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

Civil Action No. 1:07-cv-356-SM

THE FREEDOM FROM RELIGION FOUNDATION;
JAN DOE AND PAT DOE, PARENTS; DOECHILD-1, DOECHILD-2 and DOECHILD-3, MINOR CHILDREN;

Plaintiffs,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA;
THE UNITED STATES OF AMERICA;
THE HANOVER SCHOOL DISTRICT ("HSD");
THE DRESDEN SCHOOL DISTRICT ("DSD");
SCHOOL ADMINISTRATIVE UNIT 70 ("SAU #70");

Defendants.

PLAINTIFFS' RESPONSE TO THE MOTIONS TO DISMISS

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INTRODUCTION

> "We hereby declare Protestant Christianity to be the established religion of the United States of America."

Hopefully, all will agree that the foregoing would violate the First Amendment's command that "Congress shall make no law respecting an establishment of religion." Yet virtually every one of Defendants' arguments made to defend "under God" in the Pledge of Allegiance would apply just as well to the above. After all, such a declaration would be a "brief reference to a generic [Protestant Faith]." Memorandum in Support of the Federal Defendants' Motion to Dismiss (hereafter "Fed. Memorandum") at 1. Similarly, "references to [Protestant Christianity] are replete in our Nation's heritage."[1] *Id*. Certainly, "the Establishment Clause does not forbid the government from officially acknowledging that heritage." *Id*. at 2. When such a statute "does not compel anyone to recite (or lead others in reciting) [that we are Protestant]," *id*. at 3, "[c]hildren may be taught about that heritage in their History classes, and acknowledging the same in the [United States Code] is equally permissible." *Id*.

[1] A sampling of such references is provided in Appendix A. A typical example is colonial New Hampshire's call "to permit liberty of conscience to all persons except Papists." New Hampshire Provincial Papers, II, 25 (1689), cited in Kinney, CB. Church & State: The Struggle for Separation in New Hampshire - 1630-1900, (Columbia University, New York; 1955), at 35. *See*, *also*, State of New Hampshire's Memorandum of Law in Support of Motion to Dismiss (hereafter "NH Memorandum") at 15-17.

That all of these arguments apply to such a manifest Establishment Clause violation demonstrates that they are straw men. This is not surprising, since none has any principled basis. On the contrary, those arguments violate principles – the key principles of equality and neutrality –that underlie the First Amendment's Religion Clauses. As the Supreme Court reiterated only three years ago, echoing an unequivocal edict that it has repeated without contradiction for decades:[2]

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (citation omitted). Surely no one can seriously maintain that there is neutrality between belief in God and disbelief in God when the sole governmental Pledge of Allegiance asserts that we are "one Nation under God."

Moreover, the government-sponsored religion in this case is propounded in the public schools, to be recited in unison by children. "The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987). Thus, Defendants' contention that "these claims are foreclosed by Supreme Court precedent," Fed. Memorandum at 3, is totally without merit. In fact, the only

[2] See Appendix B (providing thirty-five separate majority opinions issuing the same command).

thing that Supreme Court precedent reveals – as can be seen in the decisions in **nine out of nine cases (!)** – is that every challenge to the intrusion of any religious ideology into the public school arena has been upheld. Especially in this case, where that intrusion involves not only governmental favoritism for one religious claim (and an implicit denial of another), but where the students are asked to stand, to place their hands on their hearts, and to personally affirm the favored religious belief, the Supreme Court's jurisprudence cannot seriously support a lower court's validation of the challenged practice. As was stated categorically, "as a matter of our precedent, the Pledge policy is unconstitutional." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

STATEMENT OF MATERIAL FACTS

The Federal Defendants have provided a "Factual Background" for this case. Fed. Memorandum at 9-11. Plaintiffs concur with that presentation and accept it as their Statement of Material Facts.

ARGUMENT

I. DEFENDANTS' JURISDICTIONAL CONTENTIONS ARE WITHOUT MERIT

A. PLAINTIFFS HAVE STANDING

The Supreme Court has never wavered from the idea that "school children and their parents, who are directly affected by the laws and practices against which their complaints are directed ... [have] standing to complain." *Abington School District v. Schempp*, 374 U.S. 203, 225 (n.9) (1963). Thus, that plaintiffs here have standing is unassailable. One need simply refer to *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) to corroborate this fact. As Chief Justice Rehnquist wrote, "To be clear, the Court does not dispute that respondent ... satisfies the requisites of Article III standing."

Plaintiffs here have alleged injuries that are "concrete and particularized ... and ... 'actual or imminent,' ... 'trace[able] to the challenged action of the defendant[s],' ... [and] will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Taking the Supreme Court's advice that, "[i]n many cases the standing question can be answered chiefly by comparing the allegations of the particular complaint to those made in prior standing cases," *Allen v. Wright*, 468 U.S. 737, 751-52 (1984), Plaintiffs' injuries here can be seen to stem from the same injury that has been addressed time and again in Establishment Clause litigation: unwanted exposure to

the governmental espousal of religious dogma. That was the injury in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (unwanted exposure to creche), *Stone v. Graham*, 449 U.S. 39 (1980) (unwanted exposure to Ten Commandments), *Edwards v. Aguillard* (unwanted exposure to "creation science"), and a host of other cases where standing obviously existed.

Plaintiffs here also suffer the stigmatic injury that suffices for standing purposes. In *Allen v. Wright,* the Supreme Court made clear, "[t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing." 468 U.S. at 755. Plaintiffs here are personally exposed to the challenged religious dogma, and thus personally suffer that noneconomic injury.[3]

Plaintiffs meet the other two of *Lujan*'s standing requirements. There is no question that the injuries suffered are traceable to the Defendants' actions. Although Defendants admit this with respect to the School District Defendants ("Indeed, it is New Hampshire law ... that since 2002 has required each school

[3] Defendants' repeated references to *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) illustrate a gross misunderstanding. *Valley Forge* merely stated that psychological harm must be alleged in conjunction with a "personal injury suffered by them *as a consequence* of the alleged constitutional error," *id*., at 485 (emphasis in original), in order for standing to accrue. Defendants keep ignoring that Plaintiffs have clearly alleged such personal injuries, and argue that because Plaintiffs allege psychological harm, they don't have standing. The argument is frivolous.

district in the State to ... [have] the recitation of the pledge of allegiance." Fed. Memorandum at 13), they claim that Plaintiffs's injuries are not the result of the Federal Defendants' promulgation of 4 U.S.C. § 4. ("This injury is not caused by the Pledge statute, which does not compel anyone to do anything." Fed. Memorandum at 13.)

Such a crabbed standing analysis is formalistic to the extreme when read in the context of the Pledge's legislative history. The federal government was not some idle bystander whose work product just happened to be chosen by the state legislators for use in its public school classrooms. On the contrary, having students recite the "under God" language was the specific intention of both Congress:

> More importantly, the children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. ... Fortify our youth in their allegiance to the flag by their dedication to "one Nation, under God."

H.R. Rep. No. 1693, 83rd Cong., 2d Sess. (May 28, 1954), p. 3, and President Eisenhower:

> From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."

100 Cong. Rec. 7, 8618 (June 22, 1954). Just as an Act of 2008 altering the Pledge to read "one Nation under Jesus" or "one Nation under Protestantism" would "directly affect" students by placing the government's imprimatur behind those

unconstitutional claims, the Act of 1954 has "directly affected" the students to recite the current constitutionally infirm language.

Defendants' conception of standing cannot possibly be correct. As Justice Clark stated immediately before the language that began this section, "the requirements for standing to challenge state action under the Establishment Clause, unlike those related to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed." *Abington*, 374 U.S. at 225 (n.9). Surely the Framers did not intend for the first ten words of the Bill of Rights to be mere surplusage. "[W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers." *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting). Such "full effect" cannot be one where the federal government can violate the Establishment Clause's essence at will.

The last *Lujan* standing requirement – that of redressability – is met as well. Just as the judiciary can order a school district to cease starting the day with nondenominational prayer, *Engel v. Vitale*, 370 U.S. 421 (1962), or Bible readings, *Abington*, it can tell a school district to end leading small children in pledging to "one Nation under God."

The courts can also declare the Act of 1954 to be unconstitutional. In fact, judges declare congressional acts to be in violation of constitutional provisions quite regularly, as can be seen from just the half a decade from 1995-2000. *See*, *e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (Congress lacked authority to enact Violence Against Women Act under the Commerce Clause); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2000) (Congress violated First Amendment with Rescissions and Appropriations Act); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress exceeded its powers in passing Religious Freedom Restoration Act); *Printz v. United States*, 521 U.S. 898 (1997) (Congress's interim provisions of Brady Act violated dual sovereignty); *United States v. Lopez*, 514 U.S. 549 (1995) (Congress lacked authority to enact Gun-Free School Zones Act under the Commerce Clause); *Plaut v. Spendthrift Farm*, 514 U.S. 211(1995) (Congress lacked authority to force judiciary to reopen case after final judgment issued); *United States v. National Treasury Emples. Union*, 513 U.S. 454 (1995) (Congress's ban on governmental employees' acceptance of honoraria violated First Amendment). In fact, the Federal Defendants highlight this: "See also *Newdow III*, 380 F.3d at 484 ('[T]he ... authority to ... declare a law unconstitutional [is a] functio[n] ... reserved to ... the federal judiciary.')" Fed. Memorandum at 23 (n.8).

In addition to the statutory language of the Declaratory Judgment Act, 28 U.S.C. § 2201, this reflects the Framers' view that "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments." Federalist #51. As the Supreme Court has noted, "separation of powers does not mean that the branches 'ought to have no partial agency in, or no control over the acts of each other.'" *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (quoting James Madison from Federalist #47).

Additionally, "judicial review may be brought against the United States" under 5 U.S.C. § 703, and RFRA provides its own waiver of sovereign immunity. 42 U.S.C. § 200bb-1(c). Thus, because redress will occur when the School District Defendants are precluded from leading their students in claiming that we are "one Nation under God" – either due to a direct injunction against those defendants, or due to a declaration that "under God" in the Pledge violates the Establishment Clause – all three of the *Lujan* standing requirements are met.

Regarding Defendants Dresden School District ("DSD") and School Administrative Unit 70 ("SAU #70"), Plaintiffs have alleged that the children "will attend public schools run by DSD and SAU #70," where "[t]he Pledge of Allegiance is recited." Complaint, ¶¶ 29-30. If the Court requires, Plaintiffs will amend the Complaint to demonstrate that – at least for the DoeChild-1 – matriculation to a school

administered by DSD and SAU #70 will undoubtedly occur before this litigation terminates. Thus, this is a situation that

> fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. The exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." Both circumstances are present here.

FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652, 2662 (2007).

The claim that FFRF lacks organizational standing is clearly erroneous. "A membership organization ... may assert the claims of its members, provided that one or more of its members would satisfy the individual requirements for standing in his or her own right." *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273, 1281 (1st Cir. 1996). Inasmuch as the Does are FFRF members, FFRF meets this requirement.

> An association must meet two other requirements in order to have standing to sue: the interests that the suit seeks to vindicate must be germane to the objectives for which the organization was formed, and neither the claim asserted nor the relief requested requires the personal participation of affected individuals.

Id. (n.11). FFRF "works to keep church and state separate," Complaint ¶ 9, and no personal participation is required for the claim asserted or the relief requested.

In response to the argument that "[w]here the only members with standing are ***already*** named plaintiffs, organizational standing is superfluous and therefore improper," Memorandum in Support of Motion to Dismiss of Proposed Defendant-Intervenors Muriel Cyrus, *et al* (hereafter "Cyrus Memorandum") at 4 (n.3) (emphasis in original), Plaintiffs will simply note that (a) no authority is given for that proposition, and (b) were its logic correct, multiple plaintiffs would be precluded in any case where declaratory or injunctive relief is sought.

Defendants' citations to *United States v. AVX Corp.*, 962 F.2d 108 (1992) are unwarranted. In *AVX* no organizational member had alleged a personalized harm. That is inapposite to the case at bar, where each of the Doe Plaintiffs have done exactly that. (To the extent that the Court feels that paragraphs 9 and 24 do not indicate that the Does are FFRF members, Plaintiffs will gladly amend the Complaint to clarify this fact.)

B. THIS COURT HAS JURISDICTION TO HEAR THE STATE CLAIMS

New Hampshire claims this court lacks jurisdiction "against a nonconsenting State." NH Memorandum at 8. Were Plaintiffs suing the State, this would be appropriate because, "jurisdiction over such claims would be an abrogation of the sovereign immunity guaranteed by the Eleventh Amendment." 534 U.S. at 541. But Plaintiffs are not suing the State. They are suing school districts, and "a local

school board ... is more like a county or city than it is like an arm of the State. We therefore hold that it [i]s not entitled to assert any Eleventh Amendment immunity from suit in the federal courts." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977). Accordingly, the Court has jurisdiction to hear the state claims under 28 USC § 1367.

II. "UNDER GOD" VIOLATES THE ESTABLISHMENT CLAUSE

A. DEFENDANTS' MISCHARACTERIZATIONS DO NOT CHANGE THE FACTS

In their motions, Defendants mischaracterize numerous matters. Defendants-Intervenors Muriel Cyrus, *et al*, for instance, have as their very first sentence that the case is about "hearing other schoolchildren" recite the Pledge. That is grossly wrong. Other schoolchildren can do whatever they choose. The case is about governmental agents advocating (to schoolchildren) for one side of a religious controversy. Further mischaracterizations will now be discussed.

(1) Plaintiffs' Challenge is Not Solely a Facial Challenge

It has been asserted that "Plaintiffs challenge the Pledge statute on its face," Fed. Memorandum at 25 and NH Memorandum at 14, with the implication that the Complaint contains no as-applied challenge. This is incorrect. *See*, *e.g.*, Complaint paragraphs 31, 36-38, 40-45, 47, 65-66, 69. *See*, *also*, Fed. Memorandum at 37 ("Plaintiffs contend that the Pledge statute is unconstitutional as applied ...").

(2) "Under God" is Not Patriotic or Historical. It is Religious.

"'Concepts concerning God or a supreme being of some sort are manifestly religious.'" *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Powell, J., concurring) (citation omitted). Especially when one looks at the legislative history of the intrusion of the "under God" phrase into the Pledge, Appendix C, it is fallacious to contend that those words don't reference the purely religious concept of a Supreme Being. Unfortunate as it may be for Defendants, the members of the 83rd Congress were unaware in 1954 that the Supreme Court would eventually prohibit the government from espousing monotheistic dogma. Thus, the legislators of that era didn't camouflage their unabashedly religious intentions. They specifically stated that (after the insertion of "under God") "our Pledge of Allegiance ... witness[es] our faith in Divine Providence." 84th Cong., 1st Sess., House Doc. 234 at 5. *The Prayer Room in the United States Capitol* (USGPO:Washington, DC; 1956). Moreover, in proffering the Act of 1954, they spoke freely of "the Creator," H.R. Rep. No. 83-1693 at 2, and they revealed the fundamental religious purpose of the legislation by referencing, for example, President Eisenhower's meeting with "Bishop Fulton J. Sheen, Dr. Norman Vincent Peale, [and] Rabbi Norman Salit." *Id*., at 3.

The President certainly didn't hide his clearly religious understanding of the Act. In signing it into law, he spoke of how school children would use it to "daily

proclaim ... the dedication of our Nation and our people to the Almighty."[4] His pious view has not faded from the Executive Branch landscape. Early in his administration, George W. Bush issued a proclamation noting that "[t]he theme of the 2001 National Day of Prayer is 'One Nation Under God.'"[5] He then virtually defined the Pledge of Allegiance in its entirety as a prayer:

> When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.

Appendix D. It is absurd, therefore, to suggest that proclaiming that we are "one Nation under God" is "a politically performative statement, not a religious one." Fed. Memorandum at 44.

Defendants' own statements belie this claim. For instance, defending "under God" as a mere historical reference, they reference the "for the Glory of God" phraseology of the Mayflower Compact. But they simultaneously admit that those words were used by those "seeking a haven from **religious** persecution and a home where **their faith** could flourish." *Id*., at 29 (emphases added). Similarly, they quote from *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) that "[w]e are a **religious** people whose institutions presuppose a Supreme Being." (Emphasis added.) Justice

[4] 100 Cong. Rec. 7, 8618 (June 22, 1954). See at page 6, *supra*.
[5] Accessed at http://www.whitehouse.gov/news/releases/2001/04/20010430-2.html on February 16, 2008.

Douglas in *Zorach* did not say that "we are a people who have a penchant for highlighting the majority's historical religious choices."

If "we construe a statutory term in accordance with its ordinary or natural meaning," *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), the entire basis of Defendants' arguments – i.e., that "under God" doesn't mean "under God" – cannot be sustained. This case is about religious belief. More importantly, it is about a specific religious belief. "The declaration that our country is 'one Nation under God' necessarily 'entails an affirmation that God exists.'" *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) (citation omitted). The desire of the majority to have government make this affirmation is what this case is about. Defendants' attempts to divert attention from this fact is a charade.

(3) The Issue is Not the Pledge "as a whole." It is only the phrase "under God."

Defendants devote entire sections of their memoranda to argue that "[t]he Pledge must be considered as a whole." Fed. Memorandum at 41-43; NH Memorandum at 31-35. This is wrong as a matter of fact and as a matter of law.

To begin with, a purely religious act can always be characterized as part of something larger and non-religious in order to deny an Establishment Clause violation. In both *Engel v. Vitale* and *Abington School District v. Schempp*, for instance, it could have been argued that "the focus of the Court's constitutional inquiry must be on the morning exercises as a whole, not just the [prayer or Bible

reading].” In *Epperson v. Arkansas*, 393 U.S. 97 (1968), “biology class” could have been the Court’s focus, not the religious animus towards evolution. The decorations and aesthetics of buildings and grounds, not the sacred text of the Ten Commandments, could have garnered the Justices’ attention in *Stone v. Graham*, 449 U.S. 39 (1980) and *McCreary County*. The entire Grand Staircase of the County Courthouse, not just the creche, was certainly a possible center of concern in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), just as the graduation as a whole, not the rabbi’s short nondenominational prayer, could have been that center of concern in *Lee v. Weisman*, 505 U.S. 577 (1992).

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Supreme Court manifestly rejected this argument, which was made by the dissent:

> The several preceding opinions conclude that the principal difference between § 16-1-20.1 and its predecessor statute proves that the sole purpose behind the inclusion of the phrase “or voluntary prayer” in § 16-1-20.1 was to endorse and promote prayer. This reasoning is simply a subtle way of focusing exclusively on the religious component of the statute rather than examining the statute as a whole.

Id. at 88 (Burger, C.J., dissenting). Yet “focusing exclusively on the religious component” was precisely what the majority deemed proper.

References to *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Allegheny*, Fed. Memorandum at 41-42, reveal confusion in this matter. It was not that *Lynch*’s creche and *Allegheny*’s menorah were not examined individually. It was simply

that – in the given settings – inclusion of those individual items was appropriate, and excluding them from those settings would have evidenced hostility towards their religious representations. *See*, *e.g.*, *Lynch*, 465 U.S. at 677 (addressing "all forms of religious expression" and demanding "hostility toward none."). In fact, it is *Allegheny* that reveals how in some settings (for instance, outside a building where the menorah was situated next to a Christmas tree during the holiday season[6]) an individual religious item is acceptable, whereas in others (such as a Grand Staircase where a creche was given unique access to express its one religious message) it is not. *See* at page 51-52, *infra*.

Plaintiffs' position, incidentally, is not one of hostility towards religion. It is one only of hostility towards governmental endorsements of particular religious views. Thus, plaintiffs would find a Pledge to "one Nation that disbelieves in God" just as constitutionally infirm as is the present Pledge. Similarly, governmental anti-Monotheism would be just as intolerable as has been the anti-Atheism that the government has displayed. *See* Appendix E, showing where Congress announced that "under God" was being placed into the Pledge "to deny ... atheistic ... concepts." H.R. Rep. No. 83-1693 at 2.

[6] Of note is that the Court specifically wrote, "This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations." *Allegheny*, 492 U.S. at 620 n.69. Of course, the instant case involves a public school.

Plaintiffs have no issue with cases where there is, essentially, a marketplace of ideas, and the "religious," along with the "non-religious" have a right to be heard. *See*, *e.g.*, *Van Orden v. Perry* (Ten Commandments permitted as one of 38 monuments and historical markers); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (Christian club permitted as one of numerous after-school clubs); and *Widmar v. Vincent*, 454 U.S. 263 (1981) (religious group permitted as one among "over 100 student groups"). In the instant case, however, there is no such "marketplace." There is a locale under governmental control, as there was in *Engel, Abington, Stone*, *Wallace*, and *Lee, supra*. In such situations, government is not allowed to choose and propagate one religious ideology in exclusion of others.[7]

Were Defendants' "as a whole" argument correct, what would limit the abuse? Why wouldn't "under Jesus" be permissible? Why not, instead of having the students placing their hands over their hearts, have the students make the sign of the cross? That brief, purely religious act certainly doesn't make the Pledge "as a whole" any more religious than the "under God" phrase does.

The Pledge "as a whole" was doing fine for sixty-two years. An act of Congress then corrupted its previously unifying words, and divided Americans on the basis of religious belief. Act of June 14,1954, ch. 297, § 7, 68 Stat. 249. This

[7] The one exception to this is *Marsh v. Chambers*, 463 U.S. 783 (1983), which is completely distinguishable. *See* at page 66-67, *infra.*

was accomplished by introducing a government-sponsored religious view into a completely inappropriate setting. Defendants' naked attempt to characterize the issue differently – by constantly speaking of the Pledge "as a whole" – does not conceal the constitutional wrong.

(4) Defendants' Arguments Regarding Prayer are Unavailing

According to Defendants, "describing the Republic as a 'Nation under God' is not the functional equivalent of prayer, or any other performative religious act. No communication with or call upon the Divine is attempted. The phrase is not addressed to God or a call for His presence, guidance, or intervention." Fed. Memorandum at 44. This is certainly an odd statement to hear from lawyers for the Department of Justice, inasmuch as their boss has characterized the use of those words as "humbly seeking the wisdom and blessing of Divine Providence," and employed them as the theme of his first National Day of Prayer proclamation. *See* at page 14, *supra*. Moreover, for well over a century, the Supreme Court has noted that "'courts [are] incompetent judges of matters of faith.'" *Watson v. Jones*, 80 U.S. 679, 732 (1871) (citation omitted). If making determinations of religious meaning "is not within the judicial ken," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989), then it seems highly unwise to ask federal judges to contradict the religious views of anyone, much less the President of the United States.

The President, of course, is not alone in his opinion. The only Pledge expert referenced by the Supreme Court, *Elk Grove*, 542 U.S. at 6 n.1, has written:

> In 1954, Congress after a campaign by the Knights of Columbus, added the words, "under God," to the Pledge. The Pledge was now both a patriotic oath and a public prayer.

Baer JW. *The Pledge of Allegiance: A Short History.*(1992). Accessed at http://history.vineyard.net/pledge.htm on February 16, 2008.[8] Likewise, the leading Senate expert on God has contended:

> It is with reverence that in a moment we will repeat the words of commitment to trust You which are part of our Pledge of Allegiance to our flag: ''One Nation under God, indivisible.''

148 Cong. Rec. S6177 (June 27, 2002) (prayer of the Senate Chaplain, Dr. Lloyd John Ogilvie).

Beyond this, the argument is but another straw man. There is no requirement that a government act must be a prayer in order to violate the Establishment Clause. Placing the Ten Commandments in an inappropriate public setting wasn't a prayer. *Stone*, *McCreary*. Placing a creche on a staircase wasn't a prayer.

[8] Interestingly, the Federal Defendants cited Mr. Baer's work as well. Fed. Memorandum at 42.

Allegheny. Nothing like a prayer played a part in the laws forbidding the teaching of evolution, *Epperson*, or mandating the teaching of "creation science." *Edwards*. The clause – "respecting an establishment of religion" – reaches far broader than that one particular religious act.

(5) Defendants' Arguments Regarding Religion are Exclusionary

When Defendants speak of celebrating "the Nation's Religious Heritage and Character," Fed. Memorandum at 29, they miss the entire point of the Establishment Clause. Those who seek to "acknowledge" that "heritage and character" are not doing so because they are historians. They are doing so because that "heritage and character" matches their own belief system. Thus, the ardent desire of those wishing to maintain "under God" in the Pledge does not stem from how they value religion generally, but from how they value one specific brand of religion: Monotheism. Therein lies the offense: government advocating for one religious view in exclusion of another. Especially when this occurs in the public schools, such favoritism unquestionably runs afoul of the Establishment Clause.

This concept was explained in the circuit court opinion Defendants essentially ignore in their briefs. Unlike the Fourth Circuit, *Myers v. Loudoun County Public Schools*, 418 F.3d 395 (4th Cir. 2005), and the Seventh Circuit, *Sherman v. Community Consolidated School District 21*, 980 F.2d 437 (7th Cir.

1992), the Ninth Circuit chose not to speak in terms of expediency and perpetuation of prejudice, but in terms of truth and devotion to principle:

> In the context of the Pledge, the statement that the United States is a nation "under God" is a profession of religious belief, namely, a belief in monotheism.

Newdow v. United States Cong., 328 F.3d 466, 487 (9th Cir. 2003) ("*Newdow III*"), *rev'd* on standing grounds, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). Just as with "Judaism," "Buddhism," or "Christianity," children in the public schools may not be asked "to swear allegiance to ... monotheism." *Id*.

(6) This Case is Not About Belief in God. It is About Belief in Equality.

Statements such as "Plaintiffs' strategy [is] to purge all religious observances and references from American public life," *Amicus Curiae* Brief of the American Center for Law and Justice, *et al* (hereafter "ACLJ Brief") at 2, demonstrate a lack of understanding of the gravamen of the Complaint. To Plaintiffs, governmental hostility toward Monotheism is just as wrong as governmental endorsement of that religious view. Thus, true "references" to or "acknowledgments" of our nation's religious heritage or the beliefs held by various constituencies are not only appropriate, they are welcomed. Similarly, assigning students to read the Mayflower Compact, the Declaration of Independence, or the Gettysburg Address (assuming the assignments are not being made to serve a Monotheistic agenda) are activities that public schools should encourage.

That, however, is not what a pledge to "one Nation under God" entails. Defendants and their *amici* aren't litigating to keep those words because of an affection for "history" or because that's what the Framers believed.[9] They're litigating because that's what **they** believe, and the fact that the Framers believed the same thing is simply their ticket to have "the power, prestige and financial support of government," *Engel v. Vitale*, 370 U.S. at 431, support their own views. Plaintiffs are not asking the government to support their view that God is a human invention. They seek only to have the government respect all religious views equally. It is those who have managed to wrangle their dogma into the Nation's Pledge that are aghast at losing the special treatment they unconstitutionally obtained. As ACLJ freely admits (apparently unaware of the Establishment Clause's limitations), their goal is to have government "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." ACLJ Brief at 2.

[9] With atheism being illegal in virtually every state, *Roth v. United States*, 354 U.S. 476, 482 (1957) ("[O]f the 14 States which by 1792 had ratified the Constitution, ... all ... made either blasphemy or profanity, or both, statutory crimes."), it is no more surprising to learn that the Framers believed in God than it is to learn that they believed in creationism. Yet in neither *Epperson* nor in *Edwards* did the Supreme Court let that "history" trump the Establishment Clause.

Every individual and group has a Free Exercise right (which Plaintiffs would fight to protect and maintain) to bring God into the public square. What no one has a right to do, however, is to have government enter that square in order to assist them. This is especially so when it is the public **schools**, not the public square, in which these governmental favors are sought.

Having government take a position on a controversial religious issue is not equality. Neither is it "ceremonial," nor "an acknowledgment." Fed. Memorandum at 1-2. It is an endorsement of a particular religious view. And that violates the Constitution.

> The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."

Wallace v. Jaffree, 472 U.S. at 60-61 (citation and footnotes omitted).

(7) America's Relevant History is One of Freedom of Conscience and Equality, not Religious Favoritism and Belief in God.

To justify having "under God" in the Pledge, Defendants repeatedly allude to the Declaration of Independence and its references to a higher power. *See*, *e.g.,* Fed. Memorandum at 1, 27, 30, 39, 43 and 45. But those who note these references do not go far enough. They should also note the 1763 Treaty of Paris, the 1774 Articles of Association, the Declaration of the Causes and Necessity of Taking Up

Arms, the Articles of Confederation, the 1783 Treaty of Paris, and myriad other official documents, all of which referenced God and/or Jesus. What is important is not that the Constitution was written within this ocean of Monotheism and Christianity, but that it exists as an island, staggering for its secularity.

In fact, the only reference to religion in the body of the Constitution – the test oath clause of Article VI – declares that, "no religious test shall ever be required as a qualification to any office or public trust under the United States." This is the case even though not a single state constitution had such a prohibition. In fact, of the eleven state constitutions in effect at the time of the founding, nine had religious tests as qualifications for public office ... four of which were explicitly Protestant, and all of which were explicitly Christian. Appendix F. If the Framers intended for belief in God to be part of government, why would they specifically prohibit an oath to "Him." Their Convention was in Pennsylvania. Surely they could have borrowed from its constitution and used, "I do believe in one God, creator and governor of the universe."

Likewise, why – when "so help me God" was specified for the oaths of office in the state constitutions – is that phrase absent in the oath of the President; the only oath provided in the Constitution's text?[10]

[10] The claim that "George Washington added to the form of Presidential oath prescribed by Art. II, § 1, cl. 8, of the Constitution, the concluding words 'so help me God.'" *McCreary*, 545 U.S. at 886 (Scalia, J., dissenting) appears to be a myth,

This secularity was neither unintentional nor unnoticed. In fact **everyone** who spoke on the power of the federal government to act in a religious manner – even those who wanted an acknowledgment of God – agreed that under this Constitution of enumerated powers, such power did not exist. Appendix G.

If the foregoing isn't dispositive, **the very first act of Congress** surely is. The history of that act began on April 6, 1789, when a committee of five individuals was assigned "to bring in a bill to regulate the taking the oath or affirmation prescribed by the sixth article of the Constitution." 1 Annals of Cong. 102 (1789). It was resolved:

> That the form of the oath to be taken by the members of this House, as required by the third clause of the sixth article of the Constitution of Government of the United States, be as followeth, to wit: "I, A.B., a Representative of the United States in the Congress thereof, do solemnly swear (or affirm as the case may be) **in the presence of Almighty GOD**, that I will support the Constitution of the United States. **So help me God**."

(Emphases added.) The full Congress, however, rejected this oath. The final version they chose – "as required by the third clause of the sixth article of the Constitution" – was, "I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." 1 Stat. 23. Thus, it wasn't

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first alleged sixty-five years after the event. Griswold RW. *The Republican Court: American Society in the Days of Washington* (New York: D. Appleton & Co.; 1854) at 141.

as if the First Congress – busy with all their duties creating a new nation – simply failed to consider bringing God into the oath. **They affirmatively removed two references to God in their own oath of office.**

It is simply not true that "our Nation was founded on a fundamental belief in God," H.R. Rep. No. 83-1693 at 2. The foundational idea was "freedom of conscience," with religion left entirely to the individual.

B. "UNDER GOD" FAILS EVERY ESTABLISHMENT CLAUSE TEST

Defendants have claimed that "[r]egardless of the doctrinal test employed, the Pledge cannot reasonably be viewed as threatening to establish a state religion or anything of the sort." Fed. Memorandum at 1. Even forgetting, for the moment, that the First Amendment doesn't say "establish a state religion," but that, instead, it says "respecting an establishment of religion," Plaintiffs strongly disagree.

(1) "Under God" Fails the "Touchstone" Test of Neutrality

The insertion of "under God" into the Pledge of Allegiance places the government on one side of the quintessential religious question, "Does God exist?" That violates the neutrality that the Supreme Court has deemed to be "the touchstone" of Establishment Clause jurisprudence.

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County, 545 U.S. at 860 (string citation omitted). In fact, neutrality has been seen as essential in at least thirty-five of the Supreme Court's majority opinions. Appendix B. Government is surely not being "neutral" when it takes the side of those who believe in God, while other individuals – such as Plaintiffs here – hold the completely contrary religious view.

Intimately related to neutrality is equality, which was key in James Madison's *Memorial and Remonstrance against Religious Assessments*, "the most important document explaining the Founders' conception of religious freedom."[11] Cited in 31 separate Supreme Court cases, by sixteen separate justices, in 33 separate opinions, Appendix H, the *Memorial and Remonstrance* was written in 1785 as a response to Patrick Henry's *Bill to Establish a Provision for Teachers of the Christian Religion*. In arguing against Henry's proposal, Madison mentioned equality fourteen times, for he saw that ideal as the founding principle of our government. "[E]quality," he wrote, "ought to be the basis of every law."[12]

In relation to the instant litigation, his statement that Henry's bill "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to

[11] McConnell M. *New Directions in Religious Liberty: "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age.* 1993 B.Y.U.L. Rev. 163, 169 (1993).
[12] *Memorial and Remonstrance against Religious Assessments*, II Writings of Madison 183, at 185-186, as cited in *Everson v. Board of Education*, 330 U.S. 1, 66 (1947) (Appendix of Justice Rutledge in dissent).

those of the Legislative authority,"[13] is exactly on point. As has been the case for Atheists since the nation's founding, Plaintiffs now are degraded from the equal rank of citizens. Complaint ¶ 38. The placement of "under God" in the Pledge has not only reinforced, but it has furthered that degradation.[14]

(2) "Under God" Fails the Endorsement Test

In *Lynch v. Donnelly*, Justice O'Connor introduced the "endorsement test:"

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

465 U.S. at 692 (O'Connor, J., concurring). "Under God" fails this test, which also "does preclude government from conveying ... a message that ... a particular religious belief is favored or preferred. Such an endorsement infringes the religious liberty of the nonadherents." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring). The "particular religious belief" that there exists a God – plus the notion that we are "under" Him – is clearly favored and preferred by the current version of the

[13] *Id*., 330 U.S. at 69.

[14] Especially in this case, it is also worth noting that Atheists have even lost their child custody rights merely due to their religious beliefs. Volokh E. *Parent-Child Speech and Child Custody Speech Restrictions*. 81 N.Y.U. L. Rev. 631 (2006). As with most situations where blatant anti-Atheistic bias is ignored by society, one can imagine the uproar were Judaism or Christianity behind some judge's parental rights abrogation.

Pledge. Any "objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of this Monotheism. *Id*. at 76. Furthermore, the "reasonable observer" would realize that the government only allows that one religious view (i.e., that there is a God) into the Pledge. *Cf*. *Buono v. Norton*, 371 F.3d 543, 550 (9th Cir. 2004) (holding that "a reasonable observer ... would know ... that the [government] has denied similar access for expression by an adherent of [a different] faith.").

Of course, Justice O'Connor, herself, subsequently claimed that "under God" passed the endorsement test. *Elk Grove*, 542 U.S. at 36 (O'Connor, J., concurring). Plaintiffs will simply lay out the facts for this Court, and ask that the test – not a sole Justice's application of it – be the proper guide. Justice O'Connor's volunteering that "it is a close question," 542 U.S. at 37 (O'Connor, J., concurring), suggests that she anticipated that others would rule differently. If "the text, legislative history, and implementation of the statute" are truly the factors to be used, it is **many** others, indeed, who might determine that placing the words "under God" in the midst of the Nation's sole Pledge of Allegiance endorses the purely religious ideas that (a) there is a God, and (b) our nation is under "Him."

(a) The "text" is unquestionably religious

The relevant text of the Act of 1954[15] was "under God." This is facially, entirely and exclusively religious text. In fact, it would be difficult to imagine a more purely religious two-word phrase.

(b) The "legislative history" is unquestionably religious

That the legislative history behind the Act of 1954 is categorically religious has been demonstrated in detail. Appendix C. To briefly summarize, "under God" was first placed into the previously secular Pledge by "the largest Catholic laymen's organization." That organization encouraged Louis Charles Rabaut (a congressman from Michigan) to sponsor a bill codifying this religious conversion. Rep. Rabaut proudly noted the purely religious notions and events – including a Sunday church service – that played key roles in the Act's passage. He also placed into the Congressional Record the outrageous statement that "An atheistic American ... is a contradiction in terms."[16]

He was not alone among his fellow legislators in expressing so palpably pro-Monotheistic and anti-Atheistic a bias. *See* Appendix I (providing eight and a

[15] Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249.

[16] One might consider how long a congressman who placed "A Jewish American ... is a contradiction in terms," "a Catholic American ... is a contradiction in terms," or "a Black American ... is a contradiction in terms" into the Congressional Record would remain in office. Congressman Rabaut not only served out his term, but he was reelected another three times.

half pages of Congressional Record citations). Thus, the House Report accompanying the bill to place the purely religious words, "under God," into the previously secular Pledge not only memorialized the legislature's pro-Monotheism:

> The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator,[17]

H.R. Rep. No. 83-1693 at 2, but it expressed explicit anti-Atheism as well:

> At the same time it would serve to deny the atheistic and materialistic concepts of communism ...

Id.

As if to reinforce the purely religious emphasis of the bill, the Report also noted that President Eisenhower had recently met with a Catholic Bishop, a Protestant minister, and a Jewish Rabbi in a "Back to God appeal."[18] Moreover, the Report's authors claimed, "The phrase 'under God' recognizes ... the guidance of God in our national affairs."[19] *Id*. Obviously, to an Atheist, this is as offensive as

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[17] The reference to **"<u>the</u> <u>C</u>**reator," not "**<u>a</u> <u>c</u>**reator" should be noted.

[18] *Id*. at 3. *Cf. McCreary County*, 545 U.S. at 869: "[A]t the ceremony ... the county executive was accompanied by his pastor ... The reasonable observer could only think that the Counties meant to emphasize ... the ... religious message."

[19] Incredibly, this was part of an attempt to deny the Establishment Clause transgression. Of course, that Congress felt it necessary to make this denial speaks volumes. "The lady doth protest too much, methinks." Shakespeare W. *Hamlet* (III, ii, 239).

recognizing "the guidance of Jesus in our national affairs" might be to a Jew or "the guidance of the Pope in our national affairs" might be to a Protestant.

Any "reasonable observer" has to conclude from the legislative history of the Act of 1954 that "under God" was intruded into the Pledge for nothing but unambiguously religious reasons.

(c) The "implementation" was unquestionably religious

The implementation of the statute officially took place on Flag Day, June 14, 1954. President Eisenhower announced:

> From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."[20]

That, alone, surely suffices to demonstrate the intensely religious nature of the statute's implementation. However, in case more evidence is required, that "Onward, Christian Soldiers!" was the music played as the flag ran up the flagpole should indubitably clinch the matter. Appendix C.

This "text, legislative history, and implementation of the statute" demonstrates that there has been an unquestionable violation of the endorsement test. "Under God" was intruded into the Pledge to affirm that Americans, as a people, actively believe in God. Congress, therefore, not only made a law

[20] 100 Cong. Rec. 7, 8618 (June 22, 1954).

respecting an establishment of religion," it made a law **establishing** religion – namely, Monotheism[21] – in a country with millions of Atheistic[22] citizens.

(3) "Under God" Fails the Lemon Test

Although it has had numerous critics, the test described in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) was reaffirmed by the Supreme Court when it was last examined, *McCreary County v. ACLU*. The test has two applicable prongs:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, J., concurring). Both questions are answered affirmatively in this case.[23]

(a) "Under God" violates Lemon's purpose prong

The Pledge had been serving its patriotic and unifying purposes for sixty-two years when Congress passed its Act of 1954. Thus, neither a desire for patriotism nor for unity was behind the intrusion of "under God" into that

[21] "[T]he deity the Framers had in mind" ... is *inescapably* the God of monotheism. *McCreary*, 545 U.S. at 893 (n.3) (Scalia, J., dissenting) (emphasis in original).
[22] Others – such as polytheists, pantheists, and those with "no religion" – are also excluded.
[23] *Lemon*'s "entanglement prong" is not at issue.

previously secular passage. Rather, it was advocacy of Monotheism that underlay the Act. (Remarkably, in arguing against this claim, Defendants highlight that the House Report accompanying the Act called it a "fundamental truth" that our "government ... must look to God for divine leadership." Fed. Memorandum at 38.) Even if one couches that advocacy in the context of the Cold War, where Congress sought "to highlight a foundational difference between the United States and Communist nations," *id*. at 39, the Constitution was still violated because of the illicit, purely religious manner in which it engaged in that purported goal.

Highlighting the differences between the American and Soviet societies was certainly a worthy ambition, for the freedoms of our democracy were far superior to the subjugation of Soviet communism. But Congress misidentified the distinguishing feature. The repression of our rival fifty years ago was not due to Atheism any more than that of the Spanish five hundred years ago was due to Catholicism, or that of the Taliban today is due to Islam. Our way of life was superior because we had religious freedom, not because of any one majority religious belief, and the reality is that – in declaring that ours is a land of (Christian) Monotheists – Congress took a step backwards towards the religious oppression it rightfully meant to protest.

"The proper inquiry under the purpose prong of *Lemon* ... is whether the government intends to convey a message of endorsement or disapproval of

religion." *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). As mentioned, Congress, itself, stated its purpose was to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator ... [and] to deny the atheistic and materialistic concepts of communism." H.R. Rep. No. 83-1693 at 2. Thus, even if one accepts that differentiating ourselves from the Soviets was the ultimate goal behind the Act of 1954, the immediate purpose was to both endorse Monotheism and to disapprove of Atheism (which, of course, is facially apparent from a statute that does nothing but intrude the purely religious phrase, "under God," into a Nation's sole Pledge). Accordingly, the purpose prong of the test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), was violated.

(b)"Under God" violates Lemon's effects prong

"Consciously or otherwise, teachers ... demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models." *Bethel School Dist. v. Fraser*, 478 U.S. 675, 683 (1986). Accordingly, when teachers – every school day – lead small children in reciting that ours is "one Nation under God," they inculcate those children with the belief that God exists.

Social science data (in addition to explicit Congressional and Presidential intent) confirm this. Children who recite the Pledge interpret the words "under

God" in their purely religious sense.[24] As noted by President Bush's first Secretary of Education, himself, "under God" in the Pledge is an "expression of faith."[25] A group "expression of faith" in "God" obviously has religious effects.

One can simply imagine the School Districts' teachers asking their students to stand each day, face the flag, place their hands over their hearts, and affirm that we are "one Nation under Rev. Sun Myung Moon." Obviously, such a daily activity would have strong effects with regard to a student's beliefs vis-a-vis Rev. Moon's importance and existence. The effects with regard to "God" are the same.

These effects of "under God" in the Pledge are not only profound, but often severely injurious. Plaintiffs are at risk of suffering in precisely the same manner as those whose personal stories are recounted in the Memorandum in Support of Plaintiffs' Motion for Protective Order (Document 23). *See*, *also*, Brief for Atheists and Other Freethinkers. Additionally, they perpetuate the "political outsider" status

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[24] Such data were provided in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *Brief for amicus Americans United for Separation of Church and State et al.* at 11-15 (citing Hess RD and Torney JV. *The Development of Political Attitudes in Children* 105 (1967); Seefeldt C. "*I Pledge ...*," Childhood Educ. 308 (May/June 1982); Freund EH and Givner D. *Schooling, The Pledge Phenomenon and Social Control* 12 (paper prepared for Annual Meeting of Am. Educ. Research Ass'n, Session on Adult Roles in Schools (Wash., D.C., 1975))).

[25] On June 27, 2002, Secretary of Education Rod Paige issued a statement on the Ninth Circuit's Pledge decision, in which he acknowledged that, "under God" in the Pledge is an "expression of faith." Accessed on February 18, 2008 at http://www.ed.gov/news/pressreleases/2002/06/06272002.html.

of Atheists, thus serving to maintain "the gap between acceptance of atheists and acceptance of other racial and religious minorities [that] is large and persistent."[26]

Public school districts have an affirmative duty to remedy – not promote – such situations. As specified by the United States Department of Education,[27] "teachers and other public school officials may not lead their classes in ... religious activities," since such "conduct is 'attributable to the State' and thus violates the Establishment Clause." Having impressionable students face the nation's flag, place their hands over their hearts, and voice in unison that ours is "one Nation under God," is clearly a religious activity that is "attributable to the State." Accordingly, Defendants may not even allow, much less require, their "teachers and other public school officials" to engage in this practice.

(4) "Under God" Fails the "Outsider" Test

Mirroring Madison's concern about "degrad[ing] from the equal rank of citizens all those whose opinions in religion do not bend to those of the legislative authority,"[28] the Supreme Court has often used the "outsider" test. Under this test, "[governmental] sponsorship of a religious message is impermissible because it

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[26] Edgell P, Gerteis J, and Hartmann D. *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*. Amer Sociol Rev (April, 2006) Vol. 71, pages 211-34, at 230. Plaintiffs will show the profundity of these effects at trial.

[27] *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*. February 7, 2003. Accessed February 17, 2008 at http://www.ed.gov/policy/gen/guid/religionandschools/index.html.

sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community.'" *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000) (citation omitted). Clearly, Plaintiffs here – like most individuals who do not adhere to Monotheism – have been sent that message. As noted, it is a message that can have truly severe, deeply injurious and lifelong consequences. *See* Brief for Atheists and Other Freethinkers.

(5) "Under God" Fails the "Imprimatur" Test

> When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs.

Lee v. Weisman, 505 U.S. at 606 (Blackmun, J., concurring) (footnote omitted). This renders the given activity unconstitutional, even when "nominally 'neutral'" (which the Act of 1954 most definitely is not):

> If public schools are perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of such a policy, the nominally 'neutral' character of the policy will not save it from running afoul of the Establishment Clause.

Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 264 (1990) (Marshall, J., concurring). Accordingly, it was the lack of any "imprimatur of state approval" of any religious ideology that the Supreme Court found important in determining

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[28] *See* at page 28, *supra*.

that vouchers were permissible in *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002) (citation omitted). Because the "imprimatur of state approval" of belief in God is unmistakable in the instant action, the "under God" language must be struck from the Pledge.

(6) "Under God" Fails the "Coercion" Test

The "coercion test" – noted in *Engel v. Vitale* and refined in *Lee v. Weisman* – is also violated. In *Lee*, the Court looked at public and peer pressure, recognizing that "though subtle and indirect, [this pressure] can be as real as any overt compulsion." *Id*. at 593. This was the case with students on the brink of adulthood, who merely listened twice in their entire school careers as religious dogma was proffered by an invited guest. Here – with younger, more impressionable children being encouraged by government-employed teachers to actively recite religious dogma more than 2000 times[29] – the coercion is obviously far greater. Appendix J. As was categorically stated, "[A]s a matter of our precedent, the Pledge policy is unconstitutional." *Elk Grove*, 542 U.S. at 48 (Thomas, J., concurring).

Couching the constitutional transgression within a patriotic exercise, incidentally, does not lessen the offense. On the contrary, it exacerbates "the real conflict of conscience faced by the young student," *Lee v. Weisman*, 505 U.S. at

[29] Assuming schools in session 175 days per year, thirteen years of attendance equate to 2,275 school days for each child.

596, and increases "'the brutal compulsion which requires a sensitive and conscientious child to stultify himself in public.'" *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 635 (n.15) (1943) (citation omitted). This is neither hyperbolic nor hypothetical. There are real effects from the "under God" language of the Pledge, foisted upon real children, which can have severe, lifelong, social and intellectual adverse consequences. *Brief for Atheists and Other Freethinkers*. Defendants have shown no countervailing benefits that outweigh these harms. The comfort the majority feels from governmental displays of its preferred religious dogma should not be paid for with stigmatization and emotional turmoil inflicted upon a subset – whatever its size – of our youngest citizens.

C. CASE LAW SUPPORTS PLAINTIFFS

Defendants assert that, "Two Supreme Court decisions have said without qualification that the Pledge is consistent with the Establishment Clause." Fed. Memorandum at 25. That is a rather remarkable exaggeration, especially since every principled statement ever made by the Court demonstrates how "under God" in the Pledge is totally incompatible with the basic Establishment Clause ideals.

Only one case challenging the "under God" language in the Pledge of Allegiance ever reached the Supreme Court. Because the Court determined the Plaintiff lacked standing for "prudential" reasons, no merits decision was reached.

However, prior holdings of the High Court – in addition to the mountain of principled dicta – demonstrate that the "under God" language is impermissible.

Three circuit courts have actually rendered merits opinions on the issue at hand. Only one of those – the Ninth Circuit – has used and followed the Supreme Court's enunciated principles.

(1) Elk Grove Unified Sch. Dist. v. Newdow Provides No Guidance

In the face of nine of nine Supreme Court holdings contrary to their position plus every Establishment Clause test countering their claims, it is not surprising to see Defendants grasping at flimsy dicta to make their claims. For instance, there is a single notation in *Elk Grove* that the Pledge is "a patriotic exercise designed to foster national unity and pride." 542 U.S. at 6. Although that statement totally begs the question in this case, Defendants reference it repeatedly. *See*, *e.g.*, Fed. Memorandum at 7, 8, 28, 38, 44 and 47; NH Memorandum at 24, 29, 32 and 36. The Supreme Court was obviously making no determination of the constitutionality of the "under God" phrase with this sentence. It was merely describing what the Pledge of Allegiance was designed to do. No matter how the Pledge is altered – to be a nation "under Protestant Christianity," "under Male Superiority," "under White Dominion," or whatever "historical" reference Congress may choose – that description will still hold true.

What can be said of *Elk Grove* is that six justices expressed no opinion at all regarding "under God"'s constitutionality. Additionally, of the three justices who did express opinions, two are no longer on the bench, and none of the current justices joined in either of their merits opinions. Although the third justice (Justice Thomas) clearly indicated he would uphold "under God" in the Pledge, he also – just as clearly – stated that the lower courts have no power to do the same.

Chief Justice Rehnquist relied on historical facts, all of which could easily have been countered. In looking at the founding era, the truth is that "the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition." *Abington School District v. Schempp*, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). Chief Justice Rehnquist also selectively cited the 1954 Congress. For instance, the only statement he provided from Rep. Louis C. Rabaut, the chief sponsor of the Act of 1954, was that the purpose of the act was "to contrast this country's belief in God with the Soviet Union's embrace of atheism." *Elk Grove*, 542 U.S. at 25 (Rehnquist, C.J., concurring). Ignoring the fact that this statement, in and of itself, evidences an improper (religious) purpose, there were myriad other statements of Rep. Rabaut that show the illicit purpose behind the Pledge alteration. Certainly, "An atheistic American ... is a contradiction in terms," Appendix I, demonstrates the religious bigotry the First Amendment seeks to obviate. And that "the American way of life is ... 'a way of

life that sees man as a sentient being created by God and seeking to know His will, whose soul is restless till he rests in God,'" *id*., surely reveals an invalid purpose and a forbidden endorsement.

The Chief Justice's historical focus might be considered in light of Congress's recent 50th anniversary commemoration of *Loving v. Virginia*, 388 U.S. 1 (1967). Is our nation not enriched when we highlight that some historical facts are "subversive of the principle of equality?" Appendix K.

Chief Justice Rehnquist's other arguments were equally feeble. That the Pledge is "not to any particular God," 542 U.S. at 31, is irrelevant. A comparison of "under God" to "with liberty and justice for all," *Id*. at 32, fails to recognize that the Establishment Clause exists because religious ideas differ from all others. Finally, speaking of a "'heckler's veto'" misses "the very purpose of a Bill of Rights [which is] to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Barnette*, 319 U.S. at 638.

Justice O'Connor's attempt to show that "under God" in the Pledge passes her endorsement test has already been discussed. Again, she admitted "it is a close question." 542 U.S. at 37 (O'Connor, J., concurring). *See* at pages 29-33, *supra*.

Finally, there is Justice Thomas, whose main argument was based on a position (i.e., that the Establishment Clause does not protect any individual right and that it, therefore, "resists incorporation," 542 U.S. at 45-53 (Thomas, J., concurring)) that not only is directly contrary to what was stated by the majority ("The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment," 542 U.S. at 8), but that no other Justice has embraced in more than sixty years. His merits opinion, therefore, is hardly of consequence for this Court. What is of consequence is that, as he noted, "as a matter of our precedent, the Pledge policy is unconstitutional." *Id*. at 49. Lower courts are, of course, obligated to follow Supreme Court precedent. "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982)

(2) The Supreme Court's On-Point Holdings Support Plaintiffs

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Accordingly, **in nine of the nine previous cases** involving government-sponsored religion in the public education arena – often of a degree far less than is occurring here – the Court has ruled the challenged practice invalid. *McCollum v. Board of Education*, 333 U.S. 203 (1948) (public schools provided as setting for

religious teachers); *Engel v. Vitale* ("voluntary" teacher-led prayers); *Abington School District v. Schempp* (teacher-led Bible readings); *Epperson v. Arkansas* (teaching evolution); *Stone v. Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments); *Wallace v. Jaffree* (reminder of prayer option); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching of "creation science"); *Lee v. Weisman* (graduation prayer); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (prayer at football games). This is a remarkable streak that no lower court should overturn without a strongly principled basis. Defendants have presented **no** principled basis for ruling that schoolchildren may be daily inculcated with the notion that we are "one Nation under God."

Significantly, none of the aforementioned cases had all the injurious characteristics one finds in "under God" recitations. In *McCollum*, for instance, all the teachers of religion came from the outside, and no child received the religious instruction without their parents' agreement. In the instant case, the religion purveyors are public school teachers who impose the religious dogma upon all children. In *Abington*, the religion was a separate exercise. Here, it is an unavoidable component of the school's main act of patriotism. The religion involved in *Epperson* and *Edwards* was imposed in only a small portion of the curriculum of classes taken once or twice in a student's career. The Pledge is recited every day, for thirteen years. No student or teacher actively participated in

having copies of the Ten Commandments on the classroom walls in *Stone*. In unison, students and teachers stand up, face the nation's flag, place their hands over their hearts and affirmatively state that we are "one Nation under God." Pledge recitations are more coercive than the graduation prayer of *Lee v. Weisman* in at least seven different ways. Appendix J. In *Santa Fe*, the religious activity was student-led, and occurred in the informal atmosphere of a handful of extra-curricular football games, where few, if any, young children would have been present. "Under God" is led by teachers, in a classroom environment, every day, in classrooms full of children as young as four or five.

Because *Engel* and *Wallace* (plus one other religion case not involving the public schools, and an additional public school case not involving religion) are so strongly on-point, their holdings will be discussed individually.

(a) *Engel v. Vitale* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

Engel v. Vitale, 370 U.S. 421 (1962), is essentially identical to the instant action. In *Engel*, the Court ruled that a brief morning ritual where public school teachers lead "willing students" in making a religious statement is "a practice wholly inconsistent with the Establishment Clause." *Id*. at 424. Here, Defendant School Districts' teachers lead "willing students" in a daily joint recital that makes the religious statement, we are "one Nation under God."

That the religious verbiage in *Engel* was a "prayer" and "one Nation under God" is (allegedly) not a prayer is a specious argument. "Whether or not we classify affirming the existence of God as a 'formal religious exercise' akin to prayer, it must present the same or similar constitutional problems." *Elk Grove*, 542 U.S. at 48 (Thomas, J., concurring). If the School Districts' teachers – like the teachers in *Engel* – had their public school students stand up and recite just those six words alone ("Okay, class. Everybody stand up and join me to say, 'We are one Nation under God.'"), this case would immediately be decided in Plaintiffs' favor. Thus, the alleged "prayer" issue does not distinguish the two cases.

That the religious dogma has been placed within a patriotic pledge also makes no difference. If anything, melding the religion with the patriotism increases, it does not mitigate, the offense. This is especially true where the students all stand in unison, face the flag, and place their hands over their hearts as they join in the teacher-led recitations. To further demonstrate that *Engel* is controlling, the Court might consider the Pledge with the Regent's prayer substituted for "under God." The prayer was:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country,

370 U.S. at 422. Surely, those same words would not suddenly have become constitutional if New York simply moved them into the daily patriotic oath:

> I pledge allegiance to ... one Nation under Almighty God, upon whom we acknowledge our dependence and whose blessings we seek, indivisible, with liberty and justice for all.

Engel also showed that neither the so-called denominational neutrality nor the voluntary nature of a recitation lessens the constitutional infirmity:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause.

Engel, 370 U.S. at 430. Similarly, the harm was not mitigated by the prayer's "brief" nature:

> To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: "[I]t is proper to take alarm at the first experiment on our liberties. . ."

Engel, 370 U.S. at 436 (*Memorial and Remonstrance* citation omitted). The propriety of that "alarm" is just as appropriate with "under God" in the Pledge.

Engel stands for the proposition that short, "voluntary," group espousals of monotheism – such as claiming that we are "one Nation under God" – are constitutionally infirm when led by teachers in the public schools. "When the power, prestige and financial support of government is placed behind a particular

religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id*. at 431.

(b) *Wallace v. Jaffree* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

In *Wallace v. Jaffree*, "a 1-minute period of silence in all public schools" to be used "for meditation," 472 U.S. at 40, was changed to read "for meditation **or voluntary prayer**." *Id*. (emphasis added). Relying on *Lemon*, the *Wallace* Court wrote:

> In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive.

472 U.S. at 56 (footnote omitted). To make this determination, the Court looked at the statements of the legislators, which showed – nowhere nearly as powerfully as the myriad statements of the 83rd Congress, Appendix I – that an endorsement of religious belief underlay the addition of the "or voluntary prayer" phrase. "Such an endorsement," wrote the Court, "is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id*. at 60.

Wallace, therefore, is directly on point, since a previously secular statute was altered for religious purposes here as well. A finding that Congress did not violate that neutrality (and *Lemon*'s purpose prong) with its Act of 1954 is simply

untenable. This is especially true inasmuch as *Wallace* simply notified students of a religious option, was limited to their school environment, and had at issue only a State's "power, prestige and financial support." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). In the instant case, there is no religious option (i.e., "under God" is now prescribed in the nation's pledge, 4 U.S.C. § 4), the Pledge reinforces Monotheism outside as well as inside the school environment, and the recitation is backed by the entire federal government's "power, prestige and financial support," not just that of Alabama.

(c) *Allegheny County* is controlling precedent. Following it would result in a ruling in Plaintiffs' favor.

Although it did not involve a public school setting, *Allegheny County's* creche holding is also controlling. The creche – situated on the Grand Staircase of the County Courthouse – is perfectly analogous to "under God" situated in the midst of the Pledge. In fact, the only significant differences are (i) the *Allegheny* creche was passive (whereas the Pledge invites active, group participation, with vocalization of the religious phrase), (ii) the creche was not in a public school setting (whereas the Pledge is in such a setting[30]), (iii) the creche was present only during the Christmas season (whereas the Pledge is recited throughout the school

[30] In fact, the Supreme Court specifically noted in *Allegheny* that even the menorah – which was deemed to be permissible – may have been ruled unconstitutional had it been placed within a public school setting. *See* at footnote 6, page 17, *supra*.

year), and (iv) the creche was seen by perhaps thousands, only in Pittsburgh (whereas the Pledge is recited by tens of millions throughout the nation (and beyond)).

As was stated in *Allegheny* (speaking of the creche):

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus ... the [government] sends an unmistakable message that it supports and promotes the ... religious message.

492 U.S. at 599-600 (footnote omitted). This applies precisely to "under God" in the Pledge.

(d) *Brown v. Board of Education* is Controlling Precedent. Following it Would Result in a Ruling in Plaintiffs' Favor.

Perhaps more than any other case ever decided by the Supreme Court, *Brown v. Board of Education*, 347 U.S. 483 (1954) stands as a monument to the Judiciary, to the Constitution, and to the Constitution's magnificent guarantee of equal protection. In fact, *Brown* is one of the events in our history that makes Americans truly want to stand up, face the flag, and pledge our allegiance. Because the Constitution treats religious belief and race identically, *Brown* is almost directly on-point.

The "almost" stems from the fact that the doctrine overturned in *Brown* – i.e., "separate but equal" – at least ostensibly was providing equality to the two races. In the instant case, no one can allege that there is any semblance of equality in the way government treats Monotheists as opposed to Atheists.

Perhaps this acceptance of official "disregard of devout atheists," *McCreary County*, 545 U.S. at 893 (Scalia, J., dissenting), is what leads Defendants to miss how discriminatory is their quest. Although Plaintiffs recognize that many find it disturbing to hear Plaintiffs making analogies between their plight and that of blacks (who clearly have suffered more egregious abuses), the data consistently show that animus towards Atheists is greater than that towards any other minority, racial or otherwise. *See*, *e.g.*, at page 37, *supra* (footnote 27). When the Gallup organization asked Americans in 1958 if they would vote for a "negro" candidate for President, 53% said no. The same 1958 poll showed that 75% of Americans would not vote for an Atheist. At the last poll – in 1999, with government having ended its policies whereby it treated blacks as inferiors – the number unwilling to vote for a black dropped to 4%. That year – with government persisting in its endorsements of Monotheism (including having its future electorate start each day by pledging to "one Nation under God") – the number willing to admit that they would not vote for an Atheist still stood at an appalling 48%.[31] Likewise, no state today would dare have a constitutional provision denying to blacks the right to hold public office. Eight states, at this very moment, have such provisions excluding Atheists. Appendix L.

[31] Polls given July 30-August 4, 1958 and February 19-21, 1999. Copyright: The Gallup Organization, Princeton, NJ. A.I.P.O. See, www.gallup.com. (Accessed at http://poll.gallup.com/content/default.aspx?ci=3979&pg=1&VERSION=p.)

Thus, the Court might consider the government's placement of "under God" in the Pledge as it might consider separate water fountains, etc., for blacks and whites. Although there is no overt injury from having to drink at one fountain versus another, the stigmatic injury sent – that "those people" are not as good as "we" are – is still significant. In the event that such stigmatic injuries are unseen to Defendants and others, the statement of Senator Robert C. Byrd in the aftermath of *Newdow v. United States Cong.*, 292 F.3d 597, 611 (9th Cir. 2002) ("*Newdow I*"),[32] referring to Atheists, is revealing: "They are not going to have their way. The people of the United States are not going to stand for this." 148 Cong. Rec. S6306 (June 28, 2002)). What are Atheists ... North Koreans?

Certainly, the constitutional differences between:

> 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,

H.R. Rep. No. 83-1693 at 2, and:

> [The black race] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race.

Scott v. Sanford, 60 U.S. 393, 407 (1857), are trivial. Likewise, justifying a continuation of "under God" in the Pledge by stating:

[32] *Newdow I* was the Ninth Circuit panel's original decision, amended by *Newdow III* upon the denial of a rehearing *en banc*, and subsequently reversed on standing grounds in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004).

> Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court."

McCreary, 545 U.S. at 888 (Scalia, J., dissenting), seems little different from justifying a continuation of segregation with:

> [W]e are now providing and maintaining ... separate waiting rooms, separate water fountains, and toilet facilities for members of the white and Negro races.

United States v. Montgomery, 201 F. Supp 590, 592 (D. Ala. 1962).

The Supreme Court in *Brown* realized that equality is far more important than excuses. As Defendant-Intervenor United States wrote a half century ago (maintaining an extraordinarily different posture than it holds today):

> In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or **religion**, or color, or land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."

Brief for amicus curiae United States at 2, *Brown v. Board of Education*, 347 U.S. 483 (1954) (citing President Truman's Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2) (emphasis added). Length restrictions

prohibit Plaintiffs here from providing the wealth of similar prose to be found in that brief. Suffice it to say that the difference of approach here is startling, and that this case is one where the choice is just as it was in 1954: writing an opinion as the Supreme Court did in *Brown* or one in the mold of its predecessor, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

(3) The Supreme Court's Principled Dicta Support Plaintiffs

The foregoing on-point holdings – especially in conjunction with an application of the Supreme Court's tests and a desire to follow the Constitution's basic principles – should dispose of this case. "It is to the holdings of our cases, rather than their dicta, that we must attend." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379 (1994). Nonetheless, it is dicta to which Defendants point to allege the Pledge is constitutional.

Their efforts are futile. To begin with, the Justices of the Supreme Court have proffered an overwhelming number of principled statements which, applied to "under God" in the Pledge, would serve to invalidate those words. Thus, it is questionable, at best, to rely on the very few instances where a justice (seeking to maintain a consensus against a dissenter who points out that the majority's reasoning would lead to invalidation of the Pledge) suggests that "under God" may be permissible.

The pre-*Elk Grove* dicta cited by Defendants were always expressed in passing, with no discussion of the Pledge, its history, or its effects. Because it is inappropriate to place significant weight on a statement that "has never received full plenary attention," *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979), this Court is in no way bound by those rare statements:

> We recognize that the Supreme Court has occasionally commented in dicta that the presence of "one nation under God" in the Pledge of Allegiance is constitutional. However, the Court has never been presented with the question directly, and has always clearly refrained from deciding it. Accordingly, it has never applied any of the three tests to the Act or to any school policy regarding the recitation of the Pledge. That task falls to us, although the final word, as always, remains with the Supreme Court.

Newdow I, 292 F.3d at 611. "This is particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'" *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (citation omitted).

In fact, the reasoned dicta of the Supreme Court cases where the majority opinions glossed over "under God"'s constitutional infirmities came from the dissenting Justices, who concluded that application of the Court's Establishment Clause tests should invalidate the "under God" phrase. Admittedly, rather than invalidating the Pledge, the personal predilections of those dissenters would have resulted in invalidating the test. Nonetheless, each test was approved by the

majority, and it is the test that the lower courts are obligated to apply, not a dissenting Justice's complaints about it.

In *Wallace*, for instance, "the established principle that the government must pursue a course of complete neutrality toward religion" was reiterated. *Id*. at 60. Chief Justice Burger appropriately queried, "Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method."[33] *Id*. at 88 (Burger, C.J., dissenting).

Dissenting in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), Justice Scalia recognized that "under God" cannot pass the endorsement inquiry. As he noted, the Pledge of Allegiance (which he specifically included among a list of current governmental practices) conflicts with the plurality's "assertion ... that government may not 'convey a message of endorsement of religion'" *Id*. at 29-30 (Scalia, J., dissenting).

In *Allegheny County*, Justice Kennedy noted that invalidation of "under God" in the Pledge follows from the "outsider" test:

[33] Incidentally, Chief Justice Burger obviously agreed that "under God" is religious, and that Congress inserted the words "under God" to endorse a religious view: "The House Report on the legislation amending the Pledge states that the purpose of the amendment was to affirm the principle that 'our people and our Government [are dependent] upon the moral directions of the Creator.'" 472 U.S. 38 (Burger, C.J., dissenting) (n. 3) (citation omitted).

> [I]t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false.

492 U.S. at 672-673 (Kennedy, J., dissenting). He continued, "the reference to God in the Pledge of Allegiance ... [is among] practices that the Court will not proscribe, but that the Court's reasoning today does not explain." *Id*. at 674 n.10.

It was Justice Kennedy's turn to be criticized when he raised the very real issue of "coercion" in *Lee v. Weisman*. There is no question that small children have essentially no choice but to join their fellow students when led by their public school teachers in a daily ritual, or that the rare young person with sufficient fortitude to display her disbelief in God would be ostracized in today's society by exempting herself from such a routine. Yet, dissenting from the majority opinion, Justice Scalia appropriately pointed out that "[i]f students were psychologically coerced to remain standing during the invocation, they must also have been psychologically coerced, moments before, to stand for (and thereby, in the Court's view, take part in or appear to take part in) the Pledge." 505 U.S. at 639 (Scalia, J., dissenting).

Thus, Justices of the Supreme Court have acknowledged that the neutrality, endorsement, outsider and coercion tests all demand removal of "under God" from the Pledge. Especially in view of the holdings previously discussed, plus "the

Court's assertion that governmental affirmation of the society's belief in God is unconstitutional," *McCreary*, 545 U.S. at 889 (Scalia, J., dissenting), these are the dicta – where "under God" has been measured against the accepted Establishment Clause tests – that the lower courts should be following. Defendants' reliance upon scattered, shallow statements (made without any discussion of the issues related to the Pledge, and likely employed mainly to garner a judicial majority) is misplaced.

(4) Only One Circuit Has Correctly Assessed "Under God"

There are three court of appeals cases that examined "under God" in the Pledge of Allegiance. In the Seventh and Fourth Circuits, those words were deemed constitutional in *Sherman v. Community Consolidated School Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993) and *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005), respectively. In *Newdow III*, the Ninth Circuit held that the Pledge was unconstitutional in the public schools.

In reviewing these cases, one might first consider the statement of Justice Alito, made during his confirmation hearings earlier this year. Responding to a query regarding *Elk Grove*, he stated, "Often, there are conflicting freedoms and that makes the case difficult."[34] Surely that is true. But in this litigation, there is no

[34] Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States, before the Senate Comm. on the Judiciary, 109th Cong., 2nd Sess., S. Hrg. 109-277 (January 9-13, 2006).

"conflicting freedom" at issue. There is only "the interest of the overwhelming majority of religious believers in being able to give God thanks and supplication *as a people*," *McCreary County*, 545 U.S. at 900 (Scalia, J., dissenting) (emphasis in original). That, of course, is not a freedom at all when instigated by government. On the contrary, that is precisely what the Establishment Clause exists to prevent. As Justice Douglas pointed out in an obviously ineffectual attempt to end the misuse of his *Zorach* quotation (*see*, *e.g.*, Fed. Memorandum at 29 and 34; NH Memorandum at 22; Cyrus Memorandum at 17; ACLJ Brief at 5 and 16):

> [W]e stated in *Zorach* v. *Clauson*, 343 U.S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being."
>
> But ... if a religious leaven is to be worked into the affairs of our people, **it is to be done by individuals and groups, not by the Government**. ...
> The idea ... was to limit the power of government to act in religious matters, not ... **to restrict the freedom of atheists or agnostics.**

McGowan v. Maryland, 366 U.S. 420, 563-564 (1961) (Douglas, J., dissenting) (emphases added). In other words, "The First Amendment commands government to have no interest in theology." *Id*. at 564.

Only one freedom is involved: the freedom to have a government that does not "lend its power to one or the other side in controversies over religious ... dogma." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). Or, as was phrased alternatively, "the pertinent liberty here is protection against government

imposition of a ... religious preference." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 302 (D.C. Cir. 2006). Having a national pledge that states we are "one Nation under God," therefore – especially when recited in the public schools – is prohibited.

The Ninth Circuit adhered to these ideals in *Newdow III*. Applying the Supreme Court's Establishment Clause tests (to which the *Sherman* and *Myers* Courts barely gave lip service), it ruled that "All in all, there can be little doubt that under the controlling Supreme Court cases the school district's policy fails the coercion test." *Newdow III*, 328 F.3d. at 488. This was done by proceeding methodically, as Judge Goodwin – writing for the panel majority – first focused on determining the appropriate Establishment Clause test to use. To make this determination, he looked to *Lee v. Weisman*:

> [T]he Court in *Lee* found it unnecessary to apply the *Lemon* test to find the challenged practices unconstitutional. Rather, it relied on the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so."

Newdow III, 328 F.3d at 486 (citations omitted). Looking to the *Lemon*, endorsement and coercion tests, he continued:

> We are free to apply any or all of the three tests, and to invalidate any measure that fails any one of them. Because we conclude that the school district policy

> impermissibly coerces a religious act and accordingly hold the policy unconstitutional, we need not consider whether the policy fails the endorsement test or the *Lemon* test.

Id. at 487. It might be noted, however that – in regard to the endorsement and *Lemon* inquiries – Judge Goodwin had earlier applied those two tests, finding that they, too, led to the conclusion that it is unconstitutional to have "under God" in the Pledge. *Newdow I*, 292 F.3d at 611 ("In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.").

In addition to the foregoing, Judge Goodwin (in both *Newdow I* and *Newdow III*) dealt with the issue that no other panel (nor any Supreme Court Justice) has ever addressed: how is "under God" in any way different from "under" any other religious entity?

> A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.

Id. Defendants and their *amici* never address this either. Perhaps they will argue that the Supreme Court's clear pronouncement that "governmental neutrality" is "[t]he touchstone" of Establishment Clause jurisprudence, *see* at pages 27-25, *supra*, can be superseded by "our history." Even if that contention (which would also allow "under Male Superiority" and "under White Dominion" into the Pledge)

were correct, it would only apply to the "Vishnu," "Zeus," and "no god" examples in the *Newdow III* prose. "Under Jesus" would still be permissible under this rationale. In fact, "under Jesus" would have a **greater** claim than "under God," since only Jesus – not God – is specifically referenced in the definitive document. United States Constitution, Article VII ("Done ... in the year of our Lord one thousand seven hundred and eighty seven"). Therefore, unless the Court is willing to declare that the Framers intended to allow Christianity to be the national religion of a nation whose government "shall make no law respecting an establishment of religion," this "history" argument fails.

The *Newdow I and III* opinions considered the relevant facts, formed conclusions by applying the Supreme Court's tests, and followed constitutional principles. The logic used was impeccable, and the conclusions reached correct.

Sherman and *Myers*, on the other hand, employed virtually no logic whatsoever, and neither case relied on fact, applied test, or principle. For instance, even though five of the six judges on the *Sherman* and *Myers* panels wrote opinions, not one mention was made of President Eisenhower's signing statement (admitting that the effect of the Act of 1954 would be that "millions of our school children will daily proclaim ... the dedication of our Nation and our people to the Almighty"). And whereas "the Creator" in the Declaration of Independence – a document written more than a decade before the Constitutional Convention was

even called to assemble – was highlighted in both cases, Congress's reference to "the Creator" in the Report accompanying the Act of 1954 (admitting to its clearly religious purpose of showing "dependence ... upon the moral directions of the Creator") was ignored as well.

Looking first at *Sherman*, one is rapidly lost in its illogic. For instance, the opinion begins with Justice Jackson's inspiring words – that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," *Barnette*, 319 U.S. at 642. Despite the fact that the Supreme Court has specifically noted that these words evidence "the influence of a teacher over students," *Branti v. Finkel*, 445 U.S. 507, 514 n.9 (1980), *Sherman* completely ignored those words. Doesn't the revised Pledge prescribe what shall be orthodox in religion (i.e., belief that we are "one Nation under God")?

Similarly, despite the fact that the Supreme Court issued its opinion in *Lee v. Weisman* earlier that year, the *Sherman* panel never applied the coercion (nor any other) Supreme Court Establishment Clause test. "Circuit courts are not free to ignore Supreme Court precedent in this manner." *Newdow III*, 328 F.3d at 490.

Although the coercion test was not applied, it was referenced. The *Sherman* Court apparently recognized that coercion (a) is not necessary to demonstrate a

First Amendment violation,[35] and (b) exists by definition whenever an impressionable schoolchild is placed in a situation such as exists during Pledge recitations.[36] It even enunciated the rule:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words *is* coercion, the Pledge of Allegiance becomes unconstitutional under all circumstances.

980 F.2d at 444. Yet it then ruled that the Pledge was **not** unconstitutional!?

Myers was little better. Its folly was signaled by its choice of *Marsh v. Chambers*, 463 U.S. 783 (1983) as its "paradigmatic example." 418 F.3d at 403. *Marsh* – which has been referred to as "a narrow space tightly sealed off from otherwise applicable first amendment doctrine." *Kurtz v. Baker*, 265 U.S. App. D.C. 1, 829 F.2d 1133, 1147 (1987) (R.B. Ginsburg, J., dissenting) – "explicitly relied on the singular, 200-year pedigree of legislative chaplains, noting that '[t]his

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[35] "[T]his Court has never relied on coercion alone as the touchstone of Establishment Clause analysis. To require a showing of coercion, even indirect coercion, as an essential element of an Establishment Clause violation would make the Free Exercise Clause a redundancy." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 628 (1989) (O'Connor, J., concurring) (citations omitted).

[36] "In *School District of Abington Township v. Schempp* ... it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument." *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973); "The prayer invalidated in Engel was unquestionably coercive in an indirect manner." Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (n.1) (1989) (Kennedy, J., concurring in part and dissenting in part).

unique history' justified carving out an exception for the specific practice in question." *Rosenberger v. University of Virginia*, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting). The "specific practice" here (i.e., pledging allegiance "under God") didn't first take place until 1954, and the Framers did the exact opposite – removing, not adding, references to God – when they created their own "pledge." *See* at page 26, *supra*.

How paradigmatic can *Marsh* be, anyway, when the Supreme Court has since written that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer?" *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000). More importantly, the Court specifically noted that "[i]nherent differences between the public school system and a session of a state legislature distinguish [public school] case[s] from *Marsh v. Chambers*." *Lee v. Weisman*, 505 U.S. at 596. To use *Marsh* as the "paradigmatic example" in these circumstances is inappropriate.

As with *Sherman*, no Supreme Court Establishment Clause test was actually applied in *Myers*. Rather, it was alleged that "the Justices of the Supreme Court have stated, repeatedly and expressly, that the Pledge of Allegiance's mention of God does not violate the First Amendment." 418 F.3d at 411 (Motz, J., concurring). This is a highly misleading statement. As noted, the rare dicta from the pre-*Elk Grove* cases involved litigation that had nothing to do with the Pledge.

Moreover, not one of the statements referenced any principle, and virtually all were in response to dissents that revealed how the Pledge **failed** the test upon which the given majority opinion relied. *See* at pages 57-52, *supra*.

As with *Sherman*, the "coercion test" was only mentioned, and not applied, in *Myers*. Judge Williams – writing the majority opinion – focused first on "prayer," which one can reasonably claim is different from saying a pledge to "one Nation under God" (even though two Presidents, the Pledge expert cited by both the Supreme Court and Defendants, and Congress described the Pledge as such. *See* at pages 19-20, *supra*). Then, by juxtaposing "prayer" with "religious exercise or activity" (within which pledging "under God" unquestionably falls), 418 F.3d at 407, combining the resulting muddle with the deeply flawed "take the Pledge as a whole" claim, *id*., and then adding the intellectually dishonest "acknowledgments of religion" contention, *id*. at 408, she reached her desired conclusion: "The indirect coercion analysis discussed in *Lee*, *Schempp*, and *Engel*, simply is not relevant in cases, like this one, challenging non-religious activities." *Id*.

Judge Williams' reasoning resulted in a conclusion that conflicts directly with the conclusions of the only two Justices to have applied the coercion test to the Pledge. *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring); *Lee*, 505 U.S. at 639 (Scalia, J., dissenting). Lest anyone forget, it is **a pledge to a nation "under God."** That is a purely religious exercise, involving "compelling and meaningful"

(positively to some and negatively to others) words. The courts may not simply ignore this reality.

D. PLAINTIFFS' FREE EXERCISE AND THEIR RFRA CLAIMS ARE VALID

Defendants write, "That Plaintiffs' RFRA claim must fail is further illustrated by the fact that the typical remedy for a RFRA violation — an exemption from an otherwise generally applicable law — makes utterly no sense here." Fed. Memorandum at 36 (n.16). With this Plaintiffs agree. But the reason that a "typical remedy for a RFRA violation" is inapplicable here is because a typical RFRA claim doesn't involve government's taking a purely religious position. On the contrary, RFRA envisions "neutral" laws. 42 U.S.C. § 2000bb(a)(2) ("laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.").

In the instant case, the government has violated neutrality and infused into the Pledge the purely religious notion that there exists a God. Accordingly, Plaintiffs are unable to participate in the joint pledge of allegiance. Thus, they are placed in the situation where they either violate their religious principles, or they relinquish their right to join with their peers in demonstrating their patriotism in the prescribed manner. This is precisely the sort of injury Congress sought to address

with RFRA, which has as its purpose "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963)." 42 U.S.C. § 2000bb(b)(1). What the Supreme Court wrote in *Sherbert* was:

> [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

374 U.S. at 406. Due to Defendants' actions, the benefit of being able to participate as equals in reciting the Pledge and not having their patriotism questioned is conditioned upon Plaintiffs violating **the** cardinal principle of their religious belief systems.

The citation to *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15 (1st Cir. 2004), Fed. Memorandum at 36 (n.16), is inapposite. *Gary S.* was based on the idea that "private school parents can have no legitimate expectancy that they ... will receive the same federal or state financial benefits provided to public schools." *Id.*, at 20. Public school parents, however, certainly have that legitimate expectancy.

Plaintiffs agree that their RFRA claim against the School Districts is foreclosed by *City of Boerne v. Flores*, 521 U.S. 507 (1997). But it is not foreclosed against the Federal Defendants, who are ultimately responsible for the untenable choice Plaintiffs now face. *See* at page 6, *supra.*

E. DEFENDANTS' ACTIONS VIOLATE EQUAL PROTECTION

In *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J., concurring), Justice Stewart wrote that, **"**the prime example of ... a 'suspect' classification is one that is based upon race. But there are other classifications that, at least in some settings, are also 'suspect' -- for example, those based upon national origin, alienage, indigency, or illegitimacy." (Citations and footnotes omitted.) From this, Defendants try to argue that religion is not a suspect classification, and that Plaintiffs' claims, therefore, do not merit equal protection consideration. Fed. Memorandum at 37 (n.17).

This argument is without foundation. In fact, "the religion clauses of the First Amendment ... are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions." *Newdow III,* 328 F.3d at 491 (Fernandez, J., dissenting). Accordingly, the equal protection injury in the instant case is identical to one where Congress – seeking, of course, solely to further "the legitimate goals of fostering national unity and patriotism," Fed. Memorandum at 37 (n.17), and to pay homage to "the cultural heritage of [America's] people," *id*., at 33 – might alter the Pledge to read, "one Nation under White People." (After all, every one of the Framers was white. For the first century of our nation's existence, every congressman was white. We still have only had white presidents. And the

Constitution, itself, was written with specific exclusions of equality for blacks. *See*, *e.g.*, United States Constitution, Article I, Sections 2 and 9; Article IV, Section 2; and Article V. So who could complain about "one Nation under White People?" It's our history! And, besides, the Pledge's "recitation is a patriotic exercise designed to foster national unity and pride." *See* at page 42, *supra*.)

F. THERE IS NO EVIDENCE BEFORE THIS COURT CONTRADICTING PLAINTIFFS' CLAIMS

It must be highlighted that it is Defendants' Rule 12(b)(6) Motions to Dismiss that are now before the Court. Thus, Plaintiffs' allegations are all to be accepted as true. "Where the dismissal is grounded in Rule 12(b)(6), the facts pled in the complaint are taken in the light most favorable to the plaintiff." *Bielski v. Cabletron Sys. (in Re Cabletron Sys.)*, 311 F.3d 11, 22 (1st Cir. 2002). Defendants have certainly not presented any evidence to deny the neutrality, endorsement, purpose, effects, outsider, imprimatur and coercion test violations that Plaintiffs have alleged or to show that the RFRA choices faced by Plaintiffs aren't real.

CONCLUSION

This case involves government-sponsored inculcation of religious belief in children in the public schools. This the Supreme Court has never permitted. In fact, this case involves government agents urging children to stand up, face the American flag, place their hands on their hearts and affirm in unison that this is "one Nation under God." Thus, this case also involves a clear violation of the neutrality which the High Court has deemed "the touchstone" of its Religion Clause analyses. With its additional RFRA and Free Exercise violations, Plaintiffs respectfully request that the Court follow the principles consistently enunciated by the Supreme Court, declare that "under God" violates those principles, and enjoin Defendant School Districts from continuing the practice of leading its students in making a disputed, purely religious claim as part of the Pledge of Allegiance.

Respectfully submitted,

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February 19, 2008

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

CERTIFICATE OF SERVICE

Civil Action No. 1:07-cv-356-JM

Freedom From Religion Foundation v. U.S. Congress

I HEREBY CERTIFY that a true and correct copies of

(1) PLAINTIFFS' RESPONSE TO THE MOTIONS TO DISMISS
(2) EXHIBITS ACCOMPANYING PLAINTIFFS' RESPONSE TO THE MOTIONS TO DISMISS

were provided by electronic service to the Clerk of the Court via CM/ECF on this 19th day of February, 2008, causing it to be served on

United States Defendants:	eric.beckenhauer@usdoj.gov
School District Defendants:	dbradley@stebbinsbradley.com
State of New Hampshire:	Nancy.Smith@doj.nh.gov
Muriel Cyrus, *et al*:	erassbach@becketfund.org
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February 19, 2008 /s/ Michael Newdow

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