2003

Brief Amicus Curiae of Joseph R. Grodin as Amicus Curiae Supporting Neither Party (Vacatur), Elk Grove Unified School District v. Newdow, No. 02-1624 (U.S. Dec. 19, 2003), .

Neal K. Katyal
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Docket No. 02-1624

For Opinion See 125 S.Ct. 21 , 124 S.Ct. 2301 , 124 S.Ct. 1493 , 124 S.Ct. 1191 , 124 S.Ct. 1124 , 124 S.Ct. 860 , 124 S.Ct. 384

U.S.,2003.

Supreme Court of the United States.
ELK GROVE UNIFIED SCHOOL DISTRICT, et al., Petitioners,
v.
Michael A. NEWDOW, Respondent.
No. 02-1624.
December 19, 2003.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief Amicus Curiae of **Joseph R. Grodin** in Support of Neither Party (Vacatur)

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QUESTION PRESENTED

Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance.

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***1** INTEREST OF AMICUS[FN1]

FN1. Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

Joseph R. **Grodin** is the John F. Digardi Distinguished Professor of Law at the University of California Hastings College of the Law. From 1982 to 1987 he was an Associate Justice of the California Supreme Court, and from 1981 to 1982 he was Presiding Justice of the California Court of Appeal, to which he was appointed Associate Justice in 1979. Justice Grodin wrote opinions for the California Supreme Court and the California Court of Appeal in cases involving sensitive issues of family law[FN2] and federalism.[FN3] Such issues are before the Court in this case because the Ninth Circuit's ruling that Newdow had standing rested on its determination of a novel and unsettled issue of California family law. Justice Grodin submits this brief because he believes that the Ninth Circuit decided the issue in a way that is contrary to this Court's instruction in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

FN2. See, *e.g.*, *County of Los Angeles v. Soto*, 674 P.2d 750 (Cal. 1984) (due process rights of non-custodial parents with respect to paternity determinations); *Wellman v. Wellman*, 164 Cal. Rptr. 148 (Cal. Ct. App. 1980) (dissolution order barring custodial parent from having overnight visitors of op-

posite sex, in presence of children, unless married to the individual).

FN3. See *In re Lance*, 694 P.2d 744 (Cal. 1985) (ballot measure conforming right of criminal defendant to exclude evidence under state constitution to right under Fourth Amendment); see also **Joseph R. Grodin**, *In Pursuit of Justice* ch. 8 (1989).

***2** STATEMENT

Respondent Michael A. Newdow and Sandra L. Banning are the parents of a nine-year-old daughter now in third grade. Newdow and Banning have never been married, and they have frequently been at loggerheads with respect to the upbringing of their daughter. As a result of these differences, the California courts have been required, as this case has unfolded, to adjust and readjust the respective rights and responsibilities of the parents with respect to the child.

These adjustments and readjustments have raised the question of Newdow's standing as a parent to challenge the constitutionality of the Pledge policy of his daughter's school district. The Court should not reach this question because the answer depends on the resolution of two prior questions with potentially momentous ramifications. Instead, the Court should vacate and remand.

The first question (and the basis for vacating and remanding) is whether, as the Ninth Circuit concluded, California law preserves a parent's right to challenge government action affecting his child, after the state has vested in the *other* parent sole legal custody of the child or final decision-making authority with respect to the child. California's courts have not yet decided this important question of state family law, "an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). The state's courts should be allowed to decide it in the first instance.

If the Ninth Circuit read California law correctly, then Newdow has standing as a parent to challenge the Pledge policy of his daughter's school district. But if the Ninth Circuit read California law incorrectly, then Newdow would lack standing - unless the Court were to ***3** decide that the federal Constitution itself guarantees a parent in Newdow's position the right to challenge government action affecting his child, regardless of the wishes of the parent in whom the state has vested sole legal custody or final decision-making authority.

An affirmative answer to this second question - that the Constitution overrides a state's allocation of parental rights and responsibilities - could have sweeping consequences for state family law nationwide, extending far beyond claims under the Establishment Clause. The Court should face this question only by necessity if the California Supreme Court holds that California law does not recognize Newdow's right to challenge the school district's policy in the circumstances presented here.

Relevant Facts

1. On March 8, 2000, when Newdow filed his complaint, his daughter was enrolled in kindergarten in a public elementary school in the Elk Grove Unified School District ("EGUSD"). Compl. ¶ 76. Newdow purported to sue on his own behalf and on behalf of his daughter, see *id.* ¶ 94, whom he described as "an unnamed plaintiff whom he represents as 'next friend,' " *id.* ¶ 9.

At the time, Newdow and Banning shared joint legal custody of their daughter under an order entered by the California Superior Court for the County of Sacramento.[FN4] ***4** Banning's brief in support of certiorari states that the order gave her sole physical custody of the child with limited visitation rights for Newdow. See Br. for

Sandra L. Banning in Supp. of Cert. Pets., Nos. 02-1574 & 02-1624, at 4 (filed June 27, 2003) ("Banning Cert. Br.").

> FN4. Tr. of Proceedings on Mot. re Change of Custody/Request for Attorney's Fees, Sept. 25, 2002 ("Sept. 25, 2002 Tr."), at 24-28 (court's description of the custody order), *Banning v. Newdow*, No. 99F104312 (Cal. Super. Ct.). The Ninth Circuit enlarged the record to include the transcript. See U.S. Pet. App. 91a (No. 02-1574). Because the U.S. Pet. App. includes matter not included in the EGUSD Pet. App. (No. 02-1624), this brief cites the U.S. Pet. App.

The custody order apparently required Newdow and Banning to consult on major decisions affecting their daughter but specified no process for resolving disputes between them. See Sept. 25, 2002 Tr. 25-26. It is unclear whether Newdow consulted Banning before naming their daughter as an unnamed plaintiff in this case and purporting to represent her as "next friend." In any event, the Superior Court found that Banning had acquiesced in his doing so. *Id.* at 27.

2. In his complaint, Newdow alleged, *inter alia*, that EGUSD Admin. Reg. 6115, which specifies that "[e]ach elementary school class [shall] recite the pledge of allegiance to the flag once each day," and the 1954 federal statute that added "under God" to the Pledge ("the 1954 Act"), violate the Establishment Clause. Newdow asserted that EGUSD's Pledge policy and the 1954 Act violate his daughter's right to be free from religious indoctrination by government, *e.g.*, *id.* ¶ 71, and his own right, as a parent, to direct his daughter's religious education free from government interference, *e.g.*, *id.* ¶ 78.

On April 12, 2000, EGUSD moved to dismiss Newdow's complaint, contending, *inter alia*, that Newdow had failed to state a claim. The district court referred the motion to a magistrate, who recommended that the complaint be dismissed. U.S. Pet. App. 111a. On July 21, 2000, the district court adopted the magistrate's report and dismissed Newdow's complaint. *Id.* at 110a.

3. On July 26, 2000, Newdow filed a notice of appeal. While his appeal was pending, the Superior Court replaced***5** its earlier custody order with an order awarding sole legal custody to Banning. The order, entered on February 6, 2002, stated:

The child's mother, Ms. Banning, to have *sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records. (U.S. Pet. App. 90a-91a.)

On June 26, 2002, the Ninth Circuit issued its original opinion in this case. It first held that Newdow had standing "as a parent" to challenge EGUSD's Pledge policy and the 1954 Act. *Id.* at 31a. It then held that the policy and the Act violate the Establishment Clause. *Id.* at 52a.

4. Defendants filed petitions for rehearing and rehearing en banc. On August 5, 2002, while the rehearing petitions were pending, Banning filed a motion to intervene in which she informed the court that she had sole legal custody of the child and objected to the child's involvement in the case. Newdow, meanwhile, had filed a motion with the Superior Court to restore joint legal custody. Banning Cert. Br. 6. At a hearing on August 21, 2002, the Superior Court denied Newdow's motion and set a further hearing to decide whether Newdow could continue,

over Banning's objections, to involve their daughter in this case. *Id.*

***6** In the further hearing, the Superior Court ruled that Banning was entitled to withdraw her acquiescence in Newdow's involvement of their daughter in this case. Sept. 25, 2002 Tr. 27. The court found that Banning's objections to the child's continued involvement were legitimate and reasonable. *Id.* at 31. Declining to substitute its judgment for that of Banning as the custodial parent, *id.* at 32, the Superior Court ruled that Newdow could not continue to assert the child's rights in this case. The Superior Court stated that it was "making a determination" that "based upon the California joint custody laws, *** it is not in the best interests of this child" to remain in the case as an "unnamed party" or for Newdow to represent her as "next friend." See *id.* at 44-45.

5. a. On October 9, 2002, the Ninth Circuit ordered the United States and EGUSD to brief these two questions:
Whether under CA state law the award of sole legal custody to one parent deprives the other of standing to object on constitutional grounds to the contents of school curricula, observances, and ceremonies affecting the child's education and religious upbringing. If the answer is yes, is the California rule constitutional?

Both the United States and EGUSD agreed that Newdow's standing depended on California law - in particular, on the effect of the Superior Court's custody order and Newdow's resulting status as a noncustodial parent. U.S. Supp'l Br. on Pet. for Reh'g en Banc 1-8 (filed Nov. 7, 2002). The United States argued:
As a consequence of the Superior Court order and Mr. Newdow's status as a noncustodial parent, Mr. Newdow lacks standing to advance claims that derive from his daughter's exposure to the recitation ***7** of the Pledge and from his own parental authority over her religious education.

Id. at 6. EGUSD told the Ninth Circuit that its questions raised "a matter of first impression" under California law. EGUSD Supp'l Br. Regarding Standing and Const'l Issues 1-2; see also EGUSD Cert. Pet. 20 (filed June 9, 2003) ("[n]o California court has addressed" the issue).

b. In an opinion dated December 4, 2002, the Ninth Circuit reaffirmed its holding that Newdow had parental standing to maintain this action. U.S. Pet. App. 90a.

The Ninth Circuit first considered whether the grant of sole custody to Banning deprived Newdow of standing to challenge the constitutionality of governmental action affecting his child. Drawing on *Navin v. Park Ridge School District 64*, 270 F.3d 1147 (7th Cir. 2001) (per curiam), the court concluded that "a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights." U.S. Pet. App. 94a.

The Ninth Circuit next considered whether under California law Newdow retained standing to maintain this action in his own right over Banning's opposition. The court concluded that he did. In particular, it concluded that, under California case law, Newdow, though a noncustodial parent, retained the right to "expose and educate" his daughter to his religious views, free from interference by the judiciary or other branches of government, *id.* at 95a; that religious indoctrination of his daughter by her public school, contrary to Newdow's wishes, would constitute such governmental interference with this retained right, *id.* at 96a; and that, inasmuch as California had allowed Newdow, though a noncustodial***8** parent, to retain this right, the February 6, 2002, order giving Banning sole legal custody did not empower her to force Newdow to suffer the state's interference with that retained right, *id.* at 96a-97a.

6. On February 23, 2003, the panel in this case denied the petitions for rehearing and the full Ninth Circuit

denied the petitions for rehearing en banc; and the panel also issued an amended opinion replacing its opinion of June 26, 2002. *Id.* at 59a-60a. In its amended opinion, the Ninth Circuit again held that Newdow had "standing as a parent" to challenge EGUSD's Pledge policy as an unconstitutional interference with "his right to direct the religious education of his daughter." *Id.* at 7a. On the merits, the Ninth Circuit invalidated EGUSD's Pledge policy as impermissibly coercive. *Id.* at 11a-17a. This time, however, the court "decline[d] to reach" the constitutionality of the 1954 Act. *Id.* at 18a. The court vacated the district court's dismissal of Newdow's complaint with respect to his challenge as a parent to EGUSD's policy. *Id.* at 18a.

7. On April 30, 2003, EGUSD filed its petition for certiorari. Meanwhile, Newdow continued to seek to regain legal custody of his daughter. On September 13, 2003, the Superior Court announced that it was restoring "joint legal custody" to Newdow and Banning; but under the court's order, Banning continues to have the final say in major decisions concerning the child. The court stated: "There's no reason why Dr. Newdow should not have a major say in the education and health decisions," but in the event of disagreement, "then mom is going to make the decision on it." Partial Tr. of Proceedings, Sept. 11, 2003, at 39, *Banning v. Newdow*, No. 99F104312 (Cal. Super. Ct.) (transcript lodged with Hon. William K. Suter by the United States on Sept. 22, 2003). "She makes the final decisions if the two of you disagree." *Id.* at 40.

***9** On October 14, 2003, this Court granted the petition, directing the parties to address Newdow's standing to challenge EGUSD's Pledge policy.

SUMMARY OF ARGUMENT

Matters of family law are uniquely the province of the states. Whether Newdow has standing to challenge EGUSD's Pledge policy depends on what rights he retained, as a matter of California family law, after the Superior Court awarded Banning sole legal custody of their daughter in February 2002, and after the Superior Court restored "joint legal custody" in September 2003 but left Banning with the final say in major decisions affecting the child.

California's courts have not provided an answer to these questions. The Ninth Circuit's conclusion that Newdow had standing as a parent to challenge the Pledge policy rested on its extrapolations from a pair of intermediate California appellate court decisions that permit, but certainly do not compel, that conclusion. The Ninth Circuit, moreover, overlooked other California cases that could be read to suggest a different conclusion. No court has considered the effect of the Superior Court's most recent readjustment of Newdow's parental status.

In these circumstances, the Court should vacate the Ninth Circuit's judgment and remand the case with a direction to certify to the California Supreme Court the state-law question on which Newdow's standing depends. Such a disposition would accord with the principle of avoiding premature constitutional adjudication and protect important elements of federalism. Because plaintiffs in Newdow's position are likely to assert their federal claims in federal court, certification may offer the only means by which California's courts can review the Ninth Circuit's reading of California law.

***10** ARGUMENT

I. NEWDOW'S STANDING TO CHALLENGE EGUSD'S PLEDGE POLICY PRESENTS A QUESTION OF CALIFORNIA LAW IN THE FIRST INSTANCE.

A. An individual's ability to assert a federal constitutional claim may depend on state law.

Article III standing is a "threshold determinant[] of the propriety of judicial intervention," *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (quoting *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975)), and standing therefore must exist at all times: "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English*, 520 U.S. at 67 (internal quotation marks omitted); see also *McConnell v. FEC*, No. 02-1674, slip op. 3-4 (Dec. 10, 2003) (opinion of the Court by Rehnquist, C.J.).[FN5]

FN5. See, *e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (vacating where plaintiff's job change while appeal was pending rendered challenged law inapplicable to her); *Karcher v. May*, 484 U.S. 72 (1987) (dismissing where appellants' exit from public office ended their standing to continue the litigation); *Preiser v. Newkirk*, 422 U.S. 395 (1975) (vacating where respondent's exit from maximum security prison eliminated the controversy); see also *Bd. of License Commr's v. Pastore*, 469 U.S. 238 (1985) (dismissing where plaintiff went out of business while appeal was pending); *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (vacating where petitioner graduated from law school while appeal was pending).

***11** Although Article III standing requirements are a matter of federal law, whether a plaintiff satisfies those requirements can turn on whether state law recognizes the legal right asserted. "The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956) (citations omitted).

Federal standing requirements can, and often do, incorporate state law (and particularly family and property law) in determining who can bring a cause of action.[FN6] The court below recognized this incorporation principle but overreached by extrapolating well beyond what California's courts have thus far held.

FN6. See *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978) (standing to assert Fourth Amendment claims lacking; plaintiffs' "expectations of privacy" were not rooted in "concepts of real or personal property" recognized by state law); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution," but are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

B. An individual's ability to assert a parental claim depends on state law.

The right to "raise one's children" has long been deemed "essential" and one of the "basic civil rights of man." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The Constitution recognizes the fundamental "liberty of parents and guardians to direct the upbringing and education of children under their control." ***12***Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925). The interest of parents in making decisions concerning the care, custody, and control of their children is "perhaps the oldest of fundamental liberty interests." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The right to "raise one's children" includes the right to direct the child's religious training: "[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972).[FN7]

FN7. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (analyzing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parnham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as

a unit with broad parental authority over minor children.").

But constitutionally protected parental rights - including those involving religion - are not absolute but are subject to regulation by the state: "neither rights of religion nor rights of parenthood are beyond limitation" from state law. *Prince v. Massachusetts,* 321 U.S. 158, 166 (1944). Although the right to raise one's children has its source in the Constitution, the conditions for asserting that right are determined by state law.

The very determination of who is a parent - and who can assert constitutionally protected parental rights - is a state-law question. "[D]omestic relations are preeminently matters of state law." *Mansell v. Mansell,* 490 U.S. 581, 587 (1989). "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Boggs v. Boggs,* 520 U.S. 833, 848 (1997) (quoting *In re Burrus,* 136 U.S. 586, 593-94 (1890)).

***13** When parents are unmarried, divorced, or separated, state law allocates the parental rights otherwise shared by the parents as a unit. "In the vast majority of cases, state law determines the outcome" of legal problems arising from the unwed-parent child relationship. *Lehr v. Robertson,* 463 U.S. 248, 256 (1983).

This Court has stopped short of according the rights of members of non-traditional families absolute constitutional protection when those rights would conflict under state law with the rights of the custodial parent. See *Troxel,* 530 U.S. at 75. The Court has refrained from doing so even when the family member is a child's biological father. The Court has stated that "[b]iological fatherhood plus an established parental relationship" are insufficient to establish a constitutionally protected liberty interest entitled to the "historic respect" that is "traditionally accorded to the relationships that develop" within the confines of the "unitary family." *Michael H. v. Gerald D.,* 491 U.S. 110, 123 (1989).

Subject to the requirements of procedural due process, a state may even deny a natural, custodial parent his or her "fundamental liberty" right to direct the education and upbringing of a child. See *Santosky v. Kramer,* 455 U.S. 745, 747-48 (1982) (parental rights may be terminated under "clear and convincing evidence" standard); *Lehr,* 463 U.S. at 268 (denying biological father status as a parent for failure to establish substantial relationship width child prior to adoption proceedings by stepfather); *Michael H.,* 491 U.S. at 132 (denying biological father's status as a parent as a matter of state law classifying child born into marriage as legitimate).

Because state law determines the extent of a parent's rights in cases of divided families, whether a plaintiff in Newdow's position can assert constitutionally protected parental rights is a question of California law in the first ***14** instance. *Michael H.,* 491 U.S. at 129-30; see *id.* at 133-34 (Stevens, J. concurring); see also *Navin,* 270 F.3d at 1149-50.

C. The Court need not and should not decide whether Newdow has a constitutional right to challenge EGUSD's Pledge policy that state law cannot negate.

If California law does not recognize Newdow's right to challenge EGUSD's Pledge policy, Newdow would have standing to do so only if this Court were to decide that he has a federal constitutional right to challenge the policy that California's allocation of rights between him and Banning cannot negate. Whether Newdow has such a right is a question with enormous consequences for state family law nationwide.

There are strong reasons for looking to state law before reading such a right into the Constitution. To read such a right into the Constitution would open up the federal courts nationwide as forums for parents to litigate, contest,

and control choices made by those other parents who have been awarded full custody rights or final decision-making authority with respect to a child.

The text of the Establishment Clause does not vest parents with a special right to bring suit on their own behalf as parents even if stripped of their right to bring suit on behalf of their children. If such a right exists, it must derive from some more general source of constitutional rights, such as the due process clause of the Fourteenth Amendment. See *Pierce*, 268 U.S. at 534-35. Even if the level of constitutional abstraction were drawn so high that such a right could be found, the reach of such a right could not be confined to the instant Establishment Clause challenge to a school district's Pledge policy.

***15** If such independent federal standing were recognized, a noncustodial parent would also be able to bring Establishment Clause challenges to other aspects of his child's education, such as a school's after-hours policy, or a school's decision to accept vouchers. Moreover, such a parent presumably would also be able to bring the full panoply of other constitutional challenges on such matters, such as whether the child's free speech rights were abridged in school, whether the child's Fourth Amendment rights were abused by an X-ray search, and whether the child's suspension violated due process.

Recognizing a constitutionally guaranteed right to bring such lawsuits, regardless of the state's allocation of rights between father and mother, would result in "the federalization of family law." *Santosky*, 455 U.S. at 773 (Rehnquist, J., joined by Burger, C.J., and White & O'Connor, JJ., dissenting). Such lawsuits could conflict with a state's interest in the finality of its child custody arrangements and other determinations based on the best interests of the child - a deep intrusion into state family law. See *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 513 (1982) ("The State's interest in finality is unusually strong in child-custody disputes."). The sovereign states are within their power, in the absence of a law of Congress that says otherwise, to disallow lawsuits that enable a parent denied legal control over a child to use litigation to perpetuate or reassert such control. Cf. *Rose v. Rose*, 481 U.S. 619, 625 (1987) ("Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.") (citations and internal quotation marks omitted).

The extent to which the Constitution may be deemed to override such state determinations is a weighty question, one that the text of the Constitution does not answer.***16** Even if the text did hint at an answer, the Court would be bound to consider whether Newdow could surmount the problem of *prudential* standing in light of the " 'general prohibition on a litigant's raising another person's legal rights.' " *Devlin v. Scardelletti*, 536 U.S. 1, 7 (2002) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

In a case such as this, the parent's rights are not truly distinct from the child's: the parent's rights are not violated unless the child's rights are violated, and vice-versa. To say that a parent who may not challenge government action on the child's behalf may challenge it on his own behalf may be thought to involve a form of double-counting that permits evasion of the state's determination that the parent may no longer act on behalf of the child. Although the right asserted by the parent is cast as independent, it is indistinguishable from the right of the child, thus raising, in substance if not form, a question of third-party standing.

It is unclear, moreover, how a parent stripped of parental control rights could show, for prudential standing purposes, that his injury "fall[s] within the zone of interests protected by the law invoked," *id.* (citation omitted), if *other* relatives equally without control rights have no standing - particularly where, as here, the custodial parent, who retains the final say over educational decisions, stands ready to protect the child. Normal prudential stand-

ing requirements may counsel against granting the noncustodial parent standing in such circumstances.

Before the Court undertakes to decide whether there exists an independent federal constitutional right that overrides a state's allocation of rights between the parents, it should direct the Ninth Circuit to seek from the California Supreme Court an authoritative determination of whether state law affords Newdow a right to ***17** challenge EGUSD's Pledge policy in the circumstances presented. Such a course could avoid a potential conflict with the laws not just of California, but of other states, and the need to decide federal constitutional issues.

II. WHETHER CALIFORNIA LAW RECOGNIZES NEWDOW'S RIGHT TO CHALLENGE EGUSD'S PLEDGE POLICY IS HIGHLY UNCERTAIN.

A. The Ninth Circuit rested its holding that Newdow has standing on extrapolations from two California cases that permit but do not compel that conclusion.

The Ninth Circuit's holding that Newdow has standing to challenge EGUSD's Pledge policy, despite Banning's consent to the policy, rests on several conclusions about California law - (1) that, under California law, a noncustodial parent retains a right to "expose and educate" his children to his religious views, U.S. Pet. App. 95a; (2) that this right to "expose and educate" is a right to be free not only from direct restraints imposed by judicial order (*e.g.*, through a restraining order) but also from indirect "interference" by other branches of government (*e.g.*, through government inculcation of religious belief), *id.* at 95a-96a; (3) that implicit in this state-law right to "expose and educate" is the right to invoke the judicial process to prevent one's child from being instructed by the state with religious views that are in tension with that parent's own; and (4) that, inasmuch as Newdow, although a noncustodial parent, retained this right as a matter of background California law, the February 6, 2002, order giving Banning sole legal custody of their daughter did not empower her to prevent him from challenging the state's alleged interference with that retained right, *id.* at 96a-97a.

***18** California might well want to ensure maximum enforcement of federal constitutional protections, or believe that parents - no matter how weak their custody rights - are harmed when their children are subject to unconstitutional government action. But the Ninth Circuit could read such content into California law only by extrapolating from two decisions of the California Court of Appeal, the implications of which are uncertain.

The decisions only permit, but do not compel, the conclusion that a parent in Newdow's position retains a right to be free from indirect government "interference" with his efforts to influence his child's religious development. They also only permit, but do not compel, the conclusion that a custody order may not empower the parent with custody or other decision-making authority to prevent the other parent from challenging such "interference" by invoking the judicial process.

Also uncertain is whether the California Supreme Court would agree with these conclusions, even if they necessarily flowed from the two intermediate appellate decisions. The California Supreme Court has never cited the pertinent holdings of either decision. On such a momentous question, federal courts should not decide what state law provides, because the cost of error in either direction is large.

The two intermediate appellate decisions on which the Ninth Circuit relied are *Murga v. Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980), and *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App. 1983). *Murga* merely held that "a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." 163 Cal. Rptr. at 82 (noting that it was the first California decision to opine on this matter). The Ninth Circuit extrapolated ***19** from

this holding its conclusion that under California law a noncustodial parent retains a right to influence his children's religious development free not only from direct restraint by a court but also from indirect "interference" by other branches of government. U.S. Pet. App. 96a.

The Ninth Circuit's extrapolation is defensible, and possibly also correct as a prediction of what the California Supreme Court would hold. In *Mentry*, the court held ineffective an order forbidding the father to share his religious views with his children without the mother's consent. The court concluded that the father's retained rights under background California law rendered the order ineffective in this respect. The court viewed the situation here as parallel: in both cases a court had purported to empower the mother to nullify the father's retained rights. Just as the Court of Appeal held such an order ineffective in *Mentry*, the Ninth Circuit held such an order ineffective here.

This reading of the decisions of the Courts of Appeal, however, is far from obvious or inevitable. Rather, the Ninth Circuit papered over several problems that make it difficult to be even close to the level of certainty required before a federal court makes such a momentous determination of what state law means.

Although *Murga* recognized that parents without the capacity to make decisions about their children's education still maintain the right to "expose" their children to their individual religious views, *Murga* also recognized that "the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing." 163 Cal. Rptr. at 82. In observing that it was following the "majority of American jurisdictions" in refusing "to restrain the noncustodial parent from exposing the minor child to his or her religious beliefs and practices, absent a clear, affirmative showing that these ***20** religious activities will be harmful to the child," *id.*, the *Murga* court did not suggest that it or the majority of American jurisdictions had considered or decided whether a parent without ultimate decision-making power, such as a noncustodial parent, nevertheless retains a right to challenge indirect government "interference" with that parent's ability to influence the child's religious development.[FN8]

> FN8. Many American jurisdictions, if not a majority, do not afford parents who lack final decision-making authority the right to object to the final decision-maker's choices about the religious beliefs and practices the child is to be taught, or an absolute right to share in decisions regarding education, schools, curriculum, or the like. See, *e.g.*, *Fanning v. Warfield*, 248 A.2d 890, 894 (Md. 1969); *Bateman v. Bateman*, 159 S.E.2d 387, 390 (Ga. 1968); *Bennett v. Bennett*, 73 So.2d 274, 279 (Fla. 1954); *Majnric v. Majnric*, 347 N.E.2d 552, 556 (Ohio Ct. App. 1975); *Pardue v. Pardue*, 285 So.2d 552, 555 (La. Ct. App. 1973); *Van Orman v. Van Orman*, 492 P.2d 81, 85 (Colo. Ct. App. 1971); *Zande v. Zande*, 164 S.E.2d 523, 528 (N.C. Ct. App. 1968); *Jenks v. Jenks*, 385 S.W.2d 370, 379 (Mo. Ct. App. 1964); see also *Sachs v. Sachs*, 25 P.2d 159, 160-61 (Or. 1933); *Esteb v. Esteb*, 244 P. 264, 267-68 (Wash. 1926).

Indeed, on this point there is reason to think that the opposite could be true. It is common ground that the custodial rights of the parents are held jointly so long as there is no separation of the parents or a division in the marriage. But once the parents are at loggerheads, then one or the other has to make the decisions that "direct" the critical decisions about the child. *Murga* speaks only to the relationship of the parties to each other. It does not speak to the relationship of the family to the rest of the world. Banning is entitled to send a child to religious school if she so chooses, after consulting with Newdow, even though the result would be a direct and palpable ***21** interference with Newdow's right to "expose and educate" his child. As long as Banning is happy with her child's reciting the Pledge, it may well be that the child will do so in school. On this reading of *Murga*, New-

dow's rights are to persuade Banning to change her views or to persuade his daughter of the unsoundness of her mother's decision.

By way of analogy, there is no doubt that a beneficiary under a trust has the right to persuade the trustee to change his investment strategy. But once the trustee has made its decision, then the trustee alone has the right to implement whatever investment policy he chooses, and the rest of the world is both bound and entitled to respect his sole authority in the matter. On the the same principle, if Newdow went to EGUSD to protest his daughter's exposure to the Pledge, EGUSD would be required to turn away his request because Banning is the sole guardian to whom EGUSD must look in making its policy. The restoration of Newdow's right of "joint legal custody" on August 25, 2003, was not a restoration of equal rights over the control of his daughter, for Banning retained under that decree the final say on what should be done regarding the daughter's education in the event that the two parties disagreed after consultation. In light of its specific reference to the noncustodial parent's access rights to the child, *Murga* therefore could easily be read as cutting against Newdow's standing to challenge the way that the child interacts with the rest of the world, or so the California courts could read it.

The other intermediate appellate decision on which the Ninth Circuit relied is *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App. 1983), in which the court, by a two-to-one vote, reversed a restraining order against a noncustodial father that forbade him to engage in any religious activities other than those approved by the mother. In ***22** reversing the restraining order, the Court of Appeal stated that the order violated a "concept of family privacy" that embodies "not simply a policy of minimum state intervention but also a presumption of parental autonomy," and that many of the purposes served by that presumption "become more important after dissolution [of the marriage or relationship] than they were before." *Mentry*, 190 Cal. Rptr. at 848-49 (emphasis omitted). Extrapolating again, the Ninth Circuit essayed that "[t]he type of 'minimum state intervention' discussed in *Mentry* surely does not permit" inculcation of religion in children. U.S. Pet. App. 96a (emphasis omitted).

As in the case of *Murga*, the Ninth Circuit's extrapolation from *Mentry*, although defensible analytically and possibly also correct as a prediction of what the California Supreme Court would hold, cannot be considered obvious or even likely. The Court of Appeal in *Mentry* cited the policy of "minimum state intervention" in connection with a direct restraint that the court found incompatible with "the concept of family privacy" - a judicial order forbidding a father to engage his children in religious activities not approved by the mother. It is one thing to deny one parent the power to bar the other parent from exposing their children to his religious views without her consent. It is quite another thing to vest a parent with an affirmative right to engage the judicial process to challenge rules of broad and general applicability that are not even formulated by the other parent, such as the Pledge policy at issue in this case.

Under *Mentry*, the custodial parent cannot bar the religious influences of the noncustodial parent to the extent that the latter has visitation rights with the child. And so, if during visitation Newdow wants to expose his daughter to atheism, or explain why he believes that the Pledge is unconstitutional, he is free to do so in the absence***23** of harm to the child. But that right, limited both by time (visitation) and by scope (to parent-child interactions and exposures), does not necessarily or obviously balloon into a right to use federal courts to challenge aspects of his daughter's education with which he disagrees. California's courts might so hold, but it is not self-evident that they would do so.

The key point again is not what rights a parent has before the breakdown of the normal joint custody arrangement, but what survives after those rights are reallocated through the child custody decree. The court orders governing Newdow and Banning since February 6, 2002, appear, on their face, to preclude the possibility that New-

dow can "direct" third parties in dealing with his daughter over Banning's opposition. The state-law question is the effect of those orders on Newdow's retained rights under background California law. The California Supreme Court should be afforded an opportunity to answer that question.

One final problem with the Ninth Circuit's view of *Mentry* exists: it is just as easy to read the intermediate California court to require the opposite result. *Mentry* self-consciously anchored itself to a view of "the proper reach of judicial authority." 190 Cal. Rptr. at 847. In outlining the scope of that proper reach, the *Mentry* court explained that *Murga* and the other precedents it relied upon "reflect a salutary judicial disinclination to interfere with family privacy ***. This attitude *** is predicated *** on the recognition that a 'court cannot regulate by its processes the internal affairs of the home. ***. No end of difficulties would arise should judges try to tell parents how to bring up their children.' " *Id.* at 847-48 (citations omitted).

In the end, *Mentry* justified its result as "diminish[ing] the uncertainties and discontinuities that can afflict the ***24** parent-child relationship whenever third parties (lawyers as well as judges) episodically intrude through an ill-equipped adversarial process in which decisions are subject to reconsideration and eventual appellate review. Such uncertainties and discontinuities are of course more likely and serious dangers after separation or dissolution than before." *Id.* at 849. Yet Newdow, in the name of *Mentry*, seeks a court order that opens up the can of worms that the *Mentry* majority feared, because all of the things that *Mentry* said about the restraining order - the intrusion of self-interested lawyers, the invocation of the judicial process, the diminishment of family autonomy - can also be said about the proceeding that Newdow has brought here. The Janus-faced quality of *Mentry*, and the strain placed upon it by the Ninth Circuit, underscores just how unsettled this matter is within California.

B. The Ninth Circuit overlooked other California cases that suggest a different conclusion.

Although *Murga* and *Mentry* recognize that a parent without ultimate decision-making power retains the right to expose his child to his own religion, California law also provides that ordinarily such a parent has no unqualified right to share in the determination of a child's education, choice of schools, or curriculum, even insofar as these touch religious issues. See, *e.g.*, *Burge v. City & County of San Francisco*, 262 P.2d 6, 12 (Cal. 1953) ("Custody embraces the sum of parental rights with respect to the rearing of a child, including its care. It includes the right to the child's services and earnings, and the right to direct his activities and make decisions regarding his care and control, education, health, and religion.") (citation omitted); *Lerner v. Superior Court*, 242 P.2d 321, 323 (Cal. 1952) ("The essence of custody is the companionship of the child and the right to make decisions regarding his care and control, education, ***25** health, and religion."). These cases point to conclusions other than those that the Ninth Circuit reached. Although the *Lerner* and *Burge* line of cases does not explicitly bar noncustodial parents from challenging on constitutional grounds government action that the custodial parent approves, it supports that result.[FN9]

FN9. See also *In re Guardianship of Smith*, 265 P.2d 888, 892 (Cal. 1954); *In re Trower*, 66 Cal. Rptr. 873, 874 (Cal. Ct. App. 1968); *Quiner v. Quiner*, 59 Cal. Rptr. 503, 513 (Cal. Ct. App. 1967); *Montandon v. Montandon*, 52 Cal. Rptr. 43, 45 (Cal. Ct. App. 1966).

C. The Ninth Circuit's reading of California law presents an issue of family law that is also unsettled in other jurisdictions.

Courts in other jurisdictions have struggled with the tension between the rights of noncustodial and custodial parents. Some courts have recognized that noncustodial parents have no right to determine their children's edu-

cation, schools, curriculum, etc.[FN10] Courts elsewhere have recognized that parents without decision-making power retain the right to expose their minor children to their religious beliefs and practices, absent a clear showing that these religious activities will be harmful to the ***26** child.[FN11] As these two lines of cases show, the same tension between the *Murga* and *Lerner* line of cases in California exists nationwide and remains largely unresolved.

FN10. See, *e.g.*, *Fanning v. Warfield*, 248 A.2d 890, 894 (Md. 1969); *Bateman v. Bateman*, 159 S.E.2d 387, 390 (Ga. 1968); *Bennett v. Bennett*, 73 So.2d 274, 279 (Fla. 1954); *Majnric v. Majnric*, 347 N.E.2d 552, 556 (Ohio Ct. App. 1975); *Pardue v. Pardue*, 285 So 2d 552, 555 (La. Ct. App. 1973); *Van Orman v. Van Orman*, 492 P.2d 81, 85 (Colo. Ct. App. 1971); *Zande v. Zande*, 164 S.E.2d 523, 528 (N.C. Ct. App. 1968); see also *Sachs v. Sachs*, 25 P.2d 159, 160-61 (Or. 1933); *Esteb v. Esteb*, 244 P. 264, 267-68 (Wash. 1926).

FN11. See, *e.g.*, *Felton v. Felton*, 418 N.E.2d 606, 607 (Mass. 1981); *Compton v. Gilmore*, 560 P.2d 861, 863 (Idaho 1977); *Munoz v. Munoz*, 489 P.2d 1133, 1135 (Wash. 1971); *Paolella v. Phillips*, 209 N.Y.S.2d 165, 167 (N.Y. App. Div. 1960).

Apparently the only state court to have considered directly the issue presented in this case is *Mills v. Phillips*, 407 So.2d 302 (Fla. Ct. App. 1981). Noting that there had been no prior Florida "ruling upon the right of a noncustodial parent to make educational decisions for children in custody of the other parent," the Florida court held that "a noncustodial parent, absent some extraordinary circumstance, has no standing to sue the School Board on behalf of his or her children to enforce decisions regarding their education which are at odds with the desires or actions of the custodial parent." *Mills*, 407 So.2d at 303-04. In concluding that parents without decision-making authority lack standing, the Florida court relied on the California Supreme Court's decision in *Lerner*. *Id.* at 304.

D. The effect of the September 2003 order restoring "joint legal custody" remains to be determined.

After the Ninth Circuit had issued its amended decision and petitions for certiorari were pending, the Superior Court announced at the September 2003 hearing that Newdow and Banning now have "joint legal custody" of their daughter. However, the court also made clear that Banning still retains final decision-making power.

Newdow and the United States have drawn opposite conclusions from the change in Newdow' status. Newdow ***27** argues that any question about his Article III standing is now moot. The United States responds that, because Banning continues to have the final say, the change in Newdow's custodial status has no effect on his standing.[FN12]

FN12. Letter from Michael Newdow to William K. Suter, Sept. 17, 2003, at 2; Letter from the Solicitor General to William K. Suter, Sept. 22, 2003, at 2.

"Joint custody" has traditionally been defined as an arrangement in which both parties to a marriage dissolution retain custody of the child and jointly participate in major decisions affecting the child's welfare. See David J. Miller, *Joint Custody*, 13 Fam. L. Q. 345, 360 (1979). Under California law, however, "joint legal custody" does not always mean equal decision-making power.[FN13] Because the Ninth Circuit decided Newdow's standing when Banning had sole legal custody, no court has yet considered whether, as a matter of California law, the change in Newdow's status affects his standing. This Court should not decide that question in the first instance.

FN13. *E.g.*, *Burge*, 262 P.2d at 11-12; *In re Marriage of Neal*, 155 Cal. Rptr. 157, 161-63 (Cal. Ct.

App. 1979); *Adoption of Van Anda*, 132 Cal. Rptr. 878, 881-82 (Cal. Ct. App. 1976).

III. THE COURT SHOULD VACATE THE NINTH CIRCUIT'S JUDGMENT AND REMAND FOR CLARIFICATION OF NEWDOW'S RIGHTS BY THE CALIFORNIA SUPREME COURT.

"Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism." *Arizonans for Official English*, 520 U.S. at 77 (quoting ***28***Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Certification is warranted here because the California courts have not provided clear answers to the questions central to deciding whether Newdow has standing to challenge EGUSD's Pledge policy, and the costs of an erroneous federal court interpretation of California law could be great.

If the federal courts were erroneously to find for Newdow's standing based on California law, the result would be to open federal courts in California to lawsuits by parents who lack full custody rights. Such lawsuits might well contravene the public policy of the state. The state might disfavor such lawsuits, for example, as being contrary to the best interests of the child. On the other hand, if the federal courts erroneously find against Newdow's standing, the result may be to vitiate an interest California might have in permitting parents to challenge aspects of their child's education, even when those parents lack full custody rights. The possibility of a friction-generating federal adjudication is therefore high.

If the federal courts misread California law, moreover, it is possible that California's courts will be unable to correct the error. The state-law right that the Ninth Circuit discerned is a right to assert a federal constitutional claim. Plaintiffs tend to assert such claims in federal court, and the fact that the federal district courts in California would be bound by the Ninth Circuit's decision would provide plaintiffs with every incentive to assert their claims in federal court. Plaintiffs would be unlikely to assert such claims in state court and risk a determination that the Ninth Circuit was wrong. "In this setting, the availability of a certification procedure provides the most expeditious, and, as a practical matter, perhaps the only effective means to enable California, through its courts, to exercise the state's authority over the proper interpretation and application of [its law]." ***29** *Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334, 338 (Cal. 2000).

That certification of important and unresolved questions of state law can promote federalism and prevent federal courts from invading important fields of state regulation is illustrated by the Ninth Circuit's recent certification to the California Supreme Court of questions concerning the California Public Utilities Commission's powers in a complex Takings Clause case arising from California's energy deregulation experiment. The Ninth Circuit had predicted that the California Supreme Court would find *three* violations of state law; the California Supreme Court found none. Compare *So. Cal. Edison Co. v. Lynch*, 307 F.3d 794 (9th Cir. 2002), with *So. Cal. Edison Co. v. Peevey*, 74 P.3d 795 (Cal. 2003).

Accordingly, the Court should vacate the judgment and remand the case with a direction to certify to the California Supreme Court the state-law question on which Newdow's standing depends, or certify the question directly. See Cal. Ct. R. 29.8(a); see also *Arizonans for Official English*, 520 U.S. at 77; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring); *Bellotti v. Baird*, 428 U.S. 132, 150-52 (1976) (directing lower court to certify to state court); *Clay v. Sun Ins. Office, Ltd.*, 377 U.S. 179, 180-81 & n.2 (1964) (same); *Fiore v. White*, 528 U.S. 23, 29-30 (1999) (certifying question directly); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-98 (1988) (same).

A remand to the Ninth Circuit with a direction to certify would be more appropriate than certification directly by

the Court because of the Ninth Circuit's "greater familiarity with the record and [California] law." *Mills v. Rogers*, 457 U.S. 291, 306 (1982). Such a remand would avoid the need for this Court to decide a far-reaching question of California law, and the California court's ***30** answer to the state-law question could obviate any need to decide the ultimate constitutional issue.

The Court seeks to resolve "possibly dispositive state law claims" prior to addressing federal constitutional claims, *Hagans v. Levine*, 415 U.S. 528, 546 (1974), and has long stressed the "wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of the case," *id.* at 547 n.12. See *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). The Court has also noted that this "well-settled doctrine *** carries a special weight in maintaining proper harmony in federal-state relations" and "must not yield to the claim of the relatively minor inconvenience of postponement of decision." *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 211-12 (1960). Thus, the Court has "frequently" deemed certification appropriate where "a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law." *Id.* at 212. The Court should follow that course here.

CONCLUSION

The judgment of the Ninth Circuit should be vacated and the case remanded with a direction to certify to the California Supreme Court the state-law question on which Newdow's standing depends, to wit:
When one parent is granted sole legal custody or final decision-making authority with respect to a child, does California law preserve the right of the other parent to use the courts to challenge, against the wishes of the first parent, the constitutionality of government action affecting their child?

ELK GROVE UNIFIED SCHOOL DISTRICT, et al., Petitioners, v. Michael A. NEWDOW, Respondent.
2003 WL 23010746 (U.S.) (Appellate Brief)

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