No. 09-10347

In the United States Court of Appeals for the Fifth Circuit

DAVID WALLACE CROFT, AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN; SHANNON KRISTINE CROFT, AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN; JOHN DOE, AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN; JANE DOE, AS PARENTS AND NEXT FRIEND OF THEIR MINOR CHILDREN,
Plaintiffs - Appellants,

v.

RICK PERRY, GOVERNOR OF THE STATE OF TEXAS,
Defendant - Appellee.

On Appeal from the United States District Court
Northern District of Texas, Dallas Division

BRIEF OF GOVERNOR RICK PERRY

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CERTIFICATE OF INTERESTED PERSONS

Counsel certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

David Wallace Croft and Shannon Kristine Croft, as parents and next friends of their minor children

Unknown parties, referenced in the caption as John and Jane Doe, as parents and next friends of their minor children

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STATEMENT REGARDING ORAL ARGUMENT

Although the Court to date has not specifically entered its judgment respecting the constitutionality of the Texas Pledge of Allegiance, well established principles of constitutional law make clear that the Pledge should be upheld and that the judgment below should be affirmed. Accordingly, oral argument is not necessary to the resolution of this case.

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BRIEF OF GOVERNOR RICK PERRY

The recitation of the Pledge of Allegiance is a patriotic exercise—not a religious one. As Justice Brennan observed over four decades ago in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), voluntary recitation of the Pledge serves the valuable (and secular) purpose of solemnizing public events and activities—whether to open official government proceedings, sporting events, or (as Justice Brennan envisioned) the school day. *Id.* at 280-81 (Brennan, J., concurring).

Not surprisingly, then, Plaintiffs' objection to the Texas Pledge of Allegiance is based on a proposition that this Court has repeatedly rejected, and indeed condemned as "frivolous"—namely, that the inclusion of the words "under God" somehow violates the Establishment Clause. *See, e.g.*, *Mellen v. Cong. of the U.S.*, 105 F. App'x 566, 566 (5th Cir. 2004) (unpublished) (per curiam). In fact, earlier this year, this Court, in rejecting Plaintiffs' challenge to the Texas moment of silence law, repeated Justice Brennan's observation that "daily recitation of the [U.S.] Pledge of Allegiance" (like moments of silence) may "serve the solely secular purposes of [] devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Croft v. Governor of Tex.*, 562 F.3d 735, 743 (5th Cir. 2009) (quoting *Schempp*, 374 U.S. at 281).

If the U.S. Pledge is constitutional—and of course it is—then so too must be the Texas Pledge. After all, as this Court recently observed, "the obvious purpose of [both] pledges is to inculcate patriotism among students." *Croft*, 562 F.3d at 747. Accordingly, the Court should affirm the judgment below.

ISSUE PRESENTED

Whether the Texas Pledge of Allegiance may include the words "under God" as a patriotic acknowledgment of our state and national heritage.

STATEMENT OF THE CASE

Plaintiffs challenge the Texas Pledge of Allegiance on the ground that, in 2007, the Legislature amended it to read (in purported violation of the Establishment Clause): "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). R.9-10.

On cross-motions for summary judgment, the district court granted summary judgment to the Governor and upheld the Pledge. *Croft v. Perry*, 604 F. Supp. 2d 932 (N.D. Tex. 2009). In doing so, the court noted that "Plaintiffs do not explicitly state whether their challenge to the amended Texas pledge is facial or 'as applied' to them." *Id.* at 935. The court concluded that they challenged the Pledge only on its face, "[b]ecause they have shown no evidence of the specific manner in which the statute is administered unconstitutionally against them to support an 'as-applied' challenge." *Id.* Accordingly, "[t]o prevail on a facial challenge, 'plaintiffs must show that under no circumstances could the law be constitutional.'" *Id.* (quoting *Barnes v. State of Mississippi*, 992 F.2d 1335, 1343 (5th Cir. 1993)).

After reviewing the text, history, and purpose of the law, the district court upheld the Texas Pledge. The court found that "nowhere" had the Legislature

"articulate[d] a religious purpose for [the] bill." *Id.* at 939. The court also compared the Texas Pledge to the U.S. Pledge, noting that

> Plaintiffs fail to draw a meaningful distinction between the national Pledge and the Texas state pledge. The simple fact that the insertion occurred recently is a distinction without a difference. If anything, the half-century that has passed since the insertion of "under God" into the national Pledge of Allegiance under President Eisenhower provides the Texas pledge with even deeper historical roots.

Id. at 942. Plaintiffs appealed. R.457.

STATEMENT OF FACTS

In 1954, twelve years after first adopting and codifying the Pledge of Allegiance to the United States, Congress amended the U.S. Pledge to insert two words: "under God." Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. Congress inserted this phrase to acknowledge that

> [o]ur American Government is founded on the concept of the individuality and the dignity of 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.

R.355 (H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339-43). The phrase "under God"

> reflect[s] 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 history of the amendment also includes references to William Penn, the Declaration of Independence, the Gettysburg Address, and U.S. Supreme Court opinions, all to illustrate that our Nation's political philosophy is deeply rooted in the religious convictions of our Founders. *Id.* at 355-56. The history also reflects that the amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." *Id.* at 356-57 (citing *Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952)).

Virtually every court to have addressed the issue, whether squarely or in passing, has concluded that the U.S. Pledge does not violate the U.S. Constitution. In 2002, however, the Ninth Circuit disagreed and struck down the U.S. Pledge as a violation of the Establishment Clause. *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002). In response, Congress approved legislation condemning the ruling and reaffirming that the U.S. Pledge is constitutional, both facially and as applied by public school teachers leading willing students in its recitation. Act of Nov. 13, 2002, Pub. L. No. 107-293, §§ 1-2, 116 Stat. 2057-2060. The U.S. Supreme Court subsequently reversed the Ninth Circuit decision on standing grounds. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

In 2007, the Texas Legislature amended the Texas Pledge 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). Like the 1954 amendment to the U.S. Pledge, the purpose of the 2007 amendment to the Texas Pledge was to acknowledge our heritage and our Founders. Senate sponsor Dan Patrick noted that "House Bill 1034 will acknowledge our Judeo-Christian heritage by placing the words under God in the state pledge." R.338 (Hearing on Tex. H.B. 1034 Before the Senate Comm. on State Affairs, 80th Leg., R.S. (May 14, 2007)); R.343 (Debate on Tex. H.B. 1034 on the Floor of the Senate, 80th Leg., R.S. (May 18th, 2007)). Likewise, House sponsor Debbie Riddle explained "that [Texas], even when it was its own nation, was founded on the belief that we should have the right to acknowledge God." R.316 (Hearings on Tex. H.B. 1034 Before the House Comm. on Culture, Recreation, and Tourism, 80th Leg., R.S. (Mar. 20, 2007)).

The record further reflects that the Legislature, in amending the Texas Pledge, explicitly intended to mirror the U.S. Pledge. On the House floor, Representative Riddle stated that the Texas Pledge should acknowledge our heritage in the same way as the U.S. Pledge: "[I]n 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.'" R.335 (H.J. of Tex., 80th Leg., R.S. 3145 (2007)). Although some legislators thought the bill was ill-advised, none disputed the purpose

of acknowledging our heritage. R. 221. *See also* R.360 (House Comm. on Culture, Recreation, & Tourism, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007)) (purpose of adding "under God" to the Texas Pledge was to "acknowledge our Judeo-Christian heritage"); R.361 (Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007)).

SUMMARY OF ARGUMENT

For 55 years, public school children have begun each school day pledging allegiance to "one Nation under God." 4 U.S.C. § 4. Throughout this period, the Supreme Court has cited this practice approvingly, assuring the Nation that the First Amendment permits, and indeed protects, such practices. Likewise, this Court has rejected as "frivolous" a challenge to the words "under God" in the U.S. Pledge. The words "under God" have the same purpose and effect in the Texas Pledge as they do in the U.S. Pledge. Accordingly, Plaintiffs' facial challenge to the Texas Pledge should be rejected, and the judgment below should be affirmed.

ARGUMENT

I. PLAINTIFFS CHALLENGE THE TEXAS PLEDGE ONLY ON ITS FACE.

Plaintiffs do not dispute that they have challenged the constitutionality of the Texas Pledge only on its face—and that they have not challenged a particular application of the Texas Pledge, as required to raise an "as applied" challenge. *See,*

e.g., Pltfs' Br. at 7 ("This is a challenge to the [Texas Pledge]."); Tr. 29 ("It's all—all pretty much a facial challenge.").

Plaintiffs argue, however, that there is no distinction between facial and "as applied" challenges in the Establishment Clause context. Pltfs' Br. at 10-14. The argument plainly fails. Both the Supreme Court and this Court have recognized such a distinction, including in Establishment Clause cases. *See, e.g.*, *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005) ("[W]e emphasize that respondents have raised a facial challenge to [RLUIPA's] constitutionality.") (quotations omitted); *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988) ("[W]e conclude that the AFLA does not violate the Establishment Clause 'on its face.' We turn now to consider whether . . . the AFLA was unconstitutional as applied."); *Croft*, 562 F.3d at 750 ("All of these speculative possibilities may be fertile ground for as-applied challenges to the statute if they occur. But we should not engage in such speculation on a facial review of the law.").

Accordingly, Plaintiffs challenge the Texas Pledge only on its face—and therefore, to succeed on that challenge, they must show that the Texas Pledge is unconstitutional in all of its applications. *See, e.g.*, *Barnes*, 992 F.2d at 1343. Plaintiffs plainly fail in this regard, because they cannot show that the Texas Pledge is unconstitutional in *any*—let alone *all*—of its applications.

II. THE VOLUNTARY RECITATION OF THE U.S. PLEDGE OF ALLEGIANCE, INCLUDING THE WORDS "UNDER GOD," IS A PATRIOTIC, NOT RELIGIOUS, EXERCISE ACKNOWLEDGING OUR NATION'S HERITAGE.

It is well settled that government acknowledgments of our religious heritage do not violate the Establishment Clause. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783, 792 (1983) ("the practice of opening legislative sessions with prayer . . . is not . . . 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"). Quite the contrary, the Supreme Court has consistently warned courts not to construe the Establishment Clause in a manner that "press[es] the concept of separation of Church and State to . . . extremes to condemn" the "references to the Almighty that run through our laws, our public rituals [and] our ceremonies." *Zorach*, 343 U.S. at 313. The U.S. Pledge falls well within this tradition of religious acknowledgment, as has been recognized by virtually every court to consider the issue.

A. The Supreme Court Has Repeatedly Endorsed the U.S. Pledge.

The Supreme Court has never had occasion to enter judgment respecting the constitutionality of the U.S. Pledge. Nevertheless, the Court has repeatedly made clear its view that the Pledge is entirely constitutional.

For example, although the question was squarely presented in 2004, the Court did not ultimately reach the merits, instead concluding that the petitioner lacked standing to bring the suit. *Elk Grove*, 542 U.S. at 17-18. Even so, the majority

opinion took special care to note that, "[a]s 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). Moreover, three other justices, who would have reached the merits, each stated explicitly what the majority made implicit—that recitation of the Pledge is a patriotic, not religious, exercise, and that it is entirely constitutional. *See id.* at 33 (Rehnquist, C.J., concurring), *id.* at 44-45 (O'Connor, J., concurring), *id.* at 54 (Thomas, J., concurring).

In other rulings, the Supreme Court has invoked the Pledge as a baseline for what the Establishment Clause indisputably permits. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), for example, the majority upheld a religious display featuring a creche, noting that "display of the creche is no more an advancement or endorsement of religion" than other instances of "Congressional and Executive recognition" of religion, *id.* at 683, including "the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag." *Id.* at 676. Moreover, although they disagreed about the issues presented in that case, all nine justices in *Lynch* endorsed the Pledge. *See id.* at 716-17 (Brennan, J., dissenting) ("[T]he references to God contained in the Pledge of Allegiance . . . [are] protected from Establishment Clause scrutiny chiefly because they have lost . . . any significant religious content . . . [and] are uniquely suited to serve such wholly secular purposes as solemnizing public

occasions."). Similarly, in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court reaffirmed the Pledge "as consistent with the proposition that government may not communicate an endorsement of religious belief," noting the "obvious" difference it found between the "nonsectarian references to religion" in the U.S. Pledge and motto, on the one hand, and an isolated creche display, which "demonstrate[d] the government's allegiance to a particular sect," on the other hand. *Id.* at 602-03.

In each of these cases, the Court did not merely mention the Pledge in passing. To the contrary, the constitutionality of the Pledge played a key role in the Court's analysis, providing a prominent example of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. This history underlies the Court's analysis and "help[s] explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Id.* at 678.[1]

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1. Likewise, numerous justices have invoked the Pledge, along with other similar religious acknowledgments, as constitutional guideposts. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring); *id.* at 88 (Burger, C.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, 449-50 (1962) (Stewart, J., dissenting); *Schempp*, 374 U.S. at 307-8 (1963) (Goldberg, J., concurring, joined by Harlan, J.). *But see Engel*, 370 U.S. at 437 & n.1, 439-41 (Douglas, J., concurring) (condemning legislative chaplains, use of the Bible for administration of oaths, use of GI Bill funds in denominational schools, the national motto "In God We Trust," federal tax exemptions for religious organizations, "God save the United States and this Honorable Court," and the Pledge of Allegiance as unconstitutional).

These statements are noteworthy. As one court of appeals observed: "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." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992).

B. Numerous Federal Courts, Including This Court, Have Upheld the U.S. Pledge.

Given the Supreme Court's repeated assurances that the U.S. Pledge is constitutional, it is unsurprising that this Court recently condemned an Establishment Clause challenge to it as "frivolous"—finding that "[a] reasonable observer would not conclude that the disputed phrases, symbols, and actions [including the Pledge] evince Governmental approval of religion." *Mellen*, 105 F. App'x at 566. *See also Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006) ("References to God in a motto or pledge . . . have withstood constitutional scrutiny . . . and do not give an impression of government approval."); *Murray v. City of Austin*, 947 F.2d 147, 154-55 (5th Cir. 1991) ("government use of religious acknowledgment, if not religious belief, is allowed: *e.g.*, . . . the pledge of allegiance").

Two other circuits have likewise upheld the U.S. Pledge against Establishment Clause challenge. After first stating that "[t]he Establishment Clause works to bar sponsorship, financial support, and active involvement of the sovereign in religious activity," the Fourth Circuit concluded that "[t]he Pledge, which is not a religious

exercise, poses none of these harms and does not amount to an establishment of religion." *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005) (quotation omitted). The Seventh Circuit also upheld the U.S. Pledge, reasoning that "[u]nless we are to treat the founders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as 'establishment.' They did not." *Sherman*, 980 F.2d at 445. *See also Freedom from Religion Found. v. Hanover Sch. Dist.*, No. 07-356, 2009 WL 3227860, at *8 (D.N.H. Sept. 30, 2009) ("Inclusion of the words 'under God,' in context, does not convert the Pledge into a prayer or religious exercise.").

As previously noted, the only court to strike down the U.S. Pledge was the Ninth Circuit. *See Newdow*, 292 F.3d at 612. That judgment was later reversed by the Supreme Court on standing grounds. *Elk Grove*, 542 U.S. 1. Moreover, the United States and all fifty States joined together to urge reversal of the Ninth Circuit. *See* Brief for the United States as Respondent Supporting Petitioners, in *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624, 2003 WL 23051994 (U.S. Dec. 19, 2003); Brief for Texas, et al., as Amici Curiae in Support of Petitioners, in *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624, 2003 WL 23011472 (U.S. Dec. 18, 2003); *see also* Brief for the United States in Opposition, in *Newdow v. U.S. Cong.*, No. 03-7, 2003 WL 22428408 (U.S. Aug. 4, 2003).

Various circuits have also expressed support for the U.S. Pledge, and other similar religious acknowledgments, in passing. *See, e.g.*, *Glassroth v. Moore*, 335 F.3d 1282, 1301 (11th Cir. 2003) (noting Supreme Court's approval of the Pledge and other acknowledgments); *Freethought Soc'y v. Chester County*, 334 F.3d 247, 264 (3rd Cir. 2003) (noting constitutionality of the official use of "God save the United States and this Honorable Court" and "In God We Trust"); *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291 (6th Cir. 2001) (upholding Ohio state motto: "With God, All Things Are Possible"); *ACLU v. City of Plattsmouth*, 419 F.3d 772, 777 (8th Cir. 2005) (en banc) (noting Supreme Court approval of "patriotic invocations of God and official acknowledgments of religion's role in our Nation's history").

This near-unanimity among federal courts that the Pledge is constitutional "is striking," particularly considering that the Establishment Clause is an "area of law sometimes marked by befuddlement and lack of agreement." *Myers*, 418 F.3d at 406.

III. THE TEXAS PLEDGE IS CONSTITUTIONALLY INDISTINGUISHABLE FROM THE U.S. PLEDGE.

The Texas Pledge is, for Establishment Clause purposes, indistinguishable from the U.S. Pledge and should be upheld accordingly. As this Court recently observed, "the obvious purpose of [both] pledges is to inculcate patriotism among students." *Croft*, 562 F.3d at 747. Both pledges are patriotic exercises that

acknowledge our Nation's heritage. Both are recited at the opening of each school day to promote patriotism and contemplation. *See* TEX. EDUC. CODE § 25.082(b); *Croft*, 562 F.3d at 746. And "it would be incongruous to interpret [the Establishment Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Van Orden v. Perry*, 545 U.S. 677, 688 (2005) (plurality opinion) (quoting *Marsh*, 463 U.S. at 790-91).

Plaintiffs hope to distinguish the Texas Pledge by noting that it was amended only recently to include the words "under God." Pltfs' Br. at 22. But patriotic acknowledgments of religion are constitutional, not because the practices are old, but because they fit into the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Van Orden*, 545 U.S. at 686 (plurality opinion). Indeed, the U.S. Pledge had contained the words "under God" for less than a decade when Justice Brennan observed that "daily recitation of the Pledge of Allegiance . . . adequately serve[s] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Schempp*, 374 U.S. at 281.

Not surprisingly, then, the Texas Pledge, like the U.S. Pledge, easily satisfies the various Establishment Clause doctrines set forth by the Supreme Court.

IV. THE TEXAS PLEDGE, NO LESS THAN THE U.S. PLEDGE, SATISFIES TRADITIONAL ESTABLISHMENT CLAUSE JURISPRUDENCE.

A. The Words "Under God" are "Nonsectarian."

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Allegheny*, 492 U.S. at 605 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). Plaintiffs contend that the Texas Pledge violates the anti-sectarian principle articulated in *Larson* and reaffirmed in *Allegheny*. Pltfs' Br. at 40-41.

But *Allegheny* itself confirms the validity of the U.S. Pledge under the *Larson* standard, when it notes that the reference to God in the Pledge is "obvious[ly] . . . nonsectarian." *See Allegheny*, 492 U.S. at 603 (noting the "obvious distinction between creche displays and references to God in the motto and the pledge" because the latter are "nonsectarian references to religion by the government"). *See also Elk Grove*, 542 U.S. at 42 (O'Connor, J., concurring) ("The Pledge complies with [*Larson*'s] requirement. It does not refer to a nation 'under Jesus' or 'under Vishnu,' but instead acknowledges religion in a general way: a simple reference to a generic 'God.'"). Precisely the same analysis applies to the same words in the Texas Pledge.

B. Neither Pledge Has an Impermissible Purpose.

Plaintiffs concede that the purpose of acknowledging our religious heritage genuinely motivated the Legislature to amend the Texas Pledge, just as it motivated

Congress to amend the U.S. Pledge. Plaintiffs maintain, however, that such a purpose is not secular. Pltfs' Br. at 32, 37. For example, Plaintiffs contend that "Representative Riddle . . . dropped the pretense that the bill had a secular legislative purpose" when she affirmed that its purpose was to "acknowledge our . . . 'Judeo-Christian heritage.'" *Id.* at 37. But there is nothing wrong with that. The same purpose motivated Congress to include the phrase "under God" in the U.S. Pledge. *See* R.354-58 (H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339-43).

Nor is "mirroring" the U.S. Pledge a "sham purpose," as Plaintiffs contend. Pltfs' Br. at 32-37. To the contrary, the Legislature sincerely (and understandably) believed that simply tracking the language of the U.S. Pledge affirming that we are "under God" was the safest and smoothest means of achieving its purpose to acknowledge our religious heritage. *See, e.g.*, R.361 (Senate Comm. on State Affairs, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007)) ("[President] Eisenhower signed legislation in 1954 to affirm [our religious heritage] by placing the phrase 'under God' in the [U.S. Pledge]. Placing the phrase 'under God' in the [Texas Pledge] may best acknowledge this heritage.").

C. Neither Pledge Has an Unconstitutional Effect.

1. Recitation of Either Pledge Is a Patriotic, Not Religious, Exercise.

The Texas Pledge must be considered as a whole; the phrase "under God" cannot be divorced from its larger context. *See, e.g.*, *Lynch*, 465 U.S. at 680 (courts must judge religious symbols and references in their "proper context," rather than "focus[] almost exclusively" on religious aspects); *Allegheny*, 492 U.S. at 582, 620 (analyzing the full holiday display, rather than the later-added menorah in isolation).

Considered as a whole, the Texas Pledge, like the U.S. Pledge, is plainly a patriotic, rather than religious, exercise. This Court recently observed that "the obvious purpose of [both] pledges is to inculcate patriotism among students." *Croft*, 562 F.3d at 747. And other circuits have likewise so held. *See, e.g.*, *Myers*, 418 F.3d at 407 (noting that "inclusion of ['Under God'] does not alter the *nature* of the Pledge as a patriotic activity"); *Sherman*, 980 F.2d at 439 ("states may require teachers to lead the Pledge and otherwise communicate patriotic values to their students").

2. Neither Pledge Constitutes an Endorsement of Religion.

Plaintiffs contend that the Texas Pledge endorses a particular religious belief, in violation of the principle that government may not send the message that "religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring). Pltfs' Br. at 38-40.

The Texas Pledge does not indicate approval or preference. It simply acknowledges, within a broader patriotic statement, a basic historic fact about our Nation: that religion was significant to our Founders and to their enduring political philosophy. *See Schempp*, 374 U.S. at 213 ("The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.").

Indeed, it is difficult to discern any practical difference between the acknowledgment that we are "one Nation [or State] under God" and the Supreme Court's oft-repeated assertion, beginning with the majority opinion of Justice Douglas in *Zorach*, that "[w]e are a religious people whose institutions presuppose a Supreme Being." 343 U.S. at 313. *See also Lynch*, 465 U.S. at 675 (same); *Marsh*, 463 U.S. at 792 (same).

Not surprisingly, then, the Supreme Court has observed that the U.S. Pledge is entirely "consistent with the proposition that government may not communicate an endorsement of religious belief." *Allegheny*, 492 U.S. at 602-03. *See also Elk Grove*, 542 U.S. at 36 (O'Connor, J., concurring) ("The reasonable observer . . . would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion."). This Court has likewise found that "[a] reasonable observer would not conclude that the [U.S. Pledge]

evince[s] Governmental approval of religion." *Mellen*, 105 F. App'x at 566. There is no reason to treat the Texas Pledge any differently.

3. Neither Pledge Coerces Religious Exercise.

By definition, voluntary recitation of the Pledge cannot constitute coercion of religious exercise. No student is required to recite the Pledge; to the contrary, Texas law expressly includes an "opt out" provision. *See* TEX. EDUC. CODE § 25.082(c).

For their part, Plaintiffs invoke *Lee v. Weisman*, 505 U.S. 577 (1992), to assert that the "opt out" provision of Texas law is inadequate due to "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Pltfs' Br. at 18-19 (quoting *Lee*, 505 U.S. at 592).

But the concern about "psychological coercion" expressed in *Lee* and other cases is expressly limited to *religious* exercises, especially prayer. *See Lee*, 505 U.S. at 586 ("These dominant facts mark and control the confines of our decision: State officials direct the performance of a *formal religious exercise* at promotional and graduation ceremonies for secondary schools.") (emphasis added); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000) ("[T]he religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.").

Recitation of the pledges, by contrast, is a patriotic exercise, not a religious one. *See Elk Grove*, 542 U.S. at 6 ("recitation [of the U.S. Pledge] is a patriotic exercise"); *Schempp*, 374 U.S. at 304 ("reciting the [revised] 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") (Brennan, J., concurring).

Patriotic exercises do not raise the same Establishment Clause concerns as religious exercises, even when they contain religious references:

> 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.

Engel, 370 U.S. at 435 n.21 (emphasis added).

Indeed, the Supreme Court has repeatedly noted the specific practice of reciting the U.S. Pledge in schools without the slightest hint of disapproval, including in *Lee* itself. *See, e.g.*, *Lee*, 505 U.S. at 583 (noting that "the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers"); *Lynch*, 465 U.S. at 676 (observing that the Pledge is recited by "thousands of public school

children."). This Court has similarly rejected a challenge to the recital of the U.S. Pledge in schools. *Mellen*, 105 F. App'x at 566.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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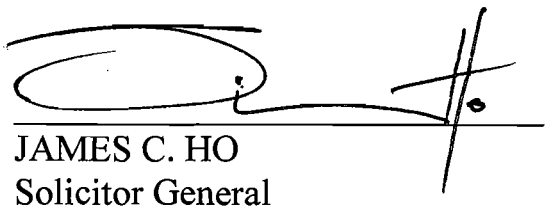

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CERTIFICATE OF SERVICE

Counsel hereby certifies that two true and correct copies of this document, along with a computer readable disk copy of the brief, was served via overnight mail, on December 2, 2009 to:

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Counsel also certifies that on December 2, 2009, this document, 7 paper copies thereof, and one computer-readable disk copy in Adobe Portable Document Format, was dispatched to the clerk, as addressed below, via FedEx Next Day Air Delivery:

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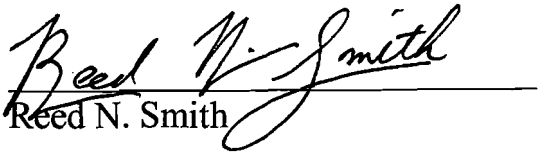

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