Appeal No. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THE FREEDOM FROM RELIGION FOUNDATION; PAT DOE, *ET AL.*,

Plaintiffs-Appellants,

v.

UNITED STATES; STATE OF NEW HAMPSHIRE; *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, Hon. Steven J. McAuliffe, Civil Action No. 1:07-cv-356

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF AFFIRMANCE

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Freedom from Religion Foundation et. al. v. United States, State of New Hampshire et al., **Civil Action No. 1:07-cv-356, Appeal No. 09-2473**

CORPORATE DISCLOSURE STATEMENT

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Amicus curiae Foundation for Moral Law is a designated Internal Revenue Code 501(c)(3) non-profit corporation. *Amicus* has no parent corporations, and no publicly held company owns ten percent (10%) or more of *amicus*. No other law firm has appeared on behalf of the Foundation in this or any other case in which it has been involved.

s/ John A. Eidsmoe
John A. Eidsmoe

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STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus Curiae Foundation for Moral Law (the Foundation), is a national public-interest organization based in Montgomery, Alabama, dedicated to defending the unalienable right to acknowledge God. The Foundation promotes a return to the historic and original interpretation of the United States Constitution, and promotes education about the Constitution and the Godly foundation of this country's laws and justice system. To those ends, the Foundation has assisted in several cases concerning the public display of the Ten Commandments, the recitation of the Pledge of Allegiance, and other public acknowledgments of God.

The Foundation has an interest in this case because it believes that the phrase "under God" in the Pledge of Allegiance constitutes one of the many public acknowledgments of God that have been espoused from the very beginning of the United States as a nation. The Foundation believes that the government should encourage such acknowledgments of God because He is the sovereign source of American law, liberty, and government. This brief primarily focuses on whether the text of the Constitution should be determinative in this case, and whether the school districts' policies violate the Establishment Clause of the First Amendment.

SOURCE OF AUTHORITY TO FILE

Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

The action of the United States Congress inserting the words "under God" in the Pledge of Allegiance and of the State of New Hampshire enacting a statute concerning the recitation of the pledge, and the Defendant school districts' policies concerning voluntary recitation of the Pledge of Allegiance in the classroom ("Pledge policies") in no way violate the Establishment Clause of the First Amendment because the policies do not conflict with the text of that Amendment, particularly as it was historically defined by common understanding at the time of the Amendment's adoption.

This Court exercises judicial authority under the United States Constitution, and it should do so based on the text of the document from which that authority is derived. A court forsakes its duty when it rules based upon case *tests* rather than the Constitution's *text*. *Amicus* urges this Court to return to first principles in this case and to embrace the plain and original text of the Constitution, the supreme law of the land. U.S. Const. art. VI.

The text of the Establishment Clause states that "Congress shall make no law respecting an *establishment* of *religion*." U.S. Const. amend. I (emphasis added). When these words are applied to the Pledge policies, it becomes evident that the policies and the phrase "under God" in the Pledge do not dictate religion to anyone and do not represent any form of an establishment. The First Amendment

was intended to protect religious freedom, and the district court's order dismissing appellants' complaint is consistent with the Establishment Clause as it was intended by its Framers.

The words "under God" in the Pledge of Allegiance are not "purely religious" as plaintiffs allege; rather, they represent a philosophy of government held by the Framers and held by most Americans today, that in the words of the Declaration of Independence, our nation is entitled to independence by the "Laws of Nature and of Nature's God," that "all men are created equal," and that they "are endowed by their Creator with certain unalienable Rights . . . ." The placement of those words in the Pledge of Allegiance is a statement of this philosophy of government, as is the word "indivisible" and the phrase "with liberty and justice for all," and it does not constitute an establishment of religion.

ARGUMENT

> *This case would be easy if the [courts] were willing to abandon the inconsistent guideposts [they have] adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clauses.*

Van Orden v. Perry, 545 U.S. 677, 692-93, (2005) (Thomas, J., concurring).

I. THE CONSTITUTIONALITY OF THE PLEDGE POLICIES SHOULD BE DETERMINED BY THE TEXT OF THE FIRST AMENDMENT, NOT JUDICIALLY-FABRICATED TESTS.

The district court correctly ruled that the recitation of the Pledge in the New Hampshire public schools as provided by New Hampshire statutes does not constitute an establishment of religion. However, in reaching that correct result, instead of using the words of the Establishment Clause, the district court incorrectly based its ruling on various court-created tests rather than on the plain meaning of the First Amendment.

A. The Constitution is the "supreme Law of the Land."

The Constitution itself and all federal laws pursuant thereto are the "supreme Law of the Land." U.S. Const. art. VI. All judges take their oaths of office to support *the Constitution* itself — not a person, office, government body, or judicial opinion. *Id.* *Amicus* respectfully submits that this Constitution and the solemn oath thereto should control, above all other competing powers and influences, including the decisions of federal courts.

As Chief Justice John Marshall observed, the very purpose of a *written* constitution is to ensure that government officials, including judges, do not depart from the document's fundamental principles. "[I]t is apparent that the framers of the constitution contemplated that instrument, as a rule of government of *courts* . . . . Why otherwise does it direct the judges to take an oath to support it?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179-80 (1803).

James Madison insisted that "[a]s a guide in expounding and applying the provisions of the Constitution . . . . the legitimate meanings of the Instrument must be derived from the text itself." James Madison, Letter to Thomas Ritchie, September 15, 1821, *in* 3 *Letters and Other Writings of James Madison* 228 (Philip R. Fendall, ed., 1865). Chief Justice Marshall confirmed that this was the proper method of interpretation:

> As men whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

Gibbons v. Ogden, 22 U.S. 1, 188 (1824).

Thus, "[i]n expounding the Constitution . . . , every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *Holmes v. Jennison*, 39 U.S. (14 Peters) 540, 570-71 (1840).

And as the Court said in *District of Columbia v. Heller,* 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008), constitutional "words and phrases were used in their normal and ordinary as distinguished from technical meaning."

B. The various and conflicting court-created tests create a confusing labyrinth that contradicts the text of the Constitution and the history of our country.

By adhering to court-created tests rather than the legal text in cases involving the Establishment Clause, federal judges turn constitutional decision-making on its head, abandon their duty to decide cases "agreeably to the constitution," and instead mechanically decide cases agreeably to judicial precedent. *Marbury*, 5 U.S. at 180; *see also*, U.S. Const. art. VI. Reliance upon precedents such as *Lemon v. Kurtzman* and *Lee v. Weisman* is a poor and improper substitute for the concise language of the Establishment Clause, because attempting to draw a clear legal line without the "straight-edge" of the Constitution is simply impossible.

James Madison observed in *Federalist No. 62* that

> [i]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes, that no man who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62 (James Madison), at 323-24 (George W. Carey & James McClellan eds., 2001). The "law" in Establishment Clause cases changes so often

and is so incoherent that "no man . . . knows what the law is today, [or] can guess what it will be tomorrow,"[1] "leav[ing] courts, governments, and believers and nonbelievers alike confused . . . ." *Van Orden*, 545 U.S. 677, 694 (Thomas, J., concurring). "What distinguishes the rule of law from the dictatorship of a shifting Supreme Court majority is the absolutely indispensable requirement that judicial opinions be grounded in consistently applied principle." *McCreary County, Ky., v. ACLU of Kentucky*, 545 U.S. 844, 890-91 (2005) (Scalia, J., dissenting).

II. THE PLEDGE STATUTES AND POLICIES ARE NOT LAWS "RESPECTING AN ESTABLISHMENT OF RELIGION."

The First Amendment provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend I. The Pledge statutes and policies do not violate the Establishment Clause because they do not "respect," *i.e.*, concern or relate to, "an establishment of religion."

A. The Definition of "Religion"

It seems axiomatic that the courts cannot determine what is or is not an establishment of religion, without defining the term "religion" itself. And yet, in

[1] In the year 2005 alone, courts observed that the Supreme Court's Establishment Clause jurisprudence is: "marked by befuddlement and lack of agreement," *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 406 (4th Cir. 2005); "convoluted, obscure, and incapable of succinct and compelling direct analysis," *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 986 (D. N.D. 2005); and "mystif[ying] . . . inconsistent, if not incompatible," *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1173 (W.D. Wash. 2005).

the courts' myriad establishment clause rulings, the courts have conspicuously skirted their obligation to define religion. Without that definition, determining whether an action constitutes an establishment of religion is impossible.

1. The neutrality myth

The Religion Clauses of the First Amendment require that religions be treated fairly, but our United States was never intended to be "neutral" toward religion. The idea that religion and law are entirely separate spheres is unworkable and utterly foreign to the thinking of the Framers of the Constitution, who intended an institutional separation of church and state but not a separation of law and government from religious values. Arlin M. Adams and Charles J. Emmerich, *A Nation Dedicated to Religious Liberty: The Constitutional Heritage of the Religion Clauses* (University of Pennsylvania Press, 1999) 51-58ff.

The primary author of the Declaration of Independence, Thomas Jefferson, observed that, "No nation has ever existed or been governed without religion. Nor can be." Thomas Jefferson to Rev. Ethan Allen, *quoted in* James Hutson, *Religion and the Founding of the American Republic* 96 (1998). The Declaration of Independence itself rests America's right to independence squarely on "the Laws of Nature and of Nature's God" and states that "all Men are created equal" and are "endowed by their *Creator* with certain unalienable Rights . . . ." *Declaration of Independence* para. 2 (1776) (emphasis added). Like Jefferson, George

Washington declared that, "While just government protects all in their religious rights, true religion affords to government its surest support." *The Writings of George Washington* 432, vol. XXX (1932). The Northwest Ordinance of 1787, reenacted by the First Congress in 1789 and considered, like the Declaration of Independence, to be part of this nation's organic law, declared that, "Religion, morality, and knowledge [are] necessary to good government." Northwest Ordinance, Article III, July 13, 1787, *reprinted in* 1 *The Founders' Constitution*, 28 (Phillip B. Kurland & Ralph Lerner eds. 1987).

Concerning the Constitution in particular, John Adams observed that, "[W]e have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." *The Works of John Adams, Second President of the United States* 229, vol. IX (1854). The United States Congress affirmed these sentiments in a Senate Judiciary Committee report concerning the constitutionality of the Congressional chaplaincy in 1853:

> The clause speaks of "an establishment of religion." What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, its meaning is to be ascertained by ascertaining what that establishment was. It was the connection with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or

> religious observances. ... They intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But ... they did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of "atheistical apathy." Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world, and an habitual reliance upon His protection of the righteous cause which they commended to His care.

The Reports of Committees of the Senate of the United States for the Second Session of the Thirty-Second Congress, 1852-53 (Washington, D.C.: Robert Armstrong, 1853) pp. 1-4. Senate Rep. No. 32-376 (1853).

The acknowledgment of God is not an establishment of religion. President George Washington, who chaired the Constitutional Convention and served as President while the Bill of Rights was being considered, declared in his October 3, 1789 National Day of Thanksgiving Proclamation, "Whereas 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...." [emphasis added]. President Abraham Lincoln's March 30, 1863 *Proclamation Appointing a National Fast Day* explained the basis for the Proclamation:

> ...[T]the Senate of the United States, devoutly recognizing the Supreme Authority and just Government of Almighty God, in all the affairs of men and of nations, has, by a resolution, requested the

> President to designate and set apart a day for National prayer and humiliation:
>
> ...[I]t is the duty of nations as well as of men, to own their dependence upon the overruling power of God, to confess their sins and transgressions, in humble sorrow, yet with assured hope that genuine repentance will lead to mercy and pardon; and to recognize the sublime truth, announced in the Holy Scriptures and proven by all history, that those nations only are blessed whose God is the Lord:
>
> ...[W]e know that, by His divine law, nations like individuals are subjected to punishments and chastisements in this world... .

Presidents Washington and Lincoln both clearly stated, in official proclamations, that the nation as well as the individual has a duty to acknowledge God. If the Appellees' understanding of the Establishment Clause is correct, then both Washington and Lincoln must have misunderstood it.

"The recognition of religion in these early public pronouncements is important, unless we are to presume the 'founders of the United States [were] unable to understand their own handiwork.'" *Myers v. Loudoun County Public Schools*, 418 F.3d 395, 404 (4th Cir. 2005) (quoting *Sherman v. Cmty Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992)). The Supreme Court has noted that "religion has been closely identified with our history and government." *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 213 (1963). In fact, "[t]here is an *unbroken history of official acknowledgment* by all three branches of government of the role of religion in American life from at least 1789." *Lynch*,

465 U.S. at 674 (emphasis added); *see, e.g.*, *Van Orden,* 545 U.S. 686-90 (2005) (listing numerous examples of the "rich American tradition" of the federal government acknowledging God). *See also, Newdow 2004*, 542 U.S. 1, 26 (noting that "official acknowledgments of religion's role in our Nation's history abound," and providing examples) (Rehnquist, C.J., concurring in part and concurring in the judgment).

Understood with this background, the fact that the Pledge contains two words acknowledging God's vital role in the life of this nation is not the least bit surprising, nor does it contradict the Establishment Clause.

2. Distinguishing "religion" from the merely "religious"

In their complaint, Appellants assert that the Pledge "makes the purely religious claim that we are 'one Nation under God.'" Complaint, p. 9, para. 35. Their assertion was squarely rejected by the U.S. Court of Appeals for the Ninth Circuit in *Newdow v. Rio Linda Union Sch. Dist.,* Nos. 05-17257, 05-17344, 06-15093, Slip op. at 3873 (9th Cir., March 11, 2010):

> The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*-the Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights . . . .

The focus of the Pledge is national identity, not ecclesiastical pronouncements.[2] The Ninth Circuit in *Rio Linda* set forth the purposes of the 1954 act of Congress adding the words "under God" to the Pledge, and then set forth the 2002 Act, Publ. L. No. 107-291, 116 Stat. 2057 at 260 (codified as amended in 4 U.S.C. § 4, 36 U.S.C. § 302) (effective November 13, 2002) which clarified the congressional intent in 1954. After describing at great length the findings of Congress concerning the recognition of God throughout America's history, the court concluded at 3902:

> These findings make it absolutely clear that Congress in 2002 was not trying to impress a religious doctrine upon anyone. Rather, they had two main purposes for keeping the phrase "one Nation under God" in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.[3]

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[2] "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." *Newdow 2004*, 542 U.S. at 31 (Rehnquist, C.J., concurring in part and concurring in the judgment).

[3] The court noted the dissent's argument that Congress cannot rewrite legislative history by subsequent legislation. But the court said at 3912-13,

> This principle applies when Congress is trying to rewrite history, not when Congress is trying to clarify our misunderstanding of *its* own purpose in enacting a statute. ...[V]irtually all of the members of Congress agreed we had misinterpreted the purpose of the words "under God."

To determine whether a statute or policy is "religious," it is necessary to define "religion." The original definition of "religion" as used in the First Amendment was provided in Article I, § 16 of the 1776 Virginia Constitution, in James Madison's *Memorial and Remonstrance*, and echoed by the United States Supreme Court in *Reynolds v. United States*, 98 U.S. 145 (1878), and *Davis v. Beason*, 133 U.S. 333 (1890). It was repeated by Chief Justice Charles Evans Hughes in his dissent in *United States v. Macintosh*, 283 U.S. 605 (1931), and the influence of Madison and his *Memorial* on the shaping of the First Amendment was emphasized in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). "Religion" was defined as: **"The duty which we owe to our Creator, and the manner of discharging it."** Va. Const. of 1776, art. I, § 16; *see also Reynolds*, 98 U.S. at 163-66; *Beason*, 133 U.S. at 342; *Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting); *Everson*, 330 U.S. at 13. According to the Virginia Constitution, those

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> The dissent calls the 2002 Congress' purpose a sham but does not point to even one place where Congress is incorrect in its recitation of history. The dissent disregards the fact that the Supreme Court has also recognized that the Founders' religious beliefs are a part of our nation's history. "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." *Schempp,* 374 U.S. at 213, 83 S.Ct. 1560.

duties "can be directed only by reason and conviction, and not by force or violence." Va. Const. of 1776, art. I, § 16.

In *Reynolds*, the United States Supreme Court stated that the definition of "religion" contained in the Virginia Constitution was the same as its counterpart in the First Amendment. *See Reynolds*, 98 U.S. at 163-66. In *Beason*, the Supreme Court affirmed its decision in *Reynolds*, reiterating that the definition that governed both the Establishment and Free Exercise Clauses was the aforementioned Virginia constitutional definition of "religion." *See Beason*, 133 U.S. at 342 ("[t]he term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. . .). In *Macintosh*, Chief Justice Hughes, in his dissent to a case which years later was overturned by the Supreme Court,[4] quoted from *Beason* in defining "the essence of religion." *See Macintosh*, 283 U.S. at 633-34 (Hughes, C.J., dissenting). And in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court stated, "The constitutional inhibition of legislation on the subject of religion . . . forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."

As the constitutional definition makes clear, not everything that may be termed "religious" meets the definition of "religion." "A distinction must be made

[4] *Macintosh* was overturned by the United States Supreme Court in *Girouard v. United States*, 328 U.S. 61 (1946).

between the existence of a religion as an institution and a belief in the sovereignty of God." H. Rep. No. 83-1693 (1954). From its inception in 1789 to the present, Congress has opened its sessions with prayer, a plainly religious exercise; yet those who drafted the First Amendment never considered such prayers to be a "religion" because the prayers do not mandate the duties that members of Congress owe to God or dictate how those duties should be carried out. *See Marsh v. Chambers*, 463 U.S. 783, 788-789 (1983). To equate all that may be deemed "religious" with "religion" would eradicate every vestige of the sacred from the public square. The Supreme Court as recently as last year stated that such conflation is erroneous: "Simply having *religious* content or promoting a message consistent with *religious* doctrine does not run afoul of the Establishment Clause." *Van Orden*, 545 U.S. at 678 (emphasis added).

The voluntary recitation of "under God" in the Pledge is an acknowledgment of God and His integral role in the life of the nation. Even if we call the words "under God" religious, their inclusion in the Pledge does not represent a "religion" under the Establishment Clause. Neither the Pledge policies nor the Pledge itself dictate *any* of the duties that students may owe to God or explain how those duties should be carried out; likewise, they do not list articles of a religious faith or the forms of worship for any faith.

Since the Judiciary Act of 1789, federal law has designated that all federal judges take their oaths "So help me God," as do the oaths for military personnel, civil servants, and for citizenship; the national motto is "In God We Trust"; and President Abraham Lincoln's "Gettysburg Address" employed the very same phrase at issue in this case in a national dedication ceremony, stating 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." *See Marsh*, 463 U.S. at 786-789; 28 U.S.C. § 453; 10 U.S.C. § 502; 5 U.S.C. § 3331; 8 C.F.R. 337.1; 36 U.S.C. § 302; Abraham Lincoln, "The Gettysburg Address," Nov. 19, 1863, *reprinted in The Essential Abraham Lincoln* 300 (John G. Hunt, ed. 1993) (emphasis added). Such acknowledgments "exclude" atheism and agnosticism, and yet are permissible under the Establishment Clause. The mere fact that the Pledge contains a monotheistic reference does not render its recitation in public schools unconstitutional.

B. The Definition of "Establishment"

Even if it is assumed that the school districts' Pledge policies are laws that pertains to a "religion" under the First Amendment—which they do not—the school districts cannot be said to have "establish[ed]" a religion through their policies.

"[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Lee v. Weisman*, 505 U.S. 577, 599 (1992) (citation omitted). Use of government force to coerce belief in particular religious tenets or participate in the worship of a particular ecclesiastical denomination is characteristic of a government establishment of religion.

In the congressional debates concerning the passage of the Bill of Rights, James Madison stated that he "apprehended the meaning of the [Establishment Clause] to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals of Cong*. 757 (1789) (Gales & Seaton's ed. 1834). Justice Joseph Story explained in his *Commentaries on the Constitution* that "[t]he real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an [sic] hierarchy the exclusive patronage of the national government." II Joseph Story, *Commentaries on the Constitution* § 1871 (1833).

The House Judiciary Committee in 1854 summarized these thoughts in a report on the constitutionality of chaplains in Congress and the army and navy. They noted that the Framers' understanding of the term "establishment of

religion" was based upon the establishment of religion that they had experienced in the mother country, England, where King Henry VIII broke away from the Catholic Church in 1534 and formally declared himself "the only supreme head in earth of the Church of England." The House Judiciary Committee declared that any establishment of religion

> must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications, to teach the doctrines and administer the rights; it must have tests for the submissive, and penalties for the non-conformist. *There never was an established religion without all these*.

H.R. Rep. No. 33-124 (1854) (emphasis added). At the time of its adoption, therefore, "establishment involved 'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.'" *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring) (citations omitted).

The Pledge policies of the New Hampshire school districts do not constitute coercion in this historically accepted sense, *i.e.*, force of law and threat of penalty. The policies specifically state, "Individuals may choose not to participate in the flag salute for personal reasons," and the school districts allow students who object on religious grounds to abstain from the recitation. *Newdow 2005*, 383 F. Supp. 2d at 1233 n.5.

This court should not change the meaning of government coercion from the use or threat of actual force or the imposition of penalties to the subjective

influences of "social pressure" and psychological coercion. Social pressure and psychological coercion are beyond the courts' ability to adjudicate with expertise, and they are beyond the scope of the First Amendment.

"Establishment," like "religion," clearly has been expanded far beyond its original context. *Amicus* urges this Court to interpret and apply the term "establishment" in its "just and natural" meaning and thus recognize that the Pledge policies do not even remotely entail an "establishment" of religion. U.S. Const. amend. I.

III. THE PHRASE "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE IS NOT A "PURELY RELIGIOUS" EXPRESSION; RATHER, IT IS A STATEMENT OF A POLITICAL PHILOSOPHY.

Appellants allege on p. 9, para. 35 of their complaint that the Pledge of Allegiance "makes the purely religious claim that we are 'one Nation under God.'" *Amicus* contends that the phrase is not "purely religious;" rather, it expresses a philosophy of government based upon God-given natural rights that the Framers held and that most Americans have affirmed throughout history and today.

The phrase "one nation under God" is a recognition that the state is not the supreme entity. Rather, in the words of the Declaration of Independence, this nation is entitled to its independence by "the Laws of Nature and of Nature's God," "all men are created equal," and "they are endowed by their Creator with certain unalienable Rights . . . ." The Supreme Court has sanctioned this philosophy in

Zorach v. Clauson, 292 U.S. 306 (1952), stating, "We are a religious people whose institutions presuppose a Supreme Being." Dissenting in *McGowan v. Maryland,* 366 U.S. 420 (1961), Justice Douglas quoted the Declaration of Independence and stated, "The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *Id.* at 563. Professor Robert J. Barth has further articulated his view that such phrases are an expression of a philosophy of government in "Philosophy of Government vs. Religion and the First Amendment," *[Oak Brook] Journal of Law and Government Policy* V:71-88 (2006).

The world crisis at the time the words "under God" were added to the Pledge demonstrate that this is the true reason for their inclusion. The words were added in 1954, at the very height of the Cold War. Americans at that time considered themselves to be locked in a life-and-death struggle with the Communist Bloc nations. Communism, often referred to as "godless Communism,"[5] was identified

[5] *Amicus* recognizes that some today would dispute this characterization of Communism and of the Cold War. Amicus believes the characterization is largely accurate. Of paramount importance, however, is the fact that Americans at that time believed the characterization was accurate, and this motivated their desire to include the words "under God" in the Pledge. *Amicus* notes that what some call "anti-Communist hysteria," the Ninth Circuit describes as "response to the oppressive governments forming around the World." *Rio Linda* at 3903.

with the Marxist philosophy of dialectical materialism, which held that there is no spiritual reality, that the State is the highest authority, that man was not created in the image of God and therefore has no intrinsic worth except insofar as he is useful to the State, and that man has no God-given rights but only such privileges as the State chooses to extend to him. Americans at that time believed that Communist ideology was spreading across the world, including within the United States. To counter the spread of Communism, Americans wanted to proclaim, both within our land and to the rest of the world, that the American philosophy of law and government is that man is created in the image of God, and therefore he possesses God-given rights that the state has no authority to take away. As the Ninth Circuit stated in *Rio Linda* at 3903:

> The words "under God" were added to the Pledge of Allegiance in 1954 in response to the oppressive governments forming around the World. Congress wanted to emphasize that in America, the government's power is limited by a higher power.

The court continued:

> In the early 1950s America became involved in the war waged between North and South Korea. North Korea was aided by the communist regimes of the Soviet Union and China, while South Korea was aided by the United Nations, including the United States, Australia, and Great Britain. This was just one of many times when the West opposed the spread of communism....
>
> The words "under God" were added as a description of "one nation" primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government. In adding the

words "under God" to the Pledge, Congress reinforced the belief that our nation was one of individual liberties granted to the people directly by a higher power:

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. [O]ur American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp.

*19 H.R.Rep. No. 83-1693, 1954 U.S.C.C.A.N. 2339, 2340 (May 28, 1954). The House Report adopted this statement from Representative Rabaut:

> By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government. In this full awareness we will, I believe, be strengthened for the conflict now facing us and more determined to preserve our precious heritage.

Id. at 2341.

Speaking in support of the bill, Congressman Rabaut said the addition of the words "under God" in the Pledge would "strike at the philosophical roots of communism, atheism and materialism" and that he hoped it would bring about "a deeper understanding of the real meaning of patriotism." He further stated,

> You may argue from dawn to dusk about differing political, economic, and social systems, but the fundamental issue which is the unbridgeable gap between America and Communist Russia is a belief in Almighty God. From the root of atheism stems the evil weed of communism and its branches of materialism and political dictatorship.

> Unless we are willing to affirm our belief in the existence of God and His creator-creature relation to man, we drop man himself to the significance of a grain of sand and open the floodgates to tyranny and oppression.

83rd Congress 1st Sess., *Congressional Record* 99, pt. 10 (21 April 1953) A2063. Again, whether the members of this Court agree with Congressman Rabaut's characterization of Communism is not the issue. The issue is whether including the words "under God" in the Pledge was a legitimate, appropriate, and constitutionally-permissible way of giving expression to the American philosophy of government. *Amicus* believes it was, and the Ninth Circuit has stated that it was.

America's Founding Fathers promulgated America's commitment to human rights and limited government by an appeal to Almighty God. As the Ninth Circuit explained at 3906-07,

> Long before this nation could be founded, the Framers had to convince the people in the American colonies that their individual rights were important enough to start a war. Important enough to die for. Important enough to send their sons to die for. We must remember the Framers urged a rationale for committing treason against Great Britain. For this, they needed to draw upon every weapon in their intellectual arsenal. They needed to call upon divine inspiration, as so many armies before them had....
>
> Alexander Hamilton argued in February 1775, "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity himself, and can never be erased or obscured by mortal power." Alexander Hamilton, *The Farmer Refuted* (1775).

> And so when the Second Continental Congress of the United States met on July 4, 1776, the original thirteen states sought to convince not only the Colonists, but also the world that a higher power granted rights directly to the people, who would in turn grant only limited powers to their new government....
>
> "The Declaration of Independence was the promise; the Constitution was the fulfillment." The Constitution fulfilled the promise of the Declaration by creating a government of limited powers. The government was divided into three coequal but separate branches that would check and balance one another to ensure the government remained limited, and the people's rights secure. (emphasis original) (footnotes omitted).

An expression of this political philosophy is entirely consistent with the Establishment Clause. And it is impossible to articulate this philosophy without mentioning the God Who is at the base of this philosophy. The Founders believed that the individual has unalienable rights which government must respect because these rights come from a higher Source than government. Without a recognition that God is the Source of human rights, this philosophy is utterly without a basis and cannot even be intelligently articulated. At the time the First Amendment was adopted, acknowledgments of God were present in the constitutions of all thirteen states, and similar acknowledgments are found in all fifty state constitutions today.

IV. THE PHRASE "UNDER GOD" IN THE PLEDGE OF ALLEGIANCE ENABLES THOSE WHO DO NOT BELIEVE THE STATE'S AUTHORITY IS ABSOLUTE, TO RECITE THE PLEDGE WITHOUT VIOLATING THEIR CONVICTIONS.

Without the phrase "under God" in the Pledge, the Pledge would give the federal government supreme status as the highest of all authorities. Some Americans are unwilling to pledge absolute allegiance to this country or to this government, because they believe God and God alone is entitled to such allegiance. They believe, as taught by Jews in Daniel 2:21 ("he removeth kings, and setteth up kings") and by Christians in Romans 13:1-7 ("For there is no power but from God: the powers that be, are ordained of God."). Samuel Adams, called by many the "Father of the American Revolution," put it succinctly as the Declaration of Independence was being signed in 1776:

> We have this day restored the Sovereign to Whom all men ought to be obedient. He reigns in heaven and from the rising to setting of the sun, let His kingdom come.

Charles E. Kistler, *This Nation Under God* (The Goreham Press, 1924) p. 1.

People who hold this belief – and at the time of this nation's founding it was a very widespread belief, and it remains widespread today – are understandably reluctant to pledge to the nation the allegiance they believe rightly belongs only to God. But if the phrase "under God" is inserted after "nation," that places government in its proper perspective, and persons who hold this belief can say the pledge without reservation.

In *Zorach v. Clauson*, 343 U.S. 306 (1952), this Court upheld a released-time program whereby public schools released students from classes for a set period of time to enable them to attend religious instruction at their respective churches. Justice Douglas wrote for the Court:

> We are a religious people whose institutions presuppose a Supreme Being. ...*When the state encourages religious instruction or cooperates with religious authorities by adjusting 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. [emphasis added]

Adding the phrase "under God" after the word "nation" enables those who, for whatever reason, believe they should not pledge absolute allegiance to the nation, to recite the Pledge without compromising their convictions. It provides a good civics lesson for all: The minority respects the majority by allowing them to say the Pledge, and the majority respects the minority by allowing them not to say it.

CONCLUSION

"When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, [the courts] should not hesitate to resolve the tension in favor of the Constitution's original meaning." *Kelo v. City of New London, Conn.*, 545

U.S. 469, 523 (2005) (Thomas, J., dissenting). And as Justice Frankfurter stated, "[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have written about it." *Graves v. O'Keefe,* 306 U.S. 466, 491-92 (1939) (Frankfurter, J. concurring). When a clash exists between court-created tests and the plain language of the First Amendment, the proper solution is to fall back to the foundation, the text of the Constitution.

For the foregoing reasons, *Amicus* respectfully submits that the district court's decision below should be affirmed, but that this court should base its ruling upon the plain language of the First Amendment as intended by its Framers.

Dated this 19th day of April, 2010.

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I hereby certify that on April 19, 2010, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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