Appeal No. 09-2473

IN THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, ET AL,
Plaintiffs-Appellant,
v.
UNITED STATES, ET AL,
Defendants-Appellees
DRESDEN SCHOOL DISTRICT; HANOVER SCHOOL DISTRICT
Defendants

Appeal from the United States District Court for the District of New Hampshire
Civil Action No. 07-356 (SM)

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, U.S. SENATORS SAM BROWNBACK AND JAMES INHOFE, U.S. REPRESENTATIVES ROBERT ADERHOLT, TODD AKIN, RODNEY ALEXANDER, GRESHAM BARRETT, ROSCOE BARTLETT, ROB BISHOP, MARSHA BLACKBURN, ROY BLUNT, KEN CALVERT, TOM COLE, JOHN ABNEY CULBERSON, MARIO DIAZ-BALART, JEFF FLAKE, RANDY FORBES, TRENT FRANKS, SCOTT GARRETT, PHIL GINGREY, JEB HENSARLING, WALLY HERGER, PETER HOEKSTRA, WALTER JONES, STEVE KING, JACK KINGSTON, JOHN KLINE, FRANK LUCAS, JOHN MCHUGH, DONALD MANZULLO, JIM MARSHALL, GARY MILLER, JEFF MILLER, SUE WILKINS MYRICK, MIKE PENCE, JOSEPH PITTS, PETE SESSIONS, JOHN SHADEGG, JOHN SHIMKUS, MARK SOUDER, JOHN SULLIVAN, LEE TERRY, JOE WILSON, AND THE COMMITTEE TO PROTECT "UNDER GOD" IN SUPPORT OF THE APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1, the ACLJ is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ states that it has no parent corporation and issues no stock.

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INTEREST OF AMICI*

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

Amici, United States Senators Sam Brownback and James Inhofe, United States Representatives Robert Aderholt, Todd Akin, Rodney Alexander, Gresham Barrett, Roscoe Bartlett, Rob Bishop, Marsha Blackburn, Roy Blunt, Ken Calvert, Tom Cole, John Abney Culberson, Mario Diaz-Balart, Jeff Flake, Randy Forbes, Trent Franks, Scott Garrett, Phil Gingrey, Jeb Hensarling, Wally Herger, Peter Hoekstra, Walter Jones, Steve King, Jack Kingston, John Kline, Frank Lucas, John McHugh, Donald Manzullo, Jim Marshall, Gary Miller, Jeff Miller, Sue Wilkins

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

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

Myrick, Mike Pence, Joseph Pitts, Pete Sessions, John Shadegg, John Shimkus, Mark Souder, John Sullivan, Lee Terry, and Joe Wilson, are currently serving in the One Hundred Eleventh Congress. These *amici* support the patriotic tradition of voluntarily reciting the Pledge as it appears in 4 U.S.C. § 4.

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

Plaintiffs' strategy to purge all religious observances and references from American public life must not be permitted to advance. If Plaintiffs are successful, it will undoubtedly embolden further challenges to other religious expressions in government venues, including the several religious works of art[2] and various religious inscriptions in the Capitol Complex,[3] as well as the prayer rooms in

[2] For example, in the Capitol Rotunda are paintings with religious themes, such as *The Apotheoisis of Washington* and the *Baptism of Pocahontas*.

[3] For example, a wall in the Capitol's Cox Corridor is inscribed with a line from the Hymn, *America the Beautiful*: "America! God shed his grace on Thee, and crown thy good with brotherhood from sea to shining sea." In the House Chamber's prayer room, two distinctly religious statements are inscribed: 1) "Annuit coeptus," (God has favored our undertakings); and 2) "Preserve me, O God, for in thee do I put my trust," Psalm 16:1. Plaintiff Freedom From Religion Foundation (FFRF) has sued "to stop the prominent engraving of 'In God We Trust' and the religious Pledge at the Capitol Visitor Center in Washington, D.C." Press Release, Freedom from Religion Foundation, FFRF Sues to Stop Religious Engravings at Capitol Visitor Center (July 14, 2009), available at http://ffrf.org/news/releases/ayers/.

House and Senate Office buildings.[4] *Amici* contend that including the words "one Nation under God" in the Pledge does not violate the Establishment Clause or the Free Exercise Clause of the First Amendment. These words echo the sentiments found in the Declaration of Independence and recognize the truth that our freedoms come from God. These words were placed in the Pledge to reaffirm America's unique understanding of this truth. The United States is different from nations who recognize no higher authority than the State. While the First Amendment affords atheists freedom to disbelieve, it does not compel the federal judiciary to redact religious references in every area of public life to suit atheistic sensibilities.

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

ARGUMENT

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

Examining United States history reveals a Nation in which, from its inception, references to God abound. In fact, the Nation's Founders based a national philosophy on a belief in the Deity: "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963). The Declaration of Independence derives inalienable rights from a Creator rather than from government, precisely so the government cannot strip away such rights. In 1782, Thomas Jefferson wrote, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782).

George Washington acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address is replete with

references to God, including thanksgivings and supplications.[5] Washington's Proclamation of a Day of National Thanksgiving, stated that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." Jared Sparks, *The Writings of George Washington*, Vol. XII, p. 119 (1833-1837). Washington used the phrase "under God" in several of his orders to the Continental Army. On one occasion he wrote, "The fate of unborn millions will now depend, under God, on the courage and conduct of this army."[6] The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between [the two]." Philip Hamburger, SEPARATION OF CHURCH AND STATE 480 (2002).

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

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. … We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting

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

[6] Diane Ravitch, *To remove 'under God' is to rewrite U.S. history*, N.Y. DAILY NEWS, Mar. 28, 2004, *available at* http://209.157.64.200/focus/f-news/1107238/posts.

> the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe.*

Id. at 313-14 (emphasis added).

In *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), *vacating*, 328 F.3d 466 (9th Cir. 2003), Justice O'Connor reaffirmed the historical basis for using religious references: "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." 542 U.S. at 35-36 (O'Connor, J., concurring).

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

> accurately reflects how the founding generation viewed the separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god.

Douglas W. Kmiec, *Symposium on Religion in the Public Square: Forward: Oh God! Can I Say that in Public?*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 312-13 (2003). Moreover, as Chief Justice Rehnquist explained in *Elk Grove*, "[t]he phrase 'under God' in the Pledge seems, as a historical matter, to sum up the

attitude of the Nation's leaders, and to manifest itself in many of our public observances." 542 U.S. at 26 (Rehnquist, C.J., concurring). He noted that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one . . . ." *Id.* at 31.

In this case, the district court recognized this principle when it stated that "the Pledge, taken as a whole, is a civic patriotic affirmation, not a religious exercise, and inclusion of the words 'under God' constitutes, at the most, a form of ceremonial or benign deism." *Freedom From Religion Foundation v. Hanover School District*, No. 07-356 (SM), 2009 U.S. Dist. LEXIS 90555, at *32 (D. N.H. Sept. 30, 2009) (unpublished). The district court said that the Pledge is "an affirmation of adherence to the principles for which the Nation stands." *Id*. at *24 (footnote omitted). In fact, as the district court noted, the legislative history "places enactment of the statute in the context of a response to the attacks of September 11, 2001," which "supports the conclusion that patriotism, rather than support of theism over atheism or agnosticism, was the guiding force behind the enactment of the New Hampshire Pledge statute." *Id*. at *17.

As such, to hold the Pledge unconstitutional is to prefer atheism over religion even to the extent of severing ties with this Nation's religious history.

II. DECLARING THE PLEDGE UNCONSTITUTIONAL WOULD CONTRADICT MANY PRONOUNCEMENTS OF THE SUPREME COURT AND INDIVIDUAL JUSTICES THAT PATRIOTIC EXERCISES WITH RELIGIOUS REFERENCES ARE CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

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

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

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

Id. at 435 n.21.

Just one year later, in *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963), Justice Goldberg again distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

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

Id. at 308 (Goldberg, J., concurring).

Even Justice Brennan, a staunch separationist, expressed the view that patriotic exercises with religious references, such as the Pledge, do not violate the Establishment Clause:

> This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

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

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

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

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

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

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

In *Lee*, the state prescribed a religious exercise: prayer. *Lee* does not support a conclusion that the Establishment Clause extends to voluntarily reciting the Pledge simply because it contains the phrase "one Nation under God." Indeed, Chief Justice Rehnquist addressed this in *Elk Grove*, stating:

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

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

Echoing this sentiment, the Fourth Circuit, in *Meyers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005), upheld a Virginia statute requiring daily, voluntary recitation of the Pledge in schools "[b]ecause the Pledge is not a religious exercise and does not threaten an establishment of religion." *Id.* at 397. The court determined that the "[t]he inclusion of ['under God'] does not alter the *nature* of the Pledge as a patriotic activity." *Id.* at 407. Thus, "[e]ven assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism." *Id.* at 408.

> The notion that official acknowledgements of religion and its role in the founding of our nation such as that in the Pledge "pose a real danger of establishment of a state church" is simply "farfetched." The Establishment Clause works to bar "sponsorship, financial support, and active involvement of the sovereign in religious activity." The Pledge, which is not a religious exercise, poses none of these harms and does not amount to an establishment of religion.

Id. (citations omitted). The Fifth Circuit likewise affirmed the Pledge's patriotic nature, stating, "[r]eferences to God in a motto or pledge, for example, have withstood constitutional scrutiny; they constitute permissible 'ceremonial deism' and do not give an impression of government approval." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006), *vacated on other grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc).

Most recently, in *Newdow v. Rio Linda Union Sch. Dist.*, Nos. 05-17257, 05-17344, 6-15093, 2010 U.S. App. LEXIS 5201 (9th Cir. Mar. 11, 2010), the Ninth Circuit held that the Pledge does not violate the Establishment Clause, and, therefore, a California statute requiring school districts to begin the school day with a patriotic exercise (including reciting the Pledge) does not violate the Establishment Clause. *Id.* at *10. The court held that the Pledge's "wording as a whole" and our Nation's history demonstrates that the Pledge is a "predominantly patriotic exercise," and that the phrase "one Nation under God"—a phrase that encompassed the Founders' idea that people derive their rights from God, not government—"does not turn this patriotic activity into a religious exercise."[7] *Id.*

[7] In *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), a divided Ninth Circuit panel held that the Elk Grove Unified School District's policy requiring teachers to lead students in reciting the Pledge violated the Establishment Clause. The Supreme Court reversed on the grounds that the plaintiff lacked standing and, therefore, the panel erred by reaching the merits. *Elk Grove*, 542 U.S. 1. The panel in *Rio Linda Union Sch. Dist.* held that the panel's analysis in *Newdow v. United States Congress* was inconsistent with the Supreme Court's

In the present case, the district court correctly recognized the distinction between religious and patriotic exercises:

> the Pledge of Allegiance is not a religious prayer, nor is it a "nonsectarian prayer" of the sort at issue in *Lee*, and its recitation in schools does not constitute a "religious exercise." The Pledge does not thank God. It does not ask God for a blessing, or for guidance. It does not address God in any way…. Inclusion of the words "under God," in context, does not convert the Pledge into a prayer or religious exercise…. Peer or social pressure to participate in a school exercise not of a religious character does not implicate the Establishment Clause, and as a civic or patriotic exercise, the statute is clear in making participation completely voluntary.

Freedom From Religion Foundation, 2009 U.S. Dist. LEXIS 90555, at *23-24 (citations and footnote omitted).

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

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

Elk Grove, 542 U.S. at 44-45 (O'Connor, J., concurring). Justice O'Connor also stated that "the Constitution does not guarantee citizens a right entirely to avoid

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subsequent decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005) and *McCreary County v. ACLU*, 545 U.S. 844 (2005).

ideas with which they disagree . . . . [N]o robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.* at 44. Chief Justice Rehnquist further stated in *Elk Grove* that

> [t]he Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they [choose] to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Id. at 33 (Rehnquist, C.J., concurring); *see also Rio Linda Union Sch. Dist.*, 2010 U.S. App. LEXIS 5201 at *5 (issue in the case was whether the plaintiff has "the right to prevent teachers from leading other students from reciting the Pledge of Allegiance . . . because the mention of God in the Pledge offends her as an atheist.").

Indeed, as Chief Justice Rehnquist noted, the only limitation that the Supreme Court and lower courts have placed on reciting the Pledge is that participation must be voluntary. This was first held in *W. Va. State Bd of Educ. v. Barnette*, 319 U.S. 624 (1943).

In this case, the district court noted that "rather than leaving students to conclude that participation is required and that non-participation is, necessarily, an 'objection,' *Lee*, 505 U.S. at 590, a 'dissent,' *id.* at 592, 593, or a 'protest,' *id.* at 593, the New Hampshire Pledge statute expressly endorses non-participation."

Freedom From Religion Foundation, 2009 U.S. Dist. LEXIS 90555, at *22. As the district court explained, "opting out of a Pledge recitation involves little more than exercising the right to demur." *Id*. at *23.

Given the Supreme Court's consistent distinction between religious exercises in public schools and patriotic exercises with religious references, which raise no Establishment Clause concerns, any argument that the Pledge violates the Establishment Clause is legally untenable.

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

The Supreme Court has made numerous proclamations regarding the Pledge's constitutionality. Any decision by this court declaring the Pledge unconstitutional would be patently inconsistent with those statements. Almost every time the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge, they have concluded that those references pose no Establishment Clause problems. To the contrary, recognizing that certain of its precedents may create the impression that some patriotic symbols and exercises would be constitutionally suspect, the Court has taken pains to assure that is not so. Statements from the Court and its members have been so numerous and consistent that ignoring them is not justified.

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

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

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

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of "ceremonial deism" because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

Id. at 602-03 (citations omitted). The three dissenting Justices in *Allegheny*, Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia, agreed that striking down

national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the Nation's religious heritage. The dissent noted that the Establishment Clause does not "require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *Id.* at 657 (Kennedy, J., concurring in judgment in part, dissenting in part).

More recently, in *Elk Grove*, the Court dismissed an attack on the Pledge. Although the case was ultimately dismissed due to plaintiff's lack of standing, Justice Stevens, writing for the Court, stated:

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

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

As the foregoing discussion shows, every reference to the Pledge, whether in majority, concurring, or dissenting opinions, has stated that it does not violate the

Establishment Clause.[8] This overwhelming approval of the Pledge by the Court led the Seventh Circuit to state, "If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992). Mechanistically applying all Establishment Clause tests is unnecessary when the Supreme Court has already spoken so clearly on the issue. *Id.*

In sum, the Court consistently has expressed the opinion that the Pledge does not violate the Establishment Clause. Any decision concluding otherwise is insupportable.

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[8] In his concurring opinion in *Elk Grove*, Justice Thomas stated that as he read Supreme Court precedent, particularly *Lee*, the Pledge policy at issue was unconstitutional. He further stated, however, that he believed "that *Lee* was wrongly decided," *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring in judgment), and that

> Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.

Id. at 54 (Thomas, J., concurring in judgment).

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

Although the primary issue is whether the Establishment Clause prohibits public schools from leading students in voluntarily reciting the Pledge, far more is at stake in this case. A decision that the Pledge is unconstitutional would render constitutionally suspect a number of public school practices that traditionally have been considered an important part of American public education.

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

subject of required recitations in public schools. President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, *The Gettysburg Address* (Nov. 19, 1863), *available at* http://www.ushistory.org/documents/gettysburg.htm (emphasis added).[9]

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

Equally disturbing is the likelihood that a decision declaring the Pledge unconstitutional will eventually foreclose the Nation's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Patriotic anthems, such as "America the Beautiful" and "God Bless America," will become taboo because

[9] Transcriptions of the address, as given, include the phrase "under God," while earlier written drafts omit the phrase. *See* Allan Nevins, *Lincoln and the Gettysburg Address* (1964); William E. Barton & Edward Everett, *Lincoln at Gettysburg* (reprint 1971) (1930).

students cannot realistically learn them unless they are sung. Such musical treasures as Bach's choral arrangements and African-American spirituals will also become constitutionally suspect, at least as a part of public school music curricula. If a group of students were to sing "God Bless America," the Establishment Clause would be violated because atheist students like the Doe children might *feel coerced* to sing along.

Justice O'Connor, addressing the constitutionality of patriotic songs in *Elk Grove*, stated:

> Given the values that the Establishment Clause was meant to serve . . . I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

Elk Grove, 542 U.S. at 36-37 (O'Connor, J., concurring) (citation omitted).

Holding that the Pledge is unconstitutional will threaten a reformation of public school curricula by censoring American history and excluding much that is valuable in choral music. Additionally, such a holding would call into question the

continued validity of federal appellate court decisions upholding the constitutionality of performing religious choral music in public schools.[10]

The Constitution does not warrant such a shift in the treatment of civic references to God. As the district court below correctly noted,

> The words "under God" undeniably come from the vocabulary of religion, or, at the least, reflect a theistic orientation, but no more so than the benign deism reflected in the national trust in God declared on our currency, or in ceremonial intercessions to "save this Honorable Court" at the commencement of many court proceedings. It may well be that some, perhaps many, people required to employ U.S. currency, or socially pressured to stand during civic ceremonies, feel offended by what seems to them an imposition of theistic doctrine. But the Constitution prohibits the government from establishing a religion, or coercing one to support or participate in religion, a religious exercise, or prayer. It does not mandate that government refrain from all civic, cultural, and historic references to a God.

Freedom From Religion Foundation, 2009 U.S. Dist. LEXIS 90555, at *29-30.

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

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

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

Plaintiffs argue that the Doe children's Free Exercise rights were violated because the "setting and peer pressures" coerced the Doe children, and, "[c]oercion of small children to recite a purely religious ideology – especially when it is completely contrary to the religious ideology their parents wish to have instilled in them – violates the children's rights to Free Exercise of their religion." First Am. Compl. ¶¶ 55-56. Even a cursory look at free exercise jurisprudence in the public school setting, however, reveals that Plaintiffs do not state a free exercise claim on the basis of coercion. Appellate courts have rejected similar coercion arguments in

a number of cases in which the challenged school policy was substantially more coercive than the New Hampshire School Patriot Act.

Plaintiffs' coercion argument is merely an attempt to dress up their Establishment Clause claim in a Free Exercise suit. The Tenth Circuit rejected this precise strategy in *Bauchman v. West High Sch.*, 132 F.3d 542 (10th Cir. 1997), in which a student sought to enjoin the singing of religious songs in a public school choir. The court refused to analyze the plaintiff's coercion claim in the Free Exercise context, explaining that this was merely

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

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

The district court rejected the Plaintiffs' coercion claims. In analyzing the Plaintiffs' Establishment Clause claim, the district court explained that "[t]he New

Hampshire Pledge statute, as implemented by the school districts, does not have the effect of coercing the Doe children to support or participate in religion or its exercise." *Freedom From Religion Foundation*, 2009 U.S. Dist. LEXIS 90555, at *20. Later, in rejecting the Doe children's Free Exercise claim, the district court stated,

> as explained above, the Pledge, taken as a whole, is a civic patriotic affirmation, not a religious exercise, and inclusion of the words "under God" constitutes, at the most, a form of ceremonial or benign deism. The benign nature of the words, in context, preclude [sic] a finding that listening to others recite the Pledge "compels affirmation of religious beliefs," or "lends [government] power to one side or the other in controversies over religious . . . dogma."

Id. at *32. The district court also quoted this court's decision in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), noting that *Parker* "involve[ed] a substantially analogous free-exercise objection to curricular materials." *Id*. at *32-33. In *Parker*, the parents claimed "that the exposure of their children, at these young ages and in this setting, to ways of life contrary to the parents' religious beliefs violate[d] their ability to direct the religious upbringing of their children." *Parker*, 514 F.3d at 105. This court, however, explained that

> [p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. The reading of *King and King* was not instruction in religion or religious beliefs.

Id. at 106 (footnote, citations, and parentheticals omitted).

In this case, the district court explained that "as in *Parker*, the objection is to mere exposure; there are no allegations of required affirmation or participation. And so, like the students in *Parker*, the Doe children have failed to state a claim under the Free Exercise Clause." *Freedom From Religion Foundation*, 2009 U.S. Dist. LEXIS 90555, at *34, *see Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1070 (6th Cir. 1987) ("Being exposed to other students performing these acts might be offensive to the plaintiffs, but it does not constitute the compulsion described in the Supreme Court cases"). The Does have not been forced to recite any creed with which they disagree. Alleging simple exposure to the Pledge is insufficient to constitute compulsion.

As to the parents' Free Exercise claim, *Parker* also controls, as the district court noted. This court in *Parker* explained that,

> the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials."

Parker, 514 F.3d at 105 (*quoting C.N. v. Ridgewood Bd. Of Educ.*, 430 F.3d 189, 185 (3d Cir. 2005) (additional citation omitted). As the district court recognized, the "the Doe parents have suffered no impairment in their ability to instruct their children in their views on religion. Accordingly, they have failed to state a claim

under the Free Exercise Clause." *Freedom From Religion Foundation*, 2009 U.S. Dist. LEXIS 90555, at *35-36.

Even if this court determines that *Parker* does not control and chooses to address the Plaintiffs' Free Exercise claim, the claim should be dismissed because reciting the Pledge is a patriotic exercise, not a religious one. *See, e.g.*, *Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring) ("Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one"). Moreover, under *Smith*, both the state and federal Pledge statutes challenged by Plaintiffs are neutral and generally applicable.[11] The clear language of the New Hampshire School Patriot Act indicates that the purpose of reciting the Pledge is to teach students about American history.[12] The statute applies to all public schools in New Hampshire. It does not refer to religion, nor does its stated purpose focus on religion. Furthermore, the Act allows students to choose to not participate in reciting the Pledge.

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

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

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the decision below.

Respectfully submitted,

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Dated: April 7, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2010, I filed the ***AMICUS CURIAE*** **Brief** electronically with the Clerk of the United States Court of Appeals for the First Circuit, using the CM/ECF system. I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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I further certify that some of the participants in the case are not registered CM/ECF users. I have emailed the foregoing document(s) to the following non-CM/ECF participants with their written consent in accordance with Fed. R. App. P. 25(c)(1)(D):

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Finally, counsel for Defendant School Districts, David H. Bradley, filed a letter with this Court on 11/23/2009, requesting that he "be removed from the service list." The Court apparently granted such request in its Order dated 01/22/2010.

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