IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

THE FREEDOM FROM RELIGION FOUNDATION, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 07-356 (SM)
THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

***AMICI CURIAE* BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, UNITED STATES SENATORS SAM BROWNBACK, JAMES M. INHOFE, AND TED STEVENS, UNITED STATES REPRESENTATIVES ROBERT B. ADERHOLT, W. TODD AKIN, RODNEY ALEXANDER, J. GRESHAM BARRETT, ROSCOE G. BARTLETT, ROB BISHOP, MARSHA BLACKBURN, ROY BLUNT, KEN CALVERT, CHRIS CANNON, TOM COLE, JOHN ABNEY CULBERSON, MARIO DIAZ-BALART, JOHN T. DOOLITTLE, TOM FEENEY, JEFF FLAKE, J. RANDY FORBES, TRENT FRANKS, SCOTT GARRETT, PHIL GINGREY, VIRGIL H. GOODE, JEB HENSARLING, WALLY HERGER, PETER HOEKSTRA, DUNCAN HUNTER, WALTER B. JONES, RIC KELLER, STEVE KING, JACK KINGSTON, JOHN KLINE, FRANK D. LUCAS, JOHN M. MCHUGH, DONALD A. MANZULLO, JIM MARSHALL, GARY G. MILLER, JEFF MILLER, SUE WILKINS MYRICK, STEVAN PEARCE, MIKE PENCE, JOSEPH R. PITTS, PETE SESSIONS, JOHN B. SHADEGG, JOHN SHIMKUS, MARK E. SOUDER, JOHN SULLIVAN, LEE TERRY, DAVE WELDON, AND JOE WILSON, AND THE COMMITTEE TO PROTECT "UNDER GOD" IN SUPPORT OF THE FEDERAL DEFENDANTS' MOTION TO DISMISS**

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INTEREST OF *AMICI*[*]

Amicus, the American Center for Law and Justice (ACLJ), is a public interest legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues.[1] The proper resolution of this case is a matter of substantial concern to the ACLJ because it will likely have a significant impact on the recognition of America's religious heritage in public life.

Amici, United States Senators Sam Brownback, James M. Inhofe, and Ted Stevens, and United States Representatives Robert B. Aderholt, W. Todd Akin, Rodney Alexander, J. Gresham Barrett, Roscoe G. Bartlett, Rob Bishop, Marsha Blackburn, Roy Blunt, Ken Calvert, Chris Cannon, Tom Cole, John Abney Culberson, Mario Diaz-Balart, John T. Doolittle, Tom Feeney, Jeff Flake, J. Randy Forbes, Trent Franks, Scott Garrett, Phil Gingrey, Virgil H. Goode, Jeb Hensarling, Wally Herger, Peter Hoekstra, Duncan Hunter, Walter B. Jones, Ric Keller, Steve King, Jack Kingston, John Kline, Frank D. Lucas, John M. McHugh, Donald A. Manzullo, Jim Marshall, Gary G. Miller, Jeff Miller, Sue Wilkins Myrick, Stevan Pearce, Mike Pence, Joseph R. Pitts, Pete Sessions, John B. Shadegg, John Shimkus, Mark E. Souder, John Sullivan, Lee Terry, Dave Weldon, and Joe Wilson, are currently serving in the One Hundred Tenth Congress. These *amici* support the patriotic tradition of voluntarily reciting the Pledge of

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[*] This brief is filed upon Motion to the court and with the consent of all the parties. *Amicus*, ACLJ, discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

[1] *See, e.g., McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

Allegiance as it appears in 4 U.S.C. § 4.

Amicus, the Committee to Protect "Under God," consists of over 80,000 Americans from across the country. The Committee includes many parents of school-age children who attend public schools and desire to recite the Pledge of Allegiance in its entirety.

Plaintiffs' strategy to purge all religious observances and references from American public life must not be permitted to move forward. If Plaintiffs are successful, it will undoubtedly embolden further challenges to other religious expressions in government venues, including the several religious works of art[2] and various religious inscriptions in the Capitol Complex,[3] as well as the prayer rooms in House and Senate Office buildings.[4] *Amici* take the position that the words "one Nation under God" in the Pledge of Allegiance in no way violate either the Establishment Clause or the Free Exercise Clause of the First Amendment to the United States Constitution. These words simply echo the sentiments found in the Declaration of Independence and recognize the undeniable truth that our freedoms come from God. These words were placed in the Pledge of Allegiance for the express purpose of reaffirming America's unique understanding of this truth. The United States is different from nations who recognize no

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[2] For example, in the Rotunda of the Capitol Building are paintings with religious themes, such as *The Apotheoisis of Washington*, depicting the ascent of George Washington into Heaven, and the *Baptism of Pocahontas,* portraying Pocohontas being baptized by an Anglican minister.

[3] For example, a wall in the Cox Corridor of the Capitol is inscribed with a line from Katherine Lee Bates' Hymn, *America the Beautiful*: "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the prayer room of the House Chamber, two distinctly religious statements are inscribed: 1) "Annuit coeptus," which means God has favored our undertakings; and 2) "Preserve me, O God, for in thee do I put my trust," Psalm 16:1.

[4] Plaintiffs' overall strategy seeks to proscribe religious expression well beyond the phrase "under God" in the Pledge of Allegiance and includes presidential addresses invoking the name of God, the use of legislative chaplains, the invocation "God save the United States and this Honorable Court" prior to judicial proceedings, oaths of public officers, court witnesses, and jurors and the use of the Bible to administer such oaths, the use of "in the year of our Lord" to date public documents, the Thanksgiving and Christmas holidays, the National Day of Prayer, and the national motto, "In God We Trust."

higher authority than the State. While the First Amendment affords atheists complete freedom to disbelieve, it does not compel the federal judiciary to redact religious references in every area of public life in order to suit atheistic sensibilities.

ARGUMENT

I. THE PHRASE "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE ACCURATELY REFLECTS THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

Justice Holmes once stated, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). An examination of United States history shows a Nation where, from its inception to the present day, references to God abound. In fact, the Nation's Founders based a national philosophy on a belief in the Deity: "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963). The Declaration of Independence[5] and the Bill of Rights place inalienable rights in a Creator rather than in government, precisely so that the government cannot strip away such rights. In 1782, Thomas Jefferson wrote, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782).

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[5] The Declaration of Independence recognizes that human liberties are a gift from God: "All men are created equal, [and] they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). The Founders also believed that God holds man accountable for his actions, as the signers of the Declaration "appeal[ed] to the *Supreme Judge of the world* for the rectitude of [their] intentions." *Id.* para. 32 (emphasis added).

The Father of our Nation, George Washington, acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address is replete with references to God, including thanksgivings and supplications.[6] In Washington's Proclamation of a Day of National Thanksgiving, he wrote that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." Jared Sparks, *The Writings of George Washington*, Vol. XII, p. 119 (1833-1837). George Washington used the phrase "under God" in several of his orders to the Continental Army. On one occasion he wrote, "The fate of unborn millions will now depend, under God, on the courage and conduct of this army."[7] The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between [the two]." Philip

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[6] George Washington's First Inaugural Address, *available at* http://www.archives.gov/exhibits/american_originals/inaugura.html.

> Such being the impressions under which I have, in obedience to the public summons, repaired to the present station; it would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe, who presides in the Councils of Nations, and whose providential aids can supply every human defect, that his benediction may consecrate to the liberties and happiness of the People of the United States, a Government instituted by themselves for these essential purposes: and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. In tendering this homage to the Great Author of every public and private good I assure myself that it expresses your sentiments not less than my own, nor those of my fellow-citizens at large, less than either. No People can be bound to acknowledge and adore the invisible hand which conducts the Affairs of men more than the People of the United States.

Id.

[7] Diane Ravitch, *To remove 'under God' is to rewrite U.S. history*, N.Y. DAILY NEWS, Mar. 28, 2004, *available at* http://209.157.64.200/focus/f-news/1107238/posts. On another occasion, Washington encouraged his army, declaring that "the peace and safety of [this] country depends, under God, solely on the success of our arms." Edwin S. Davis, *The Religion of George Washington: A Bicentennial Report*, AIR UNIV. REV. July-Aug. 1976, *available at* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1976/jul-aug/edavis.html (quoting 5 *The Writings of George Washington* 245 (John C. Fitzpatrick ed., 1931-44)).

Hamburger, SEPARATION OF CHURCH AND STATE 480 (2002). In *Sherman v. Community Consolidated School District 21*, 980 F.2d 437, 445 (7th Cir. 1992), the Seventh Circuit further stated, "Unless we are to treat the founders of the United States as unable to understand their handiwork (or, worse, hypocrites about it), we must ask whether those present at the creation deemed ceremonial invocations of God as 'establishment.' They did not."

Thus, the phrase "one Nation under God" in the Pledge of Allegiance simply describes an indisputable historical fact. As one commentator has observed, the Pledge

> accurately reflects how the founding generation viewed the separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god. This was well known to Rousseau and Marx who both complained that acknowledging God creates a competition or check upon the secular state.

Douglas W. Kmiec, *Symposium on Religion in the Public Square: Forward: Oh God! Can I Say that in Public?*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 312-13 (2003).

Moreover, as Chief Justice Rehnquist explained in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), "[t]he phrase 'under God' in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances." *Id.* at 26 (Rehnquist, C.J., concurring). He noted that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one . . . ." *Id.* at 31.

The Supreme Court of the United States has long recognized the primacy of religion in the Nation's heritage. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our

> people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe.*

Id. at 313-14 (emphasis added).

Furthermore, in *Newdow*, Justice O'Connor reaffirmed the historical basis for use of religious references: "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." 542 U.S. at 35-36 (O'Connor, J., concurring). She further stated that "some references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id.* at 35.

As such, a determination that the Pledge of Allegiance is unconstitutional is a determination that prefers atheism over religion even to the extent of severing ties with the religious history of the United States.

II. A DECISION DECLARING THE PLEDGE OF ALLEGIANCE UNCONSTITUTIONAL WILL CONTRADICT THE SUPREME COURT'S MANY PRONOUNCEMENTS THAT PATRIOTIC EXERCISES WITH RELIGIOUS REFERENCES ARE CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

The Supreme Court has made numerous proclamations regarding the constitutionality of the Pledge of Allegiance. As such, any decision by this court declaring the Pledge unconstitutional would be patently inconsistent with those statements. In every instance in which the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge of Allegiance, they have concluded unequivocally that those references pose no Establishment Clause problems. No Member of the Court, past or current, has suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression

that patriotic exercises with religious references would be constitutionally suspect, the Court has taken pains to assure that such is not the case.

A. There is a Major Difference Between Forbidden Religious Exercises and Permissible Patriotic Exercises.

Beginning with its first school prayer case in *Engel v. Vitale*, 370 U.S. 421 (1962), the Supreme Court has consistently distinguished between religious exercises, such as prayer and Bible reading, and patriotic exercises with religious references. In *Engel*, the Court struck down a New York State law requiring school officials to begin the school day with prayer. *Id.* at 424. Although the Court ruled that the "government . . . should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves," *id.* at 435, the Court specifically limited its decision, distinguishing patriotic exercises which contain religious references:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21.

Just one year later, in *Schempp*, Justice Goldberg again distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices, which by any realistic measure, create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

374 U.S. at 308 (Goldberg, J., concurring).

Even Justice Brennan, a staunch separationist, expressed the view in *Schempp* that patriotic exercises with religious references, such as the Pledge of Allegiance, do not violate the Establishment Clause. He thought that the religious references in the Pledge and patriotic songs were without religious significance:

> This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, 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.

Id. at 303-04 (Brennan, J., concurring).

In *Lee v. Weisman,* 505 U.S. 577 (1992), a decision built in large part on *Engel*, the Court reaffirmed the distinction it drew in *Engel* between religious exercises such as state-composed prayers and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of

> adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.

Id. at 598-99 (citation omitted) (emphasis added).

The deciding factor in *Lee* was that the state involved itself in a religious exercise: prayer. *Lee* gives no support to a conclusion that the Establishment Clause extends to the voluntary recitation of the Pledge of Allegiance simply because it contains the phrase "one Nation under God." Indeed, Chief Justice Rehnquist addressed this fact in *Newdow*, stating:

> I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

542 U.S. at 31 (Rehnquist, C.J., concurring).

Echoing this sentiment, the Fourth Circuit, in *Meyers v. Loudon County Public Schools,* 418 F.3d 395 (4th Cir. 2005), upheld a Virginia statute requiring a daily, voluntary recitation of the Pledge of Allegiance in schools "[b]ecause the Pledge is not a religious exercise and does not threaten an establishment of religion." *Id.* at 397. The court determined that the Pledge is a "patriotic" exercise. *Id.* at 407. The court stated that "[t]he inclusion of ['under God'] does not alter the *nature* of the Pledge as a patriotic activity." *Id.* Thus, "[e]ven assuming that the

recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism." *Id.* at 408.

> The notion that official acknowledgements of religion and its role in the founding of our nation such as that in the Pledge "pose a real danger of establishment of a state church" is simply "farfetched." 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. (citations omitted). The Fifth Circuit has likewise affirmed the patriotic nature of the Pledge, stating, "[r]eferences to God in a motto or pledge, for example, have withstood constitutional scrutiny; they constitute permissible 'ceremonial deism' and do not give an impression of government approval." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006), *vacated on other grounds by* 494 F.3d 494 (5th Cir. 2007) (en banc).

Furthermore, the Establishment Clause is not so broad as to allow mere offense to religious references in patriotic exercises to convert the exercise from patriotic to religious. In fact, Justice O'Connor dismissed such a broad construction of the Establishment Clause in *Newdow*, stating that

> distaste for the reference to "one Nation under God," however sincere, cannot be the yardstick of our Establishment Clause inquiry. . . . It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

Newdow, 542 U.S. at 44-45 (O'Connor, J., concurring). Justice O'Connor also made it clear that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.* at 44. Chief Justice Rehnquist further stated in *Newdow* that

> [t]he Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they [choose] to do so. To give the parent of such a child a sort of

> "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Id. at 33 (Rehnquist, C.J., concurring).

Indeed, as Chief Justice Rehnquist noted, the only limitation that the Supreme Court and lower courts have placed on the recitation of the Pledge is that participation must be voluntary. This was first held in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Many of the Circuits have encountered statutory schemes involving recitation of the Pledge and have focused their analyses not on the constitutionality of the Pledge itself, but rather on whether the statute makes its recitation truly voluntary.

For example, in *The Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004), the Third Circuit declared a portion of a Pennsylvania statute unconstitutional. The statute "mandate[d] that all public, private, and parochial schools . . . provide for the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day." *Id.* at 174. The statute also contained an opt out provision from the ritual, but if the student exercised his or her right to opt out, school officials were required to notify the child's parents to inform them of their child's decision to not participate. *Id.* The court concluded that the parental notification provision violated the students' First Amendment rights because it "discriminates among students based on the viewpoints they express; it is 'only triggered when a student exercises his or her First Amendment right not to speak.'" *Id.* at 180 (citation omitted).

In addition, in *Sherman*, the Seventh Circuit upheld an Illinois statute requiring the daily recital of the Pledge of Allegiance, concluding that "schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate." 980 F.2d at 439. The statute stated: "The

Pledge of Allegiance shall be recited each school day by pupils in elementary educational institutions supported or maintained in whole or in part by public funds." In its analysis, the Court debated whether the statute required "all pupils" or "willing pupils." *Id.* at 442-44. If the former, the court stated it would be unconstitutional under *Barnette*. *Id.* at 442. If the latter, the court stated it would be upheld as constitutional. *Id.* Because the schools did not force unwilling students to recite the Pledge, and because the court "adopt[ed] readings that save[d] rather than destroy[ed]" statutes, the court concluded that the statute did not violate the Establishment Clause. *Id.*

Finally, in *Frazier v. Alexandre*, 434 F. Supp. 2d 1350 (S.D. Fl. 2006), a Florida statute required all students to recite the Pledge of Allegiance daily unless their parents requested, in writing, that their children not participate in the ritual. *Id.* at 1353. If the child opted out of participating in the Pledge, the students were still required to stand at attention while the other students recited the Pledge. *Id.* The court held that the statute, "to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to [plaintiff] in violation of his First and Fourteenth Amendment rights." *Id.* at 1368.

In light of the Supreme Court's consistent distinction between religious exercises in public schools, which raise Establishment Clause concerns, and patriotic exercises with religious references, which do not, any argument that the Pledge of Allegiance violates the Establishment Clause is legally untenable.[8]

[8] It is due to this same distinction between a religious exercise and a patriotic exercise that Plaintiffs' Complaint fails to state a claim under the Free Exercise Clause. *See infra*, section IV.

B. The Supreme Court Has Consistently Upheld Patriotic Exercises Containing Religious References, such as the Pledge, As Constitutional Acknowledgements of the Nation's Religious Heritage.

In every instance in which the Court and individual Justices have addressed patriotic symbols or exercises with religious references, including the Pledge of Allegiance, they have been unequivocal that those references pose no Establishment Clause problems. No Justice of the Court, past or current, has ever suggested otherwise. To the contrary, recognizing that certain of its precedents may create the impression that some patriotic symbols and exercises would be constitutionally suspect, the Court has taken pains to assure that such is not the case. Statements from the Court and its members have been so numerous and consistent that there is no justification for ignoring them.

For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life." *Id.* at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "[g]overnment's acknowledgment of our religious heritage," and included among those examples Congress's addition of the words "under God" to the Pledge of Allegiance in 1954. *Id.* at 676-77.

> [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," which Congress and the President mandated for our currency, and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.

Id. at 676-77 (citations omitted).

In a concurring opinion, Justice O'Connor stated that governmental acknowledgements of religion such as the National Motto, "In God We Trust," "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." *Id.* at 693 (O'Connor, J., concurring). A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" 472 U.S. at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693) (O'Connor, J., concurring)).

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that 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 creche displays and references to God in the motto and the pledge.

Id. at 602-03 (citations omitted). The three dissenting Justices in *Allegheny*, Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the nation's religious heritage. The dissent pointed out that the Establishment Clause does not

> require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage. . . . [W]e must be careful to avoid "[t]he hazards of placing too much weight on a few words or phrases of the Court," and so we have "declined to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history."

Id. at 657 (Kennedy, J., concurring) (quoting *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 670-71 (1970)).

More recently, in *Newdow*, the Court dismissed an attack on the Pledge of Allegiance. Although the case was ultimately dismissed due to a lack of standing, Justice Stevens, writing for the Court, stated:

> "The very purpose of a national flag is to serve as a symbol of our country." . . . As the history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

Newdow, 542 U.S. at 6 (quoting *Texas v. Johnson*, 491 U.S. 397, 405 (1989)) (citations omitted).

As the foregoing discussion shows, every single reference to the Pledge of Allegiance, whether in majority, concurring, or dissenting opinions, has stated that it poses no Establishment Clause problems. This overwhelming approval of the Pledge of Allegiance by the Court led the Seventh Circuit to state in *Sherman*, "If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." 980 F.2d at 448. Thus, the Seventh Circuit explained that a mechanistic application of all Establishment Clause tests is unnecessary when the Supreme Court has already spoken so clearly on the issue. *Id.*

In sum, the Court has consistently expressed the opinion that the Pledge of Allegiance poses no Establishment Clause problems. Any decision concluding otherwise is, therefore, insupportable.

III. THE FIRST AMENDMENT DOES NOT COMPEL THE REDACTION OF ALL REFERENCES TO GOD IN THE PLEDGE OF ALLEGIANCE, PATRIOTIC MUSIC, AND FOUNDATIONAL DOCUMENTS JUST TO SUIT ATHEISTIC AND AGNOSTIC PREFERENCES, EVEN WHEN SUCH MATERIALS ARE TAUGHT IN PUBLIC SCHOOLS.

Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in the voluntary recitation of the Pledge of Allegiance, far more is at stake in this case. A decision that the Pledge of Allegiance is unconstitutional would render

constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

The first casualty of such a holding would be the practice of requiring students to learn and recite passages from many historical documents reflecting the Nation's religious heritage and character. If a public school district violates the Establishment Clause by requiring teachers to lead students in the voluntary recitation of the Pledge of Allegiance, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact[9] and the Declaration of Independence contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313; *see also Newdow v. United States Congress*, 328 F.3d 466, 471-82 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a founding document, contains religious language and, historically, has been the subject of required recitations in public schools. President Lincoln declared "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."

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[9] The Mayflower Compact, written by William Bradford in 1620, provides:

> *In the name of God, Amen.* We, whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord, King James, *by the Grace of God*, of England, France and Ireland, King, Defender of the Faith, etc. Having undertaken *for the Glory of God, and Advancement of the Christian Faith*, and the Honour of our King and Country, a voyage to plant the first colony in the northern parts of Virginia; do by these presents, solemnly and mutually *in the Presence of God* and one of another, covenant and combine ourselves together into a civil Body Politick, for our better Ordering and Preservation, and Furtherance of the Ends aforesaid; And by Virtue hereof to enact, constitute, and frame, such just and equal Laws, Ordinances, Acts, Constitutions and Offices, from time to time, as shall be thought most meet and convenient for the General good of the Colony; unto which we promise all due submission and obedience.

William Bradford, *Mayflower Compact*, *available at* http://www.historyplace.com/unitedstates/revolution/mayflower.htm (emphasis added).

Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), *available at* http://www.ushistory.org/documents/gettysburg.htm (emphasis added).[10]

Indeed, the references to deity in these historical documents are presumably even more problematic than the Pledge of Allegiance because they proclaim not only God's existence but specific dogma about God—He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge of Allegiance, *see Barnette*, 319 U.S. at 624, student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that a decision declaring the Pledge unconstitutional will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Students might learn about the Nation's founding documents without being required to recite them. Public school music programs cannot exist, however, without student performance. Thus, patriotic anthems, such as "America the Beautiful" and "God Bless America," will become taboo because students cannot realistically learn them unless they are sung. Such musical treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally suspect, at least as a part of public school music curricula.[11] If a group of

[10] Transcriptions of the address, as given, include the phrase "under God," while earlier written drafts omit the phrase. *See* Allan Nevins, *Lincoln and the Gettysburg Address* (1964); William E. Barton & Edward Everett, *Lincoln at Gettysburg* (reprint 1971) (1930). Lincoln's inclusion of the phrase in his address is thoroughly consistent with his conviction, shared with Washington and Jefferson, that Divine Providence played an essential role in the rise of the Nation.

[11] At least two federal appellate courts have upheld the constitutionality of religious choral music in public schools. Significantly, both courts found that a substantial percentage of serious choral music is based on religious themes or text. *See Bauchman v. West High Sch.*, 132 F.3d 542, 554 (10th Cir. 1997); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995).

students were to sing "God Bless America," the Establishment Clause would be violated because an atheist student like the Doe Children might *feel coerced* to sing along (and indeed may well be coerced inasmuch as music teachers are not constitutionally compelled to exempt students from singing with the class).

Justice O'Connor addressed the constitutionality of both the Pledge and patriotic songs in *Newdow*, stating:

> There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

Newdow, 542 U.S. at 36-37 (O'Connor, J., concurring) (citation omitted). Likewise, in *Schempp*, Justice Brennan believed that patriotic exercises, such as the Pledge, do not violate the Establishment Clause because such a reference "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 . . . ." 374 U.S. at 304 (Brennan, J., concurring).

A determination that the Pledge is unconstitutional will threaten a sort of Orwellian reformation of public school curricula by censoring American history and excluding much that is valuable in the world of choral music. Additionally, such a determination would call into question the continued validity of federal appellate court decisions upholding the

constitutionality of the performance of religious choral music in public schools. *See Bauchman*, 132 F.3d at 542; *Duncanville Indep. Sch. Dist.*, 70 F.3d at 402.

IV. PLAINTIFFS FAIL TO STATE A CLAIM UNDER THE FREE EXERCISE CLAUSE BECAUSE RECITATION OF THE PLEDGE OF ALLEGIANCE IS NOT A RELIGIOUS EXERCISE AND THEREFORE CANNOT CONSTITUTE A BURDEN ON THE FREE EXERCISE OF RELIGION.

Under the Free Exercise Clause, the "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963) (citations omitted). After the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

Plaintiffs argue that their children are being "denied the free exercise of [their] religion" because they "cannot freely exercise Atheism when being coerced to countenance the notion that [their] own land is 'one Nation under God.'" Compl. ¶ 68. Even a cursory look at free exercise jurisprudence in the public school setting, however, reveals that the facts alleged by Plaintiffs do not state a free exercise claim on the basis of coercion. Appellate courts have rejected similar coercion arguments in a number of cases in which the challenged school policy was substantially more coercive than the New Hampshire School Patriot Act.

On a preliminary note, Plaintiffs' coercion argument is merely an attempt to dress up their Establishment Clause claim in a Free Exercise suit. The Tenth Circuit rejected this precise strategy in *Bauchman*, where a student sought to enjoin the singing of religious songs in a public school choir. The court refused to analyze the plaintiff's coercion claim in the Free Exercise context, explaining that this was merely

> an attempt to bootstrap her Free Exercise claim with her Establishment Clause argument. Courts have long recognized that absent an Establishment Clause violation, the existence of a conflict between an individual student's or her parents' religious beliefs and a school activity does not necessarily require the prohibition of a school activity. Such conflicts are inevitable. In other words, while the Free Exercise clause protects, to a degree, an individual's right to practice her religion within the dictates of her conscience, it does not convene on an individual the right to dictate a school's curricula to conform to her religion.

132 F.3d at 557 (citations omitted). Failing to find coercion in the voluntary singing of choir songs, the court rejected "any invitation to obscure the appropriate scope of [the plaintiff's] Free Exercise claim by addressing issues of curriculum content" and instead "le[ft] those issues to [its] analysis of [the plaintiff's] Establishment Clause claim." *Id.* at 558.[12] This court should do the same.

Even if this court chooses to address the Plaintiffs' Free Exercise claim, the claim should be dismissed because reciting the Pledge is a patriotic exercise, not a religious one. *See, e.g.*, *Newdow*, 542 U.S. at 31 (Rehnquist, C.J., concurring) ("Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one"). Moreover, under *Smith,* both the state and federal Pledge statutes challenged by Plaintiffs are neutral and generally applicable.[13] The clear language of the New Hampshire School Patriot Act indicates that the purpose of reciting the Pledge is to teach students about American history.[14] The statute applies to all public schools

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[12] "The Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government. Accordingly, 'public schools are not required to delete from the curriculum all materials that may offend any religious sensibility.'" *Bauchman,* 132 F.3d at 558 (citations omitted). Furthermore, the Does' citation of N.H. Rev. Stat. Ann. § 169-D:23 is inappropriate to the present litigation since it is a "Public Safety and Welfare" statute that applies to children in foster care, not in public schools.

[13] In fact, 4 U.S.C. § 4 does not even mandate recitation of the Pledge but merely instructs on the *method* in which the Pledge should be recited *if* Americans choose to recite it.

[14] N.H. Rev. Stat. Ann. § 194:15-c states: "As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act," and "Pupil participation in the recitation of the pledge of allegiance shall be voluntary."

in New Hampshire. It does not refer to religion, nor does its stated purpose focus on religion. Furthermore, the Act clearly allows students to choose to not participate in the recitation of the Pledge.

Even applying the Supreme Court's free exercise jurisprudence, Plaintiffs' allegations of coercion fail to establish any burden on religious freedom. In *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995), the First Circuit concluded that even when students were compelled to attend a sex education course that included content that was contrary to their religious beliefs, their Free Exercise claim failed.[15] The court determined that the requirement that students attend a sex education class did not violate the Free Exercise Clause because there was no claim that "compulsory attendance at the Program was anything but a neutral requirement that applied generally to all students." *Id.* at 539. The New Hampshire School Patriot Act similarly applies generally to all schools in New Hampshire. Students are required to be present, as they were in *Brown*, but they are not required to participate in the recitation of the Pledge. Just as the First Circuit determined that being forced to hear offensive material in *Brown* was a neutral requirement, so too should this court find that hearing the words "under God" in the Pledge is a similarly neutral requirement. The Does have not been forced to recite any creed with which they religiously disagree. An allegation of simple exposure to the Pledge is utterly insufficient to constitute compulsion. *See Mozert*, 827 F.2d at 1070 ("Being

[15] *See also Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 690 (7th Cir. 1994) (plaintiffs' "free exercise of their religion [was] not substantially burdened" by requirement that students read texts that conflict with their religious beliefs); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1066 (6th Cir. 1987) (court rejected the plaintiffs' Free Exercise claims because the challenged classroom readings did not require students to "declare a belief" or accept the ideas presented by the readings, but simply to read the text); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1531 (9th Cir. 1985) (court found insignificant burden on Free Exercise and lack of coercion where students were not required to actively participate in discussion of offending material).

exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases").

Even if the court should somehow determine that the New Hampshire School Patriot Act is not a neutral law of general applicability, and thus find it necessary to analyze the Act under the *Sherbert* test, the Act still passes muster as it is "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 532. In *Fleischfresser*, the plaintiffs claimed that the school's required readings "indoctrinate[] children in values directly opposed to their Christian beliefs." 15 F.3d at 683. However, the court explained that "[e]ven if [it] were to find that the parent's free exercise rights were somehow substantially burdened," the government interest of building reading skills and developing imagination "outweighed such a burden." *Id.* at 690. Indeed, in seeking to achieve educational goals, "public schools are not required to delete from the curriculum all materials that may offend any religious sensibility." *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 F.2d 1311, 1318 (8th Cir. 1980). School curriculum will inevitably "conflict[] with the individual beliefs of some students or their parents." *Id.* Each of the several hundred religious bodies in the United States "'has as good a right as [any other] to demand that the courts compel the schools to sift out of their teaching everything inconsistent with its doctrines;'" thus, if courts seek to "eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, [they] will leave public education in shreds." *Id.* (quoting *McCollum v. Bd. of Educ.*, 333 U.S. 203, 235 (1948)).

New Hampshire explicitly identifies the teaching of American history to students as the compelling interest behind the recitation of the Pledge. Just as the Seventh Circuit recognized that "providing quality public school education" is a compelling enough interest to outweigh

even a substantial burden on religion, *Fleischfresser*, 15 F.3d at 690, so too should this court find that providing students with an education that includes American history and encourages patriotism is a compelling interest. Furthermore, the fact that students can opt out of the recitation of the Pledge shows that students are not required to "declare a belief" in God or accept any ideas that come from the phrase "one Nation under God." The ability to opt out also shows that the Act is written in the least restrictive means. As such, the voluntary recitation of the Pledge, even if offensive to some, passes constitutional muster.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to dismiss the plaintiff's claim that the Pledge of Allegiance is unconstitutional.

Respectfully submitted,

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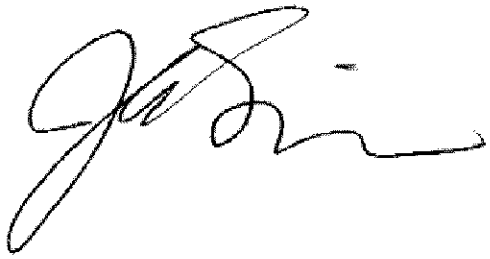
CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Michael A. Newdow and Rosanna T. Fox, counsel for the Plaintiffs, Eric. B. Beckenhauer, counsel for the federal Defendants, and David Bradley, counsel for the school district Defendants.

I further certify that on January 18, 2008, a true and correct copy of the foregoing document was sent via e-mail to Nancy Smith, counsel for proposed Intervenor-Defendant the State of New Hampshire, at nancy.smith@doj.nh.gov.



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