APPEAL NO. 09-2473

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, ET AL.

Plaintiffs-Appellants

V.

UNITED STATES, ET AL.

Defendants-Appellees

DRESDEN SCHOOL DISTRICT; HANOVER SCHOOL DISTRICT

Defendants

On Appeal from the United States District Court
for the District of New Hampshire
Civil Case No. 1:07-cv-356

AMICI CURIAE BRIEF OF THE ALLIANCE DEFENSE FUND AND CORNERSTONE POLICY RESEARCH IN SUPPORT OF APPELLEES SUPPORTING AFFIRMANCE

David A. Cortman
GA Bar No. 188810
dcortman@telladf.org
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Road
Building D, Suite 600
Lawrenceville, Georgia 30043
(770) 339-0774

Jeremy D. Tedesco
AZ Bar No. 023497
jtedesco@telladf.org
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Alliance Defense Fund and Cornerstone Policy Research state that they have no parent corporation and issue no stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

I. STATEMENT OF IDENTITY OF AMICI, INTEREST IN THE CASE, AND SOURCE OF ITS AUTHORITY TO FILE

Alliance Defense Fund ("ADF") is a non-profit, religious liberties organization, devoted to the defense and advocacy of religious freedom. ADF pursues its goal of protecting religious liberty by providing strategic planning, training, and funding to attorneys and organizations regarding religious civil liberties.

ADF and its allied organizations represent thousands of Americans who desire to maintain their right to religious expression, and to defend the Pledge of Allegiance against constitutional attacks. ADF has advocated for the rights of Americans under the First Amendment in hundreds of significant cases throughout the United States, having been directly or indirectly involved in at least 500 cases and legal matters, including numerous religious expression cases before the United States Supreme Court. ADF has also filed amicus curiae briefs in other cases challenging the constitutionality of the Pledge of Allegiance.

Cornerstone Policy Research ("CPR") is a non-profit organization whose mission is to strengthen and defend New Hampshire families by educating and equipping its citizens and advocating for God-ordained

institutions throughout the state. CPR advances this mission by researching and educating, producing policy reports, promoting responsible citizenship, and promoting unity among pro-family groups. The right to religious liberty is among the most important of the traditional, foundational principles of New Hampshire, and of this great Nation, CPR seeks to defend and preserve.

This case is of significant concern to ADF and CPR because it involves the proper interpretation and application of the Establishment Clause to the daily recitation of the Pledge of Allegiance, an ubiquitous practice across the United States. ADF and CPR represent thousands of Americans across the nation and in the State of New Hampshire who desire to see the Pledge of Allegiance protected against constitutional attacks, and preserved as an essential component of our nation's cultural and historical heritage.

All parties participating in this appeal have consented to the filing of this amicus brief. The school districts, who have indicated that they do not want to participate in this appeal and requested to be removed from the service list, have stated that they neither object nor consent to the filing of this brief.

II. SUMMARY OF ARGUMENT

The lower court correctly decided that daily recitation of the Pledge of Allegiance in New Hampshire public schools does not violate the Plaintiffs' constitutional rights. However, it should not have reached the merits because the Plaintiffs lack Article III standing to sustain this action.[1] As the Supreme Court has often stated,

> Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. For that reason, every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it.

[1] In the proceedings below, the court granted the rule 12(b)(6) motions to dismiss filed by the defendant school districts, intervenors-defendants Muriel Cyrus, et al., and intervenor-defendant United States of America. (Order at 35.) In making its ruling, it was unnecessary for the lower court to evaluate the merits of Plaintiffs' claim, since the focus in the motion to dismiss context is "not on 'whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" (*Id.* at 7, *quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).) A ruling that Plaintiffs lacked standing—like a ruling that Plaintiffs failed to state a claim—does not necessitate an evaluation of the merits of Plaintiffs' claims. And the standing issue should be resolved first, since it involves the question of a court's jurisdiction to hear the case. As discussed *infra*, the standing issue is easily resolved against the Plaintiffs here by the simple fact that the Pledge of Allegiance is a patriotic, not religious, exercise.

Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986) (citation omitted). *Accord United States v. AVX Corp.*, 962 F.2d 108, 113 (1st Cir. 1992) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("[S]tanding is a 'threshold question in every federal case, determining the power of the court to entertain the suit'").) Plaintiffs lack this "indispensable component of federal court jurisdiction," *Osediacz v. City of Cranston*, 414 F.3d 136, 139 (1st Cir. 2005), and their lawsuit should be dismissed accordingly.

Plaintiffs include the Freedom From Religion Foundation, Inc. ("FFRF"), and the Doe children and their parents. FFRF's claimed injury is based entirely on the injuries allegedly suffered by its members. (First Amended Complaint ("FAC") ¶ 36 (claiming FFRF represents its members whose injuries are the "same or similar" to the injuries suffered by the Does).) Thus, FFRF's standing is entirely contingent on the ability of the Does to establish their standing to sue, which they cannot do.

The Plaintiffs lack standing because their alleged injuries are predicated on a fiction: that inclusion of the words "under God" in the Pledge of Allegiance transforms its recitation into a religious exercise or

activity. The lower court correctly found that the Pledge of Allegiance is a patriotic, not religious, exercise: "[T]he Pledge . . . is a civic patriotic statement – an affirmation of adherence to the principles for which the Nation stands. Inclusion of the words "under God" . . . does not convert the Pledge into a prayer or religious exercise." (Order at 20.)[2] Considering the non-religious nature of the Pledge, Plaintiffs claimed injuries of feeling "coerced" to say the Pledge and feeling like political outsiders go up in smoke. Such injuries are only cognizable when a person is required or feels coerced to participate in a religious exercise or activity, which the Pledge is not.[3] The lower court should not have

[2] The lower court's decision is consistent with the Supreme Court's most recent statement regarding the Pledge. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 6 (2004) (Pledge of Allegiance is "a patriotic exercise designed to foster national unity and pride in [the nation's] principles") (emphasis added).

[3] While Plaintiffs raise other causes of action in addition to their Establishment Clause claims, the injuries alleged to support standing as to these claims are also entirely dependent on the fiction that the Pledge is a religious exercise that requires students to recite religious dogma. (FAC ¶ 56 (free exercise claim based on the Doe children being "[c]oerc[ed] . . . to recite a purely religious ideology"); ¶¶ 64, 65 (equal protection claim based on notion that Pledge requires students to recite "purely Monotheistic religious dogma" and that the "now-religious Pledge creates a societal environment where prejudice against Atheists . . . is perpetuated").) Thus, the Plaintiffs have not alleged cognizable injuries to support these claims as well.

reached the merits, but rather should have dismissed the case due to Plaintiffs lack of Article III standing.

Plaintiffs' other alleged injuries are insufficient for similar reasons. First, Plaintiffs assert their belief that the Establishment Clause prohibits the government from including the words "under God" in the Pledge of Allegiance. But the Supreme Court has held that the vigor with which one believes in the separation of church and state, and the "psychological consequence" (however severe) one suffers from observing conduct that (allegedly) violates that separation, is "not an injury sufficient to confer standing under Art. III." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485-86 (1982).

Second, Plaintiffs include several allegations regarding the taxes they pay that are woefully inadequate to support a finding of taxpayer standing. Importantly, the FAC does not contain a single allegation identifying a specific expenditure of state or local funds appropriated for the purpose of implementing the State Pledge statute, or the School

Districts' Pledge practices.[4] Such an allegation is a prerequisite to taxpayer standing. *See Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007) (proof of extraction and spending of tax dollars in support of program that allegedly violates Establishment Clause prerequisite to taxpayer standing); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 348-49 (2006) (same). Further, Plaintiffs' allegations that their taxes fund the Defendant school districts are insufficient to confer taxpayer standing because the expenditures complained of would have been incurred with or without the recitation of the Pledge.

Casting aside the rhetoric and bald assertions upon which Plaintiffs' alleged "injuries" are based, the FAC really complains of one thing: Plaintiffs' belief that including the words "under God" in the Pledge of Allegiance violates the Establishment Clause. This is woefully inadequate to satisfy Article III's stringent standing

[4] The lower court rejected Plaintiffs' claim of taxpayer standing to challenge the federal Pledge statute. (Docket No. 44, District Court Opinion at 18 ("Under even the most generous reading of plaintiffs' complaint, it simply does not contain allegations sufficient to" confer taxpayer standing).) Plaintiffs did not appeal that Order in their Notice of Appeal.

requirements. The lower court properly dismissed Plaintiffs' lawsuit, but should have done so based on lack of Article III standing.

III. ARGUMENT

Plaintiffs seeking redress in federal court must make three showings to establish Article III standing: 1) that they have suffered an "injury in fact" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical'"; 2) that there is "a causal connection between the injury and the conduct complained of"; and 3) it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (citations omitted). The burden of proving these elements lies with the party invoking federal jurisdiction. *Id.* at 561.

Where standing is challenged in the motion to dismiss context, as here, the First Circuit has held that "purely conclusory" allegations will not suffice:

> Because standing is fundamental to the ability to maintain a suit, and because the Court has saddled the complainant with the burden of clearly alleging facts sufficient to ground standing, we are of the opinion that, where standing is at issue, heightened specificity is obligatory at the pleading stage. The resultant burden cannot be satisfied by purely

> conclusory allegations . . . . [Rather] [t]he complainant must set forth reasonably definite factual allegations, either direct or inferential, regarding each material element needed to sustain standing.

AVX Corp. 962 F.2d at 115 (citation omitted). When considering a motion to dismiss, a court typically accepts all well-plead allegations in a complaint as true, but "this formulation does not mean . . . that a court must (or should) accept every allegation made by the complainant, no matter how conclusory or generalized." *Id.* *See also Resolution Trust Corp. v. Driscoll*, 985 F.2d 44, 48 (1st Cir. 1993) (in 12(b)(6) context, court need not credit "bald assertions" or "legal conclusions" as true); *AVX Corp.*, 962 F.2d at 115 (stating that on motion to dismiss court need not accept as true "bald assertions," "unsubstantiated conclusions," "subjective characterizations," "optimistic predictions," or "problematic suppositions").

Plaintiffs' FAC is saturated with bald assertions, conclusory allegations, and legal conclusions, all of which reflect Plaintiffs' belief that including the words "under God" in the Pledge violates the Constitution. But these errant and self-serving allegations are simply insufficient to confer standing. They do not establish a concrete and particularized injury, but rather simply demonstrate the vigor of

Plaintiffs' commitment to church state separation, which is insufficient as a matter of law to satisfy Article III.

A. Plaintiffs Lack Standing To Challenge The New Hampshire Law Requiring Recitation Of The Pledge In Public Schools And The School Districts' Policies Implementing The Pledge Requirement.

Plaintiffs allege both noneconomic (coercion and political outsider status) and economic (use of tax funds in aid of religion) "injuries" in an attempt to establish their standing to challenge the State Pledge statute and School Districts' Pledge practices. As shown below, these "injuries" are insufficient to satisfy Article III's requirement that they demonstrate a concrete and particularized injury to maintain their suit.

1. Plaintiffs' Claimed Injuries Require Exposure To A Religious Exercise, And The Pledge of Allegiance Is A Patriotic, Not Religious, Exercise.

Plaintiffs' claimed injuries are that daily exposure to the Pledge of Allegiance is "coercive," and makes them suffer the "stigmatic injury" of feeling like political outsiders. (FAC ¶¶ 51, 52.)[5] These injuries are predicated on the Establishment Clause, and thus as a prerequisite require a showing that Plaintiffs have been exposed to a religious

[5] They make these claims despite the fact that the law allows children to opt out of saying the Pledge. (FAC ¶ 17 ("Pupil participation in the recitation of the pledge of allegiance shall be voluntary").)

exercise or activity. For example, in *Valley Forge*, 454 U.S. at 485-86, the Supreme Court explained that the plaintiffs in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), had standing to challenge the daily recitation of Bible verses and the Lord's Prayer solely because such activities were a religious exercise, not because they alleged a violation of the Establishment Clause:

> The plaintiffs in *Schempp* had standing, not because their complaint rested on the Establishment Clause-for as *Doremus* demonstrated, that is insufficient-but because impressionable schoolchildren were subjected to unwelcome religious exercises or were forced to assume special burdens to avoid them. Respondents have alleged no comparable injury.

Valley Forge, 454 U.S. at 487 n.22 (emphasis added).

Applying this principle to the case at bar, the Plaintiffs have not been injured because, as a matter of fact and law, the Pledge of Allegiance is not a religious exercise. This is precisely what the lower court held:

> The Pledge of Allegiance is not a religious prayer, nor is it a "nonsectarian prayer" of the sort at issue in *Lee*, 505 U.S. at 589, 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. Rather, the Pledge, in content and function, is a civic patriotic statement — an affirmation of adherence to the principles for which the Nation stands.

> Inclusion of the words "under God," in context, does not convert the Pledge into a prayer or religious exercise . . . .

(Order at 19-20 (citation omitted).)

The Supreme Court, individual Justices in concurring and dissenting opinions, and other federal courts have likewise held that the Pledge of Allegiance is a patriotic, not religious, exercise. In *Elk Grove Unified School District v. Newdow*, a majority of Supreme Court justices concluded that "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." 542 U.S. 1, 6 (2004) (emphasis added). Then Chief Justice Rehnquist agreed in his concurring opinion:

> [T]he phrase "under God" in the Pledge [does not] convert[] 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.

Id. at 31 (Rehnquist, C.J., concurring) (emphasis added). Justice O' Connor similarly concluded that the Pledge is a form of "ceremonial deism," *id.* at 37, which a reasonable observer does not "perceive . . . as signifying a government endorsement of any specific religion, or even of religion over nonreligion," *id.* at 36 (O'Connor, J., concurring). Justice O'Connor also found that acts of ceremonial deism "are simply not religious in character." *Id.* at 44 (O'Connor, J., concurring) (emphasis added). *Accord Myers v. Loudoun County Public Schools*, 418 F.3d 395, 397 (4th Cir. 2005) (the "Pledge is not a religious exercise and does not threaten an establishment of religion") (emphasis added).[6]

Because the Pledge is a patriotic (not religious) exercise, Plaintiffs' alleged "injuries" cannot confer Article III standing. Plaintiffs claim they are injured because being subjected to daily recitation of the Pledge (which they can opt out of) results in: 1) being indirectly "coerced" into participating in a religious exercise because of the classroom setting and peer pressure (FAC ¶ 55); and 2) the "stigmatic

[6] Consistent with this unambiguous precedent, the State of New Hampshire Pledge statute is titled the "School Patriot Act" and treats the recitation of the Pledge as part of "a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state." (FAC ¶ 17.)

injury of being turned into 'outsiders, not full members of the political community'" (*id.* ¶ 51). These claimed injuries fail as a matter of law because the Pledge is not a religious exercise.

Consider, for example, the Plaintiffs' "coercion" injury. To allege a "coercion" injury in the Establishment and Free Exercise context, one must be compelled to participate, directly or "indirectly," in a religious exercise or activity.[7] As the Fourth Circuit held in rejecting an identical challenge to the Pledge practices of a Virginia School District, "all of the cases holding that indirect coercion of religious activity violates the Establishment Clause presuppose that the challenged activity is a *religious exercise*." *Myers*, 418 F.3d at 406-07. *Cf. Lee v. Weisman*, 505 U.S. 577, 599 (1992) (describing sole issue as "whether a religious exercise may be conducted at a graduation ceremony") (emphasis added). After reviewing the Supreme Court's decisions striking down the religious exercises in *Lee*, 505 U.S. at 577, *Schempp*, 374 U.S. at 203, and *Engel v. Vitale*, 370 U.S. 421 (1962), the Fourth Circuit distinguished those cases from a challenge to the Pledge:

---

[7] It is undisputed here that Defendants do not directly compel the Plaintiffs to recite the Pledge. (FAC ¶ 55 ("Plaintiffs all acknowledge and stipulate to the fact that none of them are or have been actually compelled to say the words, 'under God,' in the Pledge of Allegiance").)

> The prayers [were] ruled unconstitutional in *Lee, Schempp*, and *Engel,* and were viewed by the Court as distinctly religious exercises. It was the religious nature of these activities that gave rise to the concern that non-participating students would be indirectly coerced into accepting a religious message. The indirect coercion analysis discussed in *Lee, Schempp*, and *Engel,* simply is not relevant in cases, like this one, challenging non-religious activities.

Myers, 418 F.3d at 408.

In a similar vein, Justice O'Connor also rejected any possible concerns over coercion where recitation of the Pledge is at issue: "Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential . . . because such acts are simply not religious in character." *Newdow*, 542 U.S. at 44 (O'Connor, J., concurring).

Consistent with this precedent, the lower court correctly found that New Hampshire's Pledge law "does not have the effect of coercing the Doe children to support or participate in religion or its exercise." (Order at 17.) The court rightly distinguished exposure to the Pledge from exposure to the prayer involved in *Lee* based on the "critical and dispositive difference" that "the Pledge of Allegiance is not a religious prayer, . . . and its recitation in schools does not constitute a 'religious exercise.'" (Order at 19-20.) Based on this indisputable fact, the Court

went on to properly hold that "[p]eer 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." (Order at 20 (emphasis added).) This analysis is also dispositive of whether Plaintiffs have standing. Exposing students to a patriotic, rather than a religious, exercise does not even implicate Establishment Clause concerns. Accordingly, Plaintiffs have not suffered a cognizable Establishment Clause injury and their suit should have been dismissed due to their lack of Article III standing.

Plaintiffs' alleged political outsider "injury" suffers the same fatal flaw. It is predicated on the Pledge being treated as a religious exercise that endorses religion over nonreligion, which it is not, and thus cannot confer standing. As Justice O'Connor, author and main proponent of the "endorsement test" (upon which Plaintiffs' alleged "political outsider" injury is based, *see* FAC ¶ 51) stated, a reasonable observer would not perceive the Pledge "as signifying a government endorsement of any specific religion, or even of religion over nonreligion." *Newdow*,

542 U.S. at 36 (O'Connor, J., concurring).[8] Because the Pledge is not a religious exercise and a reasonable observer would not view the Pledge as endorsing a particular religion or religious belief, Plaintiffs have simply not suffered a cognizable "political outsider" injury by being exposed to the Pledge.

2. Plaintiffs' Bald Assertions and Legal Conclusions That The Pledge Is Overtly Religious Does Not Transmute A Patriotic Exercise Into A Religious Activity.

The Plaintiffs try to resuscitate their standing argument by repeatedly alleging in their Complaint that the Pledge of Allegiance is a religious exercise that endorses Monotheism and Christianity. (FAC ¶ 28 (Pledge "endors[es] (Christian) Monotheism"); ¶ 65 (describing "under God" as "purely Monotheistic religious dogma").) In the same vein, they also repeatedly claim that the Pledge is religious and sectarian in nature. (Compl. ¶ 56 (reciting Pledge requires students "to

[8] Justice O'Connor further stated that the reasonable observer, who is "fully cognizant of the history, ubiquity, and context" of the Pledge of Allegiance would view the inclusion of the phrase "under God" as "merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority." *Id.* at 40 (O'Connor, J., concurring) (emphasis added).

recite a purely religious ideology"); ¶ III of Prayer for Relief (describing Pledge as the "now-sectarian Pledge of Allegiance").

As noted *supra*, such bald assertions and inaccurate legal conclusions are properly rejected in the motion to dismiss context. *See, e.g., Resolution Trust Corp.*, 985 F.2d at 48 ("bald assertions" and "legal conclusions" not tolerated in context of 12(b)(6) motion). As the lower court properly found, and consistent with other federal courts and the Supreme Court, reciting the Pledge is a patriotic, not religious, exercise. Plaintiffs simply cannot satisfy Article III's injury requirement by littering their FAC with allegations that are contrary to undisputed facts and settled law. Plaintiffs' unsupported allegations that the Pledge is a religious exercise that endorses Monotheism does not transmute the Pledge into a religious exercise, no matter how many times they repeat them.

3. Plaintiffs' Remaining "Injuries" Are Insufficient to Confer Standing.

Stripped of their coercion and political outsider injuries, the only noneconomic "injuries" the Plaintiffs have left are: 1) their belief that the Pledge violates the Establishment Clause; and 2) their discomfort at observing a practice that they believe violates the Establishment

Clause. Federal courts, including the Supreme Court, have repeatedly held that these types of "injuries" do not confer standing.

The Plaintiffs are committed to separation between church and state. (FAC ¶ 5 (Plaintiffs are dedicated to "keeping church and state separate").) And plainly, they view the inclusion of "under God" in the Pledge as a violation of the church-state separation that they believe is required by the Establishment Clause. (FAC ¶ 34 (Congress's act of including "under God" in the Pledge "unquestionably violated the Supreme Court's Establishment Clause tests").) The problem for Plaintiffs is that no Court has ever held that the mere pleading of an Establishment Clause violation satisfies Article III's injury-in-fact requirement. Indeed, in *Valley Forge*, 454 U.S. at 472, the Supreme Court rejected the Third Circuit's finding that alleging a violation of the "shared individuated right to a government that 'shall make no law respecting the establishment of religion'" is a sufficient injury to satisfy Article III. *Id.* at 482 (citation omitted). As the Court put it,

> This Court repeatedly has rejected claims of standing predicated on "the right, possessed by every citizen, to require that the Government be administered according to law . . . ." Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government."

Id. at 482-83 (citations omitted). The D.C. Circuit Court of Appeals recently reaffirmed this principle: "A per se rule defining automatic injury-in-fact for every plaintiff who claims an Establishment Clause violation . . . would run counter to decades of settled jurisprudence setting forth the requirements for standing in Establishment Clause cases." *In re Navy Chaplaincy*, 534 F.3d 756, 763 (D.C. Cir. 2008). The Plaintiffs' claim that the recitation of the Pledge violates the Establishment Clause is precisely the type of generalized grievance that cannot satisfy Article III's injury-in-fact requirement.

Any attempt by Plaintiffs to predicate their standing on the psychological distress or discomfort they experience as a result of being exposed to what they believe is a violation of the Constitution would likewise be fruitless. Once again, the Supreme Court (and other federal courts, including this Court) has rejected similar "injuries" as insufficient to confer standing:

> Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III . . . . It is evident that respondents are firmly committed to the constitutional

> principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 454 U.S. at 485-86 (citations omitted). *Accord Freedom From Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463, 1468 n.3 (7th Cir. 1988) (rejecting claim that "severe distress" at viewing Ten Commandments monument conferred standing, concluding that "irrespective of the fervor with which a litigant is committed to the principle of separation of church and state, that commitment alone does not satisfy the standing doctrine"); *AVX Corp.*, 962 F.2d at 114 ("A mere interest in an event-no matter how passionate or sincere the interest and no matter how charged with public import the event-will not substitute for an actual injury)." Whatever distress and discomfort Plaintiffs experience, and no matter how severe, is insufficient to confer Article III standing upon them.

4. Plaintiffs Lack Taxpayer Standing Because They Cannot Allege An Expenditure Of Tax Money Allocated Specifically To Implement The State's Pledge Statute Or Districts' Pledge Practices.

Plaintiffs' FAC severely curtailed the allegations contained in their original complaint concerning their standing as taxpayers. However, Plaintiffs' FAC still contains several (woefully inadequate)

allegations that suggest that Plaintiffs have not abandoned that basis for standing altogether. For example, Plaintiffs allege that they are State and local taxpayers, whose taxes fund the Defendant school districts. (FAC ¶¶ 5-6.) These are the only allegations in the Complaint that Plaintiffs could rely on to support taxpayer standing, and they are insufficient to confer standing as a matter of law.

In *Flast v. Cohen*, 392 U.S. 83 (1968), the Supreme Court created an exception in certain types of Establishment Clause cases to the general rule that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers." *DaimlerChrysler Corporation v. Cuno*, 547 U.S. 332, 346 (2007). The Supreme Court has recently emphasized that "the *Flast* exception has a 'narrow application in our precedent,' that only 'slightly lowered' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Hein v. Freedom From Religion Foundation*, 551 U.S. 587, 609 (2007) (citations omitted).

Under *Flast*, *Hein*, and *DaimlerChrysler*, to establish standing a taxpayer-plaintiff must show that the state has extracted taxes from them, or has appropriated and spent public monies, to fund a program

that allegedly violates the Establishment Clause. For example, in *Hein*, the Supreme Court held that the plaintiffs lacked standing to challenge the use of tax money by the Executive Branch of the federal government to pay for religious conferences and speeches. *Id.* at 605. The plaintiffs in *Hein* argued for a broad interpretation of *Flast*, stating that *Flast* confers standing where "any 'expenditure of government funds in violation of the Establishment Clause'" is challenged. *Id.* at 603. But this Court rejected this interpretation, instead holding that only "expenditures . . . made pursuant to an express congressional mandate and a specific congressional appropriation" satisfied *Flast*'s standing requirements. *Id.* *Accord DaimlerChrysler*, 547 U.S. at 348 (observing that the taxpayer injury that satisfies standing in Establishment Clause cases is "the very 'extract[ion] and spend[ing]' of 'tax money' in aid of religion" (quoting *Flast*, 392 U.S. at 106)).

In fact, as far back as 1952, this Court held that a taxpayer challenging a practice under the Establishment Clause must allege "a good-faith pocketbook action" in which there is a "direct dollars-and-cents injury." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). This requires a taxpayer-plaintiff to show "a

measurable appropriation or disbursement of [public] funds occasioned solely by the activities complained of." *Id*. The taxpayer-plaintiff in *Doremus* lacked standing because he could not show that any tax funds had been spent on the school's practice of having the Bible read at the beginning of each school day. In rejecting plaintiff's standing, the Supreme Court said that he, like Plaintiffs here, was seeking to litigate a "grievance [that] is not a direct dollars-and-cents injury but is a religious difference." *Id*.

Plaintiffs lack taxpayer standing here for the same reason the Supreme Court rejected standing in *Hein* and *Doremus*. The FAC simply does not allege that State or local taxpayer funds have been "extracted and spent" to implement the Pledge law and practices of which Plaintiffs complain. In fact, the New Hampshire Pledge recitation statute, RSA 194:15-c, does not require, authorize, or mention the expenditure of tax money to implement the statute. (FAC ¶ 17.)

The Plaintiffs' sparse allegations that they pay taxes that fund the schools in which the complained of Pledge practices occur are insufficient to confer taxpayer standing for an additional reason: these tax dollars would have been expended with or without the recitation of

the Pledge. The First Circuit has held that allegations of "incidental expenses," like those contained in the FAC, do not meet the taxpayer standing requirement of pleading a "direct dollars-and-cents injury." *Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 639 (1st Cir. 1990) (quoting *Doremus*, 342 U.S. at 434).

Other Circuit Courts have applied this principle in denying taxpayer standing. For example, the Ninth Circuit denied standing to taxpayers who challenged a public school's sponsorship of prayer at a graduation ceremony. *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999). In *Doe*, the plaintiffs alleged that tax dollars had been used to rent the hall, print programs, buy decorations, and hire security guards. *Id.* at 794. But the school would have incurred these costs regardless of whether a student prayed at the graduation ceremony, so the court rejected the challenge: "[W]hen a plaintiff has failed to allege that the government spent tax dollars solely on the challenged conduct, we have denied standing." *Id.* Similarly, the Seventh Circuit rejected a claim of taxpayer standing to challenge a crucifix located in a public park because "although Township funds are spent maintaining the Park areas surrounding the crucifix, this cost would be incurred with or

without the presence of the crucifix." *Gonzales v. North Twp. of Lake County, Indiana*, 4 F.3d 1412, 1416 (7th Cir. 1993).

Accordingly, the Plaintiffs cannot base their taxpayer standing on the fact that they pay taxes that fund the schools where their children encounter the Pledge. Presumably, Plaintiffs' unspoken complaint is that their tax dollars pay the salaries of the teachers who implement the Pledge recitation requirement. Such "incidental expenses," *Schneider*, 917 F.2d at 639, would be incurred with or without recitation of the Pledge, and thus are insufficient to confer standing.

B. Plaintiffs Lack Standing To Challenge The Federal Statute Specifying The Content Of The Pledge Of Allegiance.[9]

As discussed, the Plaintiffs complain that being subjected to daily recitation of the Pledge causes them two primary injuries—feeling "coerced" to say the Pledge and feeling like political outsiders. While these "injuries" are insufficient to confer standing to challenge the State

[9] While the relief requested in Plaintiffs' FAC appears to abandon all claims against the federal Pledge statute, Plaintiffs nonetheless urge this Court "to declare the Act of 1954 invalid, and to enjoin Defendants from using the religious Pledge of Allegiance in the public schools." (Appellants' Br. 64.) Because Plaintiffs persist in seeking relief against the federal statute, *amici* briefly address Plaintiffs' lack of standing to seek such relief.

law and Districts' practices, they are irrelevant to their standing to challenge the federal Pledge statute because it does not require New Hampshire (or any other State) to provide for the recitation of the pledge in its public schools.

Indeed, as the lower court properly found, the federal statute prescribing the content of the Pledge of Allegiance, 4 U.S.C. § 4, "does not command any person to recite it, or to lead others in its recitation." (Order at 6-7.) The Plaintiffs' FAC concedes this, as it alleges that the School Districts implemented the Pledge practices solely pursuant to the New Hampshire Pledge statute. (FAC ¶ 42 ("Pursuant to RSA § 194:15-c . . . Defendants HSD and DSD have their teachers and/or other government agents lead their public school students in reciting the Pledge of Allegiance during school hours") (emphasis added).) Based on these undisputed facts, the lower court was correct in finding the federal statute irrelevant to Plaintiffs' claims, and that their alleged injuries stem solely from the implementation of the New Hampshire Pledge statute. (Order at 7.)

Because the federal statute does not result in the Pledge practices of which Plaintiffs complain, their standing to challenge the federal

statute can only be based on two grounds—their status as federal taxpayers and their view that the Pledge violates the Establishment Clause. The lower court already rejected Plaintiffs' claim of taxpayer standing to challenge the federal statute, *see supra*, n.3, and Plaintiffs did not appeal this ruling.

Plaintiffs' complaint that the federal statute violates the Establishment Clause—is, as noted *supra*, insufficient to confer standing as a matter of law. As they put it, Congress's act of including "under God" in the Pledge "unquestionably violated the Supreme Court's Establishment Clause tests." (FAC ¶ 34.) Once again, under *Valley Forge*, 454 U.S. at 464, such claims—alleging a general right to have the government act according to (one's view of) the law—cannot suffice to confer standing on a plaintiff to challenge a law on Establishment Clause grounds. Neither Plaintiffs' "firm[] commit[ment] to the constitutional principle of separation of church and State," nor the "intensity of [their] interest" are sufficient to confer standing. *Valley Forge*, 454 U.S. at 486.

C. FFRF Lacks Standing Because None Of Its Members Have Standing To Challenge The Pledge Of Allegiance Laws And Practices At Issue In This Case.

The first of three prerequisites for an association to have standing to sue is to show that "at least one of [its] members possesses standing to sue in his or her own right." *AVX Corp.*, 962 F.2d at 116. FFRF premises its standing solely on the "injuries" it claims the Does (who are members of FFRF) have suffered. (FAC ¶ 36 ("Plaintiff FFRF represents its members, including the Doe Plaintiffs, as well as others who may suffer the same or similar injuries that the Doe Plaintiffs endure . . . .").) Since the Does have not suffered a cognizable injury, *see supra*, neither have any of FFRF's other members, and FFRF's claim of associational standing fails.

IV. CONCLUSION

The lower court rightly dismissed Plaintiffs' lawsuit. It erred, however, in reaching the merits. It should have dismissed Plaintiffs' lawsuit due to their lack of Article III standing. All of Plaintiffs' alleged "injuries" are predicated on exposure to a religious exercise and the Pledge of Allegiance, as a matter of fact and law, is a patriotic, not religious, exercise. Thus, Plaintiffs' alleged injuries fail to confer standing as a matter of law.

Dated: April 13, 2010.

Respectfully submitted,

s/ Jeremy D. Tedesco

David A. Cortman
GA Bar No. 188810
dcortman@telladf.org
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Road
Building D, Suite 600
Lawrenceville, Georgia 30043
(770) 339-0774

Jeremy D. Tedesco
AZ Bar No. 023497
jtedesco@telladf.org
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6140 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Century Schoolbook.

Dated: April 13, 2010

s/ Jeremy D. Tedesco

David A. Cortman
GA Bar No. 188810
dcortman@telladf.org
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Road
Building D, Suite 600
Lawrenceville, Georgia 30043
(770) 339-0774

Jeremy D. Tedesco
AZ Bar No. 023497
jtedesco@telladf.org
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

Counsel for the Plaintiffs-Appellants :

Michael A. Newdow
PO Box 233345
Sacramento, CA 95823
newdowlaw@gmail.com

Counsel for Defendant-Appellee Muriel Cyrus, et al.:

Bradford T. Atwood
Clauson, Atwood & Spaneas
Ten Buck Road
Hanover, NH 03755
batwood@cas-law.net

Kevin J. Hasson
Eric C. Rassbach
The Becket Fund for Religious Liberty
3000 K Street, NW Suite 220
Washington, DC 20009
khasson@becketfund.org
erassbach@becketfund.org

Counsel for the Federal Defendants-Appellees:

Theodore Charles Hirt
US Dep't of Justice
Office of Immigration Litigation
5312
PO Box 878
Ben Franklin Station
Washington, DC 20044
Theodore.hirt@usdoj.gov

Lowell Vernon Sturgill, Jr.
US Dep't of Justice
Civil Division
Room 7241
950 Pennsylvania Ave., NW
Washington, DC 20530
Lowell.Sturgill@usdoj.gov

Gretchen Leah Witt
US Attorney's Office
53 Pleasant Street
4th Floor
Concord, NH 03301
Gretchen.witt@usdoj.gov

Counsel for Defendant-Appellee State of New Hampshire:

Nancy Smith
Office of Attorney General
33 Capitol St.
Concord, NH 03301
Nancy.Smith@doj.nh.gov

Counsel for Amici Curiae American Center for Law and Justice, et al.:

Jay A. Sekulow, Esq.
American Center for Law and Justice, Inc.
201 Maryland Ave., NE
Washington, DC 20002
sdemos@aclj.org

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document to the following non-CM/ECF participants via U.S. Mail:

Counsel for the Plaintiffs-Appellants :

Rosanna T. Fox, Esq.
The Freedom from Religion Foundation
12 Eldorado Circle
Nashua, NH 03062
Rosief13@comcast.net

Counsel for the Federal Defendants-Appellees:

Eric. B. Beckenhauer
US Department of Justice
20 Massachusetts Ave NW
Washington, D.C. 20001
Eric.beckenhauer@usdoj.gov

Counsel for Amici Curiae
American Center for Law and
Justice, et al.:

John Anthony Simmons, Sr.
John Anthony Simmons PLLC
886 Lafayette Road
Hampton, NH 03842
info@clearvictoryministries.org

s/ Jeremy D. Tedesco

Jeremy D. Tedesco
AZ Bar No. 023497
jtedesco@telladf.org
ALLIANCE DEFENSE FUND
15100 North 90th Street
Scottsdale, Arizona 85260
(480) 444-0020
Attorney for Amici Curiae