
Nos. 05-17257, 05-17344, 06-15093
(Consolidated)

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL A. NEWDOW, *et al.*,
Plaintiffs-Appellees,

vs.

RIO LINDA UNION SCHOOL DISTRICT, *et al.*,
Defendants-Appellant,

and

UNITED STATES OF AMERICA, *et al.*,
Defendants-Intervenors-Appellants,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA
NO. CIV. S-05-17LKK/DAD
HON. LAWRENCE K. KARLTON, U.S. DISTRICT JUDGE

**BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION
& LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANTS-
APPELLANTS FOR DENIAL OF PETITION FOR
REHEARING**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”) makes the following disclosures: (1) Eagle Forum ELDF has no parent corporations, and (2) no publicly held companies hold 10% or more of Eagle Forum ELDF’s stock.

Dated: June 25, 2010

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”), a nonprofit organization founded in 1981, files this brief with the consent of all the parties pursuant to Circuit Rule 29-2(a). For thirty years, Eagle Forum ELDF has defended traditional American values, including the right to religious expression in public life. In addition, the dissent republished hearsay found nowhere in the record and altered the hearsay in a manner that disparages a public figure as well as Eagle Forum’s Alaska chapter. Because the public relies on court opinions as authoritative and based on rules of evidence, that misleading non-record misquotation requires correction. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court.

SUMMARY OF ARGUMENT

The plaintiffs (collectively hereinafter, “Newdow”) cannot rely on prior litigation that was reversed for lack of standing (Section I), and Newdow’s incorporation by reference of citations and whole arguments outside the petition waives those issues (Section II). As the panel found, the phrase “under God” in the Pledge of Allegiance both predates and permeates the Founding of this Nation (Section III). Finally, the dissent’s use and misuse of a statement attributed to Eagle Forum Alaska and Alaska’s former Governor, Sarah Palin, defy the rules of evidence and unfairly disparages these non-parties (Section IV).

ARGUMENT

I. THIS CASE AND *LEFEVRE* ARE CONSISTENT

Newdow argues that the decisions in his challenge to the Pledge of Allegiance here and in his challenge to the national motto in *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), are inconsistent because (1) the panel here declined to follow a panel decision from prior litigation ultimately dismissed for want of standing, while (2) *Lefevre* invoked *stare decisis* from a panel decision in prior litigation where the *district court* had found standing lacking, but where this Court reached the merits without considering standing. *See* Pet. at 4-5. Whatever disconnect Newdow perceives between the opinions here and in *Lefevre* cannot help Newdow, either here or in *Lefevre*.

Starting with this litigation, the panel correctly disregarded the panel decision in Newdow's prior litigation against the Pledge. Slip Op. at 3927-28. In the earlier case, the Supreme Court held that Dr. Newdow lacked standing to enforce his daughter's rights. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004). Because standing goes to a federal court's power to hear a case, it goes to the court's jurisdiction to declare the law:

A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case.

Orff v. U.S., 358 F.3d 1137, 1149-50 (9th Cir. 2004) (quoting *U.S. v. Troup*, 821

F.2d 194, 197 (3rd Cir. 1987) (alterations in *Troup*)); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause”) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)). The panel here is absolutely correct that the now-reversed panel decision in *Newdow*’s prior litigation is without any effect here.

Moving to *Lefevre*, the reasoning gets trickier, but the result is the same: any error in *Lefevre* cannot aid *Newdow*, either here or in *Lefevre*. In *Aronow v. U.S.*, 432 F.2d 242, 243 (9th Cir. 1970), this Court upheld the national motto “In God We Trust” on Establishment-Clause grounds and declined to reach the district court’s holding that the plaintiffs lacked standing. Acknowledging that *Steel Company* denies the use of “hypothetical jurisdiction” *prospectively*, *Lefevre* suggests in *dicta* that that “did not overturn the holdings of every case that had been decided using the ‘hypothetical jurisdiction’ approach.” *Lefevre*, 598 F.3d at 645. In essence, *Newdow* complains that his prior lack of standing prevented issue preclusion in his favor here, but the *Aronow* plaintiffs’ *possible* lack of standing nonetheless provided *stare decisis* in *Lefevre*. Because he needed standing in *Lefevre* and this Court held that he had standing in *Lefevre* (598 F.3d at 642), *Newdow* cannot challenge the *Aronow* plaintiffs’ standing to press identical claims. First, issue preclusion from his *Lefevre* standing precludes an attack on the

Arnonow plaintiffs' standing. Second, even if he could challenge the *Arnonow* plaintiffs' standing, that self-defeating exercise would avoid the *Aronow* merits, but result in dismissal in *Lefevre* for lack of standing. In any event, any quarrel with the *Lefevre dicta* has no relevance here.

II. ARGUMENTS INCORPORATED BY REFERENCE ARE WAIVED

In several instances Newdow's petition incorporates citations and even whole arguments from appendices or prior filings. *See* Pet. at 15 (legislative history and decisions in appendices), 17 (constitutional history in appendix and arguments from briefs), 18 (legislative history in appendices). That mocks page limitations, and courts should deem all such issues waived.

Indeed, if his petition instead were a *brief*, Newdow clearly would have waived all of the arguments supported or incorporated in this manner. *See* FED. R. APP. P. 28(a)(9)(A) ("appellant's contentions and the reasons for them, with citations to the authorities ... on which the appellant relies"); *id.* 28(b) (same for appellees); Circuit Rule 28-1(b) ("Parties must not append or incorporate by reference briefs submitted to the district court or agency or this Court in a prior appeal, or refer this Court to such briefs for the arguments on the merits of the appeal"). Issues that are not briefed in accordance with these rules are waived. *See Retlaw Broadcasting Co. v. N.L.R.B.*, 53 F.3d 1002, 1005 n.1 (9th Cir. 1995); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259-60 (9th Cir. 1996). Moreover, parties

cannot incorporate materials by reference from past briefs. *Swanson v. U.S. Forest Service*, 87 F.3d 339, 345 (9th Cir. 1996); *U.S. v. Marchini*, 797 F.2d 759, 767 (9th Cir. 1986). By taking this unorthodox approach as the *petition* stage, Newdow presents two questions (1) whether a petition qualifies as a “brief” under the foregoing rules and (2) if not, what standards apply at the petition stage.

The first question is easier than the second: a petition plainly is not a brief. *See, e.g., Fry v. Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723, 724-25 (7th Cir. 2009); *cf.* FED. R. APP. P. 29 Advisory Committee Note to 1998 Amendments (contemplating Rule 29’s applying *by analogy* at the petition stage). If Federal Rule 28 and Circuit Rule 28-1 do not apply, what does?

Federal Rule 40(a)(2) requires that “petition[s] must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition.” FED. R. APP. P. 40(a)(2). Further, the Federal Rules limit petitions to 15 pages, which this Court equates with 4,200 words. FED. R. APP. P. 40(b); Circuit Rule 32-3(3). Together, these rules are at least as strict as the rules for briefs. Moreover, this Court disfavors motions to exceed any page limitation and requires detailed supporting declarations. Circuit Rule 32-2. Because litigants cannot bypass such requirements by incorporating arguments and citations by reference, this Court should clarify that litigants waive arguments that they fail to support *within* a petition or motion.

III. THE PLEDGE OF ALLEGIANCE OBVIOUSLY IS LAWFUL

Our Declaration of Independence acknowledges that our Creator endowed us with inalienable rights and that God entitled us to a separate and equal station. DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776). Our Constitution recognizes religion in the “Year of our Lord one thousand seven hundred and [e]ighty seven.” U.S. CONST. art. VII. Under Newdow’s view, the Constitution itself is unconstitutional.

Moreover, the “day after the First Amendment was proposed, Congress urged President Washington to proclaim ‘a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal [favours] of Almighty God.’” *Lynch v. Donnelly*, 465 U.S. 668, 675 n.2 (1984) (citations omitted). And “on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, ... which declared: ‘Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.’” PUB. L. NO. 107-293, §1(5), 116 Stat. 2057 (2002). To suggest that the First Amendment prohibits the phrase “under God” in the Pledge of Allegiance is fanciful.

As the Supreme Court has held, “[i]t is *impossible* to believe that Congress [at the same time] wrote such a specific declaration in favor of [a legal concept]

and a short time later by general phrases of [a second enactment] intended to invalidate or disregard [the first legal concept].” *Jewell Ridge Coal Corp. v. Local No. 6167, U.M.W.*, 325 U.S. 161, 180 (1945) (emphasis added); *Houston Corp. v. U.S.*, 219 F.2d 841, 844 (9th Cir. 1955) (using “contemporaneous statutes” as an interpretive tool). Like it or not, “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Lynch*, 465 U.S. at 675 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Under the circumstances “fanciful” understates Newdow’s burden: it is *impossible* to believe that the Founders intended to prohibit describing this Nation as “under God” in an official and patriotic act such as the Pledge of Allegiance.¹

IV. DISSENT IMPROPERLY RELIES ON UNTESTED, INACCURATE NON-RECORD EVIDENCE TO IMPUGN NON-PARTIES

Perhaps to disparage Governor Palin and Eagle Forum’s Alaska chapter, Judge Reinhardt misquotes a third-party’s internet publication of a response provided by Governor Palin’s campaign to an Eagle Forum Alaska survey. Slip op. at 3940 n.4 (“If [the Pledge] was good enough for the founding fathers, its [*sic*]

¹ Newdow devotes considerable effort (Pet. at 17) to attacking the Pledge as it existed between 1954 and 2002, without considering the subsequent statute that re-enacted the Pledge. PUB. L. NO. 107-293, §2(a), 116 Stat. at 2060. Assuming *arguendo* that re-enactment does not moot complaints about the prior version, the subsequent statute nonetheless is “entitled to great weight in statutory construction.” *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969).

good enough for me....”) (Reinhardt, J., dissenting) (all alterations by Judge Reinhardt) (*citing* “Eagle Forum Alaska, 2006 Gubernatorial Candidate Questionnaire, July 31, 2006, <http://irregulartimes.com/eagle-forum-2006-gubernatorial-candidate.html>”). Judge Reinhardt’s dissent uses the purported quotation as evidence that many Americans know only the current Pledge and, if “not familiar with our political history[,] may even be under the impression that its language dates back to the founding fathers.” *Id.* at 3940. Because Judge Reinhardt altered the quotation and because it is unreliable evidence, the quotation has no legitimate purpose in even a dissenting opinion of this Court.

As established in the prior section, this Nation’s operating under God was a foundational concept that pre-dates and permeates the founding of this Nation. The phrase “under God” derives from General Washington’s General Orders dated July 2, 1776:

The fate of unborn Millions will now depend, *under God*, on the Courage and Conduct of this army – Our cruel and unrelenting Enemy leaves us no choice but a brave resistance, or the most abject submission; this is all we can expect – We have therefore to resolve to conquer or die.

Slip Op. at 3906 n.22 (*quoting* George Washington, General Orders (July 2, 1776) (emphasis added in Slip Op.)). In consecrating another moment where the Nation’s fate was uncertain, President Lincoln echoed General Washington and rallied “this nation, under God, [to] a new birth of freedom” so “that government of the people,

by the people, for the people, [would] not perish from the earth.” Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863). Even as republished in Judge Reinhardt’s *Irregular Times* internet evidence,² the response plainly says that the phrase “under God” is good enough for Governor Palin because that phrase was good enough for the Founders.

Judge Reinhardt’s use and misuse of his *Irregular Times* internet evidence suffers two critical flaws. First, Judge Reinhardt lacks any evidentiary basis for the validity of his purported quotation, which is hearsay – indeed, hearsay within hearsay within hearsay. Second, Judge Reinhardt unjustifiably substitutes “[the Pledge]” for the first “it” in the response’s second sentence, notwithstanding that that “it” refers to “the phrase ‘under God.’” Each of these flaws independently warrants a correction.

² Judge Reinhardt’s *Irregular Times* citation provides as follows:

Are you offended by the phrase □Under God□ in the Pledge of Allegiance? Why or why not?

JB: No.

SP: Not on your life. If it was good enough for the founding fathers, its good enough for me and I□ll fight in defense of our Pledge of Allegiance.

<http://irregulartimes.com/eagle-forum-2006-gubernatorial-candidate.html> (non-standard characters in original) (last visited June 25, 2010).

A. Non-Record Hearsay Has No Place in Appellate Opinions

It is “Hornbook law” that appellate courts rely on evidence adduced in district court, *Duran v. U.S.*, 413 F.2d 596, 604-05 (9th Cir. 1969), except for materials that qualify for judicial notice. *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992). Although appellate courts may supplement records to include “anything material to either party [that] is omitted from the record by error or accident.” FED. R. APP. P. 10(e)(2), “[t]his circuit has construed [that] provision narrowly.” *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987). These strict standards ensure that the evidence that reaches appellate courts has been tested below.

Similarly, “[i]t is black-letter law that hearsay evidence cannot be considered on summary judgment.” *Davila v. Corporacion de Puerto Rico Para la Difusion Publica*, 498 F.3d 9, 17 (1st Cir. 2007). Eagle Forum ELDF could not confirm the level of Governor Palin’s personal involvement, whether as author, speaker, typist, or reviewer of the response. Instead, a Palin campaign worker passed the response along to Eagle Forum Alaska, which *Irregular Times* subsequently posted online without authorization, making the *Irregular Times* posting triple hearsay.

Appellate judicial opinions hold an authority that derives both from the adversarial process and evidentiary rules and from the respect accorded the judicial office. Quite simply, appellate opinions matter. Judge Reinhardt unearthed

unreliable, non-record internet evidence and then misquoted it with political overtones against non-parties who cannot defend themselves. Because one can find almost anything on the internet, that is a recipe for politicizing the judiciary and decreasing public confidence in the courts.

B. Judge Reinhardt's Misquotation Require Correction

More significantly, Judge Reinhardt not only introduces Governor Palin gratuitously into his dissent but also mangles the response to make it fit his point. In the response, the prepositional phrase “in the Pledge” modifies “phrase ‘under God,’” and “it” plainly refers to the “phrase ‘under God.’” *See U.S. v. Nader*, 542 F.3d 713, 717-18 (9th Cir. 2008); *Nuclear Information & Resource Serv. v. U.S. Dep't of Transp. Research & Special Programs Admin.*, 457 F.3d 956, 959 (9th Cir. 2006). Judge Reinhardt's alteration does not merely save a few words in his 100-page dissent: it changes the response's very meaning.

Civility and courtesy are among the professional obligations that “are essential to the fair administration of justice.” California Attorney Guidelines of Civility & Professionalism, at 3 (2007), *reprinted in* State Bar of California, CIVILITY TOOLKIT (2007) (hereinafter, “*Civility Guidelines*”). Lack of civility and courtesy “not only disserves the individual[s] involved, it demeans the profession ... and our system of justice.” *Id.* Civility rejects not only disparaging words but also “creat[ing] a false or misleading record of events.” *Id.* at 5. The “highest

standard of civility” reserved for non-party witnesses requires “special care to protect a witness from undue harassment.” *Id.* at 10. Here, with the appearance of political motivations, Judge Reinhardt disparagingly misquoted Governor Palin to suggest that she does not know political history.

If Judge Reinhardt’s misquotation was an honest mistake, the Court still can fix it. If it was intentional, it was an act of drive-by judicial activism against non-parties who cannot defend themselves.

CONCLUSION

For the foregoing reasons and those cited by the appellants, this Court should deny Newdow’s petitions. In doing so, the Court should issue a *per curiam* order for publication to clarify that (1) the *dictum* in *Lefevre* does not preclude challenging jurisdiction for prior federal holdings that did not consider the challenged jurisdictional issue, (2) arguments or authorities incorporated by reference from outside a petition, motion, or other filing are waived, and (3) the dissent’s erroneous attribution to Governor Palin and Eagle Forum is withdrawn.

Dated: June 25, 2010

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BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rules 29-2(c)(2) and 32-3(3), I certify that the foregoing “Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendants-Appellants for Denial of Petitions for Rehearing” is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 2,734 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2007, and I have relied on that software’s word-count feature to calculate the word count.

Dated: June 25, 2010

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 25, 2010. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users and that I have mailed the foregoing document by U.S. Mail, postage prepaid, to the following non-CM/ECF participants:

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I further certify that I understand, based on reasonable inquiry, that: Messrs. Anthony R. Picarello and Craig M. Blackwell have left their positions with the Becket Fund for Religious Liberty and the U.S. Department of Justice, respectively; that they no longer are participants in this litigation; and that their former colleagues at those organizations who are registered CM/ECF users continue to represent their respective former clients.

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