

TABLE OF CONTENTS

Page

**PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC
OF DEFENDANT-APPELLEE STATE OF CALIFORNIA** 1

ARGUMENT

I. REHEARING EN BANC IS APPROPRIATE
BECAUSE THE PANEL OPINION DIRECTLY
CONFLICTS WITH AN EXISTING OPINION BY
ANOTHER COURT OF APPEALS AND
SUBSTANTIALLY AFFECTS A RULE OF
NATIONAL APPLICATION IN WHICH THERE IS
AN OVERRIDING NEED FOR NATIONAL
UNIFORMITY. 3

II. REHEARING OR EN BANC CONSIDERATION IS
JUSTIFIED BECAUSE THE PANEL MISAPPLIED
RELEVANT TESTS FOR ALLEGED VIOLATIONS OF THE
ESTABLISHMENT CLAUSE 5

III. REHEARING SHOULD BE GRANTED SO THAT THE
MATTER MAY BE REMANDED TO THE DISTRICT
COURT FOR A DETERMINATION WHETHER PLAINTIFF
HAS STANDING TO BRING THIS ACTION. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Federal Cases

<i>County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter</i> , 492 U.S. 573, 602-03 (1989)	4, 7
<i>Engle v. Vitale</i> , 370 U.S. 421, 435 n.21 (1962)	8
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.</i> , 528 U.S. 167, 180 (2000)	10, 12
<i>Kuntz v. Reese</i> , 785 F.2d 1410 (9 th Cir. 1986)	11
<i>Lee v. Weisman</i> , 505 U.S. 577, 587 (1992)	7, 8, 13
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	4, 6, 8
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 561 (1992)	10
<i>Lynch v. Donnelly</i> , 465 U.S. 668, 693 (1984)	2, 6, 9
<i>Mender v. Williamsport Area Sch. Dist.</i> , 475 U.S. 534, 541 (1986)	10
<i>Monterey Mechanical Co. v. Wilson</i> , 125 F.3d 702, 706 (9 th Cir. 1997)	10
<i>Newdow v. Congress of the United States</i> , Ninth Circuit No. 00-164231, June 28, 2002	Passim
<i>Sherman v. Community Consolidated School District 21 of Wheeling Township</i> , 980 F.2d 437 (7 th Cir. 1992)	3, 4, 5, 7
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	7

Federal Rules of Court

Federal Rules of Appellate Procedure

Rule 35 2, 3
Rule 40 1

Ninth Circuit Rules

Rule 35.1. 2

Federal Rules of Civil Procedure

Rule 19(a). 12

Other Authorities

Pub. L. No. 396, ch. 297, 68 Stat. 249 (1965) 2

Miscellaneous

Associated Press, *Girl in Pledge Case No Atheist, Mother Says*, The
Washington Post, July 12, 2002, at A22 11

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court*, July 13, 2002, at A.15 11

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 00-16423

THE REVEREND DR. MICHAEL A. NEWDOW,

Plaintiff-Appellant,

v.

**THE CONGRESS OF THE UNITED STATES;
THE UNITED STATES OF AMERICA;
WILLIAM J. CLINTON, PRESIDENT OF THE
UNITED STATES; THE STATE OF
CALIFORNIA; THE ELK GROVE SCHOOL
DISTRICT; DAVID W. GORDON,
SUPERINTENDENT; THE SACRAMENTO
CITY UNIFIED SCHOOL DISTRICT; DR. JIM
SWEENEY, SUPERINTENDENT, SCUSD,**

Defendants-Appellees.

E.D. Cal. No.
CIV-S-00-0495 MLS PAN PS

**PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC
OF DEFENDANT-APPELLEE STATE OF CALIFORNIA**

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PS

On Appeal from the United States District Court
for the Eastern District of California

Honorable Milton L. Schwartz, United States District Judge

PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC
OF DEFENDANT-APPELLEE STATE OF CALIFORNIA

Defendant-Appellee State of California respectfully petitions the Court
for a rehearing of the panel's opinion. Fed. R. App. P. 40. Furthermore, the State

petitions for a rehearing en banc because this matter involves a question of exceptional importance and because the panel's opinion directly conflicts with an existing opinion by the Seventh Circuit Court of Appeals. Fed.R.App.P. 35; Cir.Rule 35.1.

Contrary to the panel's opinion, the Pledge of Allegiance (Pledge), as amended in 1954, Pub. L. No. 396, ch. 297, 68 Stat. 249 (1965), does not violate the Establishment Clause. The inclusion of the words "under God" in the context of the Pledge is a constitutionally acceptable expression of this country's religious heritage. Those words, and the entire Pledge, "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." *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). Indeed, the universal and bipartisan outcry in reaction to the panel's decision dramatically confirms Justice O'Connor's observation about the significance of the Pledge to the public as a vocal expression of patriotism and unity.

In light of the unquestionable importance of this issue to the public, rehearing is warranted.

ARGUMENT

I.

REHEARING EN BANC IS APPROPRIATE BECAUSE THE PANEL OPINION DIRECTLY CONFLICTS WITH AN EXISTING OPINION BY ANOTHER COURT OF APPEALS AND SUBSTANTIALLY AFFECTS A RULE OF NATIONAL APPLICATION IN WHICH THERE IS AN OVERRIDING NEED FOR NATIONAL UNIFORMITY.

Circuit Rule 35-1 specifies that “[w]hen the opinion of a panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity, the existence of such a conflict is an appropriate ground for suggesting a rehearing en banc.” This criterion is clearly met here.

The panel decision in this case squarely conflicts with the Seventh Circuit’s opinion in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992). In *Sherman*, parents of an elementary school student sued a school district to enjoin compliance with a state statute requiring daily recitation of the Pledge by elementary school pupils.^{1/} Unlike the panel here, the Seventh Circuit unanimously held that the 1954

1. In *Sherman*, claims against state defendants were dismissed on Eleventh Amendment grounds. *Sherman*, 980 F.2d at 440-41. The Eleventh Amendment is not an issue here as the State of California appears voluntarily as a defendant.

amendment to the Pledge is consistent with the Establishment Clause. Reasoning that the methodology of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is not a sufficiently precise lens for consideration of the issue presented, the circuit court took a more direct approach and satisfied itself that the Framers manifestly did not understand ceremonial invocations of God to constitute “establishment” of religion within the meaning of the First Amendment. *Sherman*, 980 F.2d at 445-48.

The Seventh Circuit took note of the Supreme Court’s observation that the Pledge’s reference to God is wholly “*consistent* with the proposition that government may not communicate an endorsement of religious belief.” *Sherman*, 980 F.2d at 447 (emphasis added) (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989)). Conceding that the Supreme Court might feel differently if confronted squarely with the question, the *Sherman* court elected, nevertheless, to maintain the status quo unless and until the Supreme Court rules otherwise: “[A]n inferior court had best respect what the majority says rather than read between the lines. If the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.” *Id.* at 488. The panel here, of course, chose to disregard the *Allegheny* majority’s

assurances. More troublesome though—considering the magnitude of the issue, the impact on the American public (especially following the events of September 11), and the absence of clear controlling precedent—was the panel’s rejection of the Seventh Circuit’s prudent approach: affording the Supreme Court the first opportunity to disavow its prior endorsement of the Pledge, should that Court find it appropriate to do so.

There is an overriding need for national uniformity in resolution of Establishment Clause challenges to the Pledge as it has been recited for nearly 50 years by citizens throughout the country and in American installations abroad. It is unimaginable that recitation of the Pledge—a verbal symbol of national unity—might be permissible in one form in one State, but impermissible in that same form in another State. The conflict between the panel decision and the decision of the Seventh Circuit in *Sherman* demands the resolution of the matter *en banc*.

II.

REHEARING OR EN BANC CONSIDERATION IS JUSTIFIED BECAUSE THE PANEL MISAPPLIED RELEVANT TESTS FOR ALLEGED VIOLATIONS OF THE ESTABLISHMENT CLAUSE.

The panel erroneously held that the Pledge of Allegiance, as modified nearly 50 years ago to add a reference to God, violates the Establishment Clause.

Slip op. at 9131. By misapplying the various tests used to analyze the constitutionality of the Pledge, the panel makes this the first and only court to strike down the Pledge as unconstitutional. The panel's tests are referred to in the opinion as the "endorsement test;" the "coercion test;" and the three-prong "purpose," "effects," and "religious-entanglement" test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The panel misapplied the endorsement test and found that the words "under God" amount to an endorsement of religion. Slip op. at 9122-24. The endorsement test was first articulated by Justice O'Connor in a concurring opinion in *Lynch v. Donnelly*, 465 U.S. 674 at 687-88. As explained by Justice O'Connor, government action can violate the Establishment Clause by excessive entanglement with religion as well as by government endorsement or disapproval of religion.

There is no precedent for the panel's holding that the Pledge fails the endorsement test. In fact, the holding is contrary to multiple suggestions by the Supreme Court that the Pledge passes constitutional muster. In *Lynch*, the Court approvingly referred to our country's acknowledgments of its religious heritage, including the Pledge, when it found that a city did not violate the First Amendment by including a nativity scene in an annual Christmas display. *Lynch*,

465 U.S. at 676-77. Subsequently, in ruling on the constitutionality of the display of a creche and a menorah, the Court noted that its prior decisions had characterized the Pledge “as *consistent* with the proposition that government may not communicate an endorsement of religious belief.” *County of Allegheny*, 492 U.S. at 602-03 (emphasis added). In finding that the Pledge fails the endorsement test, the panel ignored this clear direction. *Cf. Sherman*, 980 F.2d at 488. The panel instead relied on *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), which held that children may not be required to salute the flag and recite the Pledge as a prerequisite to public school attendance. *Barnette* was a compulsory-speech case that manifestly did not involve allegations of religious infringement—the case antedates by 11 years the disputed 1954 amendment to the Pledge—and is, therefore, inapposite to consideration of an alleged endorsement of religion within the meaning of the Establishment Clause.

The panel similarly misapplied the coercion test as formulated in *Lee v. Weisman*, 505 U.S. 577, 587 (1992), in relying on the principle that “government may not coerce anyone to support or participate in religion, or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” The panel incorrectly analogized the Pledge to forbidden invocation and benediction prayers led by clergy as part of the formal public

school graduation ceremonies. Slip op. at 9124. The Pledge is not a prayer or other form of religious exercise, even if it does refer to God. *See Engele v. Vitale*, 370 U.S. 421, 435 n.21 (1962) (distinguishing ceremonial references to God from supplications for divine assistance). The Supreme Court in *Lee*, while holding that a religious exercise may not be conducted at a graduation ceremony, nevertheless recognized the importance of making such a distinction to any fair assessment of the proper place of religion in American cultural heritage: “A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.” *Lee*, 505 U.S. at 598. Finally, the panel misapplied the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. at 612-13, for determining whether a statute violates the Establishment Clause: (1) The statute must have a secular legislative purpose; (2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion.

The panel erroneously held that the Pledge fails the “purpose” prong of the *Lemon* test. Slip op. at 9129. The panel’s analysis on this point was wrong for the same reason that its analyses of the endorsement and coercion tests were wrong: as the Supreme Court has observed, mere ceremonial reference to God in

acknowledgment of this country’s religious heritage does not amount to an endorsement or advancement of religion.^{2/} Indeed, the panel found that the addition of the words “under God” to the Pledge has an impermissible *religious* purpose, even though the panel also found that the Elk Grove Unified School District policy has a permissible *secular* purpose of fostering patriotism. Slip op. at 9129.

The depth and breadth of the public outcry at the panel’s decision should leave little doubt that the Pledge, as it is recited today, serves the secular purpose of fostering patriotism and a sense of unity as Americans.

In the end, the panel’s analysis suffers from an overly restrictive view of the Framers’ intent in the Establishment Clause. Based on an “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789,” the Supreme Court “consistently has declined to take a rigid, absolutist view of the Establishment Clause.” *Lynch*, 465 U.S. at 674, 678. Contrary to this more flexible approach, the panel branded the Pledge unconstitutional solely because it includes a reference to religion—a reference that is little different from that found on our currency and from that

2. The panel found that the addition of the words “under God” to the Pledge had a religious purpose, and not a secular one, even though the panel acknowledged that the sponsors of the addition of the words expressly disclaimed a religious purpose. Slip op. at 9128.

found in the ceremonial expressions of our courts and legislative bodies. A correct reading of the Pledge as an instrument to foster patriotism, albeit in a manner reflective of the county's religious heritage, reveals that the Pledge, in fact, satisfies all tests under the Establishment Clause.

III.

REHEARING SHOULD BE GRANTED SO THAT THE MATTER MAY BE REMANDED TO THE DISTRICT COURT FOR A DETERMINATION WHETHER PLAINTIFF HAS STANDING TO BRING THIS ACTION.

The panel correctly observed that Article III standing is a jurisdictional issue that “may be raised at any stage of the proceedings.” Slip op. at 9114. Every appellate court has a “special obligation to ‘satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review,’ even though the parties are prepared to concede it.” *Mender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986); *see also Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 180 (2000) (standing considered *sua sponte*); *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 706 (9th Cir. 1997) (accord). Plaintiff had the burden below of establishing his standing to bring this action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). And this Court was obligated to assure itself of Plaintiff's Article III standing before considering the merits of his appeal. *See Friends of the Earth, Inc.*, 528 U.S. at 180. The

Court should grant rehearing to reconsider the question of Newdow's standing. *See, e.g., Kuntz v. Reese*, 785 F.2d 1410 (9th Cir. 1986).

In concluding that Plaintiff has standing to bring the instant action, the panel relied on his status as a parent: "Newdow has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter. The mere enactment of the 1954 Act in its particular context constitutes a religious recitation policy that interferes with Newdow's right to direct the religious education of his daughter." Slip op. at 9118. The action below was brought in the name of one parent only, and Newdow's complaint creates the impression that he has sole and exclusive parental rights to direct his daughter's religious education. Indeed, Plaintiff alleged that he "represents" his daughter, in this action. Compl. ¶ 9.

Neither the magistrate judge nor the district court made findings regarding Newdow's standing. *See* Ex. R. 200, 243. And recent news accounts, if true, cast doubt on Newdow's asserted right to represent his daughter unilaterally or to direct her religious education.^{3/} It is Appellee's understanding that the mother of Newdow's daughter will request leave to intervene in this

3. *See, e.g.,* Associated Press, *Girl in Pledge Case No Atheist, Mother Says*, The Washington Post, July 12, 2002, at A22, available at 2002 WL 23853045; Bob Egelko, *Girl in pledge case not an atheist, mom to tell court*, The San Francisco Chronicle, July 13, 2002, at A.15, available at 2002 WL 4025156.

action and will inform this Court that she has legal custody of the child and that the two parents significantly differ as to the direction of the child's religious education. These facts were not known to the panel and may not have been known to the district court.

Appellee respectfully submits that the news accounts alone raise sufficient questions about Newdow's standing to justify reconsideration of the panel's opinion. Such reconsideration could be solely for the purpose of remanding the matter to the district court for further proceedings on this threshold jurisdictional issue and for consideration of what may be a question of first impression: Does a parent without primary custody have standing to challenge, on Establishment Clause grounds, a statute related to his child's education that neither the child nor the parent with primary custody wants challenged? Indeed, the rights of the custodial parent as respects the religious education of the child may be sufficiently threatened as to compel her joinder as a party to these proceedings. Fed. R. Civ. P. 19(a).

In light of the Supreme Court's direction in *Friends of the Earth*, both the district court and this Court, *before* proceeding to determine the merits of the controversy, should have, *sua sponte*, assured themselves that Newdow had demonstrated sufficient standing to bring his action. *Friends of the Earth, Inc.*,

528 U.S. at 180. The absence of any findings of fact on that point realistically precluded such an assurance. Especially in light of recent revelations concerning custody, the Court should grant this petition for rehearing and remand the proceedings to the district court for an evidentiary hearing on the question whether Newdow has sufficient standing to bring his action.^{4/}

CONCLUSION

Newdow’s personal offense at the words “under God” in the Pledge obviously does not end the inquiry. “People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation [of the Establishment Clause].” *Lee*, 505 U.S. at 597. The Supreme Court has never stated that all official references to religion are forbidden by the Establishment Clause. In fact, quite the opposite is true. Supreme Court precedent confirms that mere ceremonial reference to God in patriotic expressions such as the Pledge does not violate the Establishment Clause.

4. Indeed, to the extent that Newdow’s right unilaterally to direct the religious education of his child raises issues implicating a state-court custody arrangement, the district court may be required to abstain from deciding the jurisdictional question pending disposition of a state-law issue.

This Court should reconsider the panel's opinion. Moreover, rehearing en banc is manifestly appropriate because the panel's opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is a overriding need for national uniformity.

Dated: July 25, 2002

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4 AND 40-1**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is:

- Proportionately spaced, has a typeface of 14 points or more and contains 3509 words.

or

- Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text.

or

- In compliance with Fed.R.App.P.32(c) and does not exceed 15 pages.

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