-applied" versus "facial" distinction in this context because the prohibition on governmental Establishment of Religion is not an individual right per se, but a restriction on state action. By way of contrast, the free speech clause of the First Amendment protects a right to individual action –the individual's freedom to take certain actions[3]. The Free Exercise clause of the First Amendment also protects freedom of action -the freedom to believe what one wants regarding religion, and, presumably, the freedom to communicate those beliefs to others by speaking and writing.[4] By way of contrast, the prohibition on an Establishment of Religion probably does not guarantee any sort of

[3] Admittedly, saying that an individual is politically free to take a particular action ultimately means the government is restrained from restricting that action by means of penalties such as fines, jail, or execution, but Constitutional provisions like the prohibition on ex post facto laws or on the establishment of religion are, more directly speaking, prohibitions on government behavior than they are a positive sanction regarding individual freedom of action. (The free speech clause and the freedom of religion clause are examples of such a positive sanction regarding individual freedom of action.) This may be why the courts typically do not want to require a showing of coercion before finding an Establishment clause violation. (See Engel v. Vitale, 370 U.S. 421, 430 (1962), see also, County of Allegheny v. ACLU, 492 U.S. 573, 628 (1989).)

[4] See TARA SMITH, MORAL RIGHTS AND POLITICAL FREEDOM, 123-139 (Rowman & Littlefield Publishers, Inc. 1995) for an excellent philosophical discussion of the nature of freedom.

individual freedom of action –it is more like the other prohibitions on governmental power found in the constitution, such as the prohibition on bills of attainder or ex post facto laws found in Article I, Section 9, Clause 3 of the US Constitution. While it may make sense to speak of a statute that prohibits certain types of speech as either invalid "facially" –i.e., for the actions of all people, or "as-applied", i.e., only with regard to the actions of particular individuals, this distinction makes no sense in the Establishment clause context –either the statute (or other governmental action) establishes religion or it doesn't.

Speaking of a "facial" versus "as-applied" distinction regarding Establishment clause cases also doesn't seem to make sense in light of traditional tests developed by the court such as the test found in Lemon v. Kurtzman[5] Under this test, the statute must have "secular legislative purpose". This secular purpose is normally going to need to be found in the text of the statute, i.e., on its face, and also in such secondary sources as the legislative history. This secular purpose prong of Lemon seems like a "facial" inquiry. Then, the court must look to whether the statute's principle or primary effect advances or inhibits religion. This seems more like an "as-applied" inquiry. The courts are basically looking at whether, regardless of the intentions of legislators in passing the law, the effect, which would seem to mean, at least in part, the law's application, or "how it has been administered in practice", advances or inhibits religion. In Bowen, this is precisely what was meant when the court spoke of a statute as violating the Establishment clause "as applied":

> "The District Court then concluded that the statute **as applied** also runs afoul of the *Lemon* effects test…"(See Bowen v. Kendrick, 487 U.S. 589, 599(1988), emphasis added.)

[5] (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))

The Court in Bowen did not mean that before they can win, the Plaintiff must show how a challenged statute "…has been administered against them." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 10, note 9.) The Court in Bowen simply meant that the secular purpose prong of the Lemon test could be seen as looking at the statute's "facial" validity, while the effects test of Lemon looks at whether the statute's application, but not necessarily it's application with respect to any particular individual plaintiff, advances or inhibits religion.

It should also be noted that the issue in Bowen was whether a particular governmental grant program to certain private organizations, specifically, anti-birth-control religious groups, for services in the area of premarital adolescent sexual relations and pregnancy, violated the Establishment clause. Furthermore, with the exception of Edwards v. Aguillard, 482 U.S. 578 (1987), the cases cited in the Bowen quote above, regarding this "facial" versus "applied" distinction, seem all to involve money aid, or the transfers of property, to religious groups:

> Wolman v. Walter, 433 U.S. 229 (1977), Ohio statute violated the Establishment Clause by authorizing various forms of state aid to church-related schools; Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), a state's education and tax laws were amended to establish financial aid programs for nonpublic schools; Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973), state law provided reimbursement to private schools for certain costs of testing and recordkeeping; Meek v. Pittenger, 421 U.S. 349 (1975), state statute authorizing public school authorities to lend textbooks and instructional material and equipment and to supply professional staff and supportive materials to qualifying nonpublic elementary and secondary schools, including primarily parochial schools; Grand Rapids School District v. Ball, 473 U.S. 373 (1985), state provided classes for nonpublic school students which were financed by public funds; Aguilar v. Felton, 473 U.S. 402 (1985), distribution of federal funds to pay the salaries of public employees who taught in parochial schools; Hunt v. McNair, 413 U.S. 734 (1973), state statute provided for an authority to review proposals for educational facilities and approve the issuance of revenue bonds for such facilities -the

> authority approved a proposal from a Baptist college; Tilton v. Richardson, 403 U.S. 672 (1971), citizens and taxpayers, sought injunctive relief against, appellees, officials who administer the Higher Education Facilities Act of 1963 to prevent them from providing federal aid for church-related colleges; Roemer v. Maryland Bd. of Public Works, 426 U.S. 736 (1976), state statute providing for annual grants to private colleges, including religious colleges.

For this reason, if it has any validity in Establishment clause cases at all, this, "facial" versus "as-applied" distinction should be limited to the situation of state money aid to religious schools or groups.

III. The Promoting Patriotism Argument

Defendant seems to believe that the Texas Pledge is Constitutional as written because it promotes patriotism, which is alleged to be its secular purpose. (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 11, quoting Justice Stevens writing for the majority in Elk Grove Unified School District v. Newdow, 542 US 1, 6 (2004), "Its [the US Pledge's] recitation is a patriotic exercise designed to foster national unity and pride in those principles.") Patriotism is defined as "Love of and devotion to one's country."[6] While the US Pledge may promote "love of and devotion of one's country", the Texas Pledge of allegiance is more of a declaration of state's rights, or nativism, and therefore not patriotic at all. Arguably, a declaration of "state's rights" is still a secular purpose, but, the fact that the Texas Pledge has such a radically different origin and motivation tends to suggest that Supreme Court dicta in other cases regarding the Constitutionality of the US Pledge shouldn't be considered applicable when judging the Constitutionality of the Texas Pledge.

[6] See The American Heritage Dictionary (2d College Ed. 1985)

IV. The Texas Pledge and "Ceremonial Deism"

Defendant also argues that the Texas Pledge's "under god" language is, in effect, mere "ceremonial deism" when he says "…the recitation of the national pledge is simply not a religious exercise." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 11) Even if the US Pledge's "under god" language can be upheld under this "ceremonial deism" rationale, the recent insertion of "under god" language in the Texas Pledge would mean that it has not lost its religious meaning through rote repetition over the years. (See "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry" at 9) Furthermore, the legislative history in Plaintiff's brief supporting their motion for summary judgment also shows that it is meant to have religious significance. (See "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry" at 13-20)

Defendant also cites dicta from a 5th Circuit Case, that seems to suggest that it would regard the US Pledge's "under god" language as Constitutional:

> "[G]overnment use of religious acknowledgement, if not religious belief, is allowed: *e.g.*,…the pledge of allegiance…"(See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 17, quoting Murray v. City of Austin, 947 F.2d 147, 154-55 (5th Cir. 1991).)

However, in another case cited, but not quoted, by Defendant's brief, the 5th Circuit spoke of the reference to God in the US Pledge as possibly justified as "ceremonial deism":

> "References to God in a motto or pledge, for example, have withstood constitutional scrutiny; they constitute permissible "ceremonial deism" and do not give an impression of government approval." (See Doe v. Tangiapahoa, 473 F.3d 188, 198 (5th Cir. 2006).)

If the 5th Circuit believes the US Pledge may be Constitutional as mere "ceremonial deism", then it is adopting the position of the 7th Circuit Court of Appeals:

> " Justice Brennan concluded that 'the reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content.' (Footnote omitted.) This court adopted such an approach when observing in *ACLU v. St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), that both "In God We Trust" and Christmas trees are secular, having lost their original religious significance. See also *Allegheny*, 492 U.S. at 616 (opinion of Blackmun, J.)." (See Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992)

As has already been noted by Plaintiffs in their memorandum in support of their motion for summary judgment, the "under god" language in the Texas Pledge was just inserted in 2007, and therefore has not lost its religious significance through rote repetition.

V. The Van Orden Case and "Passive Displays"

Perry Takes the Position that The Texas Pledge is a form of "public display" similar to the display of the Ten Commandments on a monument near the Texas State Capital Building. (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 21). Defendant then argues that since the Texas State Pledge is a "public display", Van Orden v. Perry, 545 U.S. 677 (2005) is significant.

It should first be noted that Van Orden was a close decision. Although the Ten Commandments display on the Texas Capital Building grounds was upheld, by a 5-4 majority of the US Supreme Court, only 4 Justices joined in the judgment of the Court. Rehnquist

announced the judgment, and Scalia, Kennedy and Thomas joined in that opinion. Breyer wrote a separate opinion in which he merely concurred in the judgment, and described the issue as "…a borderline case…" (See Van Orden v. Perry, 545 U.S. 677, 700 (2005).)

Breyer found the Ten Commandments monument in Van Orden different from other Ten Commandments display cases such as Stone v. Graham, 449 U.S. 39 (1980), because it did not involve public school children:

> "This case, moreover, is distinguishable from instances where the Court has found Ten Commandments displays impermissible. The display is not on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state." (See Van Orden v. Perry, 545 U.S. 677, 703 (2005).)

The plurality opinion in Van Orden also expressed the idea that public schools are subject to heightened scrutiny regarding Establishment clause issues:

> "…we held unconstitutional a Kentucky statute requiring the posting of the Ten Commandments in every public schoolroom. *Stone v. Graham, 449 U.S. 39, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam).* In the classroom context, we found that the Kentucky statute had an improper and plainly religious purpose…we have 'been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,' *Edwards* v. *Aguillard*, 482 U.S. 578, 583-584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987)."(See Van Orden v. Perry, 545 U.S. 677, 690-691 (2005).)

Van Orden also involved not just a "public display" of the Ten Commandments, but a **passive** public display of the Ten Commandments:

> "The placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more **passive** use of those texts than was the case in *Stone*, where the text confronted elementary school students every day."(See Van Orden v. Perry, 545 U.S. 677, 691 (2005), emphasis added.)

No reasonable person would believe that a ritualistic invocation of the Judeo-Christian deity prior to the beginning of class is a passive public display. The declaration that Texas is "one state under god" by the majority of a child's fellow school students and his teacher, all at the direction and encouragement of the State, at a place that he is required to attend by the compulsory school attendance laws, is not the same as a relatively small stone monument discretely tucked away on the lawn of the Texas State Capital Building.

VI. The "under god" Language in Texas Pledge is Sectarian

Defendant claims that the Texas Pledge's "under god" language is nonsectarian, and references the opinion in County of Allegheny v. ACLU:

> "[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, [52] history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 25-26, quoting County of Allegheny v. ACLU, 492 U.S. 573, 603 (1989).)[7]

The Texas Pledge, by proclaiming that this is "one state under god" does show government allegiance to a particular sect or creed. It shows allegiance to monotheism over polytheism, and atheism (if atheism is considered a "sect" or "creed".) Those who believe in the Judeo-Christian god would consider it a preference for polytheism if the Texas Pledge said this

[7] Interestingly, just prior to this section of the Allgeheny opinion, the court also noted:

> "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 [*603] of religious belief. Lynch, 465 U.S., at 693 (O'Connor, J., concurring); id., at 716-717 (Brennan, J., dissenting). We need not return to the subject of "**ceremonial deism**," see n. 46, supra, because there is an obvious distinction between creche displays and references to God in the motto and the pledge."(See County of Allegheny v. ACLU, 492 U.S. 573, 602-603 (1989), emphasis added.)

Which suggests that if the US Supreme Court were to uphold the US Pledge's "under god" language, it would do so on the grounds of "ceremonial deism".

was "one state under gods", and they would certainly consider it an affront to their beliefs if the Texas Pledge said this is "one state under no god". Since the majority of people in Texas believe in the Judeo-Christian deity, the majority of people tend to view a pledge that this is "one state under god" as non-discriminatory because they have never personally met a polytheist, such as a Hindu, but, as was discussed in Plaintiff's brief in support of their motion for summary judgment, Texas is now a religiously diverse society. (See "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry" at 22-23.)

VII. All Prongs of the Lemon Test Apply In This Case

Perry asserts that "After *Van Orden* and *McCreary*, it is not clear that the second two prongs of *Lemon* have any continuing application to religious display cases. (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 29) First, it has already been noted that the plurality opinion in Van Orden was only joined in by 4 Justices: Rehnquist, Scalia, Kennedy and Thomas. Breyer wrote a separate opinion, but joined in the judgment that the Establishment Clause allows the display of a monument inscribed with the Ten Commandments on the Texas State Capitol grounds. (See Van Orden v. Perry, 545 U.S. 677, 681 (2005).) Second, it is questionable that the daily recitation of the Texas Pledge in public schools is a "passive monument" like Van Orden, although Defendant seems to believe that it is. (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 29):

> "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."(See Van Orden v. Perry, 545 U.S. 677, 686 (2005), emphasis added.)

Defendant also implies that because the US Supreme Court was able to find no secular purpose under the first prong of Lemon, for a Ten Commandments display in McCreary County v. ACLU, 545 U.S. 844 (2005), that this somehow means they are no longer part of the Establishment clause jurisprudence:

> "*McCreary* reaffirmed the importance of *Lemon's* purpose prong…but did not discuss the other prongs, even so much as mention that it did not need to reach them." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 29)

In reality, this just means that it was unnecessary to discuss the effects and entanglement prongs of Lemon because the court in McCreary found that the Ten Commandment display at issue so blatantly failed the purpose prong of Lemon. At no point did the Court intimate that it was discarding the effects or entanglement prongs of the Lemon test in McCreary. In fact, the US Supreme Court has explicitly said that if "…the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary.'…" (See Edwards v. Aguillard, 482 U.S. 578, 585 (1987), quoting Wallace v. Jaffree, 472 U.S. 38, 56 (1985).)

VIII. Perry's Proposed "Remedy"

Defendant seems to suggest that this whole situation could be remedied by "…a school district policy permitting their children to leave the room during the pledge recitation." (See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 32-33) This proposed solution is unacceptable for a couple of reasons.

First, it must be remembered, as already discussed in Plaintiffs' brief in support of their motion for summary judgment, 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 "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry" at 8, quoting Engel v. Vitale, 370 U.S. 421, 430 (1962).)

Therefore, whether the Plaintiff's children are present or not when the State directs teachers to lead school students in reciting the Texas Pledge is probably not relevant to whether it violates the Establishment clause.

Second, requiring the Plaintiff's children to leave the classroom during the recitation of the Texas Pledge would subject them to ridicule, scorn, and social stigma[8], and, as noted by one Justice in a prior case, it is like sending them to a temporary jail:

> "Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church." (See Zorach v. Clauson, 343 U.S. 306, 324 (1952), Justice Jackson, dissenting.)

Third, it is doubtful that this is truly an option under Texas Education Code Section 25.082(c), since its text does not explicitly say that the children will be allowed to leave the classroom during the recitation of the Texas State Pledge or the US Pledge:

> "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)." (See Tex. Ed. Code Sec. 25.082(c).)

[8] "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention…To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.." (See Lee v. Weisman, 505 U.S. 577, 593-594 (1992).)

The express statutory language only speaks of excusing a student from **reciting** a pledge of allegiance, not that he is excused from the classroom or the school during the recitation. Given the fact that he could be subject to criminal sanctions under Texas Education Code Sections 25.085, and 25.094 for truancy if he leaves the classroom, this is not a genuine option for the Plaintiffs children.

Respectfully Submitted,

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