

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

**EDWARD R. MYERS,**

Plaintiff-Appellant,

v.

**LOUDOUN COUNTY SCHOOL BOARD and**

**COMMONWEALTH OF VIRGINIA,**

Defendant-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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**BRIEF OF APPELLEE**  
**COMMONWEALTH OF VIRGINIA**

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## **INTRODUCTION**

We do honor to the stars and stripes as the emblem of our country and the symbol of all that our patriotism means. We identify the flag with almost everything we hold dear on earth. It represents our peace and security, our civil and political liberty, our freedom of religious worship, our family, our friends, our home.

Virginia Board of Education Guidelines, Recitation of the Pledge of Allegiance (July 26, 2001) (quoting Calvin Coolidge, 30<sup>th</sup> President of the United States, regarding the flag).

Virginia has directed that the curriculum of its public schools include elements aimed at ensuring an education in the “history and principles of the flag of the United States.” Va. Code § 22.1-202; Joint Appendix (hereinafter “JA”) 38, 39, and 40. Among these elements is a requirement that the Pledge of Allegiance to the flag of the United States of America be recited in public school classrooms each day and that students be required to refrain from any disruption during the recitation. Va. Code § 22.1-202(C). This appeal asserts that the Establishment Clause forbids such a requirement.

It has long been acknowledged that a system of public education is essential to a citizenry, prepared to participate in - and preserve - our republic. Accordingly, “inculcating fundamental values necessary to the maintenance of a democratic political system” is a legitimate part of what public schools do, *Ambach v. Norwick*, 441 U.S. 68, 77 (1979), and it is precisely this effort that animated the

Virginia statute challenged here. To suggest that, in this important educational context, recognition of the faith of those who founded the Nation (and many who have followed them in service) could violate the fundamental principles that inspired them is to seek a radical separation of God and government never contemplated by the Founders.

Neither the inclusion of the words “under God” in our Nation’s official statement of political loyalty nor daily recitation of the words in public school classrooms, so alters the nature of the Pledge that it - or daily recitation of it - have become a violation of the Constitution.

### **STATEMENT OF THE ISSUE**

Does a statute requiring recitation of the Pledge of Allegiance in public school classrooms each day violate the Establishment Clause?

### **STATEMENT OF THE CASE**

In October of 2002, the Appellant, Myers, filed a Complaint *pro se* in the United States District Court for the Eastern District of Virginia. He alleged that various activities in his children’s public elementary school in Loudoun County, including compliance with two state statutes, combined to violate the Establishment Clause of the First Amendment and interfered with his free exercise rights and right to raise his children as he sees fit. JA 6-9. The two statutes challenged were Virginia Code § 22.1-202 (C) mandating display of the flag and

daily recitation of the Pledge of Allegiance in public school classrooms (“the Pledge statute”) - and an uncodified statute found at 2002 Va. Acts ch. 895 which requires posting the National Motto. Pursuant to 28 U.S.C. § 2403(b), the Attorney General of Virginia intervened in the case in order to defend the constitutionality of the two statutes.<sup>1</sup>

Both the Commonwealth and the Loudoun County School Board filed Motions to Dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for its failure to state a claim. JA 16, 10. Myers filed a response which included an amended complaint that stated more clearly his facial challenge of Virginia’s Pledge statute - as an effort to establish a “civil religion” - and provided additional allegations concerning the conduct of the Loudoun County schools. JA 42. After oral argument on defendants’ motions, the district court dismissed the Complaint. JA 96.

The district court characterized Myers’ Complaint as alleging three constitutional injuries: “(1) that the Pledge statute is unconstitutional on its face; (2) that the pledge statute, as it is applied by the School, is unconstitutional; and (3) that the Motto statute, as it is applied by the School, is unconstitutional.” JA 66. Properly applying the three prong test for Establishment Clause violations enunciated by the Supreme Court in *Lemon*

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<sup>1</sup> Both statutes require the Attorney General to defend them should any challenge be made. Va. Code §22.1-202(C); 2002 Va. Acts ch. 895.

v. *Kurtzman*, 403 U.S. 602, 612-13 (1971), the district court upheld Virginia's Pledge statute. JA 77. The Court also rejected Myers' "as applied" challenges under the Free Exercise and Due Process Clauses. JA 95.

Myers filed an appeal of the district court's decision. JA 97. After informal briefing was completed, this Court invited him to retain counsel in order to permit formal briefs and oral argument. Myers has done so. His formal brief repeats the abandonment of any challenge to Loudoun County's implementation of Virginia's National Motto statute contained in his informal brief and, in addition, abandons his "as applied" challenges of the Pledge statute under the Free Exercise and Due Process Clauses. Appellant's Formal Brief at 1. Thus, it is a modified version of Myers' original challenges of the Pledge statute that is pressed by Myers' formal appeal of the decision below.<sup>2</sup>

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<sup>2</sup> The Establishment Clause argument now presented by Myers' formal brief was not before the district court for decision. JA 69. In the informal briefs on appeal, Myers confirmed that his challenge did not depend upon the fact that the Pledge contains the words "under God." Appellant's Informal Brief at 2. However, considerations of judicial economy counsel against returning the facial challenge to the district court for consideration of this new theory. The Commonwealth's brief will respond to the position taken by Myers' formal brief, and relies on its Informal Brief to the extent a response to Myers' earlier arguments is desired.

## STATEMENT OF FACTS

### **A. The Historical Context**

In 1789, when the First Congress of the United States voted to submit the Bill of Rights - including the Establishment Clause - to the States for ratification, it also called upon President George Washington to “recommend to the People of the United States, a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God . . . .” 1 Annals of Congress 90, 92, 949-50, 958-59 (Joseph Gales ed., 1789). In 1814, Francis Scott Key observed the bombardment of Fort McHenry and wrote the words to what would become our Nation’s official Anthem, including these words: “Then conquer we must, when our cause it is just; and this be our motto, ‘In God is our trust!’ And the star spangled banner in triumph shall wave o’er the land of the free and the home of the brave.”

Drawn from our National Anthem, the words “In God We Trust” began appearing on the coins of the United States in the 1860’s and were adopted by Congress as our Nation’s official motto in 1956. 36 U.S.C. § 302. The National Motto appears on the wall above the Speaker in the U.S. House of Representatives, *County of Allegheny v. ACLU*, 492 U.S. 573, 673 (1989), and over the entrance to the chambers of the U.S. Senate. *See* Pub. L. 107-293 § 1, 10 (Congressional finding); *Engel v. Vitale*, 370 U.S. 421, 440 n.5 (1962). Other official government

references to God are heard every day in federal courtrooms around the Country when bailiffs or clerks recite, “God save the United States and this Honorable Court.”

The Declaration of Independence contains four references to a deity or supreme power in its clear articulation of the premises upon which this Nation was conceived. The constitutions of all 50 States affirm the existence of God. *See Elk Grove Unified School District v. Newdow*, Brief of the United States, Appendix B (December 19, 2003). Thanksgiving, the day the First Congress suggested President Washington establish once, is now an annual national holiday. 5 U.S.C. § 6103.

Presidents throughout the Nation’s history have repeatedly expressed the Nation’s reliance on the divine for our security, our success, our prosperity and our future. *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301, 2317 - 2318 (2004) citing 4 Papers of George Washington 131: Presidential Series (W. Abbot & D. Twohig eds.1993) (“Whereas it is the duty of all Nations to acknowledge the problems of Almighty God, to obey His will, to be grateful for his benefits, and humbly to implore his protection and favor--and whereas both Houses of Congress have by their joint Committee requested me ‘to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of

Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.”); Documents of American History 443 (H. Commager ed. 8th ed.1968) (from Lincoln’s March 4, 1865 inaugural address: “With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.”); *Id.*, at 132 (Woodrow Wilson requesting a declaration of war: “To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have, with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and the peace which she has treasured. God helping her, she can do no other.”); *Id.*, at 242 ( President Roosevelt’s first inaugural address: “In this dedication of a nation, we humbly ask the blessing of God. May He protect each and every one of us! May He guide me in the days to come!”); <http://www.eisenhower.archives.gov/dl/DDay/SoldiersSailorsAirmen.pdf> (General Eisenhower, in his “Order of the Day” to the soldiers, sailors, and airmen of the Allied Expeditionary Force on D-Day: “Good Luck! And let us all beseech the blessings of Almighty God upon this great and noble undertaking,”). Clinton

Inaugural Address (January 21, 1993) (“The scripture says ‘And let us not be weary in well-doing, for in due season, we shall reap, if we faint not.’ . . . And now, each in our way, and with God’s help, we must answer the call . . . .”). Indeed, Abraham Lincoln’s Gettysburg Address, among its numerous references to God, declares in words that ring with familiarity, a patriotic expression as well known and widely taught as the Pledge of Allegiance:

. . . 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.

1 Documents of American History 429 (H. Commager ed. 8<sup>th</sup> ed. 1968) (emphasis added).

## **B. The Pledge of Allegiance**

The Pledge of Allegiance was written as a “voluntary and recommended patriotic exercise” for the 400<sup>th</sup> anniversary celebration of Columbus’ discovery of America, in 1892. It was first published in the *Youth’s Companion*, a weekly children’s magazine in Boston, Massachusetts. It was, originally, a pledge to “my flag.” At the 1923 National Flag Conference, the words “my flag” were replaced by “the Flag of the United States.” In the following year, the words “of America” were added after “United States,” and, in 1953, Congress added the phrase “under

God.” The full text of the Pledge of Allegiance - for the last half century - has read:

“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 .

The Pledge of Allegiance is routinely recited at official government-sponsored events. It is a ubiquitous symbol of national unity and patriotism.

### **C. Virginia’s Public School Curriculum**

Virginia law directs certain programs and courses of instruction for its public schools. *See generally* Va. Code §§ 22.1-199 through 22.1-212.5. It sets out what subjects will be taught in elementary school and requires, *inter alia*, physical and health education, family life education, instruction concerning drugs and alcohol, and drivers’ education. It also provides that certain historic documents and principles “shall be thoroughly explained and taught by teachers to pupils in public elementary, middle, and high schools” for the purpose of increasing the “knowledge of citizens’ rights and responsibilities thereunder and to enhance the understanding of Virginia’s unique role in the history of the United States.” Va. Code § 22.1-201. It is in this latter context that the challenged Pledge statute appears.

The General Assembly first provided for “instruction in the history of the flag” in 1980. 1980 Acts of Assembly ch. 559. In 1998, the Code provision was amended to ensure that instruction in the history of the flag includes instruction in “the principles of the flag of the United States and the flag of the Commonwealth” and “the pledge of allegiance and the appropriate etiquette and conventions for respecting the dignity and appropriate display of such flags.” JA 39. 1988 Acts of Assembly, Ch. 128. In 2001, the Virginia General Assembly amended § 22.1-202 of the Virginia Code again. The 2001 amendment of § 22.1-202 provided that all students, in recognition of the civic heritage of the United States, be required to learn the Pledge of Allegiance and demonstrate that they have done so. Va. Code § 22.1-202(A) JA 40. The amended § 22.1-202 further required, by the addition of sub-paragraph (C), “daily recitation of the Pledge of Allegiance in each classroom of every school division.” Va. Code § 22.1-202(C). JA 40. The new paragraph (C) provided further that “no student shall be compelled to recite the Pledge if he, his parent or legal guardian objects on religious, philosophical or other grounds to his participating . . . .”<sup>3</sup> *Id.*

The Virginia General Assembly expressly set out the purpose of the 2001 amendment in the new law. Chapter 666 of the 2001 Virginia Acts of Assembly

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<sup>3</sup> There is nothing in the statute that requires the recitation to be “teacher-led” as indicated by Myers’ formal brief.

records the legislature's clear statement of its purpose, as adopted by that body with the amendment of § 22.1-202. JA 40. It reads as follows:

Whereas, Congress enacted the statute setting out the Pledge of Allegiance during the early stages of World War II at a time when national unity and concentrated effort were essential; and

Whereas, during the difficult days of World War II and the decades that have followed, the Pledge of Allegiance has symbolized our strength; and

Whereas, the Pledge of Allegiance is recited daily by many children and adults in the United States; and

Whereas, the Pledge of Allegiance symbolizes our national ideals and is an expression of our patriotic sentiment; and

Whereas, it is in our national and state interest to teach the children of our country about the history and values of the United States; now, therefore

Be it enacted by the General Assembly of Virginia: . . . .

Paragraph B of § 22.1-202 directs Virginia's Board of Education to "develop guidelines on constitutional rights and restrictions relating to the recitation of the pledge of allegiance to the American flag in public schools." Va. Code § 22.1-202(B). On July 26, 2001, the Virginia Board of Education adopted Guidelines for the Recitation of the Pledge of Allegiance that included implementation of the new recitation requirement. JA 23. The guidelines were distributed to the Superintendents of Virginia's school divisions by the Superintendent of Public Instruction on August 3, 2001. JA 22.

## **STANDARD OF REVIEW**

The Commonwealth agrees that, on appeal, a dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 (4<sup>th</sup> Cir. 2004). It should also be noted that when a legislature's purpose is placed in issue by an Establishment Clause challenge, the Court "is normally deferential to a legislative articulation of a secular purpose [and] . . . is reluctant to attribute unconstitutional motives to the States, especially when a plausible secular purpose . . . may be discerned from the face of the statute." *Westside Comm. Bd. of Educ. v. Mergens*, 496 U.S. 226, 249 (1990) (plurality opinion) (quotation marks and citations omitted).

## **SUMMARY OF ARGUMENT**

The Establishment Clause, as applied to the States, provides that they "shall make no law respecting an establishment of religion." U.S. Const. amend. I. It is - without question - one of the principles at the very heart of the individual liberty enjoyed by citizens of this Nation. Neither the Supreme Court nor this Court has ever held, however, that it banishes all mention of God from patriotic expression and civil ceremony. Indeed, all reflection on the question is to the contrary. Virginia's statute requiring the Pledge of Allegiance to be recited each day in its public school classrooms does not violate the Establishment Clause.

Virginia's statute was adopted to serve patriotic and educational purposes. Both purposes are entirely secular. Indeed, teaching patriotism - the virtues of the Nation that justify its survival - has long been acknowledged an important role of public education. A daily civic ritual, by which willing students commit their loyalty to the American flag, and to the Nation it represents, using the Nation's official oath of allegiance, is the essence of patriotic expression. It neither advances nor inhibits religion. That the Pledge recited contains the words "under God" does not change this result. The mention of a deity in an otherwise secular political expression is not sufficient to transform it into a constitutionally prohibited religious exercise. The history, ubiquity and clear context of references to God in American civic culture assure that no reasonable observer would perceive the Pledge as an endorsement of religion. Written by Congress, the Pledge and its recitation implicate no government interaction with religion at all.

It is important, of course, that Virginia's statute does not require any student to participate in the Pledge recitation. Any student can stand and remain silent, or remain seated, without explanation or consequence. There is no coercion. And, because there is not religious exercise, the exposure of young children to the ritual does not create coercion where otherwise there is none. The Supreme Court has twice said clearly that the Pledge of Allegiance is constitutional. Numerous other opinions of various Justices have affirmed that ceremonial references to God in the

Nation's civic traditions and expression are different in nature and kind from the sorts of exercises, expressions and practices that the Establishment Clause forbids. The Founders did not intend to banish such religious references from civic expression by adoption of the First Amendment. The Constitution does not forbid a law that requires daily recitation of the Pledge in the public school classrooms of Virginia. Virginia's statute is constitutional.

## **ARGUMENT**

### **I. VIRGINIA'S PLEDGE STATUTE SATISFIES *LEMON*.**

This Court has made it clear - as recently as its controversial decision in *Mellen v. Bunting* - that in spite of much criticism, and expressions of doubt by various courts, the test for Establishment Clause violations adopted by the United States Supreme Court in *Lemon v. Kurzman*, 402 U.S. 602 (1971) continues to govern Establishment Clause challenges in the Fourth Circuit. *Mellen v. Bunting*, 327 F.3d 355, 370-71 (4<sup>th</sup> Cir. 2003); *Brown v. Gilmore*, 258 F.3d 265, 275 (4<sup>th</sup> Cir. 2001). In order to withstand an Establishment Clause challenge under *Lemon* "(1) a statute must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster an excessive governmental entanglement with religion." *Brown v. Gilmore*, 258 F.3d at 275. Section 22.1-202(C) of the Virginia Code - Virginia's Pledge statute - satisfies each of these three constitutional requirements.

**A. Virginia’s Pledge Statute Has a Clearly Secular Purpose.**

The assessment of a statute’s purpose must be conducted with appropriate deference to the legislature. *Brown v. Gilmore*, 258 F.3d at 276. Even a statute with dual purposes, one clearly secular and one related to religion, satisfies the first prong of *Lemon*. *Id.* at 277. Indeed, “[t]he first prong of *Lemon* is a ‘fairly low hurdle.’” *Mellen*, 327 F.3d at 372; *Brown v. Gilmore*, 258 F.3d at 276; *Koenick v. Felton*, 190 F.3d 259, 266 (4<sup>th</sup> Cir. 1999) quoting *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4<sup>th</sup> Cir. 1995) (Luttig, J., concurring in the judgment) (internal quotation marks omitted)).

**1. The purpose of Virginia’s Pledge statute is clearly stated.**

The General Assembly left little room for doubt concerning the purpose of Virginia’s Pledge statute. The purpose of the challenged statutory amendment is expressly set out in the adopted legislation recorded in the Acts of Assembly for the 2001 Session. JA 40-41. Describing the Pledge of Allegiance as a symbol of our Nation’s strength, our national ideals and a patriotic sentiment, the General Assembly directed that it be recited in public school classrooms every day “to teach the children of our country about the history and values of the United

States.”<sup>4</sup> JA 40. Thus, the purposes of the statute are educational and patriotic. Both are entirely secular.<sup>5</sup>

The Guidelines adopted by the Virginia Board of Education, pursuant to § 22.1-202 (B) of the statute, further inform the secular purposes of Virginia’s Pledge statute. JA 23-31. They speak to the role of public education in preparing students for responsible citizenship. They explain that teaching students the importance of civic participation, and familiarizing children with the beliefs, symbols, and rituals of American society, are important elements in that effort. JA 27. They explain further that recitation of the Pledge is an important first step in teaching civic values and forms a foundation for future understanding of more complex documents such as the Declaration of Independence and the United States Constitution. JA 27-28.

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<sup>4</sup> Additional secular purposes were identified by Delegate Robert Marshall, speaking in support of his bill to require posting of the National Motto. He listed the purposes of that bill and described them as “the same purposes that lead us to display the flag and recite the Pledge of Allegiance in Virginia’s public schools.” JA 35. The purposes included i) to help solemnize the proceedings that take place within these places of learning, and ii) “to symbolize our common identity as Americans . . . and reinforce our citizens’ sense of membership in our nation.” JA 34. Of course the purposes of a single member of the legislature do not reflect anything more than his own individual intent and cannot be taken for the purpose of the body adopting any statute, but the statement of Delegate Marshall is entirely consistent with the express purposes adopted for the Pledge statute.

<sup>5</sup> These purposes are not only secular, but lie at the heart of the role of public education in Virginia. *See* Va. Const. art. I, § 15. Civic education promotes understanding and respect for the history, tradition and values of our Nation, and for their most universal symbol - our flag.

## 2. The Pledge statute satisfies the first prong of *Lemon*.

Myers' argument that the district court erred in its failure to allow further development of the facts on the question of purpose seriously misapprehends the demands of *Lemon*'s first prong. A state statute violates the first prong of *Lemon* "only 'if it is *entirely* motivated by a purpose to advance religion.'" *Mellen*, 327 F.3d at 372 (quoting *Wallace v. Jaffree*, 472 U.S. 38 (1985) (emphasis added)).

The statute at issue in *Brown v. Gilmore* - Virginia's Moment of Silence law - made reference to, and permitted, prayer. The law did not violate *Lemon*'s first prong. Although one of its purposes was to permit religious expression it also had a purely secular educational purpose. 258 F.3d at 276. As the Supreme Court said in *Wallace v. Jaffree*, 472 U.S. 38, 74 (1985), *Lemon* requires "only a secular purpose." 258 F.3d at 277 (emphasis added). Therefore, *Lemon*'s first prong was satisfied. *Id.*

Virginia's Pledge statute, on its face, provides no reason to impute any purpose other than the secular purposes stated. Indeed, Myers' complaint did not allege any other purpose.<sup>6</sup> Even if an additional, presumably impermissible, purpose were alleged and could be proved, such a purpose could not be the "sole

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<sup>6</sup> It was, instead, the patriotic purpose itself that Myers asserted was an impermissible establishment of religion. It appears he has abandoned this position upon the opportunity for formal briefing and oral argument. If he has not, the panoply of practices and events that would be implicated by his theory should alone be enough to forestall adoption of the rule he suggests.

purpose” for the legislation.<sup>7</sup> At best it would be a purpose in addition to the purposes identified by the enactment and the Pledge statute would survive *Lemon*’s first prong.

**3. The Intent of Congress - Though Irrelevant to the Constitutionality of the Virginia Statute - Also Satisfies the First Prong of *Lemon*.**

It is the purpose of the challenged statute that is the subject of Establishment Clause analysis and the purposes of Virginia’s Pledge statute - promoting patriotism and teaching the history and values of the United States - are entirely secular. Nonetheless, while disavowing any intent to challenge the constitutionality of the Pledge itself, Myers devotes substantial attention to Congress’ purpose in amending the Pledge to include the words “under God” in 1954. Appellant’s Formal Brief, pp. 30 - 34. It is not entirely clear for what purpose Myers offers his careful parsing of the Congressional Reports that reflect Congress’ intent. What is clear is that the General Assembly of Virginia made no mention or reference to them in 2001. Congress’ purposes for adding the words

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<sup>7</sup> It is possible for a state to “disingenuously profess a secular purpose for what is, in fact, a religious practice,” and it is the Court’s obligation to distinguish “a sham secular purpose from a sincere one.” However, there has never been any allegation, by Myers *pro se* or by his counsel, that the General Assembly of Virginia voted to enact a “sham purpose” into state law.

“under God” to the Pledge of Allegiance are not relevant to the constitutionality of Virginia’s Pledge statute.<sup>8</sup>

**B. The Pledge Statute Does Not Advance or Inhibit Religion.**

The second prong of *Lemon* requires that the “principle or primary effect (of the challenged statute) must be one that neither advances nor inhibits religion.” 403 U.S. at 612. It requires facial neutrality between religious and nonreligious expression. *Brown v. Gilmore*, 258 F. 3d at 277. As a threshold matter, and taking Myers at his word that it is Virginia’s Pledge statute he challenges and not the Pledge itself, the statute can not possibly violate *Lemon*’s second prong.

Virginia’s Pledge statute is entirely neutral towards religion. It does not require, or even permit, a religious exercise or religious expression. It is indifferent to whether the Pledge contains or does not contain any particular words. If Congress were to amend the Pledge, the Pledge statute would require the amended version to be recited. The Virginia Pledge statute demands only that the Pledge of Allegiance of the United States be recited in public school classrooms. It

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<sup>8</sup> Although a full reading of the House and Senate Reports concerning the addition of “under God” to the Pledge reveals that secular purposes - both educational and patriotic - animated Congress’ decision, defense of Congress’ 1954 amendment of the Pledge is best left to the United States. Let it suffice to say here that, were the purposes of Congress for adding “under God” relevant to the constitutionality of Virginia’s Pledge statute, they would do nothing to undermine its validity. See H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954); S. Rep. No. 1287, 83d Cong., 2d Sess. 2 (1954).

does nothing to advance or inhibit religion and plainly survives *Lemon's* second prong.

**1. The Pledge is a patriotic expression, not a religious exercise.**

The Supreme Court has affirmed that the recitation of the Pledge of Allegiance “is a patriotic exercise designed to foster national unity and pride in those principles” that the flag symbolizes. *Elk Grove Unified School District v. Newdow*, 124 S. Ct. at 2305. It is a public declaration of loyalty and respect for one’s country by which citizens of this Nation announce to each other, and to the world, their commitment to the Nation, and to protecting and preserving it. It is an announcement of an individual commitment to the flag of the United States and the Nation it represents.

Recitation of the Pledge does not strengthen or otherwise contribute to any church or faith group.<sup>9</sup> *Newdow*, 124 S. Ct. at 2320 (Rehnquist, C.J., concurring). Participants “promise fidelity to our flag and our Nation, not to any particular God, faith, or church,” or to the concept of religion. *Id.* It requires only a sense of respect and devotion toward this Country, with a tolerable understanding and recognition that its beginnings and founding principles were inextricably bound up

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<sup>9</sup> Indeed, Myers’ original complaint seemed to be that the Loudoun County School Board was turning patriotism into a civil religion. He characterized the Pledge as flag or worship. Plaintiff’s Memorandum of Corrections and Amendments to Complaint in Opposition to Defendants’ Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted, p. 6 (Jan. 3, 2003).

with a common belief in God. *See* Pub. L. 107-293 § 1 (Nov. 13, 2002) (Congressional findings in support of 4 U.S.C. § 4 reaffirming the federal Pledge law). Recitation of the Pledge is a patriotic exercise, not a religious one. The pride and unity the Pledge inspires, the respect and loyalty it expresses, are far and away the primary - indeed the only - effects of reciting the Pledge. *See Newdow*, 124 S. Ct. at 2305.

## **2. The words “under God” do not make the Pledge a prayer.**

The Pledge of Allegiance is not a prayer like those considered by the Supreme Court in *Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000) , or those considered by this Court in *Mellen*, *Brown v. Gilmore*, *North Carolina Civil Liberties Union v. Constangy*, 947 F.2d 1145 (4<sup>th</sup> Cir. 1991), and *Hall v. Bradshaw*, 630 F.2d 1018 (4<sup>th</sup> Cir. 1980). The words “under God” - two of thirty-one words - do not so fundamentally alter the Pledge of Allegiance as to turn laudable patriotic expression and civil ceremony into a constitutionally prohibited establishment of religion. Amendment of the Pledge to include acknowledgment of our Nation’s origins in religious doctrine and faith did not change the primary effect of its daily recitation.

A prayer is “an address to God or a god in word or thought.” *Webster’s New Collegiate Dictionary* 924 (9<sup>th</sup> ed. 1990). Whether to offer thanks or praise, seek

guidance, ask forgiveness or mercy, or to request blessing or favor, a prayer is directed to a higher power or authority. It can take many forms: it may be brief, it may be long; it may be said aloud, or silently; it may be recited individually, or in a group. Whatever form it takes, prayer is a religious exercise. *See, e.g., Santa Fe*, 530 U.S. 290. ; *Lee*, 505 U.S. 577; *Engel*, 370 U.S. 421.

In contrast, reciting the words “under God” is no declaration of faith. It is not an expression of adherence, even to the monotheism of the founders. It is, at most, a statement of understanding and appreciation for the role of God in the conception and founding of this Nation. *Newdow*, 124 S. Ct. at 23.

### **3. Daily recitation of the Pledge does not impermissibly advance religion**

In 1789, when the 1<sup>st</sup> Congress of the United States voted to submit the Bill of Rights - including the Establishment Clause - to the States for ratification, it also called upon President George Washington to “recommend to the People of the United States, a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God . . . .” 1 Annals of Congress 90, 92, 949-50, 958-59 (Joseph Gales ed., 1789). It is not plausible that Congress intended, in the same breath, both to approve the Establishment Clause, and to violate it. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (declaring use of legislative chaplains permissible under the

Establishment Clause, based on action of the First Congress in approving the practice). It is thus clear that the Establishment Clause does not forbid all government expressions of religious sentiment. References to God in our civic and patriotic expressions do not impermissibly advance religion. *Newdow*, 124 S. Ct. at 2323 (O'Connor, J., concurring); *Allegheny*, 492, U.S. at 602; *Lynch*, 465 U.S. at 676; *Engel*, 370 U.S. at 435, n.21.

That this Nation was conceived and founded “under God” is a matter of historical fact. *Newdow*, 124 S. Ct. at 2320 (Rehnquist, C.J., concurring). H.R. Rep. No. 1693, 83d Cong., 2d Sess. 2 (1954). That fact is not subject to revision and the Constitution does not demand that it be banished from our civic ceremonies, or from our efforts to galvanize the Nation’s citizens in the face of adversity. Acknowledgement of the fact does not advance religion in an impermissible way. *See* 124 S. Ct. at 2323.

The Supreme Court has been consistently careful over several decades, to disclaim any inclination to find that the Establishment Clause forbids official reference to God in the Pledge of Allegiance. In *Engel v. Vitale*, where the Supreme Court first struck down official prayer in public schools, the Court recognized the Nation’s religious heritage and expressly distinguished ceremonial references to God from the prayer the Constitution forbid. *Engel v. Vitale*, 370 U.S. at 435 n.21 (“[T]here is of course nothing in the decision reached here that is

inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."').<sup>10</sup>

More than twenty years later, upholding a government sponsored Christmas display including a crèche in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court identified a list of civic exercises - including the Pledge of Allegiance - that include a reference to God, with the clear implication that they do not raise constitutional concerns. 465 U.S. at 676. In *Allegheny v. ACLU*, 492 U.S. 573, the Court offered assurance that its application of the Establishment Clause to invalidate a government holiday display including a crèche also had no implications for references to God contained in routine civic contexts. *Allegheny*,

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<sup>10</sup> Justice Brennan acknowledged a year later that "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." *Abington School District v. Schempp*, 374 U.S. 203, 303-03 (1963) (Brennan, J. concurring).

492 U.S. at 602-03 (“Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that the government may not communicate an endorsement of religious belief . . . . We need not return to the subject of ‘ceremonial deism,’ . . . because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.”).

Most recently, the Court in *Newdow* affirmed that the recitation of the Pledge is a patriotic exercise. *Newdow*, 124 S. Ct. at 2305. Concurring in *Newdow*, Justice O’Connor - author of the endorsement test that Myers relies upon - concluded that the words “under God” do not operate to render the Pledge of Allegiance an impermissible endorsement of religion. *Id.* Justice O’Connor explained that the words “under God” in an otherwise purely secular and patriotic sentiment do not create “a government endorsement of any specific religion, or even of religion over non-religion.” *Id.*<sup>11</sup> “Their history, character, and context prevent them from being constitutional violations at all.” *Id.*

Indeed, on the basis of the Supreme Court’s assurances, the Seventh Circuit has rejected a challenge very much like this one. *See Sherman v. Community*

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<sup>11</sup> Preferring the endorsement test she first enunciated in *Lynch*, 465 U.S. at 688, Justice O’Connor wrote a concurrence in *Newdow* in which she set out the four factors of endorsement analysis and her application of them to conclude that the two words “under God” do not cause recitation in schools of the Pledge of Allegiance to violate the Establishment Clause. *See Newdow*, 124 S. Ct. at 2322 - 2326 (O’Connor, J., concurring).

*Consol. Sch. Dist. 21*, 980 F.2d 437 (7<sup>th</sup> Cir. 1992). It did so with the comment that, while the Supreme Court sometimes changes its mind when it confronts a subject directly, “[I]f the Court proclaims that a practice is consistent with the [E]stablishment [C]lause, we take its assurance seriously.” *Sherman*, 980 F.2d at 448. This Court should do the same. If the words “under God” in the Pledge do not impermissibly advance religion, then recitation of the Pledge can not do so, whether recited every day or once a year, or in the halls of Congress, or in Virginia’s classrooms.

**4. That classrooms contain young children does not alter the result.**

If Virginia’s Pledge statute does nothing to advance or favor religion, the impressionability of students is not relevant to the Establishment Clause analysis. *Brown v. Gilmore*, 258 F.3d at 278. Upholding Virginia’s Moment of Silence law, this Court explained that “[T]o hold otherwise, especially in the context of a facial challenge, would result in the introduction of a ‘modified heckler’s veto, in which . . . religious activity can be proscribed on the basis’ of sincere, but utterly mistaken perceptions of state endorsement of religion.” *Id.* “Therefore speculative fears as to the potential effects of this statute cannot be used to strike down a statute that on its face is neutral between religious and nonreligious activity.” *Id.* This reasoning applies even more emphatically to the statute challenged here.

The fact that Virginia’s Pledge statute may require young children to hear the Pledge recited each day and that, in the early years, they might not know precisely why or what it means, does not pose an Establishment Clause problem because recitation of the Pledge does not impermissibly advance religion.<sup>12</sup> *Newdow*, 124 S. Ct. at 2322-23 (O’Connor, J., concurring). The recitation represents only the proper and constitutionally permissible inculcation of young citizens in the habits of patriotism. Here, as in *Brown v. Gilmore*, “[T]o hold otherwise, especially in the context of a facial challenge, would result in the introduction of a ‘modified heckler’s veto, in which . . . religious activity can be proscribed on the basis’ of sincere, but utterly mistaken perceptions of state endorsement of religion.” 258 F.3d at 278.

**C. The Virginia Pledge Statute Does Not Foster Any Government Entanglement With Religion.**

Myers makes no allegation - and no argument - that the Virginia Pledge statute violates the entanglement prong of the *Lemon* test. Indeed, compliance with Virginia’s Pledge statute does not require any government contact with or

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<sup>12</sup> Myers’ reliance on social science studies to show that young children often misunderstand the meaning of the Pledge underscore the pedagogical value of the recitation as an opportunity to develop appreciation and understanding in the context of a broader civics and history curriculum. It is precisely the goal of the curriculum required by Virginia law to ensure that citizens educated in Virginia’s public schools will not only be familiar with and comfortable in the civic ceremony that is reciting the Pledge, but will understand its origins and purposes.

consideration of any religious institution, individual or expression. Only a reference to an act of Congress is necessary to comply with the challenged statutory requirement. So separate and apart is the Pledge - the Nation's official ceremonial expression of patriotism - from any interaction with religion, that the Pledge statute not only satisfies the third prong of *Lemon*, but the first and second prongs as well.

## **II. THE VIRGINIA PLEDGE STATUTE DOES NOT COERCE PARTICIPATION IN A RELIGIOUS EXERCISE.**

Contrary to the position urged by Myers - and the opinion of the Ninth Circuit now vacated by the Supreme Court's recent decision in *Newdow* - Virginia's Pledge statute does not "impermissibly coerce a religious act."

### **A. There Is No Coercion**

It is clear from the Supreme Court's decision in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), that "[C]ompelling the flag salute and the pledge transcends constitutional limitations . . . ." *Barnette*, 319 U.S. at 642 (emphasis added). However, Virginia's Pledge statute is, on the subject of compulsion, expressly contrary to the West Virginia statute at issue in *Barnette*.

The West Virginia statute required every student to participate and recite the Pledge. "[F]ailure to conform [was] 'insubordination' dealt with by expulsion. Readmission [was] denied by statute until compliance. Meanwhile the expelled

child [was] ‘unlawfully absent’ and [could] be proceeded against as a delinquent. His parents or guardians [were] liable to prosecution, and if convicted [were] subject to a fine not exceeding \$50 and jail term not exceeding thirty days.” *Barnett*, 319 U.S. at 629 (footnotes omitted). In fact, so clear and complete was the coercion to pledge imposed by the West Virginia statute, that the Court described it as “(conditioning) access to public education” on reciting the Pledge. *Id.* at 630-31.

In stark contrast, Virginia’s Pledge statute requires no one to recite the Pledge who doesn’t want to. Va. Code § 22.1-202 (C).<sup>13</sup> The statute expressly provides that any student may decline to stand and recite the Pledge for religious reasons, for philosophical reasons or for any other reasons. Va. Code § 22.1-202 (C) . A student who objects - for any reason - to reciting the pledge must only refrain from disruption while others participate. Students do not have to stand. Students do not have to recite. No explanation is required. The statute establishes no consequence for declining to participate. The statute coerces nothing.

Only where challenged speech or activity is religious in nature is the possibility of social pressure to participate a matter of constitutional concern. It is because the religion clauses of the First Amendment call for religious speech and activity to be treated differently that, in the context of religious exercises,

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<sup>13</sup> The Guidelines issued to school superintendents also make it quite clear that “no student can be compelled to recite the Pledge of Allegiance.” JA 26.

heightened sensitivity to coercion - concerned with impressionable young children and peer pressure - is employed. *See, e.g., Santa Fe*, 530 U.S. 290 (prayer at high school football games); *Lee*, 505 U.S. 577 (prayer at middle school graduation); *Mellen*, 327 F.3d 355. Where, as here, the activity in question is not a religious exercise, but a political one, the fact that young children might misunderstand, or a student might realize his views place him in a minority in his school or class, is of no constitutional consequence.<sup>14</sup> If the same constitutional protections that attach to religious activity attend political speech, there is no end to the aspects of a public school curriculum that students or their parents might seek to ban from the schoolhouse because they find them personally objectionable on religious grounds. *See e.g. Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454 (10<sup>th</sup> Cir. 1996) (challenging mandatory community service curriculum); *Smith v. Board of Sch. Comm'rs.*, 827 F.2d 684 (11<sup>th</sup> Cir. 1987) (challenging history and social studies textbooks); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6<sup>th</sup> Cir. 1987) (challenging basic use of reader series chosen by school); *Grove v. Mead*, 753 F.2d 1528 (9<sup>th</sup> Cir. 1985) (challenging books including in sophomore literature curriculum).

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<sup>14</sup> Indeed, such misunderstanding provides an ideal opportunity to teach about Congress' concern for distinguishing between our system of government and Communism, which affirmatively asserted atheism as a fundamental principle, and the many other aspects of the history of this Nation that the words reflect.

**B. There Is No Religious Exercise.**

The Pledge of Allegiance is not a prayer like those considered by the Supreme Court in *Engel*, *Lee* and *Santa Fe*, or those considered by this Court in *Mellen*, *Brown v. Gilmore*, *Constangy* and *Hall*. See *Supra* pp. (22-23). It does not involve government display of religious icons or the study of religious texts like the practices considered in *Abington Township School Dist. v. Schempp*, 374 U.S. 203, *Stone v. Graham*, 449 U.S. 39 (1980), *Lynch v. Donnelly*, 465 U.S. 668 (1984), *Edwards v. Aguillard*, 482 U.S. 579 (1987) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). The Establishment Clause jurisprudence Myers relies upon involves activities not present here, activities that are unquestionably and exclusively religious in character. This case does not. Nor does it involve support for any church or religious organization like those practices at issue in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), *Lemon v. Kurtzman*, 403 U.S. 602, and *Walz v. Tax Commissionn of New York*, 397 U.S. 664 (1970).

Myers' coercion argument places special reliance on the principles announced in *Lee*, 505 U.S. 577, and echoed in *Santa Fe*, 530 U.S. 290. However, those principles can be applied here only if this Court accepts the premise that by adding "under God" to the Pledge of Allegiance, Congress transformed it from "a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents," *Newdow*, 124 S. Ct. at 1319 (Rehnquist, C.J.,

concurring), into, not just an “affirmation of religious belief,” Appellant’s Brief at 30, but into a prayer. That premise is simply wrong. The Pledge of Allegiance is not a prayer or any other sort of religious exercise.

The Court in *Lee* was very clear that it was the nature of prayer - “a formal religious exercise,” 505 U.S. at 586, “prayer and religious exercise,” *Id.*, “religious activity,” *Id.* at 587, “religion or its exercise”, *Id.*, “overt religious exercise,” *Id.* at 588 - combined with the fact that the exercise was directed by the principal, a school official, who selected the religious participant, and with the practical import of a graduation ceremony, that elevated the “subtle coercive pressures” to coercion of students to participate in the challenged prayer. *Lee*, 505 U.S. at 587-88. The Court was also careful to identify what it did not hold:

“[W]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive . . . . A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution . . . . The *sole question* presented is whether a *religious exercise* may be conducted at a graduation ceremony in circumstances where . . . young graduates who object are induced to conform.”

*Id.* at 597 (emphasis added). The mention of God in the Pledge certainly may “implicate religion,” but, as Justice Kennedy recognized, that is not the same as a

religious exercise. The Pledge is not any sort of religious exercise: it is not an act of religious worship; it is not a part of any religious ceremony; it is not a statement of religious faith. Thus, Myers' claim must fail.

Likewise, the Court's decision in *Santa Fe* does not lead to the result Myers seeks. That decision too is entirely dependant on the fact that the activity in question was prayer - "a religious exercise." The Court recognized "the important role that public worship plays in many communities" but explained that "religious activity" must occur within the limitations of the First Amendment. *Santa Fe*, 530 U.S. at 307. It found that the delivery of a pre-game prayer at a high school football game improperly coerces those present "to participate in an *act of religious worship*." *Id.* at 312. (emphasis added). The same simply cannot be said for a Pledge directed to a flag and the Nation it represents. It may be accomplished merely by adding the words "under God" to an otherwise secular opinion or sentiment, religious worship is a meager and small thing indeed.

Where what is delivered to the student body is a pledge of loyalty to the flag that represents the United States, for purely patriotic purposes, the reference to God it contains – to describe the Nation's heritage and character – does not transform the exercise into something religious, rather than political, in substance. Were it so, the variety of civic rituals, founding documents, presidential

proclamations and speeches that would be subject to invalidation on that basis are too numerous to catalogue. The Constitution does not require such a result.

### **III. AN ESTABLISHMENT CLAUSE CHALLENGE OF THE VIRGINIA PLEDGE STATUTE IS MISPLACED.**

Virginia's Pledge statute directs a single element of the civics and history curriculum of Virginia's public schools. It is clear from the face of § 22.1-202 as a whole that the legislature intends for every student in Virginia's public schools to be educated in the civic heritage of the United States of America. Indeed, in addition to provisions concerning education about the flag and the history and civic traditions surrounding it, § 22.1-202 also expressly provides for the study of specific political documents and the history of them, in order to increase students' knowledge and understanding of a citizen's rights and responsibilities. Va. Code § 22.1-202. It was but a small additional step, of the same sort and directed at the same object, to determine that a daily opportunity to recite the Pledge in each classroom should also be required.

Thus, the requirement of a daily opportunity, in every classroom, to join in a recitation of the Pledge was added to preexisting provisions directing that the public school curriculum include instruction about the flags of Virginia and the United States, their history, and the appropriate etiquette for respect and display of

both flags.<sup>15</sup> JA at 40-41. Recognizing that there may not be homogeneity of viewpoint on the opinions expressed by the Pledge, and that the First Amendment to the Constitution forbids government to require anyone to express adherence to any particular political point of view, the statutory requirement included an opt out provision so that no student who didn't want to would be required to participate in the Pledge. *Id.*

Decisions concerning what to teach and how to teach it are the proper province of state and local officials. *See Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 371 (4<sup>th</sup> Cir. 1998). Virginia's Pledge statute is a curricular decision clearly within the bounds of the State's power to provide for public education. Myers' challenge, at its essence, reflects one parent's disagreement with the curricular content decisions of those officials. While there is no question that the power over public education must be exercised within the limits of the federal Constitution, Virginia's Pledge statute does not exceed federal constitutional limitations. Whether it requires recitation every day, or once a week, or once a month, or once a year, a State statute that "requires reciting the Pledge of Allegiance, which includes the words 'under God,' does not violate the

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<sup>15</sup> Those provisions also directed that students learn the Pledge, and be able to demonstrate that they know it.

Establishment Clause of the First Amendment.” *See Newdow*, 124 S. Ct at 2312 (Rehnquist, C.J., concurring). *See also Sherman*, 980 F.2d at 439 (1992).

### **CONCLUSION**

Neither the Supreme Court, nor this Court, has ever declared that the Establishment Clause forbids the States from requiring a daily recitation of the Pledge of Allegiance in their public school classrooms, as long as no one is required to participate. This Court should decline the invitation to do so here and affirm the district court’s dismissal of Myers’ facial challenge of Virginia’s Pledge statute.

ORAL ARGUMENT IS RESPECTFULLY REQUESTED.

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 7, Times New Roman, 14 point.
2. Exclusive of the table of contents, table of citations and the certificate of service, this brief contains 8,780 words.

/s/ Maureen Riley Matsen  
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**CERTIFICATE OF SERVICE**

This will certify that, on this 14<sup>th</sup> day of February, 2005, a true copy of the foregoing was mailed by first class mail, postage pre-paid to the following:

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