IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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

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# DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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## DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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

Plaintiffs' request that the Court issue a preliminary injunction barring the application of Texas Government Code §3100.101—which prescribes the language of the Pledge of Allegiance to the Texas Flag—is fundamentally flawed. Plaintiffs cannot demonstrate that they have a substantial likelihood of success on the merits, either in an as-applied or a facial constitutional challenge. Nor can Plaintiffs demonstrate that they will suffer irreparable harm without preliminary injunctive relief, that the harm to themselves outweighs the harm to the

State, or that issuing a preliminary injunction is in the public interest. Accordingly, the Court should deny Plaintiffs' request for preliminary injunctive relief.

## STATEMENT OF FACTS

Plaintiffs filed suit on August 7, 2007, asserting that the Pledge of Allegiance to the Texas Flag violates the Establishment Clause of the First Amendment to the United States Constitution. *See* Plaintiffs' Original Complaint & Application for Injunctive Relief ("Complaint") at 4. It is unclear from the Plaintiffs' Complaint whether they are challenging the constitutionality of the statute prescribing the Pledge on its face, or as it applies to them. *See* Complaint at 1-5. In either event, the Complaint is without merit, and as such, the Court should deny Plaintiffs' request for preliminary injunctive relief.

### I. THE TEXAS PLEDGE & THE STATUTORY FRAMEWORK

The Pledge of Alliance to the Texas Flag was first adopted in 1933 as part of an effort to establish a set of guidelines for the proper display of the Texas Flag. Act of April 19, 1933, 43d Leg., R.S., ch. 87, §3, 1933 Tex. Gen. Laws 186, 187 (amended 1965) (current version at TEX. GOV'T CODE §3100.101); *see also* The Handbook of Texas Online: Flags of Texas, http://www.tsha.utexas.edu/handbook/online/articles/FF/msf1.html (last modified July 20, 2001). As initially written, the Pledge read: "Honor the Texas Flag of 1836; I pledge allegiance to thee, Texas, one and indivisible." Act of April 19, 1933, 43d Leg., R.S., ch. 87, §3, 1933 Tex. Gen. Laws 186, 187. In 1965, the Pledge was amended to delete the previous

reference to Texas's Flag of 1836. Act of April 2, 1965, 59th Leg., R.S., ch. 55, 1965 Tex. Gen. Laws 138 (amended 1989) (current version at TEX. GOV'T CODE §3100.101).

In 2007, the Texas Legislature added the words "one state under God" to the Pledge, giving the Pledge its current text: "Honor the Texas flag; I pledge allegiance to thee, Texas, one state under God, one and indivisible." TEX. GOV'T CODE §3100.101. According to the author of the bill proposing the 2007 amendment, the change was intended to "acknowledge" the tradition and heritage of God's role "in the political and social culture of the United States." House Comm. on Culture, Recreation & Tourism, Bill Analysis, Tex. H.B. 1034, 80th Leg., R.S. (2007). The author noted the repeated references to God included in foundational government documents—like the Declaration of Independence and the Emancipation Proclamation—in speeches from Presidents, and in the United States's own Pledge of Allegiance. *Id.*

A provision of the Texas Education Code governs the recitation of the pledge in public-school classrooms. TEX. EDUC. CODE §25.082(b). That provision states: "The board of trustees of each school district shall require students, once during each school day . . . to recite: (1) the pledge of allegiance to the United States flag . . . and (2) the pledge of allegiance to the state flag . . . ." *Id.* The statute expressly allows students to opt out of the recitation of the pledge upon their parents' written request. *Id.* §25.082(c).

## II. PLAINTIFFS' SUIT

Plaintiffs filed suit on August 7, 2007, asking the Court to enjoin Defendant from enforcing Texas Government Code §3100.101 and to declare that §3100.101 violates the First Amendment to the United States Constitution. *See* Complaint at 4-5. Notably, Plaintiffs do not ask the Court to declare Texas Education Code §25.082 unconstitutional, or to enjoin its enforcement. *Id.* at 1-5.

Plaintiffs' Complaint alleges that Plaintiffs are parents of minor children attending Texas public schools. *Id.* at 1. The Complaint also asserts that Plaintiffs' children will be injured by potentially hearing and watching other students recite the Texas Pledge. *Id.* at 4.

On the same day that Plaintiffs filed their Complaint, they also asked the Court for preliminary injunctive relief barring enforcement of Texas Government Code §3100.101. *See* Plaintiffs' Brief Setting Forth Their Contentions of Fact and/or Law and Argument and Authorities on Plaintiffs' Motion for Preliminary Injunction ("Plaintiffs' Brief") at 2-6. The next day, August 8, 2007, the Court denied the Plaintiffs' request for *ex parte* injunctive relief, but set a hearing on Plaintiffs' Motion for Preliminary Injunction for Monday, August 20, 2007, at 10 a.m. *See* Order of August 8, 2007 at 1. The Court also set a deadline of August 16, 2007, at 12 p.m. for Defendant to respond to Plaintiffs' request for a preliminary injunction. *Id.* at 3. The Court granted a one-week extension, setting a new deadline of Thursday, August 23, 2007, for Defendant's response. Order of August 16, 2007 at 1.

## SUMMARY OF THE ARGUMENT

For nearly fifty years, schoolchildren have begun the day reciting the Pledge of Allegiance to "one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. §4. Until the Ninth Circuit's infamous—and unanimously vacated—holding in 2002, no court in the nation had ever held that the voluntary recitation of the Pledge somehow violates the United States Constitution. The Texas Pledge uses the identical phrase "under God," which can be traced to U.S. Pledge, to the Gettysburg Address, and to countless recitations before that. President Lincoln, famously dedicating and consecrating that bloody Pennsylvania battlefield, put it this way:

> ". . . that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

The U.S. Supreme Court has repeatedly upheld public acknowledgments of faith and God, and virtually every single reference to the Pledge—by the Supreme Court, by the federal courts of appeal, and repeatedly by individual Justices—has confirmed its constitutionality. Because the Texas Pledge uses the identical phrase as the U.S. Pledge, and because a wealth of Supreme Court precedent demonstrates that the use of the phrase "under God" is entirely constitutional, Plaintiffs cannot demonstrate a substantial likelihood of success on the merits.

Nor can Plaintiffs satisfy the other requisites for a preliminary injunction. Plaintiffs' sole alleged harm—the possibility that their children will be forced to listen to other children

reciting "under God"—could be altogether eliminated by a policy that would allow objecting students to remain outside the classroom during the Pledge recitations. For that reason, any facial challenge to the statute must fail, and any as-applied challenge is not yet ripe. And, given the substantial confusion that would be engendered by giving conflicting instructions to some 8,000 schools throughout the State, Plaintiffs likewise cannot demonstrate that the balance of harms favors granting an injunction at this time. Accordingly, the Court should deny Plaintiffs' request for a preliminary injunction.

## ARGUMENT

A preliminary injunction is an extraordinary remedy reserved for extraordinary circumstances. *Roho, Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990). Such an injunction will not be granted unless the movant makes a clear showing that (1) there is a substantial likelihood he will ultimately prevail on the merits, (2) there is a substantial danger he will suffer irreparable injury if the court does not issue an injunction, (3) the threatened injury outweighs any harm to the defendant resulting from the injunction, and (4) the injunction will not harm the public interest. *Hull v. Quitman County Bd. of Educ.*, 1 F.3d 1450, 1453 (5th Cir. 1993); *Marquis*, 902 F.2d at 358.

"In considering these four prerequisites, the court must remember that a preliminary injunction is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). If the movant fails to clearly carry that burden on any one

of these four prerequisites, a preliminary injunction should not issue. *Id.* at 573; *see also Allied Mktg. Group, Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 809 (5th Cir. 1989); *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985); *Enter. Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472-73 (5th Cir. 1985). "[O]nly those injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction." *Callaway*, 489 F.2d at 573.

There is little reason to believe that Plaintiffs' suit would succeed at trial, and, thus, no reason to grant Plaintiffs' request for preliminary relief. Indeed, Plaintiffs' request for preliminary relief fails on a number of levels.

## I. IT IS HIGHLY UNLIKELY THAT PLAINTIFFS WILL PREVAIL ON THE MERITS.

To obtain preliminary injunctive relief, Plaintiffs must show that there is a "substantial likelihood" that they will prevail on the merits. *Hull*, 1 F.3d at 1453. This is an especially heavy burden in a constitutional challenge, given that state statutes are generally presumed to be constitutional. *Ala. State Fed'n of Teachers, AFL-CIO v. James*, 656 F.2d 193, 195 (5th Cir. 1981). Whether Plaintiffs' suit is construed as a facial or as-applied challenge to Texas Government Code §3100.101, it is highly unlikely to ultimately prevail on the merits.

### A. Plaintiffs' Facial Challenge to Texas Government Code §3100.101 Has Little Likelihood of Success.

A facial challenge to a statute is the most difficult to mount successfully because "plaintiffs must show that under no circumstances could the law be constitutional." *Barnes*

*v. Mississippi*, 992 F.2d 1335, 1343 (5th Cir. 1993). Courts are "obliged to presume that state officials will act in accordance with the law." *Id.* (citing *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990)). Given the virtual unanimity of American jurisprudence pointing to the clear constitutionality of the United States Pledge of Allegiance—which uses the identical phrase "under God"—Plaintiffs cannot meet their burden of demonstrating the substantial likelihood of success in challenging the Texas Pledge on its face.

**1. Historical and patriotic acknowledgments of our nation's cultural and religious heritage—like the words "one state under God" in the Texas Pledge—are entirely consistent with the First Amendment's prohibition on the establishment of religion.**

**a. Acknowledgments of religion in patriotic or historical contexts are fundamentally different from government-endorsed religious ceremony.**

The Supreme Court has observed that the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" demonstrates that the Constitution has long been understood to permit public recognition of religious traditions. *See Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984)). The Court has recognized that "religion has been so identified with our history and government," *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 214 (1963), and that "[t]he history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962). Indeed, the Court has said, "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*, 545 U.S. at 688 (quoting *Marsh v. Chambers*, 463 U.S. 783, 790-91 (1983) (upholding a state legislature's practice of maintaining a chaplain to open sessions with prayer)).

In *Van Orden*, the Supreme Court upheld a public display of the Ten Commandments where the display comported with the historical tradition of acknowledging religion's importance to our heritage and where the display did not cause political divisiveness. *See* 545 U.S. at 686-90; *id.* at 701-04 (Breyer, J., concurring) (upholding a Ten Commandments monument on the Texas Capitol grounds containing the full text of the Ten Commandments). The plurality opinion cited several prominent examples of official acknowledgments of religion, including George Washington's Thanksgiving Day proclamation asking citizens to thank God for the country's successes, the practice of legislative prayer, and religious displays on buildings throughout the Nation's capital. *Id.* at 686-90. Indeed, it cited several uses of scripture itself, including the carving of Moses holding tablets inscribed with a portion of the Ten Commandments in the Supreme Court's own courtroom and a quotation from Micah 6:8 in the Library of Congress's Jefferson Building's Great Reading Room. *Id.* at 689. The plurality also recognized that nontextual representations of the Moses and the Ten Commandments abound on public buildings, as do patriotic invocations of God in public settings. *Id.* at 687-89 & n.7. All of these, the Court explained, are unquestionably constitutional. *Id.* at 686-90; *id.* at 699 (Breyer, J., concurring) ("But the Establishment

Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.").

Notably, "the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid chaplains for the House and Senate." *Lynch*, 465 U.S. at 674. And among the "countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage," *id.* at 677, is the reference to our religious heritage found in the "statutorily prescribed national motto 'In God We Trust,'" *id.* at 676. Such references to and acknowledgments of religion are an undeniable part of our nation's rich cultural history.

In deciding Establishment Clause cases, the Supreme Court has been careful to distinguish between government-sponsored religious ceremonies—which it has found at times to run afoul of the First Amendment—and the historical and patriotic recognition of religion by government institutions—which it has repeatedly found to be entirely constitutional. *See County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989) (noting the "*obvious distinction*" between unconstitutional religious displays "and *references to God in* the motto and *the pledge*" (emphases added)). The words "under God" in the Texas Pledge fall into the later, constitutional category.

Indeed, even government-sponsored religious ceremony is not always inconsistent with the Establishment Clause. In *Marsh*, 463 U.S. at 792-95, for example, the Supreme

Court, relying primarily on historical guidance, held that the Nebraska Legislature's practice of opening its legislative sessions with a prayer was not an unconstitutional establishment of religion. The Supreme Court wrote:

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

*Id.* at 792 (citation omitted).

Likewise, the Court has made abundantly clear that historical and patriotic acknowledgments of religion do not run afoul of the First Amendment. As Justice O'Connor has observed, historical and patriotic acknowledgments of religion, such as the

> government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court' . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

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

Accordingly, it cannot be said that the Texas Pledge's acknowledgment of our nation's religious heritage violates the First Amendment to the United States Constitution. Reciting the Texas Pledge cannot seriously be described as government-sponsored religious ceremony. Rather, the acknowledgment of religion in the Texas Pledge more closely tracks those of other patriotic and historical references to religion that the United States Supreme Court has repeatedly recognized do not run afoul of the Establishment Clause.

**b. Virtually every reference to the pledge of allegiance—by the United States Supreme Court and repeatedly by individual Justices—has agreed that the United States Pledge is entirely consistent with the First Amendment.**

Even assuming that historical acknowledgments of religion might sometimes be unconstitutional, the United States Supreme Court has eliminated any doubt about the phrase "under God" in the United States Pledge of Allegiance by consistently stating that those particular words would survive constitutional scrutiny.

The Supreme Court has repeatedly noted with particularity that the reference to God in the United States Pledge of Allegiance withstands Establishment Clause scrutiny. Illustrating the existence of "an unbroken history of official acknowledgment . . . of the role of religion in American life from at least 1789," the Court in *Lynch*, for example, noted—with no hint of criticism—"the language 'One nation under God' . . . [in] the Pledge of Allegiance to the American flag." 465 U.S. at 674. This language, like the national motto "In God We Trust" on United States currency and the frieze of the Ten Commandments in the Supreme Court, serves as an "illustration[] of the Government's acknowledgment of our

religious heritage" that "help[s] explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause." *Id.* at 676-78.

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

The opinions of the Court in *Lynch* and *County of Allegheny* were written or joined by Chief Justice Burger, Chief Justice Rehnquist, and Justices Brennan, White, Marshall, Blackmun, Powell, Stevens, and O'Connor. In addition, individual Justices have repeatedly agreed as well.

For example, Justice Brennan wrote in concurrence in *Schempp*:

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

374 U.S. at 304. Likewise, Justice O'Connor has expressed her view that the reference to God in the Pledge of Allegiance "serve[s] as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in

the future.'" *See Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) (citation omitted).

Other similar references are legion. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 633-39 (1992) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White & Thomas, JJ.); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., and White & Scalia, JJ.); *Engel*, 370 U.S. at 449 (Stewart, J., dissenting); *see also Schempp*, 374 U.S. at 307-08 (Goldberg, J., concurring, joined by Harlan, J.).

Given that virtually every reference to the United States Pledge by the Supreme Court or by an individual Justice of the Supreme Court has confirmed its constitutionality,[1] there is no reason—and certainly no substantial reason—to believe that the Texas Pledge, which uses the identical phrase "under God," would be held unconstitutional. Both Pledges serve as patriotic statements and acknowledgments of our nation's rich heritage. Simply put, it cannot be said that there is a substantial likelihood that the Texas Pledge would be held to violate the United States Constitution.

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

**2. Centuries of historical and patriotic acknowledgment of religion—like that in the Texas Pledge—have not threatened the First Amendment's prohibition on established religion.**

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

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

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

**3. There is no merit to Plaintiffs' claim that the Texas Pledge somehow stands on lesser footing than the U.S. Pledge.**

Plaintiffs suggest that even if the United States Pledge is fully constitutional, the Texas Pledge should be struck down because it was adopted more recently. That distinction is of no import. The U.S. Pledge reads: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. §4. At least forty-three state statutes provide for the recitation or use of the Pledge of Allegiance by public schoolchildren.[2]

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2. *See* ALA. CODE §16-43-5 (2001); ALASKA STAT. §14.03.130 (2000); ARIZ. REV. STAT. §15-506 (2002); ARK. CODE §6-16-122 (2003); CAL. EDUC. CODE §52720 (1989); COLO. REV. STAT. §22-1-106 (2003); CONN. GEN. STAT. §10-230(c) (2003); DEL. CODE tit. 14, §4105 (2003); FLA. STAT. ch. 1003.44(1)

The words "under God" were added to the U.S. Pledge in 1954 in an effort to illuminate a key distinction between our government and those of Communist nations. Congressional Committee Reports from the time of the 1954 amendment note, for example, that whereas the Communists were "spiritual[ly] bankrupt[]," S. REP. NO. 83-1287, at 2 (1954), our government recognized the importance of each human "endowed by [God] with certain inalienable rights which no civil authority may usurp," H.R. REP. NO. 83-1693, at 2 (1954). The Reports also note the great number of similar references to God in historical and patriotic documents throughout our history. H.R. REP. NO. 1693, at 2; S. REP. NO. 1287, at 2.

The Texas Pledge uses the identical phrase "under God." If the recitation of that phrase by schoolchildren across the nation at the beginning of each school day does not violate the Constitution, then surely a State's amending its own pledge to include the *identical phrase* does not either. The effect, and any purported "injury," is the same. As the Supreme Court has observed, "it would be incongruous to interpret [the Establishment

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(2002); GA. CODE §20-2-310(c)(1) (2001); IDAHO CODE §33-1602(4) (2001); 105 ILL. COMP. STAT. 5/27-3 (2002); IND. CODE §20-10.1-4-2.5 (2003); KAN. STAT. §72-5308 (2002); KY. REV. STAT. §158.175(2) (2001); LA. REV. STAT. §17:2115(B) (2001); MD. CODE EDUC. §7-105(c) (2001); MASS. GEN. LAWS ch.71, §69 (2003); MINN. STAT. §121A.11 (2003); MISS. CODE §37-13-7(1) (2001); MO. STAT. §171.021(2) (2003); MONT. CODE §20-7-133 (2005); NEV. REV. STAT. §389.040 (2002); N.H. REV. STAT. §194:15-c (2002); N.J. STAT. §18A:36-3(c) (1999); N.M. STAT. §22-5-4.5 (2001); N.Y. EDUC. LAW §802(1) (2000); N.C. GEN. STAT. §115C-47(29a) (1999); N.D. CENT. CODE §15.1-19-03.1(4) (2001); OHIO REV. CODE §3313.602(A) (1999); OKLA. STAT. tit. 70, §24-106 (2003); OR. REV. STAT. §339.875 (2001); 24 PA. CONS. STAT. §7-771 (1992); R.I. GEN. LAWS §16-22-11 (2001); S.C. CODE §59-1-455 (2000); S.D. CODIFIED LAWS §13-24-17.2 (2002); TENN. CODE §49-6-1001(c)(1) (2002); TEX. EDUC. CODE §25.082 (2003); UTAH CODE §53A-13-101.6 (2000); VA. CODE §22.1-202(C) (2002); WASH. REV. CODE §28A.230.140 (1997); W. VA. CODE §18-5-15b (1999); WIS. STAT. §118.06 (2003).

Clause] as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government." *Van Orden*, 545 U.S. at 688 (quoting *Marsh*, 463 U.S. at 790-91).

Moreover, Plaintiffs' time-based argument—that Texas's Pledge is automatically unconstitutional because Texas added the terms "under God" more recently than the United States Congress did—contravenes Supreme Court precedent. The Supreme Court has made abundantly clear that history alone does not determine whether a government's reference to religion violates the Establishment Clause. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 38 (2004) (O'Connor, J., concurring) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence."); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees . . . ."). While time can be a factor in the analysis, it is not the sole dispositive factor.

**4. The federal circuit courts—with the exception of a lone, vacated Ninth Circuit decision—have consistently upheld the constitutionality of the United States Pledge of Alliance.**

The United States Court of Appeals for the Fourth Circuit is the court to have most recently adjudicated the constitutionality of the words "under God" in a pledge-recitation statute. *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 408 (4th Cir. 2005). The statute in question, like Texas's, mandated the recitation of the United States Pledge of Alliance but allowed exceptions for parents who object. *Id.* at 398. The court held that the recitation of

the pledge is not unconstitutional because it is a "patriotic activity," not a state-sponsored prayer. *Id.* at 407-08. The court opined as follows:

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

*Id.* at 408 (citations omitted).

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

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

and *all 50 States* urged the reversal of the Ninth Circuit's decision,[3] and the Supreme Court's vacation of that aberrant Ninth Circuit judgment was unanimous.

Accordingly, it is not only the case that the United States Supreme Court's references to the words "under God" indicate that the phrase's presence is fully constitutional, but also that the federal circuits agree. Therefore, it cannot be said that Plaintiffs have a substantial likelihood of success on the merits challenging the constitutionality of those same words in the Texas Pledge.

**5. In any event, Plaintiffs cannot demonstrate that the statute prescribing the Texas Pledge would be unconstitutional in all applications.**

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

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3. Brief of the United States, Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624 (U.S. Supreme Court Dec. 2003), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1624/02-1624.mer.usa.pdf; Amicus Brief of Texas on Behalf of All Fifty States, Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624 (U.S. Supreme Court Dec. 2003), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-1624/02-1624.mer.ami.texas.pdf.

eliminate entirely Plaintiffs' hypothetical injury, Plaintiffs' facial challenge to the Texas Pledge statute fails as a matter of law.

### B. Because §3100.101 Has Not Been Applied to Plaintiffs, Plaintiffs Have No Plausible As-Applied Challenge to the Statute.

As-applied challenges to statutes are determined by whether a particular application of a statute runs afoul of the Constitution. *Bowen v. Kendrick*, 487 U.S. 589, 601 (1988). In other words, the Court must look not only to the language of a statute, but also to the "manner in which it ha[s] been administered in practice." *Id.* Only a facial challenge can be considered when a statute has not yet been administered. *Id.* at 600.

In this case, Plaintiffs have no ability to wage an as-applied challenge because the new version of §3100.101 has not yet been administered in Texas schools. And even if it had, Plaintiffs have offered no evidence of the specific manner in which it has been administered. As a result, Plaintiffs can have no likelihood of success on the merits of an as-applied constitutional challenge to §3100.101. *Cf. id.*[4]

## II. THE PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THEY WILL BE IRREPARABLY HARMED WITHOUT EXTRAORDINARY PRELIMINARY INJUNCTIVE RELIEF.

The second element a movant must show to obtain a preliminary injunction is a substantial danger that he will suffer irreparable injury if the court does not issue the injunction. *Hull*, 1 F.3d at 1453. "Assuming that the threatened harm is more than de

4. If they might at some future time have an as-applied challenge, that claim is not yet ripe. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir. 1987).

minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction." *Callaway*, 489 F.2d at 575. The fact that adequate corrective relief will be available at a later date weighs heavily against a finding of irreparable harm. *Enter. Int'l*, 762 F.2d at 472-73. As the Fifth Circuit observed in *Callaway*, an injury is irreparable only if the judicial process would be rendered futile by an act of the defendant. 489 F.2d at 573. Plaintiffs have failed to meet their burden under this *Callaway* element because (1) they have failed to show they will suffer an injury, and (2) an injunction after a hearing on the merits would provide adequate relief.

First, Plaintiffs have not shown that they will suffer any injury. They allege that their children will be injured by watching and listening to classmates saying "under God" when pledging allegiance to the Texas Flag. *See* Plaintiffs' Brief at 4. Yet Plaintiffs have neither alleged nor demonstrated that their children will be forced to remain in the classroom during the Texas Pledge. Moreover, Plaintiffs are challenging only the Texas pledge, not the national pledge. *See* Complaint at 2-3. Thus, even if the Court were to grant a preliminary injunction for the Plaintiffs, and even if Plaintiffs' children were forced to remain in the classroom for the pledges, those children will continue to hear the *identical* phrase "under God" in the U.S. pledge, and thus will continue to suffer the same illusory injury.

Second, Plaintiffs have not shown that any alleged injury would be irreparable. As the *Callaway* Court held, an irreparable injury is one that deprives the court of its ability to render relief after a hearing on the merits. 489 F.2d at 573. That is not the case here. The

Court's granting or denial of a preliminary injunction will not affect its ability to make a final adjudication on the constitutionality of the statute after a hearing on the merits.

Moreover, Plaintiffs and their counsel's actions in a closely related case indicate that they do not believe alleged injuries of this type to be irreparable. In *Croft v. Perry*, Civil Action No. 3:06-CV-9434-M (N.D. Tex. Mar. 10, 2006), where the same Plaintiffs and the identical counsel are raising a similar challenge to the Texas minute-of-silence statute, Plaintiffs did not seek a preliminary injunction and their counsel explicitly conceded to Judge Barbara Lynn in open court at the summary judgment hearing that there was no need for a quick ruling regarding whether the minute-of-silence statute violates the Establishment Clause. Affidavit of Brantley Starr, App. A at 1.

Plaintiffs have failed to show how the Texas Pledge is irreparably injurious while the minute-of-silence (expressly allowing children the option of "pray[ing]") is not. Because Plaintiffs have failed to show that a denial of the preliminary injunction will cause irreparable injury, the Court should deny their motion. *See Callaway*, 489 F.2d at 577.

## III. PLAINTIFFS HAVE NOT SHOWN—AND CANNOT SHOW—THAT THE HARM TO THEMSELVES OUTWEIGHS THE HARM TO THE STATE, OR THAT THE PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

The third element a movant must show to obtain a preliminary injunction is that the threatened injury outweighs any harm to the defendant resulting from the injunction. *Hull*, 1 F.3d at 1453. The fourth element, closely related to the third, requires a movant to show that the injunction will not harm the public interest. *Id.*

Because Texas Government Code §3100.101 is constitutional, *see supra* Part I, there is no harm to Plaintiffs, nor would an injunction serve the public interest. And as discussed previously, Plaintiffs have failed to show any alleged harm brought about by the Texas Pledge that would not also be caused by the national pledge. Because Plaintiffs have not, and cannot, prove harm, they cannot carry their burden under the final two *Callaway* factors.

But even were they able to prove some harm, it would not outweigh the harm to the State and the public interest caused by granting the preliminary injunction. Texas has over 1,000 school districts—with over 8,000 public schools. SchoolMatters: Texas Public Schools & Districts, http://www.schoolmatters.com/app/location/q/stid=44/llid=111/stllid=155/locid=44 (last visited Aug. 21, 2007). Notifying each of these schools of an eleventh-hour change to the Texas Pledge, just as school has begun, would be a significant undertaking. And, it would only foment confusion if all 8,000 schools were told to change the Pledge, and then, following a trial on the merits or an appeal, told to change it back. The public interest would not be served by altering the status quo and by setting aside a state law passed by the Legislature and signed by the Governor, even before any adjudication on the merits. Because Plaintiffs have not and cannot demonstrate harm, and the harm to the State and public interest would be significant, Plaintiffs have failed to meet their burden under the third and fourth *Callaway* factors.

## IV. THE COURT SHOULD NOT WAIVE THE BOND REQUIREMENT.

If the Court orders a preliminary injunction, it should not waive the bond requirement. Pursuant to the Federal Rules of Civil Procedure, "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." FED. R. CIV. P. 65(c). The amount of the bond is within the discretion of the trial court. *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996).

Although the Fifth Circuit has not yet settled whether not requiring a bond is reversible error, *compare Phillips v. Charles Schreiner Bank*, 894 F.2d 127, 131 (5th Cir. 1990) ("[F]ailure to require the posting of a bond or other security constitutes grounds for reversal of an injunction.") *with Kaepa*, 76 F.3d at 628 (court "may elect to require no security at all"), the Court has required no bond in the limited circumstances when (1) the defendant's arguments did not pass constitutional muster and (2) the defendant would not incur any significant cost due to the injunction. *Incubus Invs., L.L.C. v. City of Garland*, No. 3:03 CV-2039-K, 2003 WL 23095680, at *3-4 (N.D.Tex. Dec. 17, 2003). Neither condition is present here. Plaintiffs are unlikely to prevail on the merits, *see supra* Part I, and the State would incur a significant cost due to the preliminary injunction because it would have to immediately notify each of the over 8,000 public schools in Texas, *see supra* Part III, as well as appeal the preliminary injunction. Therefore, if the Court orders a preliminary injunction,

it should set the bond requirement at least to an amount sufficient to cover the cost to the State of the injunction.

## PRAYER

For the foregoing reasons, the Court should deny Plaintiffs' request for preliminary injunctive relief.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

On August 23, 2007, a true and correct copy of this Defendant's Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction in electronic form, was sent to the persons listed below in accordance with the Local Rules of the U.S. District Court for the Northern District of Texas:

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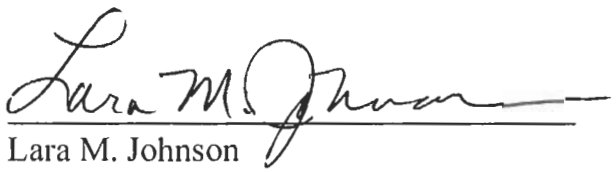

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