UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

The Freedom From Religion Foundation, *et al*. Plaintiffs	*	
v.	*	Civil Action No. 07-cv-356-SM
The United States Congress, *et al*. Defendants	*	

STATE OF NEW HAMPSHIRE'S REPLY TO OBJECTION TO MOTION TO DISMISS

Despite Plaintiffs claim that they do not seek to expunge affirmations by our nation's leaders and their fellow citizens of their personal belief systems in public forums, plaintiffs' objection, taken to its logical conclusion would do exactly that. By demanding total neutrality, Plaintiffs seek to muzzle the expression of others. The New Hampshire statute in question explicitly guarantees non-religious or religious objectors the freedom of conscience to participate in all, part, or none of the pledge recitation, as well as to supply their own interpretation of what "God" means. Despite this zealous guardianship of their individual rights, Plaintiffs seek to prevent others from expressing their views. This interpretation of the meaning of the United States Constitution is wrong and should not be adopted.

The State submits this reply to address two points raised in Plaintiffs' objection. First, that the New Hampshire statute requiring a voluntary Pledge opportunity, as well as the Pledge statute, pass constitutional muster under any of the likely Establishment/Free Exercise tests that have been articulated. Second, the Plaintiffs' dismissal of the Supreme Court's separate opinions

and considered factual findings, as well as the on-point opinions of the Fourth and Seventh Circuits stating that the Pledge is constitutional as not persuasive authority is unwarranted.

I. THE PLEDGE AND RSA 194:15-c REQUIRING VOLUNTARY PLEDGE OPPORTUNITY PASS CONSTITUTIONAL MUSTER UNDER ANY LIKELY ESTABLISHMENT/FREE EXERCISE TEST ARTICULATED

Justice Thomas lamented recently that "our Establishment Clause jurisprudence is in hopeless disarray." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring.). Although several courts have noted that there is "no single mechanical formula that can accurately draw the constitutional line in every case", *Myers v. Loudon Count Public Schools*, 418 F.3d 395, 402 (4th Cir. 2005); *see also Lee v. Weisman*, 505 U.S. 577, 598 (1992), RSA 194:15-c, the New Hampshire School Patriot Act and the Pledge pass any of the likely Establishment Clause or Free Exercise tests identified by Plaintiffs.

A. The *Lemon* Test

Contrary to Plaintiffs' rendition, the *Lemon* test is a three-pronged test. "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement with religion." *Van Orden v. Perry*, 545 U.S. 677, 686, n.6 (2005); *Edwards v. Aquillard*, 482 U.S. 578, 583 (1987).

As to RSA 194:15-c, Plaintiffs offer no argument that the New Hampshire law was adopted with anything other than a secular purpose. The legislative history that the State provided in its motion to dismiss has not been disputed. The purpose of the New Hampshire statute is unquestionably to promote civic and patriotic awareness.

As to the federal pledge statute, even Plaintiffs seem to acknowledge that the Pledge, even after the 1954 amendment had, and continues to have, a primary patriotic purpose. The flag

continues to be the symbol of our nation, not that of any religious sect or denomination. *Elk Grove*, 542 U.S. at 6. Invalidation under the purpose prong is only appropriate when the legislation's predominant motive was to promote or advance religion and the secular purpose is found to be nothing more than a sham. *McCreary County v. ACLU*, 545 U.S. 844, 864-865 (2005) (legislature's stated reason to be given deference as long as it is not a sham); *Wallace v. Jaffery*, 472 U.S. 38, 56 (1985) (statute must be invalidated if it is entirely motivated by purpose to advance religion); *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (statute or activity was motivated wholly by religious considerations). Therefore the Pledge passes the purpose prong of the *Lemon* test.

RSA 194:15-c and the Pledge also pass the effect prong, as they do not have the "principal or primary" effect of advancing religion. Plaintiffs argue passionately that inclusion of the phrase "under God" transforms the Pledge into a religious activity equivalent to prayer demanding belief in a monotheistic Protestant God. Pltf's Obj. p. 21. It does neither.

The Pledge requires allegiance to the flag, which represents our nation, not to any particular concept of God. As noted by Justice O'Connor, no reasonable observer could conclude that reciting the Pledge is worship or akin to prayer. *Elk Grove*, 542 U.S. at 49 (O'Connor, J., concurring). The Merriam-Webster Online Dictionary defines prayer as "an address (as a petition) to God or a god in word or thought". The Pledge does not have as its purpose placing the speaker or the listener in a penitent state of mind, nor does it attempt spiritual communion or request divine aid. *Id.*; s*ee also Myers*, 418 F.3d at 407-408 (A prayer by contrast is "a solemn and humble approach to Divinity in word or thought."). The Pledge is not addressed to God.

Plaintiffs' argument that the phrase "under God" is necessarily equivalent to phrases such as "under Jesus" and to endorsement of monotheistic Protestant religion in particular, is factually incorrect. The Merriam Webster Online Dictionary provides the following four definitions of the noun "God" that are expansive enough to include non-traditional religious views that do not include a divine being:

> **1:**the supreme or ultimate reality: as **a:**the Being perfect in power, wisdom, and goodness who is worshipped as creator and ruler of the universe **b:***Christian Science* the incorporeal divine Principle ruling over all as eternal Spirit **:**infinite Mind.
> **2:**a being or object believed to have more than natural attributes and powers and to require human worship; *specifically* **:**one controlling a particular aspect or part of reality.
> **3:**a person or thing of supreme value
> **4:**a powerful ruler.

Nothing in the Pledge defines the concept of God. Every individual, adult and child alike, is free to apply the concept of God that his or her conscience supplies, regardless of whether that concept is founded on any religion or not.[1] Atheists, as any other group, are free interpret the term God in the Pledge consistent with their own world view, or to abstain.

Plaintiffs have offered no argument that the Pledge or RSA 194:15-c create any degree of excessive entanglement by government in religion. Therefore the Pledge and the state statute pass the third prong of the *Lemon* test as well.

B. Endorsement Test

The endorsement test,[2] as most recently articulated and promoted by Justice O'Connor in *Elk Grove,* provides that "government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular

[1] Atheism is not excluded from being part of a "religion". Indeed, Plaintiffs' counsel. Micheal Newdow, has been an ordained minister in the Universal Life Church since 1977 and started his own church in 1997 the First Atheists Church of True Science. See Micheal Newdow website, http://www.restorethepledge.com/.

[2] Plaintiffs also refer to an "Outsider" test. Pltf's Obj. p. 38. However, this is really just a restatement of the endorsement test, as the case cited by Plaintiffs makes clear. *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290, 308 (1990). Therefore the "Outsider" test will not be dealt with separately.

religious belief is favored or preferred." 542 U.S. at 34 (O'Conner, J., concurring). Two additional "crucial and related principles" are that the test must assume the viewpoint of a "reasonable observer" who must not evaluate the practice in isolation from its origins and context, and who must understand the history of the conduct and its place in our Nation's cultural landscape. *Id*. at 34-35; *See also*. *Skoros v. City of New York*, 437 F.3d 1, 24 (2nd Cir. 2006). For the reasons that have been briefed extensively in the State and Federal Defendants Motions to Dismiss, the Pledge fits squarely within allowable "ceremonial deism" and passes the endorsement test.

C. Coercion, Imprimatur, and Neutrality Tests

The Plaintiffs refer to coercion, imprimatur and neutrality as three other "tests". In reality, none of these have been identified as a test by the Court. At most, they are factors that have been considered in some cases but not in others. What the courts have used is a common sense, "we know it when we see it", imprecise line-drawing approach to the religion clauses. *Lee*, 505 U.S. at 598; *Lynch*, 465 U.S. at 678-679, *see also Van Orden*, 545 U.S. at 686 (analysis driven by the nature of the monument and our Nation's history); *Myers*, 418 F.3d at 402 (in borderline cases there can be no test-related substitute for the exercise of legal judgment).

Plaintiffs rely on *Lee v. Weisman* for the tests referred to as the imprimatur and coercion tests. Pltf's Obj. p. 39-41. However, *Lee* declined to jettison the *Lemon* test and simply stated that due to the "formal religious observance" involved in prayer and the importance of graduation ceremonies, the activity was inherently a religious act creating a state sponsored religious exercise that was pervasive. Although expressing concern regarding coercion, it was not the coercion or imprimatur that the Court found objectionable, but the overt and explicitly religious nature of prayer in the context of an event of singular importance in a student's life,

graduation. *Lee*, 505 U.S at 598; *see also Elk Grove,* 542 U.S. at 31 (Rehnquist, J., concurring)(whatever the virtues and vices of *Lee,* the court was concerned only with "formal religious exercises, which the Pledge is not). The Fourth and Seventh Circuits have likewise found that the brief reference to "under God" in the Pledge does not change the essential patriotic nature of the Pledge or convert it into an inherently religious exercise. Therefore the coercion concern raise by *Lee* does not apply. *Myers,* 418 F.3d at 407-408; *Sherman v. Community Consolidated Sch. Dist. 21,* 980 F.2d 437, 445-447 (7th Cir. 1992).

As for the "neutrality" test, the case relied on by Plaintiffs utilized the purpose prong on the *Lemon* test to determine whether the statute was in fact neutral. *McCreary County,* 545 U.S. at 859. Therefore neutrality is not a separate test.

> "Where the Establishment Clause is at issue, tests designed to measure "neutrality' alone are insufficient, both because it is sometimes difficult to determine when a legal rule is neutral and because "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive or even active, hostility to the religious."(quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963).

Van Orden, 545 U.S. at 699. (Breyer, J., concurring).

D. Free Exercise Standard

The Plaintiffs have not actually articulated any standard related to their free exercise claim. However, the most recent controlling First Circuit authority, decided after the State and the Federal defendants submitted their motions to dismiss, support the defendants position that Plaintiffs free exercise claim must fail. On January 31, 2008 the First Circuit issued a decision in a case in which two sets of parents objected on Free Exercise grounds to their very young children (kindergarten, first and second grade) being presented with or being required to listen to the reading of books that portray homosexuality and same sex marriage in a positive light by

their school district. *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008). After discussing at length various standards that prior cases have utilized, the Court stated that it need not enter the fray regarding the various standards, as answering the threshold question "whether the plaintiff's free exercise is interfered with at all" showed no constitutionally significant burden on plaintiffs rights. *Id.* at 99.

The *Parker* Court stated, "free exercise means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 103. As a result, a government is barred from: 1) compelling affirmation of religious beliefs; 2) punishing expression of religious doctrine it believes false; 3) imposing special disabilities on particular religious beliefs or status; or 4) lending it's power to one side or the other in controversies over religious authorities or dogma. *Id.* It also noted that in recent funding cases there was no burden on free exercise rights where the government has imposed no criminal or civil sanction and does not require students to choose between their religious belief and receiving a government benefit. (citing *Locke v. Davey*, 540 U.S. 712, 720-21 (2004)). *Id.*

Within this context, the Court found that nothing about the exposure to materials that were presumed to be sincerely objectionable on religious grounds prevented the parents from raising their children in their own religious views. (citing *Elk Grove v. Newdow* 542 U.S. at 16, noting school's requirement that Newdow's daughter recite the Pledge every day did not impair his right to instruct her in his religious views). *Parker*, 514 F. 3d at 105-106. Turning to the children's rights, the Court held that even the child that was required to be present during the reading of a book that affirmatively endorsed gay marriage had not suffered coercion of free exercise rights. Significantly, the Court stated that public schools are not obliged to shield individual students from ideas which are potentially religiously offensive, particularly when the

school imposes no requirement that the student agree with or affirm those ideas. *Id* at 106. It was further noted that in *Board of Education v. Barnette*, 319 U.S. 624 (1943) it was the **mandatory** nature of the recital of the Pledge, backed by suspension, that violated the free exercise clause, not the attempt to inculcate values by instruction. *Id.* at 105

Here, Plaintiffs' children are not required to participate in the recitation of the Pledge. RSA 194:15-c specifically allows them to stay seated or stand silently. There is also nothing that requires them to say all of the pledge. If they wish to affirm their patriotism, but not say the words "under God," there is absolutely nothing preventing them from doing so.

II. PLAINTIFFS' DISMISSAL OF THE SUPREME COURT'S SEPARATE OPINIONS, CONSIDERED FACTS AND FOURTH AND SEVENTH CIRCUIT OPINIONS STATING THAT THE PLEDGE IS CONSTITUTIONAL IS UNWARRANTED.

Plaintiffs' counsel argue that the considered facts of the majority opinion in *Elk Grove*, and the concurring opinions, which explicitly reached the question of the constitutionality of the pledge, have no value. Pltf's Obj. p 41-45. However, that is contrary to Supreme Court precedent, which has cited with approval those concurring opinions that Plaintiffs seek to dismiss "flimsy dicta" (Pltf's Obj. p. 42) or because the authors are "no longer on the bench" (Pltf's Obj. p. 43). *See Van Orden*, 545 U.S. at 688, n. 7 (citing the concurring opinions of Justice Rehnquist and O'Connor). Indeed, the First Circuit relied on similar dicta from *Elk Grove* in a recent Free Exercise case. *Parker*, 514 F. 3d at 106. The Fourth Circuit cited the very language from *Elk Grove* regarding the patriotic nature and purpose of the Pledge that the Plaintiffs argue here is irrelevant in determining that the Pledge is not a religious exercise. *Myers*, 418 F. 3d at 407.

Further, Plaintiffs' claim that the on-point holdings and principled dicta of the courts support their position is inconsistent with the only clear reading that can be taken from the existing Establishment Clause jurisprudence, which is that in the case specific, "line drawing" in

which no one test applies, generalizations from one type of activity to another are not possible. Rather, "in the specific context before us, the Court and the individual Justices thereof have made it clear that the Establishment Clause, regardless of the test to be used does not extend so far as to make unconstitutional the daily recitation of the Pledge in public schools." *Myers*, 418 F.3d at 405. The *Myer*s Court went on to note that E*lk Grove* and **every** prior case in which any of the Justices have mentioned the Pledge, has assured that the Pledge does not violate the Establishment clause. *Id. citing Engel v. Vitale*, 370 U.S. 421, 449-50 (1962)(Stewart, J.); *Wallace v. Jaffree*, 472 U.S.38, 78 n.5 (1985) (O'Connor, J.); *Wallace*, 472 U.S. at 88 (Rehnquist, J.); *Lynch*, 465 U.S. at 716 (Brennan, J.); *County of Allegheny v. ACLU*, 492 U.S. 573, 674 (1989) (Kennedy, J.); *Lee*, 505 U.S. at 638-39 (Scalia, J.). Therefore, with Justice Thomas in *Elk Grove*, no less than seven Supreme Court Justices have expressed the view that the Pledge does not violate the Establishment clause.

In the context of construing the Pledge, the Fourth and the Seventh Circuits have said that such statements or separate opinions have "considerable persuasive value" and that when "the Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Myers*, 418 F.3d at 406; *Sherman*, 980 F. 2d at 448. The First Circuit takes a similar approach. "Nevertheless, persuasive, reasoned dicta may provide a valuable guide to statutory interpretation. *See Gibson*, 37 F.3d at 736 (absent explicit ruling by state's highest court, federal court sitting in diversity may consult 'considered dicta') (citing *Michelin Tires*, 666 F.2d at 682); *see also Bank of New England Old Colony, N.A. v. Clark*, 986 F.2d 600, 603 (1st Cir. 1993) (relying on 'persuasive' dicta of United States Supreme Court)." *Clarke v. Kentucky Fried Chicken of California, Inc.*,

57 F.3d 21, 29 (1st Cir. 1995). Therefore, Plaintiffs attempt to divert and devalue the authority that is most on-point must fail.

III. CONCLUSION

For the reasons stated herein, and in the previously filed motion to dismiss and memorandum of law, the State of New Hampshire's motion to dismiss should be granted.

Respectfully submitted,

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Certification

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I hereby certify that a copy of the foregoing document was filed electronically and served electronically by operation of the Court's electronic filing system to all counsel of record.

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