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

Civil Action No. 07-cv-356-SM

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

Plaintiffs,

v.

THE HANOVER SCHOOL DISTRICT ("HSD");
THE DRESDEN SCHOOL DISTRICT ("DSD");

Defendants,

and

MURIEL CYRUS, *et al.*;
THE UNITED STATES OF AMERICA;
THE STATE OF NEW HAMPSHIRE;

Defendants-Intervenors.

PLAINTIFFS' RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENOR STATE OF NEW HAMPSHIRE'S MOTION TO DISMISS; TO THE RENEWED MOTION TO DISMISS OF DEFENDANTS-INTERVENORS MURIEL CYRUS *ET AL.*; AND TO THE RENEWED MOTION TO DISMISS BY INTERVENOR-DEFENDANT THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

In response to Plaintiffs' First Amended Complaint (Document #52), Defendant-Intervenor State of New Hampshire has filed a Supplemental Memorandum of Law (Document #53, hereafter "NHSM") in support of its Motion to Dismiss (Document #14); Defendants-Intervenors Muriel Cyrus *et al.* have filed a Renewed Motion to Dismiss All Claims. (Document #55, hereafter "CyrusRM"); and Defendant-Intervenor The United States of America has filed a Renewed Motion to Dismiss (Document #56, hereafter "FedRM") as well. Plaintiffs respond as follows.

LEGAL ARGUMENTS

I. The Court Has Supplemental Jurisdiction Over the State Claims

As it did in its original Motion to Dismiss (Document #14), the State of New Hampshire continues to contend that this litigation involves "a question of state law that should not be subject to the jurisdiction of this court." NHSM at 2. As an initial matter, in its Order of August 7, 2008, this Court specifically noted that "the State of New Hampshire will not be heard on any of the other issues raised in its motion to dismiss, such as: (1) this court's jurisdiction to decide state-law questions." Document #44 at 21.

Moreover, Congress has specifically granted jurisdiction to District Courts when the state claims being heard "are so related" to the federal claims for which original jurisdiction exists. 28 U.S.C. § 1367(a). In fact, that supplemental jurisdiction remains even if the original federal claims are terminated. *Grispino v. New Eng. Mut. Life Ins. Co.*, 358 F.3d 16, 19 (1st Cir. 2004). Here, each of the state claims is virtually identical to the corresponding federal claim. *See, e.g.*, NHSM at 2 (acknowledging that "federal and state parental rights are co-extensive.").

II. Erroneously Decided, the *Sherman* Case is Not at All Determinative of the Proper Resolution of This Case

Because *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), a case which ruled the Pledge recitations constitutional, has been referenced by both Intervenor-Defendants New Hampshire and Muriel Cyrus, *et al*, in their filings, a brief analysis of that opinion is warranted.

Quoting Justice Jackson's famous passage from *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943), the *Sherman* court began by recognizing that:

> "No official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

980 F.2d at 439. One notes immediately that this statement is comprised of two clauses: (1) no official can prescribe what shall be orthodox, and (2) no official can force citizens to confess. Despite the fact that it is the first of these two clauses that most pertains to the Establishment Clause (especially as it relates to the words "under God" in the Pledge), the *Sherman* court totally disregarded that issue, concentrating instead only on the second clause.

There, the Seventh Circuit reviewed the Supreme Court's jurisprudence, and concluded:

> 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, the *Sherman* panel then proceeded to find that the Pledge was constitutional!

When the Ninth Circuit reviewed this "logic" a decade later in *Newdow v. United States Congress*, 328 F.3d 466, 489 (9th Cir. 2002), *rev'd on standing grounds, Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), the panel majority tactfully wrote, "We have some difficulty understanding" how the *Sherman* court reached its conclusion. Moreover, the later panel found the *Sherman* opinion to contain "serious error," 328 F.3d at 490, because the Seventh Circuit "refuses to apply the *Lemon* test ..., but it also fails to apply the coercion

test from *Lee*. Circuit Courts are not free to ignore Supreme Court precedent in this manner."

Sherman had other serious errors as well. Key among these is that it ignored the religious component of the Pledge that formed the gravamen of the litigation. Instead, it "treat[ed] the Pledge as a patriotic expression," 980 F.2d at 444, which makes as much sense as treating *Plessy v. Ferguson*, 163 U.S. 537 (1896) as a case about transportation, or *Bradwell v. State*, 83 U.S. 130 (1873) as one about law school. *Sherman* also characterized the Pledge as part of "the prescribed curriculum of the public schools," *id*., as if the daily indoctrination of children in a rote exercise could be equated with "books, essays, tests and discussions." *Id*. Most extraordinarily, completely confusing the Free Exercise Clause with the Establishment Clause, *Sherman* stated:

> Government nonetheless retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L. Ed. 1070 (1925), and select private education at their own expense. The private market supports a profusion of schools, many tailored to religious or cultural minorities, making the majoritarian curriculum of the public schools less oppressive.

980 F.2d at 445. This is a rather novel approach to see in the federal judiciary: "You don't like when the government violates the Constitution? Then go find someplace in the private sector where its mandates are followed."

Pierce, of course, involved private schools to which parents **chose** to send their children. For the *Sherman* court to twist that case to allow government to abrogate basic liberties because such choices exist is truly remarkable. This is especially so since *Pierce* contains language that strongly supported the *Sherman* plaintiffs: "[R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State." 268 U.S. at 535. "Acknowledg[ing] ... dependence ... upon the moral directions of the Creator,"[1] "deny[ing] ... atheistic ... concepts,"[2] and "proclaim[ing] ... dedication ... to the Almighty"[3] are certainly not purposes within the State's competency. Similarly, *Pierce* announced that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children ..." *Id.* Not only was the phrase "under God" intruded into the Pledge to standardize impressionable school children, but it was done to standardize them in a matter of religion, i.e., in the one subject area specifically mentioned in the Bill of Rights.

There is more. *Sherman* referenced "remaining neutral on religious issues," 980 F.2d at 445, despite the manifest avowal of the existence of God in the Pledge. It spoke of those "who want to pledge allegiance to the flag 'and to the Republic

[1] First Amended Complaint (Document #52) at ¶ 28.
[2] *Id*. at ¶ 29.
[3] *Id*. at ¶ 30.

for which it stands.'" *Id*. But the *Sherman* plaintiffs never objected to teachers leading children in pledging to the flag or to the Republic. It was only the "under God" phrase that was at issue.

The unprincipled and illogical *Sherman* opinion might be contrasted with that of the Ninth Circuit panel in *Newdow v. United States Congress*, 328 F.3d 466, 489 (9th Cir. 2002), *rev'd on standing grounds*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004):

> The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. 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.

328 F.3d at 487. Add to this the fact that the Ninth Circuit carefully analyzed the Pledge in terms of the Establishment Clause jurisprudence set out by the Supreme Court, and the proper resolution of the instant case (as between the Seventh and the Ninth Circuits) is readily ascertained.

III. The Does Have Standing to Challenge the Infringement of Their Rights of Parenthood

Citing *Sherman*, Defendant-Intervenor New Hampshire asserts that the Does lack "the right to object" to the teacher-led recitation that this nation is "under

God." Again, the Court's Order of August 7 instructed the parties that, "the State of New Hampshire will not be heard on any of the other issues raised in its motion to dismiss, such as ... plaintiffs' standing to assert that RSA 194:15-c violates the federal constitution." Document #44 at 21.

Additionally, the State's argument in this regard ignores the most foundational aspect of Plaintiffs' challenge by referencing school practices that "may offend someone's religious scruples." NHSM at 2. Although Plaintiffs' religious scruples are certainly offended, that is hardly the extent of their legal claims. What is being argued is that the practice offends the Constitution, as was argued by the parents in *Engel v. Vitale*, 370 U.S. 421 (1962), *Abington School District v. Schempp*, 374 U.S. 203 (1963), *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (among other cases). The constitutional offenses (i.e., the violations of the Establishment and Free Exercise Clauses, which further interfere with the Does' rights of parenthood) are not mere trivialities that "may offend [their] religious scruples."

IV. Infringements of Parental Rights by Public School Teachers and Officials Become Actionable when the Establishment Clause is Violated

The citations to *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), NHSM at 3 and FedRM at 3-4, are misguided. First of all *Parker* specifically noted that the

"plaintiffs ... do not assert an Establishment Clause claim." *Id*. at 94 (n.3). In other words, unlike the situation at bar, the government was not inculcating the children with a specific religious belief. Rather, it was only the parents who found a religious component within the challenged activity (i.e., teaching about homosexual relationships). This distinction, critical to the case at bar, is obviously not recognized when, for example, the State of New Hampshire alludes to a "right to object to every practice that may offend someone's religious scruples." NHSM at 2. Only one particular practice is being objected to in the instant lawsuit: governmental inculcation of a specific purely religious belief, needlessly and divisively infused on a daily basis into an otherwise permissible patriotic exercise.

In fact, dicta from *Parker* strongly support Plaintiffs' claim here. In considering which of the various approaches available was the proper one to use under the facts of the case, the panel noted that Supreme Court jurisprudence "require[s] a compelling justification for any law that targets religious groups." 514 F.3d at 96. As was clearly intended by the 83rd Congress ("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. At the same time it would serve to deny the atheistic and materialistic concepts of communism ..." H.R. 1693, 83rd Cong., 2d Sess., at 2), and President Eisenhower ("From this day forward, the millions of our school children will daily proclaim ... the

dedication of our Nation and our people to the Almighty." 100 Cong. Rec. 7, 8618 (June 22, 1954) (Statement by President Dwight D. Eisenhower, as reported by Sen. Homer Ferguson)), "under God" in the Pledge is "targeting"[4] religious groups based on their belief or disbelief in God. For this, there is no justification at all, much less one that is "compelling." In fact, avoiding such targeting is the compelling interest. "There is no doubt that compliance with the Establishment Clause is a [compelling] state interest." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761 (1995).

The allusions to the *Parker* court's citation of *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 16-18 (2004) are misplaced as well. NHSM at 3-4, FedRM at 4. The issue is not whether or not the Does have the ability to influence their children's religious views. It is merely whether or not that ability is

[4] The *Parker* panel equated "targeting" with "singling out ... particular religious beliefs." 514 F.3d at 96. As the just-noted words of Congress and President Eisenhower reveal, that is exactly what was involved in the Act of 1954, when the purely religious phrase, "under God," was spatchcocked into the Pledge. Although Plaintiffs stipulate that none of the current Defendants had that purpose in mind, the fact is that the effects of the current Pledge are those that were originally intended; i.e., "acknowledge[ing] ... dependence ... upon the moral directions of the Creator," "deny[ing] ... atheistic ... concepts," and "proclaim[ing] ... dedication ... to the Almighty." Whether under the second prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or under the endorsement inquiry of Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), Defendants are not only precluded from causing such effects, they are affirmatively obligated to prevent them.

unconstitutionally infringed upon. The parents in *Engel* (and *Abington*, *Lee*, *Santa Fe*, and myriad similar cases) all had the ability to influence their children's religious views, too. Yet, even though, as in the instant case, their children were not required to recite the prescribed religious verbiage, the Supreme Court explained that:

> 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.

370 U.S. at 431. Although the argument was not specifically addressed in *Engel*, that "power, prestige and financial support" – once interposed in the parent-child relationship – infringes upon the rights of parents to raise their children along the religious paths they choose. Plaintiffs readily acknowledge that school officials are permitted to infringe upon those parental rights when other paths are involved. But the first sixteen words of the Bill of Rights sets religion apart from those other paths. Thus, precisely as *Engel* informs this discussion, when claims involve basic and profound religious questions (such the existence or nonexistence of God), the infringement is forbidden.

Intervenor-Defendant The United States of America takes an *Elk Grove* dictum out of context when it writes that the Supreme Court "recognized that a school district's daily Pledge recitation practices did nothing to 'impair[]

Newdow's right to instruct his daughter in his religious views.'" FedRM at 4 (citing *Elk Grove*, 542 U.S. at 16). That sentence came from a discussion of the reach of the pertinent California family law cases involving custody arrangements, and the ability of noncustodial parents to impart their views to their children when custody is at issue. The Supreme Court was not speaking about the rights of custodial parents, such as the Does in this litigation, to guide their children's religious upbringing without state interference. As the High Court has noted:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.

Edwards v. Aguillard, 482 U.S. 578, 584 (1987). Were The United States correct in its sweeping view, then the *Edwards* plaintiffs – along with those in *Engel*, *Abington*, *Lee* and *Santa Fe* – would not have prevailed. *Elk Grove* surely has never been thought to have overturned those seminal cases.

V. Defendants-Intervenors Are Wrong as a Matter of Law

Defendants-Intervenors Muriel Cyrus *et al* claim "that government has the right to lead some children in reciting the Pledge as long as it gives other, objecting children the right to opt out in accordance with their scruples." CyrusRM at 2.

Their citation to *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) to make this claim reveals a basic misunderstanding of the instant litigation. The "under God" verbiage was not intruded into the Pledge of Allegiance until 1954. Thus, because the 1943 Pledge at issue in *Barnette* stated only that we are "one Nation indivisible," there was no Establishment Clause component to the Court's opinion.

Again, the Pledge was interlarded with the purely religious "under God" phrase in order to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator" and "to deny ... atheistic ... concepts." H.R. 1693, 83rd Cong., 2d Sess., at 2. This takes the Pledge out of the Free Speech / Free Exercise realm of *Barnette*, and places it squarely into the realm of laws respecting religious establishments. Cases such as *Engel* reveal that government does **not** have "the right to lead some children in [making some religious claim] as long as it gives other, objecting children the right to opt out in accordance with their scruples."

Plaintiffs agree "that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons," *Sherman* v. *Community Consol. Sch. Dist.*, 980 F.2d 437, 444 (7th Cir. 1992) (as cited at CyrusRM at 2). That truth, however, has nothing to do with the power of the Establishment Clause to restrain government from making religious claims. Cases such as *Barnette* and

Parker, where the government never had a religious purpose and where the effects are considered religious only because of the unique views of the given plaintiffs, are completely inapposite to cases such as *Engel*, *Abington*, *Edwards*, *Lee*, *Santa Fe* and the instant case, where the religious purpose and the religious effects of the challenged activity are plain to all.

For this reason, The United States is also mistaken when it claims that "[t]he related claims of the Doe children fare no better." FedRM at 4. By its analysis, as long as "state law explicitly protects their right to 'opt out,'" a daily church service provided in a public school by one denomination would also be permissible, since it would be "the mere 'exposure to ideas.'" *Id.* (citations omitted).

An incidental burden on the free exercise of religion (and on the associated rights of parenthood) that stems from a "neutral law," *see, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872 (1990), is a far cry from a burden that follows a government policy specifically targeting a religious ideology. *See, e.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). This case is not at all like the former, and is very much like the latter.

CONCLUSION

The practice of governmental agents leading impressionable children in daily making the purely religious claim that the United States is "one Nation under God" violates the Establishment Clause and unconstitutionally infringes upon the rights of the Doe parents to have their children educated in the public schools without adverse influence from "the power, prestige and financial support of government." For these and other reasons previously stated, the Defendants-Intervenors' Motions to Dismiss must fail.

Respectfully submitted,

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December 21, 2008

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

Civil Action No. 07-cv-356-SM

CERTIFICATION

I hereby certify that a copy of the foregoing PLAINTIFFS' RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENOR STATE OF NEW HAMPSHIRE'S MOTION TO DISMISS; TO THE RENEWED MOTION TO DISMISS OF DEFENDANTS-INTERVENORS MURIEL CYRUS *ET AL.*; AND TO THE RENEWED MOTION TO DISMISS BY INTERVENOR-DEFENDANT THE UNITED STATES OF AMERICA was filed via the Court's CM/ECF filing system on this 21st day of December, 2008. It is expected that it will be served electronically to all counsel of record by operation of CM/ECF.

/s/ Michael Newdow December 21, 2008

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