CASE NO. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, et al.

Plaintiffs-Appellants,

v.

HANOVER SCHOOL DISTRICT, et al.

Defendants-Appellees,

On Appeal from the United States District Court
for the District of New Hampshire

(District Court #1:07-cv-356)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Freedom From Religion Foundation, Inc. ("FFRF") has no parent corporation. No publicly held corporation owns any of FFRF's stock.

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JURISDICTIONAL STATEMENT

I. District Court's Jurisdiction

This is a civil action claiming violations of the First, Fifth, and Fourteenth Amendments to the Constitution of the United States of America. As such, the District Court had subject matter jurisdiction under 28 U.S.C. § 1331.

II. Court of Appeals' Jurisdiction

On 09/30/2009, the District Court for the District of New Hampshire entered an Order and Judgment Granting Defendants' motions to dismiss, under Fed. R. Civ. P. Rule 12(b)(6). Documents 60 & 61. This Court of Appeals has jurisdiction under 28 U.S.C. § 1291.

III. Filing Date Establishing the Timeliness of the Appeal

Plaintiffs-Appellants' Notice of Appeal was timely filed on 10/24/2009. Document 62.

IV. Final Order

The District Court's 09/30/2009 Order was a final order that disposed of all parties' claims.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The issue presented in this case is whether the District Court erred in granting Defendants' Fed. R. Civ. P. Rule 12(b)(6) motions to dismiss. Specifically, can relief be granted to Plaintiffs on their claim that governmental agents (i.e., public school teachers) leading impressionable students in contending that the United States of America is "one Nation under God" violates their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

I. Nature of the Case

This case concerns the **governmental** claim that ours is "one Nation under God." This claim was first made in 1954, when (after more than six decades of unifying the nation with its phrase, "one Nation indivisible") the Pledge of Allegiance was altered by Congress. In an Act that did nothing but spatchcock the purely religious two-word phrase, "under God," into its then-existent prose, the Pledge became divisive as it turned those who believe in God into political insiders, and those who disbelieve in God into political outsiders.

New Hampshire requires this now Monotheistic Pledge to be recited in its public schools. RSA § 194:15-c. The public school teachers of the Hanover School District and the Dresden School District (hereafter, "the School District Defendants") follow this statutory command, thus violating the federal and state constitutional rights of the instant plaintiffs.

II. Course of the Proceedings

Plaintiffs first filed this action on 11/01/07, naming the United States Congress, the United States of America, the Hanover School District, the Dresden School District and School Administrative Unit 70 as defendants. Document 1. On 01/18/08, motions to intervene were made by the State of New Hampshire, the

United States of America, and Muriel Cyrus et al.[1] Documents 12, 15, and 21, respectively.

Because the case involves children who might be subject to serious harm (due to the unpopular nature of this action) should their names be made public, Plaintiffs moved (on 01/22/08) to have a protective order issued. Document 23. That motion was granted on 01/27/08. APP039.[2] (The three motions to intervene were granted on the same date. APP040-42.)[3]

On 01/18/08, motions to dismiss were filed by the State of New Hampshire, Document 14; the Defendants the United States of America and the United States Congress ("the Federal Defendants"), Document 16; and Muriel Cyrus et al., Document 22. On 01/25/08, Muriel Cyrus et al. answered Plaintiffs' Complaint. Document 30.

Plaintiffs responded to the motions to dismiss on 02/19/08. Document 34. On 03/11/08, the State of New Hampshire replied to Plaintiffs' responses. Document 41. The District Court filed an Order on 08/07/08, granting (in part) the Federal Defendants' motion to dismiss and denying the other motions to dismiss. Document 44.

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[1] Muriel Cyrus et al. are students, parents, and the Knights of Columbus, all of whom wish to have the "under God" language retained.
[2] References to the Appendix will be in the form APP---. Those to the Addendum (which is attached at the end of this brief) will be in the form ADD---.
[3] Of these grants of motions, only the one for the Protective Order is listed on the District Court's Docket Sheet. ADD041 (Document 24).

On 09/17/08, the School District Defendants filed a motion to dismiss, stating, in essence, that they would leave the legal debate to the other parties. Document 46.

A First Amended Complaint was filed by Plaintiffs on 11/17/08. Document 52. On 12/04/08, the State of New Hampshire filed a Supplemental Memorandum of Law in support of its prior motion to dismiss, Document 53; and Muriel Cyrus *et al.* filed a Renewed Motion to Dismiss All Claims. Document 55. The United States of America filed a Renewed Motion to Dismiss on 12/19/08. Document 56.

III. Disposition Below

On 09/30/09, the District Court filed an Order granting the motions to dismiss and closing the case. ADD001 (Document 60). The associated Judgment was filed the same day. ADD037 (Document 61).

STATEMENT OF THE FACTS

The nation's Pledge of Allegiance was first created in 1892. APP007. It was then a purely secular statement that read:

> I pledge allegiance to my Flag and to the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.

Id. Over the course of sixty-two years, this Pledge unified our nation, helping us through two world wars and a great depression. On June 14, 1954, however, President Eisenhower signed into law Pub. L. No. 396, 68 Stat. 249. APP008. That law (hereafter "Act of 1954") did nothing but interlard the previously secular verbiage with the purely religious phrase, "under God." *Id.* Thus, as now codified in 4 U.S.C. § 4, APP009, the Pledge reads:

> I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

In referring to the need for this change, the chief House sponsor of the legislation, Rep. Louis C. Rabaut (who placed in the Congressional Record that "An atheist American … is a contradiction in terms." APP066) emphasized that "the fundamental basis of our Government is the recognition that all lawful authority stems from Almighty God." *Id*. The chief sponsor in the Senate, Sen. Homer Ferguson, proudly noted that he brought forth the legislation to "specifically acknowledge that we are a people who do believe in and want our

Government to operate under divine guidance." APP053. In the House Report accompanying the legislation, Congress wrote that "[t]he inclusion of God in the Pledge … would … acknowledge the dependence of our people and our Government upon the moral directions of the Creator." APP058. President Eisenhower envisioned that "the millions of our schoolchildren will daily proclaim in every city and town, every village and rural schoolhouse the dedication of our Nation and our people to the Almighty." APP010.

Others echoed this sentiment. Rep. Oliver P. Bolton, for instance, stated that, by including "under God" in the Pledge, "we are officially recognizing once again this Nation's adherence to our belief in a divine spirit, and that henceforth millions of our citizens will be acknowledging this belief every time they pledge allegiance to our flag." APP069. And, in case there was any doubt as to which divine spirit was the object of this state-sponsored devotion, Congress underscored its intention as the flag ran up the flagpole during the new law's celebration at the Capitol, playing *Onward, Christian Soldiers!* APP010.

New Hampshire requires this now religious pledge to be recited in each of its public schools. RSA § 194:15-c. APP006. Thus, every day, governmental agents lead their students in claiming that there exists a God, that our nation is "under God," and (as Monotheists convinced of their rectitude contend) that it is an "undeniable truth that our freedoms come from God." APP023.

Plaintiffs are Atheists "who specifically deny/doubt the existence of God." APP012. Included among them are children who have all repeatedly been forced by the School District Defendants' agents to confront the government's purely religious claim that this is "one Nation under God." *Id*.

SUMMARY OF THE ARGUMENT

The vast majority of Utah's residents are Mormon.[4] Imagine if that majority desired "to acknowledge the dependence of our people and our Government upon the moral directions of the Mormon Church." Additionally, certain that a Mormon foundation leads to superior government, imagine them seeking "to deny the non-Mormon and materialistic concepts of the other states." Imagine further that their legislators responded to this popular mandate by passing a law requiring every **public** school to lead their students every day in a Pledge of Allegiance to the Utah flag, in which they affirmed that Utah was "one State under Joseph Smith."

Consider that the governor (a Mormon, himself, of course) announced as he signed the measure into law, "From this day forward, our schoolchildren will daily proclaim the dedication of our State and our people to Joseph Smith." If this

[4] The figure is reported to be 72%. *See* http://www.newsroom.lds.org/ldsnewsroom/eng/news-releases-stories/utah-membership, accessed on January 28, 2010.

occurred prior to the development of modern Establishment Clause jurisprudence, the elected officials would not worry about the consequences of openly voicing their true feelings. Thus, they might proudly assert that they are enacting this law because they feel that Mormonism is the best religion, and that the other religions are evil and immoral. In fact, the bill's chief sponsor might place in the legislative record that "a non-Mormon Utahan is a contradiction in terms." Additionally, during the ceremony commemorating this grand event, *Onward, Mormon Soldiers!* might be played.

If a minority Lutheran, Catholic or Jewish citizen of Utah – upset that his or her children, sent to the **public** schools, were being asked to extol the virtues of a being representing a religion with which they disagreed – challenged this practice, no federal judge would dismiss that lawsuit for failure to state a claim.

If those plaintiffs argued that the state pledge was not neutral as between their beliefs and Mormon beliefs, no District Court would just skip over that issue. Nor would the "under Joseph Smith" phrase be discounted due to an assertion that one must take the Pledge "as a whole." If (after the Supreme Court subsequently ruled that acts having a religious purpose are invalid) the legislators changed their tune, no judicial officer would consider the new argument – that "under Joseph Smith" is not religious, but secular (being used only for "teaching the State's history") – to be anything but a sham.

The obvious effect of the "under Joseph Smith" phrase is the elevation of that figure's import and prestige, with "political insider" status accruing to his followers (i.e., Mormons), and with all others being turned into "political outsiders." No judge would ever deny this. Nor would a judge excuse such a pledge because it is "not a prayer." Pages of ink would not be spent denying there is coercion (a Free Exercise issue – *see Abington School District v. Schempp*, 374 U.S. 203, 223 (1963) ("[A] violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended"), when the Supreme Court had found unconstitutional coercion in a case with far weaker coercive elements. And "ceremonial Mormonism" would not be touted as a means to absolve the government of its constitutional duty.

Except for not being limited to one religious sect, and having national (as opposed to merely statewide) support, the instant case is identical to this Mormon hypothetical. The District Court's grant of the Fed. R. Civ. P. Rule 12(b)(6) motions to dismiss, therefore, was in error. Plaintiffs have surely stated a claim upon which relief can be granted, since the requested declaratory and/or injunctive relief will readily remedy their injuries. "Under God" in the Pledge violates every Establishment Clause test as well as every principle and ideal for which the clause stands. The District Court's opinion should be reversed.

ARGUMENT

I. Standard of Review

> We review *de novo* the district court's dismissal of a complaint under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. In doing so, we must accept as true all well-pleaded facts "indulging all reasonable inferences in [Appellant's] favor." However, the Court shall not accept Appellant's "'bald assertions, periphrastic circumlocutions, unsubstantiated conclusions, or outright vituperation,' or 'subjective characterizations, optimistic predictions, or problematic suppositions.'"
>
> We will affirm the dismissal of the complaint if, and only if, accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of Appellant, the complaint "fails to state a claim upon which relief can be granted." In order to defeat a Fed. R. Civ. P. 12 (b)(6) motion, a complaint must contain "enough facts to raise a reasonable expectation that discovery will reveal evidence supporting the claims."

Fantini v. Salem State College, 557 F.3d 22, 26 (1st Cir. 2009) (citations omitted).

Additionally, a *de novo* review also applies to the challenge to the constitutionality of 4 U.S.C. § 4. *United States v. Hussein*, 351 F.3d 9, 14 (1st Cir. 2003); *United States v. Bongiorno*, 106 F.3d 1027, 1030 (1st Cir. 1997).

II. Plaintiffs-Appellants Are Entitled to Offer Evidence to Support Their Claims

The District Court appropriately recognized that, under a Fed. R. Civ. P. 12(b)(6) motion to dismiss, the focus is "not on 'whether a plaintiff will ultimately prevail but whether a claimant is entitled to offer evidence to support the claims.' *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)." ADD007. In other words, the Court was required to proceed as just stated – i.e., by "accepting all well-pleaded facts as true and drawing all reasonable inferences in favor of Appellant." Had the Court done so, the inescapable conclusion would have been that the practice of governmental agents leading impressionable school children in claiming there is a God violates federal and state constitutional guarantees, and that declaratory and/or injunctive relief would redress Plaintiffs' injuries. Accordingly, it was error for the District Court to deny Plaintiffs-Appellants the right "to offer evidence to support the claims."

III. "Under God" in the Pledge Violates the Establishment Clause

(A) "Under God" Violates Every Establishment Clause Test

i. "Under God" Violates the Neutrality Test

In regard to Establishment Clause matters, the Supreme Court has proclaimed:

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County v. ACLU, 545 U.S. 844, 860 (2005) (citation omitted). Surely no one can seriously maintain that – as between belief in God and disbelief in God – there is neutrality when the sole governmental Pledge of Allegiance asserts that we are "one Nation under God." The District Court, therefore, failed to abide by this "touchstone," mandated by the Supreme Court.

This requirement for religious neutrality has been discussed by the high court in at least **thirty-five separate majority opinions**. APP048-50. Yet the District Court never denied that "under God" violates the neutrality touchstone. Rather, it simply mentioned that the Supreme Court has instructed the lower courts to ensure neutrality, and then ignored the instruction.

In fact, the District Court's analysis was extraordinary in this regard. Responding to Plaintiffs' repeated attempts to draw attention to this critical principle, the Court not only repeated the *McCreary* quote, but it then provided three others, all of which further emphasize the importance of governmental neutrality in matters of religion. ADD012-13. And that was the extent of the neutrality analysis. Subsequent discussion had nothing to do with whether or not "under God" is neutral with regard to Monotheistic versus Atheistic belief. Instead, what followed was a patchwork of unrelated arguments.

The first was the argument that can always be used to deny an Establishment Clause violation: refusing to focus on the actual violation. Thus, the District Court bought into the Defendants' contention that "the Pledge must be considered as a whole," ADD013, despite the fact that such an approach was expressly rejected in the Supreme Court case that is perhaps most on point: *Wallace v. Jaffree*, 472 U.S. 38 (1985).

As in the instant case, *Wallace* involved the alteration of an originally permissible statute. *Id*. at 41. The original *Wallace* statute called for a one minute period of silence "for meditation." This was changed to "for meditation or voluntary prayer," which is not unlike the change from "one Nation indivisible" to "one Nation, under God, indivisible." The

addition of the phrase, "or voluntary prayer," said the *Wallace* Court, violated the Establishment Clause. 472 U.S. at 60-61.

The dissent argued that the majority was mistaken in "focusing exclusively on the religious component of the statute rather than examining the statute as a whole." *Id*. at 88 (Burger, C.J., dissenting). As noted, that argument was rejected … as it must be for the Establishment Clause to continue protecting "the inviolable citadel of the individual heart and mind." *Abington*, 374 U.S. 203, 226 (1963).

Abington, which dealt with Bible readings, could also have been excused under an "as a whole" analysis. After all, those readings were part of the morning exercises, which had the "secular purposes" of "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id*. at 223. Yet, there, too, the Supreme Court refused to take the "as a whole" approach. Instead, it focused only on the Bible readings, rather than the "whole" of morning exercises, ruling that the readings violated the Constitution.

That has been the Court's consistent approach. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), for example, "biology class" could have been the "whole" to which the Court's attention was drawn. Instead, the

gravamen of the case was only the specific religious animus towards evolution. The use of classroom walls to impart knowledge, not the one Ten Commandments poster, could certainly have been the "whole" of Kentucky's activities in *Stone v. Graham*, 449 U.S. 39 (1980). In *Lee v. Weisman*, 505 U.S. 577 (1992), nothing prevented the Court from taking graduation "as a whole," rather than addressing only the rabbi's short nondenominational prayer. Nothing, that is, except the Establishment Clause.

Every Establishment Clause violation – no matter how blatant – can be cast in terms of serving some larger secular purpose. As but two of the countless imaginable examples, one might ponder an election statute that standardizes the printing of ballots, and includes, among the myriad other required statements, "Jesus Christ is Lord," placed in bold letters at the top. Would the "secular purpose" of that law – i.e., the "whole" of furthering democracy by having standardized ballots for elections – permit such a Christian espousal? A state education code might mandate a multitude of warm-up exercises at the beginning of all physical education classes. If an Islamic majority lobbied to have prostration facing Mecca while reciting the Qu'ran as one of those exercises, would the "whole" secular purpose of having physically fit students permit that religious activity?

Some may argue that cases such as *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *Van Orden v. Perry*, 545 U.S. 677 (2005) support an "as a whole" doctrine. In fact, they do. However, that "as a whole" doctrine is distinct from the one that is involved in *Wallace* and the instant case. *Lynch*'s crèche and *Van Orden*'s monument were not examined individually because they were both part of some larger grouping of similar items. In *Lynch*, for example:

> The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Clause house, reindeer pulling Santa's sleigh, candy striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here.

465 U.S. at 671. In *Van Orden*, the very first point made by Chief Justice Rehnquist was that the Ten Commandments monument was one of "17 monuments and 21 historical markers commemorating the 'people, ideals, and events that compose Texan identity.'" *Van Orden*, 545 U.S. at 681 (citation omitted). Thus, removal of either the *Lynch* crèche or the *Van Orden* Ten Commandments monument would have evidenced hostility toward religion. *See, e.g.*, *Lynch*, 465 U.S. at 677 (addressing "all forms of religious expression" and demanding "hostility toward none"); *Van Orden*,

545 U.S. at 684 (warning that the courts must not "evince a hostility to religion"). In other words, where the religion is one among many similar components, the forced removal of that one component is impermissible. That is quite different from a situation where the religion is not one among equals, but is a unique component thrust into the activity to extol the religion's perceived virtues.

Perhaps the case most illustrative of this idea is *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), where two displays were at issue. One was a crèche situated on the Grand Staircase of the County Courthouse. The other was comprised of "a Chanukah menorah placed just outside the City-County Building, next to a Christmas tree and a sign saluting liberty." *Id*. at 578.

The crèche was in the "'most beautiful,' and 'most public' part of the courthouse … set into one arch and surrounded by others, with arched windows serving as a backdrop." *Id*. at 579. It was accompanied by "a sign disclosing ownership by a Roman Catholic organization," *id.* at 600, and it had red and white poinsettia plants, small evergreen trees, and a wooden fence. *Id*. at 580. Thus, there was more to the display than simply the crèche, and the Court could surely have employed the "as a whole" methodology to deem the display permissible. After all, a courthouse "as a

whole" is at least as judicial, and a staircase "as a whole" is at least as pedestrian, as the Pledge "as a whole" is patriotic.

The Court, however, did not see the value of that "as a whole" approach, and it did not repeat these irrelevant diversionary descriptors *ad nauseam*.[5] Rather, it isolated the crèche as the sole religious item for its analysis:

> No viewer could reasonably think that it occupies this location without the support and approval of the government. … Thus, by permitting the "display of the creche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

492 U.S. at 599-600 (footnote and citation omitted). Do the United States, the State of New Hampshire, and the School Districts not send that same "unmistakable message" regarding their support for the existence of God by not only permitting, but actively placing, "under God" in the "particular [official Pledge of Allegiance] setting"?[6]

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[5] The District Court used the words "patriotic" and patriotism" fourteen times in its dismissal order. Document 60. In their memoranda supporting their motions to dismiss, the Federal Defendants and the State of New Hampshire use those words thirty, Document 16-2, and twenty-one, Document 14-2, times, respectively.

[6] In addition to being placed by a private entity (rather than by the government itself), the *Allegheny* crèche display did not encourage active participation, was not in a locale specifically chosen for its effects on children, and was not in a public school setting. These characteristics of the "under God" message only heighten the need for an end to this constitutional violation.

The display with the menorah and Christmas tree was different. There, the "as a whole" approach was reasonable because (in contrast to the crèche) not just one religious view was being supported. There were two views, thus symbolizing the government's respect for religious diversity. 492 U.S. at 589-90, 613 and 619.

Importantly, the crèche was ruled impermissible even though it was placed in the context of the combined secular-religious holiday season. This further emphasizes that a multiplicity of religious views is required to avoid a religious endorsement.[7] In fact, under *Allegheny County*, it appears that not only must there be a multiplicity of religious views, but those views must be displayed simultaneously. 492 U.S. at 600 n.50 (noting that the crèche display would have violated the Establishment Clause even though it was not permanent and "even if the Grand Staircase occasionally was used for displays other than the creche."). Obviously, "under God" was intended to be permanent, and there is no suggestion that any similar display will ever be permitted within the Pledge to advocate for other religious views.

[7] A singular religious view may be permissible, but only in situations such as "representing [one of] the several strands in the State's political and legal history." *Van Orden*, 545 U.S. at 691. Additionally, it must be a "passive" display. *Id*. at 682, 686 and 691. "Under God" in the Pledge fits neither of these essential criteria.

ii. "Under God" Violates the Purpose Prong of the *Lemon* Test

The District Court appropriately recognized that the three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) remains the framework under which to analyze an Establishment Clause challenge in this Circuit, ADD010-11, and that the first prong requires that "the statute must have a secular legislative purpose." ADD011 (citing *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.6 (2005)). Plaintiffs have stipulated that the New Hampshire legislators had a secular purpose in enacting RSA § 194:15-c. Document 57 at 9 n.4. However, the purpose that **Congress** had in passing the Act of 1954 was anything but secular.

As the District Court highlighted (referencing the neutrality principle just discussed), "'[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." ADD012 (citing *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005)) (emphasis by the District Court). That it could then conclude – despite the material provided in the Statement of Facts (at pages 6-7, *supra*) – that the government was not taking sides when it promulgated the Act of 1954 is beyond reason.

Whether or not God exists is perhaps the quintessential religious controversy. Some thoughtful, compassionate, and patriotic individuals believe He does; and some thoughtful, compassionate, and patriotic individuals believe he does not. In 1954, the United States Congress, in conjunction with its President, made it absolutely clear that not only were they on the side of the believers, but that they were actively opposed to the nonbelievers as well.[8]

In fact, it is difficult to conceive of a clearer espousal of Monotheism and concomitant denigration of Atheism than what was placed in the House Report that accompanied the 1954 Act:

> The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time, it would serve to deny the atheistic and materialistic concepts of communism.

APP058. Similarly, President Eisenhower announced what he saw as the purpose of the new law: to have "the millions of our schoolchildren … daily proclaim … the dedication of our Nation and our people to the

[8] With the *Lemon* test still two decades in the future, the members of the 83rd Congress did not realize they would need to hide truth. That can be contrasted with the situation existing since 1973. *See, e.g.*, the Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057, referenced repeatedly by Defendants' counsel. Memorandum in Support of the Federal Defendants' Motion to Dismiss at 4, 25 and 33.

Almighty." APP010. To acknowledge dependence upon the moral directions of the Creator and to proclaim dedication to the Almighty are purely religious goals.

Defendants will undoubtedly contend that there was a secular purpose to the Act of 1954, in that Congress sought to address the problem of an expanding Soviet empire. However, as the Supreme Court just pointed out, "[w]hen Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy." *Citizens United v. Federal Election Commission*, 558 U.S. ___ (2010), slip op. at 45. In other words, Congress surely had the right to contrast the communists' totalitarianism with America's freedom. When it framed the societal difference as Monotheism versus Atheism, though (rather than as liberty versus repression), its purpose drifted into unconstitutional waters. Favoring a religious regime, rather than a political one, is impermissible under the Establishment Clause.[9]

[9] In just five years (from 1952-1956), Congress let fly a barrage of Monotheistic statutes. *See*, *e.g.*, Act of Apr. 17, 1952, ch. 216, 66 Stat. 64 (National Day of Prayer); H. Con. Res. 60, 83rd Cong., 1st Sess., July 17, 1953 (Prayer Room in the United States Capitol); Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249 (adding "under God" to the Pledge of Allegiance); Act of July 11, 1955, ch. 303, 69 Stat. 290 (requiring "In God We Trust" on every coin and currency bill); Act of July 30, 1956, ch. 795, 70 Stat. 732 ("In God We Trust" as the national motto).

The other argument given is that "under God" was inserted into the Pledge to reference the nation's history. This is a bogus claim. The few allusions to history were made to support the intrusive religious verbiage, not vice versa. Moreover, those relatively rare references were overshadowed by the repeated claims of a desire to actively inculcate the populace with Monotheistic belief. Our legislators were certainly versed well enough in the English language to have written "one Nation historically under God" if that was what they intended.[10]

iii. "Under God" Violates the Effects Prong of the *Lemon* Test

In discussing *Lemon*'s "effects" prong, the District Court again began appropriately – this time by noting that government is precluded from "'the effective promotion or advancement … of religion in general.'" ADD016 (citation omitted).[11] Yet, despite the obvious fact that placing the religious phrase, "under God," in the midst of the nation's sole Pledge of Allegiance does just that, the Court proceeded

[10] In providing this alternative, Plaintiffs do not suggest it would be constitutional, either. They are merely showing that – had an espousal of our nation's "history" truly been its intention – Congress could easily have expressed that notion.

[11] The Court appeared to demonstrate a bit of confusion regarding the effects prong, misconstruing *Lee v. Weisman* by stating that, "Lee was decided on the second prong of the Lemon Test." ADD021 n.4. *Lee*, of course, was decided on the basis of the so-called "coercion test." *See* at page 29, *infra*.

with a complete non sequitur: "The critical and dispositive difference is this: the Pledge of Allegiance is not a religious prayer … ." ADD019.[12]

This contention is neither critical nor dispositive. To begin with, nothing in the Establishment Clause limits its violations to prayer. Placing a crèche scene on a staircase was not prayer. *Allegheny County*. Teaching creation science was not prayer. *Edwards v. Aguillard*, 482 U.S. 578 (1987). Hanging a Ten Commandments poster on a wall was not prayer. *Stone v. Graham*, 449 U.S. 39 (1980).

Moreover, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990). Likewise, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989). In other words, judicial tribunals are impotent to decree the extent to which words and actions

[12] The District Court continued " … nor is it a 'nonsectarian prayer' of the sort at issue in Lee, and its recitation in schools does not constitute a 'religious exercise.'" ADD019-20 (citation omitted). Even assuming, *arguendo*, that the Pledge is neither a prayer nor a religious exercise, it is government taking a position on a religious controversy. That it may not do. "The government may not lend its power to one or the other side in controversies over religious dogma." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990).

have religious meaning.[13] This is especially true in the case at bar, where both Congress and the President seem to have disagreed with the Court's assessment. Congress announced that the words "under God" "acknowledge the dependence of our people and our Government upon the moral directions of the Creator," and the President declared that they "proclaim … the dedication of our Nation and our people to the Almighty." Acknowledging dependence upon the moral directions of the Creator[14] and proclaiming dedication to the Almighty are surely within the sphere of "prayer" activities.

In *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004), the Supreme Court cited only one expert on the Pledge. That individual has explicitly stated that, by adding "under God" to its prose, "[t]he Pledge was now both a patriotic oath and a public prayer."[15] One of the

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[13] *Cf. Gobitis v. Minersville School District*, 24 F. Supp. 271, 274 (E.D. Penn. 1938) ("[I]t is not for this court to say that since the act has no religious significance to us it can have no such significance to them.").

[14] It is noteworthy that Congress spoke of "**the Creator**," and not "**a creator**." Thus, the Establishment Clause violation went beyond striving to inculcate belief in a generic god. Congress strived to inculcate belief in a specific (Judeo-Christian) deity, limiting the "insider" class even further.

[15] Baer JW. *The Pledge of Allegiance: A Short History* (1992). Accessed at http://www.oldtimeislands.org/pledge/pledge.htm on January 20, 2010.

nation's foremost legal scholars on religion clause jurisprudence has said the same thing.[16]

So, too, have our governmental agents. In 2002, the day after the release of *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002), *amended upon denial of rehearing en banc*, 328 F.3d 466 (9th Cir. 2003), *rev'd on standing grounds, Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004), the usually sparsely populated Senate Chamber was filled with senators as the President *pro tempore* informed his audience, "The prayer to Almighty God, the supreme Judge of the world, will be led by the Senate Chaplain."[17] The chaplain opened with, "Almighty God, Creator, Sustainer and Providential source of all our blessings, …" and soon referenced the prior day's Pledge decision:

> It is with reverence that in a moment we will repeat the words of commitment to trust You which are part of our Pledge of Allegiance to our flag: ''One Nation under God, indivisible.''[18]

[16] Davis, The Pledge of Allegiance and American Values, 45 J. Church & State 657, 661 (2003) ("The Pledge was now both a patriotic oath and a public prayer.").
[17] 148 Cong. Rec. S6177 (June 27, 2002).
[18] *Id.*

Repeating words of commitment to trust "Almighty God, Creator, Sustainer and Providential source of all our blessings" certainly sounds like prayer.

President George W. Bush, speaking of the Pledge, wrote, "In one sentence, we affirm our form of government, our unity as a people, and our reliance on God." APP055. He continued:

> When we pledge allegiance to One Nation under God, our citizens participate in an important American tradition of humbly seeking the wisdom and blessing of Divine Providence.

id., which certainly comports well the dictionary definition of "prayer": "an address (as a petition) to God or a god in word or thought."[19] Additionally, "One Nation Under God" was the theme of President Bush's first National Day of Prayer Proclamation,[20] and he invoked that phrase yet again (in a paragraph that began with scripture, no less) in his "National Day of Prayer and Remembrance" following 9/11.[21] In view of these facts, the District Court was inappropriately dismissive in stating that "[i]nclusion of the words 'under God,' in context, does not convert the Pledge into a prayer or religious Exercise." ADD020.

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[19] http://www.merriam-webster.com/dictionary/prayer, accessed 01/29/2010.
[20] April 30, 2001 Proclamation of President George W. Bush, accessed 06/25/2006 at http://www.whitehouse.gov/news/releases/2001/04/print/20010430-2.html.
[21] September 13, 2001 Proclamation of President Bush, accessed 06/25/2006 at http://www.whitehouse.gov/news/releases/2001/09/print/20010913-7.html.

iv. "Under God" Violates the Coercion Test

The District Court cited *Lee v. Weisman* for the propositions that "'[i]t is beyond dispute that … government may not coerce anyone to support or participate in religion or its exercise,'" and "'there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.'" ADD016-17 (citations omitted). It then claimed that "the sort of coercion at issue in Lee is not present in this case." ADD017. If that is so, its truth lies only in that the coercion in this case is far more extensive than that in *Lee*. APP075 (comparing the coercive elements of *Lee*'s graduation prayer with those of the Pledge). As Justice Thomas stated unequivocally, "the Pledge policy … poses more serious difficulties than the prayer at issue in *Lee* … [and] is more troubling than *Lee* with respect to 'coercion.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 46-47 (2004) (Thomas, J., concurring).

The District Court's large citation from *Lee*, ADD017-18, does nothing but emphasize that Justice Thomas was correct – i.e., that the coercion endured by the Plaintiff children in this case is "more troubling" than that in *Lee*. The students, being as young as five years

old (as opposed to being on the brink of adulthood), are far more impressionable. Rather than being led by some stranger, they are led by their own teacher, whom they've grown to respect as an authority figure. They are encouraged to actively verbalize the religious words of the Pledge, rather than passively listen to the graduation prayer. The Pledge exposure occurs every single school day, rather than once or twice, maximum, in their entire public school careers. Whereas not listening to the prayer would be completely obscured from their peers, not saying "under God" in the Pledge might be obvious. And, unlike at a graduation ceremony (where their parents are next to them to provide support), those seeking to dissent from the majority's religious infusion are essentially alone in the setting of the Pledge. Thus, that the District Court would find a "dilemma" for the children in *Lee*, but "no such dilemma," ADD018, with the Pledge, is puzzling, to say the least.

Apparently the argument relies somewhat on the fact that "the New Hampshire Pledge statute expressly endorses nonparticipation." ADD019. This argument fails on its face: small children are hardly aware of (much less read, study, and comprehend) state statutes. And even if they were knowledgeable regarding RSA 194:15-c, II, nonparticipation has been "expressly endorse[d]," for these situations

for more than sixty years. *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). As the Supreme Court noted in *Engel v. Vitale*, 370 U.S. 421, 423-24 n.2 (1962), *Abington School District v. Schempp*, 374 U.S. 203, 224-25 (1963), and *Wallace v. Jaffree*, 472 U.S. 38, 61 n.51 (1985), the fact that no student is required to participate is completely inconsequential in terms of whether or not the given practice violates the Establishment Clause.

Interestingly, after this argument, the District Court admitted that coercion, in fact, likely exists: "I recognize that peer or social pressure probably does push students toward participation." ADD019. But that is precisely what *Lee* prohibits:

> No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

505 U.S. at 599 (provided as the concluding sentence of the opinion). Accordingly, "as a matter of our precedent, the Pledge policy is unconstitutional." *Elk Grove*, 542 U.S. at 49 (Thomas, J., concurring).

v. "Under God" Violates the Endorsement Test

In *Lynch v. Donnelly*, Justice O'Connor introduced the endorsement test:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.

465 U.S. at 688 (O'Connor, J., concurring). Reading the history of the Act of 1954, it is impossible to deny that such messages were precisely the ones sought to be delivered by the 83rd Congress. APP009-10 (Complaint ¶¶ 27-33). Those who believe in God were the favored members of the political community, and Atheists were to be considered outsiders. *See also* APP051-54 (providing an exegesis on this subject); APP066-074 (listing nine pages of quotations from the Congressional Record (circa 1954), unequivocally demonstrating this reality).

These data would end the discussion were it not for the fact that the test's author, herself, wrote that the "under God" verbiage was permissible. *Elk Grove*, 542 U.S. at 33-45 (O'Connor, J., concurring). Plaintiffs will simply point out that Justice O'Connor was joined by none of her colleagues in her concurrence, and that her application of

the endorsement test in *Elk Grove* has been markedly criticized.[22] Her admission that the Pledge's constitutionality was "a close question," *id.* at 37, suggests she recognized that nothing in that concurrence was consistent with the noble and principled statements she had previously made. *See, e.g.*, *Employment Div. v. Smith*, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority,"); *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("[W]hen [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share.").

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[22] *See, e.g.*, Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 Harv. L. Rev. 155, 235 (2004) (opining that Justice O'Connor's *Elk Grove* "rationale is unconvincing both to serious nonbelievers and to serious believers."); Roy, *The Establishment Clause and the Concept of Inclusion*, 83 Or. L. Rev. 1, 23 (2004) (noting her ceremonial deism argument to be "inconsistent with [Establishment Clause] doctrine."); Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. Pa. J. Const. L. 725, 763 (2006) (finding Justice O'Connor's vacillations to be "really a reflection of her own confusion about the proper purposes of the Establishment Clause."); Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 Mich. St. L. Rev. 667, 717-18 (2008) (finding "something amiss" in Justice O'Connor's *Elk Grove* analysis, as she "pejoratively" analogizes sincere believers to hecklers, and "seems to assume a particular view about our Nation's cultural landscape that individuals of both majority and minority faiths might not share."); Trunk, *The Scourge of Contextualism: Ceremonial Deism and the Establishment Clause*, 49 B.C. L. Rev. 571, 596 (2008) (describing Justice O'Connor's *Elk Grove* approach as "ad hoc [and] result-oriented.").

vi. "Under God" Violates the Imprimatur, the Outsider and Divisiveness Tests

It is clear that, by reciting each morning that the republic for which the flag stands is "one Nation under God," the Defendants have placed their imprimatur on the notions that (a) God exists, and (b) we, as a nation, are under that religious entity. As a result, Plaintiffs are transformed into "outsiders, not full members of the political community," *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring), precisely as the 83rd Congress intended. Of note is that there were no complaints regarding religion vis-à-vis the Pledge until the 1950s, demonstrating that it was not until the Pledge was interlarded with "under God" that any divisiveness arose. Thus, the "imprimatur test," *see*, *e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002), the "outsider test," *see*, *e.g.*, *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 309 (2000), and the "divisiveness test," *see, e.g.*, *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948), *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 311 (2000), *McCreary County v. ACLU*, 545 U.S. 844, 876 (2005) and *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring), were all violated.

(B) The Pledge Decisions of the Other Circuits Are Instructive

In reviewing the three prior federal Court of Appeals challenges to the nation's now religious Pledge of Allegiance, the District Court contended that the panels took "slightly different analytical approaches." ADD009. This is incorrect. The approaches were not "slightly" different at all. One was a principled, logical and unassailable judicial opinion that reflected the Constitution's devotion to equality. The two others were nothing but schemes to justify a violation of the ideals upon which the Establishment Clause of the First Amendment is based.

i. The Ninth Circuit Adhered to Constitutional Principle

> To recite the Pledge is not to describe the United States; instead, it is to swear allegiance to the values for which the flag stands: unity, indivisibility, liberty, justice, and--since 1954--monotheism. The text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion."

Newdow v. United States Cong., 328 F.3d 466, 487 (9th Cir. 2003), *rev'd* on standing grounds, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004). With these words, the Ninth Circuit ruled in a

principled, logical, and unassailable manner, invalidating the current version of the Pledge of Allegiance. Although severely criticized by the religious right and by politicians of almost every stripe, *see*, *e.g.*, Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C.L. Rev. 1865 (2003) (noting how President Bush called the decision "ridiculous," Sen. Majority leader Tom Daschle called it "just nuts," and Robert Byrd – "Dean of the Senate" and the longest serving member of the Congress in the nation's history – called the judges "stupid"), not one valid legal criticism has ever been lodged against the opinion. Perhaps recognizing that such is the case, the District Court here didn't even attempt to find any defect in the *Newdow* opinion. In fact, in its thirty-five page Order, the District Court's *Newdow* analysis consisted of a single sentence! ADD024.

This being the case, perhaps the best place to look for a coherent dissection of the *Newdow* opinion is in the dissent. Yet one finds no legally sound criticism there, either. On the contrary, Judge Fernandez essentially acknowledged the rectitude of his colleagues' views:

> [W]hat the religion clauses of the First Amendment require is neutrality; that those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions.

Newdow, 328 F.3d at 491 (Fernandez, J., dissenting). That a judge could begin with that premise and then conclude that intruding "under God" into the nation's sole Pledge of Allegiance, to be affirmed daily in the public schools by impressionable children (led by government agents) is permissible, reveals in and of itself how powerful an individual's religious biases can be.

Would a Monotheistic judge really accept her young children being asked to stand each day to pledge to "one nation under no god"? If she were Christian and more than ninety percent of the citizenry were Hindu, would she claim that a Pledge with "one Nation under Vishnu" has "no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion"? *Id*. at 492. And would she fail to recognize that such a pejorative disrespect for a minority view does not even address the Constitution's textually-defined criterion? Actions need not "establish" any religion or "suppress" any religious beliefs to be violations of the Establishment Clause. They merely need to be actions "**respecting** an establishment of religion."

In 1778, South Carolina placed into its Constitution that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted

and declared to be, the established religion of this State."[23] If that state then had a Pledge of Allegiance to "one State under Protestant Christianity," would Judge Fernandez really not find that pledge to be one **respecting** that establishment of Christian Protestant religion?

Furthermore, however "minuscule," "de minimis," or "picayune," is "the danger that 'under God' in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody's beliefs," *id.* at 491, it is certainly no less than the danger that existed in any of the nine other Supreme Court cases challenging a religious activity in public schools, **every one of which** resulted in a ruling against the school authorities. *McCollum v. Board of Education*, 333 U.S. 203 (1948); *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Stone v. Graham*, 449 U.S. 39 (1980); *Wallace v. Jaffree*, 472 U.S. 38 (1985), *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). One would certainly expect Circuit Court judges to follow the principles found in **nine out of nine Supreme Court holdings**.

[23] South Carolina Constitution of 1778, Article XXXVIII accessed on January 22, 2010 at http://avalon.law.yale.edu/18th_century/sc02.asp.

Finally, it should be noted that the Ninth Circuit's ruling resulted in a "political firestorm," Gey, *supra*, at 1866, that persisted throughout the year.[24] Yet, eight months later, Judge Fernandez still maintained his "minuscule," "de minimis" and "picayune" characterization.[25] In other words, despite observing the extensive and continuing nationwide protestations responding to **the removal** of the endorsement of a religious ideal, he still had no misgivings about trivializing the complaints regarding **the creation** of that governmental endorsement. This is extraordinary, inasmuch as constitutional infirmity exists only when there is the imposition of governmental religious favoritism, not its withdrawal. How could Judge Fernandez then use the words "minuscule," "de minimis," and "picayune" to describe the effects upon a politically disenfranchised minority, as they object to that infirmity?

The District Court in this case engaged in unsound arguments little different from those made by Judge Fernandez. Besides mistakenly contending that "the Constitution prohibits the government

[24] Following the Washington, DC area sniper shootings and the war in Iraq, the Pledge case was the third most followed news story of 2002. Accessed at http://people-press.org/report/168/sniper-attacks-draw-most-public-interest-in-2002 on January 24, 2010.

[25] The original Ninth Circuit opinion, *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002), was issued on June 26, 2002. An amended opinion, *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2003) was filed on February 28, 2003. Judge Fernandez used the same verbiage in both opinions.

from establishing a religion," ADD025 (when, again, a law simply **respecting** an establishment of religion violates the Constitution), the District Court wrote that "rote repetition has … removed any significant religious content embodied in the words." *Id.* The manifest fallacy of that claim is seen not only in the response to the Ninth Circuit's 2002/2003 decisions (along with the intense religious interest when the Pledge case was heard at the Supreme Court in 2004[26]), but in the materials filed by Defendants themselves. In its memorandum in support of its motion to intervene, the State of New Hampshire included an Exhibit A. APP024. Entitled, "Statement of the [school boards] in connection with Pledge of Allegiance Litigation," that exhibit directly contradicts the District Court, averring that, "the core principles behind the Pledge are intended to be the subject for thoughtful reflection and not merely intended for rote recitation." APP027.

Thus, there remains no legally supportable criticism of the Ninth Circuit's Pledge ruling, which was meticulously constructed to adhere to constitutional principle.

[26] On the order of **fifty** amicus briefs were submitted at the Supreme Court. See http://restorethepledge.com/docs/docket1624.pdf (Docket Sheet, case #02-1624). The overwhelming majority of these were by religion-related individuals and/or organizations.

ii. The Fourth and Seventh Circuits Did Not Adhere to Constitutional Principle

Two other circuit courts of appeals have ruled on the "under God" phrase in the Pledge of Allegiance. In contrast to the Ninth Circuit in *Newdow*, no constitutional ideals underlay their decisions.

1. The Seventh Circuit Did Not Adhere to Constitutional Principle

In *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 445 (7th Cir. 1992), the Seventh Circuit chose not to consider the "elements identified by the Court in Lemon." ADD010. Accordingly, it should be noted that *Sherman* did not use the test that is used in this Circuit. *Boyajian v. Gatzunis*, 212 F.3d 1, 4 (1st Cir. 2000). Instead, the *Sherman* panel relied largely on "ceremonial deism" – a term given importance far in excess of its use by the Supreme Court.

In fact, "ceremonial deism" has been mentioned in only three of the high court's cases. The first was *Lynch v. Donnelly*, 465 U.S. at 716, when Justice Brennan (in dissent) responded to the majority's having raised such items as the motto and "under God" in the Pledge. Justice Brennan footnoted a book review where the reviewer heard "ceremonial deism" at a lecture, quoting the words "from my memory … I hope correctly." Sutherland, Book Review, 40 Ind. L. J. 83, 86 n.7 (1964).

Professor Sutherland was hypothesizing about church-state problems that "can be accepted as so conventional and uncontroversial as to be constitutional." *Id*. That hardly applies to "under God" in the Pledge, which has been challenged repeatedly by unrelated plaintiffs since its inception, which has resulted in a circuit split, and which raised a "political firestorm" when it was ruled unconstitutional. Furthermore, Justice Brennan began his comments with, "While I remain uncertain about these questions," and simply said he "would suggest" that those practices "can best be understood," as ceremonial deism. 465 U.S. at 716 (Brennan, J., dissenting). He never said that he (or anyone else) actually bought into that understanding.

The next Supreme Court use of the term – also the last before *Sherman* was decided – took place in 1989 in *Allegheny County*. There, in Justice Blackmun's plurality opinion, "ceremonial deism" was initially employed in a footnote referencing Justice Brennan's earlier *Lynch* dissent. *Allegheny County*, 492 U.S. at 595 n.46. It was repeated a few pages later, in the totally unhelpful statement:

> We need not return to the subject of "ceremonial deism," see n. 46, *supra*, because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.

Id. at 603. The term appeared once more in the concurrence of Justice O'Connor, as she referenced her myopic and outlandish contention (made five years earlier) that Atheists are incapable of "solemnizing public occasions" or "expressing confidence in the future." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (asserting that "the only ways reasonably possible in our culture" to accomplish these ends are to have governmental "acknowledgements" of Monotheistic religion).

Plaintiffs contend that to rely on such a feeble Supreme Court pedigree to decide an important constitutional question – when the conclusion is so contrary to constitutional ideals – is inappropriate. This is especially true when "ceremonial deism" – like "ceremonial Christianity," "ceremonial Protestantism," "ceremonial Mormonism" (or, for that matter, "ceremonial Atheism") – goes beyond "respecting an establishment of religion." It is, essentially, an acknowledgement of having actually established religion. Would not the following be an apt entry in a law dictionary?

> Establishment of Religion (*noun*) 1. A religious ideology, which (as a result of governmental action) has become "interwoven … deeply into the fabric of our civil polity." *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 447 (7th Cir. 1992).

Sherman's allusions to other Supreme Court statements were equally weak, and none addressed the neutrality "touchstone" or the obvious fact that "under God" is "directly subversive of the principle of equality." *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Furthermore, *Lee v. Weisman* had just been decided, which *Sherman* itself recognized requires overturning the Monotheistic Pledge:

> If as *Barnette* holds no state may require anyone to recite the Pledge, and if as the prayer cases hold the recitation by a teacher or rabbi of unwelcome words is coercion, then the Pledge of Allegiance becomes unconstitutional under all circumstances, just as no school may read from a holy scripture at the start of class.

980 F.2d at 444. Yet *Sherman* then simply ignored that very command.

The Seventh Circuit's synthesis of the opinions from *Allegheny County* was also somewhat disconcerting. The *Allegheny* plurality held that the outsider test was a "sound analytical framework." 492 U.S. at 595. Looking then at the agreement by the "four Justices" in dissent that "under God" turns Atheists into outsiders, 980 F.2d at 443, *Sherman* concluded that "under God" is fine. This is bizarre. If five justices in a majority say that government may not turn individuals into outsiders, and four other justices say the "under God" in the Pledge does just that, should not the conclusion be that "under God" is not fine?

To be sure, in *Allegheny*, Justice Blackmun (struggling to find a consensus) noted that the Pledge had been "characteriz[ed] … as consistent with the proposition that the government may not communicate an endorsement of religious belief." 492 U.S. at 602-03. But he specifically pointed out that this characterization had been made "in dicta," *id*. at 602, signaling that there had not been any definitive determination of this issue (and that, likely, he merely was trying to maintain his frail plurality among the fractured opinions in the case then before him). After all, in that very case, Justice Blackmun also penned:

> [T]oday [the words of the Establishment Clause] are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Id*. at 589-90;
>
> [T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine. *Id*. at 590;
>
> "[G]overnment may not favor religious belief over disbelief." *Id*. at 593 (citation omitted);
>
> "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion." *Id*. (citation omitted);
>
> [T]his kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes. *Id*. at 601 n.51;

> It is worth noting that just because Marsh sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional. … Legislative prayer does not urge citizens to engage in religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct. But, as this practice is not before us, we express no judgment about its constitutionality. *Id*. at 603 n.52;
>
> [W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion. *Id*. at 604;
>
> [T]he Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths. *Id*. at 610;
>
> It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state. *Id*. at 611;
>
> [T]he availability or unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith. *Id*. at 618 n.67;
>
> Establishment Clause must be applied with special sensitivity in the public-school context. *Id*. at 620 n.69; and

> [G]overnment may not engage in a practice that has the effect of promoting or endorsing religious beliefs. *Id*. at 621.

In view of the foregoing, to write, "If the Justices are just pulling our leg, let them say so," *Sherman*, 980 F.2d at 448, shows a fair amount of gall. The Justices did say so. They said government must be neutral as between Monotheism and Atheism. *McCreary*, 545 U.S. 844 at 860.[27] They said government may not pass laws, such as the Act of 1954, that have a clearly religious purpose. *Wallace*, 472 U.S. 38 at 56. They said laws may not have predominantly religious effects. *Agostini v. Felton*, 521 U.S. 203, 223 (1997). They said government may not coerce public school students to participate in any way in making a religious claim. *Lee*, 505 U.S. at 596. And – noting that government may not turn people into outsiders on the basis of their religious beliefs – at least four justices agreed it is "sophistry," *Allegheny County*, 492 U.S. at 673 (Kennedy, J., concurring and dissenting), to suggest that having a pledge that announces we are "one Nation under God" does not do precisely this to Atheists.

[27] The Court said this in thirty-four other case, also. APP048-50.

2. The Fourth Circuit Did Not Adhere to Constitutional Principle

The other circuit court Pledge case discussed by the District Court was *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005). As an initial matter, it should be noted that the "ceremonial deism" argument touted in *Sherman* was criticized in *Myers*:

> The phrase "ceremonial deism" is somewhat disconcerting because it suggests that, when "initially used" phrases like "in God we trust" and "under God" "violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use." Sherman v. Community Consolidated Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) (Manion, J., concurring). Moreover, "ceremonial deism" provides no account for why only words with religious connotations lose meaning, and not words like "liberty, and justice for all."

418 F.3d at 402.

Myers was otherwise as unprincipled and flawed as *Sherman*. In *Myers'* first footnote, for instance, *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) was referenced for the notion that "'No official … can prescribe what shall be orthodox in … religion.'" 418 F.3d at 398 n.1. What did the *Myers* judges think occurs when public school teachers stand their students up each day to assert that we exist "under God"?

Myers also engaged in the incessant falsehood of describing "under God" as a "referenc[e] to the Deity." 418 F.3d at 403 n.8. Claiming that the nation exists "under God" is not a mere "reference." It is, as the Supreme Court noted, an "affirmation of a belief and an attitude of mind." *Barnette*, 319 U.S. at 633. "References" to God do not "acknowledge … dependence … upon the moral directions of the Creator," APP058, "daily proclaim … dedication … to the Almighty," APP010, or "humbly see[k] the wisdom and blessing of Divine Providence." APP055.

Did *Myers*' author, Judge Williams, really not recognize this obvious distinction? Perhaps so, in view of her apparent oblivion to how others might view "**the <u>D</u>**eity," see this page, *supra*, as if there could only be one true God (hers, no doubt) that the Pledge is "referencing." This shortsightedness is also seen in her view of "the Establishment Clause's historical setting." 418 F.3d at 402. Correctly noting that this "'rested on the belief that a union of government and religion tends to destroy government and degrade religion.'" *id.* (citation omitted), she surely was aware that "one Nation under Jesus" would be an example of such a "union." Why, then, is "one Nation under God" not the same?

The standard citation to Justice Douglas' observation that, "We are a religious people whose institutions presuppose a Supreme Being," *Zorach v. Clausen*, 343 U.S. 306, 313 (1952), is provided … with its also standard omission of the Justice's clarification (after he saw how his words had been misused):

> But … if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, first, that the dogma, creed, scruples or practices of no religious group or sect are to be preferred over those of any others.

McGowan v. Maryland, 366 U.S. 420, 563 (1961) (Douglas, J. dissenting). Here, the religious leaven is being worked into the affairs of our people **not** by individuals or groups, but "by the Government."

That *Myers* referenced *Marsh v. Chambers*, 463 U.S. 783 (1983) as "paradigmatic," 418 F.3d at 403, also demonstrates the invalidity of the Fourth Circuit's opinion. "Paradigmatic" is hardly an appropriate description of a case noted to be "an exception to the Establishment Clause," 463 U.S. at 796 (Brennan, J., dissenting); *Rosenberger v. University of Virginia*, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting)), and "a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine," *Kurtz v. Baker*, 829 F.2d 1133, 1147 (D.C. Cir. 1987) (R.B. Ginsburg, J., dissenting).

Moreover, it is certainly not "paradigmatic" to never discuss the key legal text underlying the given litigation. Yet there is not a word in *Marsh* about what the Establishment Clause entails. That may be understandable, since the *Marsh* decision flies in the face of every one of the tests just discussed. However, it is not something upon which to further extend actions of questionable (at best) constitutional validity.

In fact, while claiming that legislative prayer was not objectionable to the Framers, *Marsh* had to relegate the words of the Father of the Constitution (and of the Bill of Rights) to a footnote. "Madison expressed doubts concerning the chaplaincy practice," wrote Chief Justice Burger. 463 U.S. at 791 n.12. "[E]xpressed doubts" is an interesting way to characterize Madison's actual prose: "The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles." 3 Wm. & Mary Q. 534, 558 (E. Fleet ed. 1946). Can that notion be more categorically expressed?

On top of all this, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards v. Aguillard*, 482 U.S. at 583-84. Thus, a lower court should be quite hesitant to seek support for "under

God" in the classroom by allusions to *Marsh*, which pertained solely to "legislative and other deliberative public bodies." *Marsh,* 463 U.S. at 786. Nothing in the Supreme Court's jurisprudence warrants extending that case's Establishment Clause contortions beyond that "legislative/deliberative-body exception." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191 (5th Cir. 2006). In fact, the Supreme Court explicitly warned against such an extension in *Lee v. Weisman*: "Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*." 505 U.S. at 596. Thus, to have done as *Myers* did and extend *Marsh* to the public school context was plainly irresponsible.

Another distinguishing feature is legislative prayer's "unambiguous and unbroken history of more than 200 years." *Marsh*, 463 U.S. at 792. The challenged practice here has existed less than sixty years (i.e., for barely twenty-five percent of the history of the United States), and it is hardly "unambiguous and unbroken." In fact, even as of today the duration of the Pledge's original secular (inclusive) version exceeds the duration of its current religious (divisive) version. Adding the Supreme Court's subsequent pronouncement that "the religious liberty protected by the Constitution is abridged when the State

affirmatively sponsors the particular religious practice of prayer," *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 313 (2000), any claim that the *Marsh* "legislative/deliberative-body exception" excuses "under God" in the Pledge is untenable.

Myers' allusions to "patriotic references to the Deity," 418 F.3d at 403 n.8 and 404, are also misguided. There is nothing "patriotic" about referencing disputed, purely ecclesiastical entities. In fact, this conflation of patriotism and Pledge recitations is one of the most pernicious aspects of this case. With "under God" now in the Pledge, the patriotism of all who cannot in good conscience participate is called into question. That is a shameful effect of RSA § 194:15-c, which further stigmatizes individuals merely because their religious beliefs differ from those of the majority.

Moreover, the act at issue is not a "reference." It is pledging – a unique, personal "affirmation of a belief." *Barnette*, 319 U.S. at 633. Thus, as the government encourages this practice, it is not only impermissibly "lend[ing] its power to one or the other side in [a] controvers[y] over religious … dogma," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), but it is actively proselytizing as well. Government may not take a captive audience of impressionable small

children, assemble them within its public school classrooms, and encourage them to "affirm … our reliance on God." APP055 (as expressed by the President of the United States).

Perhaps the most extraordinary mischaracterization in *Myers* was the contention that the Supreme Court's Justices "have made clear," 418 F.3d at 405, that "under God" is constitutional. The rare dicta relied upon for this claim, filtered from an ocean of **principled** statements (all totally inconsistent with the conclusion *Myers* strained to reach), were completely ancillary to the matter before the Justices in each case. Furthermore, all of those dicta came from dissenting Justices, all but one of whom was arguing that any fair application of the majority's logic should lead to invalidation of the "under God" phrase.[28] *Lee v. Weisman*, 505 U.S. 577, 638-39 (1990) (Scalia, J., dissenting) (arguing that the majority's coercion test would "[l]ogically" result in the Pledge being deemed unconstitutional); *Allegheny County*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring and dissenting) (arguing that the majority's endorsement test, "applied logically," should lead to the Pledge being ruled unconstitutional); *Wallace v. Jaffree*, 472 U.S. 38,

[28] The sole exception was Justice Brennan, who (writing wholly in the subjunctive) was postulating how "under God" in the Pledge might possibly be justified (as he attempted to have the majority rule that the crèche in *Lynch* was unconstitutional). *See* discussion at page 41, *supra.*

88 (1985) (Burger, C.J., dissenting) (arguing that since it is improper to look at the statute "as a whole," the Pledge must be unconstitutional);[29] *Engel v. Vitale*, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting) (arguing that if "the state and federal governments are without constitutional power to prescribe" religious statements, the Pledge must be unconstitutional). To ignore these logical applications of the majority's holdings, focusing instead on the dissenters' objections to them, is hardly an appropriate technique for the lower courts.

Along these lines, the *Myers*' claim that "*not one Justice has ever suggested that the Pledge is unconstitutional*," 418 F.3d at 406 (emphasis in original), is erroneous. To be sure, no Justice – fully aware of the popular outcry that will result when the majority's religious belief is no longer included in the Pledge – has been eager to express a sentiment that is certain to subject him or her to extensive religion-based ridicule. Nonetheless, numerous Justices have, through their principles and rulings, gone far beyond "*suggest[ing] that the Pledge is unconstitutional*."

[29] *Myers* mistakenly attributed this dissent to then-Justice Rehnquist. 418 F.3d at 405. It also referenced Justice O'Connor's reply to Chief Justice Burger, where she referenced her offensive claim from *Lynch* that Atheists are incapable of solemnizing occasions or expressing confidence in the future. *Wallace*, 472 U.S. at 78 n.5 (O'Connor, J., concurring). *See* at page 43, *supra*.

Moreover, focusing on existing case law (rather than principle), Justice Thomas has forthrightly acknowledged "**as a matter of our precedent, the Pledge policy is unconstitutional.**" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring). One would think that the lower courts would recognize that they are bound by that precedent, not by musings of what they think the Justices will or will not ultimately decide. Yet *Myers* made no mention of Justice Thomas's declaration, or of how *Lee*'s coercion analysis unequivocally corroborates it.

Myers' argument that "the Pledge, unlike prayer, is not a religious exercise or activity, but a patriotic one," 418 F.3d at 407, relates back to the "as a whole" argument discussed previously. *See* at pages 14-18, *supra*. Plaintiffs will simply highlight that this is one more example of the contradictions found among those arguing that "under God" in the Pledge should be maintained. As the Fourth Circuit sought to distinguish the Pledge from "legislative prayer and days of thanksgiving," 418 F.3d at 405, it was approvingly alluding to Justice Kennedy's opinion in *Allegheny County*. 418 F.3d at 403 n.9 and 405. In his analysis in that case, however, Justice Kennedy specifically grouped together "Thanksgiving Proclamations, the reference to God in

the Pledge of Allegiance, and invocations to God in sessions of Congress and of this Court." 492 U.S. at 674 n.10. Likewise, in the same paragraph acknowledging that "under God" in the Pledge is "a religious phrase, and it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance," 418 F.3d at 407, *Myers* referred to "cases, like this one, challenging non-religious activities." *Id*. at 408.

(C) The Personal Predilections of the Judges Should Not Determine the Outcome of This Case

Assuming that the religious makeup of our judiciary reflects the religious makeup of our population, only a few percent, at most, of our jurists are Atheists.[30] With the widespread animus towards this disenfranchised minority,[31] it is likely that even this figure is an overestimate, since political connections are often essential for judicial elections and/or appointments. Yet empirical evidence shows that there

[30] *See*, *e.g.*, the U.S. Religious Landscape Survey, indicating that less than 2% of the population is Atheist. Accessed at http://religions.pewforum.org/reports on January 28, 2010.

[31] *See* Edgell P, Hartmann D, and Gerteis J. *Atheists as "other": Moral Boundaries and Cultural Membership in American Society*. American Sociological Review, Vol. 71 (April, 2006), p. 230 (noting that "Atheists are at the top of the list of groups that Americans find problematic in both public and private life, and the gap between acceptance of atheists and acceptance of other racial and religious minorities is large and persistent.").

is a relationship between the religion of the judge and the outcome of cases when religious liberty is at stake.[32] Thus, the fear that Establishment Clause ideals, principles, and tests may be "followed or ignored in a particular case as our predilections may dictate," *Wallace*, 472 U.S. at 69 (1985) (O'Connor, J., concurring), is real. As Justice Blackmun stated:

> [B]ias [of] this Court according to the religious and cultural backgrounds of its Members [is] a condition much more intolerable than any which results from the Court's efforts to become familiar with the relevant facts.

Allegheny County, 492 U.S. at 614 n.60.

It is highly doubtful that any Atheist judge would ever have signed on to *Sherman* or *Myers*, because an Atheist judge would not see the glory of God or the perceived benefits of extolling Monotheistic values. But any judge – Atheist, Christian, or whatever – could certainly see the glory of equality and the benefits of treating all religious views with equivalent respect. Thus Judge Goodwin, the

[32] *See, e.g.*, Sisk GC. *How traditional and minority religions fare in the courts: Empirical evidence from religious liberty cases*. 76 U. Colo. L. Rev. 1021, 1030 (2005).

author of the Ninth Circuit's Pledge opinion, is a minister's son,[33] who "was for many years an elder in the Presbyterian church."[34]

That makes sense, for religious persuasion rarely interferes with adherence to the values and principles found within our great charter. As Justice Thomas has written, "the strength of those universal principles of equality and liberty provides the means for resolving contradictions between principle and practice." Thomas C. *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation*. 1987 How. L.J. 691, 702 (1987). "Under God" in the Pledge is a contradiction that deserves such a resolution.

IV. "Under God" in the Pledge Violates the Free Exercise Clause

Not only do the District Court's contentions regarding Counts II and III miss the point of the Free Exercise Clause, the cases cited support Plaintiffs' arguments. For instance, the previously noted quote from *Smith*, 494 U.S. at 877 (i.e., "the government may not … lend its power to one or the other side in controversies over religious … dogma") was provided. ADD026. Did the Court truly not see that

[33] Holding R. *Newsmaker Profile: Alfred T. Goodwin*. San Francisco Chronicle, June 28, 2002, at A1.
[34] McKay F. *Don't Blame the Judge for Defending Your Rights*. Seattle Times, July 4, 2002.

– in stating that we are "one Nation under God" – the government is lending its power to the side that says God exists? ADD027.

The District Court then cited *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008), which is completely distinguishable from the case at bar. In *Parker*, as in *Barnette*, the religion was only of the plaintiffs' making. In other words, the government had no more of a religious motive in discussing gay marriage in *Parker* than it had in having a (secular) pledge in *Barnette*. Since "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest," *Smith*, 494 U.S. at 886 n.3, there was no actionable Free Exercise claim in *Parker*.

Here the complete opposite exists. "Under God" was intruded into the Pledge to "acknowledge the dependence of our people and our Government upon the moral directions of the Creator," APP058, and to "proclaim … dedication … to the Almighty." APP010. In other words, unlike in *Parker* and *Barnette*, the law in this case fails the neutrality requirement. "A law failing to satisfy th[at] requiremen[t] must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-32 (1983). Clearly, there is no compelling interest here … especially if, as the District Court wrote, "inclusion of the words 'under God' constitutes, at the most, a form of ceremonial or benign deism." ADD027.

The idea that "the Doe parents have suffered no impairment in their ability to instruct their children in their views on religion," ADD029, is simply untrue. Sending their children to public school, the Doe parents have a right to know that a specific, purely religious claim (directly contrary to what they wish to instill in their children) will not be advocated by authority figures such as their children's teachers. This is not a case of children "exposed on occasion in public school to a [secular] concept offensive to a parent's religious belief." ADD029 (citing *Parker*, 514 F.3d at 105-06). It is children inculcated daily with a religious concept offensive to a parent's belief system. That is a Free Exercise Clause violation.

V. "Under God" in the Pledge Violates Equal Protection

The District Court cited *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005) to support its claim that equal protection has not been violated. *Wirzburger*, however, can immediately be distinguished from the instant action, since the issue here **does** "hinge on the religious beliefs" of Plaintiffs, *see* 412 F.3d at 280; having "under God" in the Pledge **does** "'require [plaintiffs] to choose between their religious beliefs and receiving a government benefit,'" *id*. at 281 (citation omitted) (with the benefit being the ability to join with their fellow students to recite a patriotic oath); and – as demonstrated by H. R. Rep. No. 1693 (noting that placing "under God" in the Pledge would "serve to deny … atheistic … concepts"),

APP058 – there **was** "'an official purpose to disapprove of'" Atheism. 412 F.3d at 281 (citation omitted).

The District Court's contention that the Pledge statute "applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the pledge," ADD031, shows a complete lack of understanding of religious beliefs and the gravamen of this legal challenge. Plaintiffs can no more participate in reciting the Pledge than a person of color can use a bathroom marked "Whites Only." To be sure, it is a threat of conscience, rather than a threat of police action, that keeps them out. But, constitutionally, that former threat is just as pernicious as the latter. "Just as we subject to the most exacting scrutiny laws that make classifications based on race . . . so too we strictly scrutinize governmental classifications based on religion." *Employment Div. v. Smith*, 494 U.S. 872, 886, n.3 (1990).[35]

The District Court's "discriminatory intent" argument, ADD032-33, is, in essence, a repackaging of the discussion regarding *Lemon*'s "purpose prong." *See* at pages 21-24, *supra*. Although (as Plaintiffs have stipulated) the School Districts and the State had no "discriminatory intent," Congress had precisely that intent

[35] The District Court's footnote referencing "'facially neutral laws'" is inapposite. ADD031 n.7. There is nothing "facially neutral" about a statute that says that schools "shall authorize a period of time during the school day for the recitation of [a pledge to 'one Nation under God']."

when it passed the Act of 1954. Since the federal courts "retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution," *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997), the issue of Congress's "discriminatory intent" is before this Court, which may order the appropriate declaratory and/or injunctive relief to protect Plaintiffs from more of the discrimination that this intent has wrought.

VI. "Under God" in the Pledge Violates the Fundamental Constitutional Right of Parenthood

The District Court stated that Plaintiffs "do not identify any specific constitutional provision guaranteeing [the right of parents to instill their preferred religious ideals in their children]." ADD033. Plaintiffs submit that right is embraced within the general right of parenthood. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Although this "parenthood" right is integrally related to the Free Exercise claim in this case, it stems from a liberty interest separate and distinct from those interests embraced by the First Amendment. Thus, it remains a separate count.

CONCLUSION

The District Court erred in granting the motions to dismiss. Plaintiffs have presented arguments that demonstrate conclusively that the Establishment Clause is violated by the inclusion of "under God" in the Pledge of Allegiance. In this regard, the Court is respectfully requested to declare the Act of 1954 invalid, and to enjoin Defendants from using the religious Pledge of Allegiance in the public schools.

In the alternative (should the Court believe an enhanced record is necessary to properly decide the issues), Plaintiffs respectfully request the Court to rule that they are entitled to offer evidence to support each of their claims, and to remand this case to the District Court for that purpose.

Respectfully submitted,

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CASE NO. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C), the attached opening brief is proportionately spaced and has a typeface of 14 points.

According to Microsoft Word's "Statistics," this document – excluding the Cover Page, Table of Contents, Corporate Disclosure Statement, Table of Authorities, (this) Certificate of Compliance, and Certificate of Service – contains exactly 13,738 words.

February 1, 2010 /s/ - Michael Newdow

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CASE NO. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, et al.

Plaintiffs-Appellants,

v.

HANOVER SCHOOL DISTRICT, et al.

Defendants-Appellees,

On Appeal from the United States District Court
for the District of New Hampshire

(District Court #1:07-cv-356)

LOCAL RULE 28.0 ADDENDUM TO APPELLANTS' OPENING BRIEF

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(LOCAL RULE 28.0 ADDENDUM)

DISTRICT COURT'S 9/30/2009 ORDER OF DISMISSAL

(DOCUMENT 60)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

The Freedom from Religion Foundation;
Jan Doe and Pat Doe, Parents;
DoeChild-1, DoeChild-2, and DoeChild-3,
Minor Children,
Plaintiffs

v.

Civil No. 07-cv-356-SM
Opinion No. 2009 DNH 142

The Hanover School District and
The Dresden School District,
Defendants

The United States of America,
Intervenor

The State of New Hampshire,
Intervenor

Anna Chobanian, John Chobanian,
Kathryn Chobanian, Schuyler Cyrus,
Elijah Cyrus, Rhys Cyrus, Austin
Cyrus, Daniel Phan, Muriel Cyrus,
Michael Chobanian, Margarethe Chobanian,
Minh Phan, Suzu Phan, and the Knights of
Columbus,
Intervenors

O R D E R

The parties remaining as defendants in this case are the Hanover School District and the Dresden School District. All other individuals and institutions named in the caption of this order are intervenors and, as such, have the right to be heard on only two issues: the constitutionality of 4 U.S.C. § 4 (sometimes referred to below as "the federal Pledge statute"), and the constitutionality of N.H. REV. STAT. ANN. ("RSA") § 194:15-c

(sometimes referred to below as "the New Hampshire Pledge statute").

Background

The school districts moved to dismiss the claims against them "for the reasons set forth in the Federal Government's Memorandum in Support of the Federal Defendants' Motion to Dismiss . . . as to the constitutionality of 4 U.S.C. § 4 and the State of New Hampshire's Memorandum of Law in Support of Motion to dismiss . . . as to the constitutionality of RSA 194:15-c." (Mot. to Dismiss (document no. 46), at 1-2.) Thereafter, plaintiffs filed their first amended complaint (document no. 52). The following facts are drawn from that complaint.

Jan Doe and Pat Doe ("the Doe parents") are the mother and father of DoeChild-1, DoeChild-2, and DoeChild-3 ("the Doe children"). At the time the complaint was filed, the eldest Doe child attended a middle school jointly administered by the Hanover and Dresden school districts. The two younger Doe children were enrolled in a public elementary school operated by the Hanover district.

Jan and Pat Doe describe themselves as atheist and agnostic, respectively. Both are members of the Freedom from Religion Foundation. Each of the Doe children is said to be either an

atheist or an agnostic, and each is said to either deny or doubt the existence of God.

The Pledge of Allegiance ("Pledge") is routinely recited in the Doe childrens' classrooms, under the leadership of their teachers. As provided by Congress, the Pledge reads:

> I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

4 U.S.C. § 4. While the statute prescribes the text of the Pledge, and describes the preferred formalities attendant to its recitation, the statute includes no other mandate. That is, the statute does not compel recitation of the Pledge under any circumstances or by any person.

In New Hampshire, recitation of the Pledge in schools is governed by state law, which provides:

> I. 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.
>
> II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.
>
> III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or

> remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

RSA 194:15-c.

Plaintiffs stipulate that no Doe child has been compelled to recite the Pledge or its included phrase, "under God." (Plaintiffs do assert, however, that while the Doe children have not been compelled to recite the Pledge, they have been coerced.[1]) The Doe parents asked the principals of their childrens' schools to provide assurances that the Pledge would not be recited in their childrens' classes, but have received no such assurance.

Plaintiffs claim that by leading the Doe childrens' classes in reciting the Pledge of Allegiance in the manner prescribed by RSA 194:15-c, defendants have violated the rights of the Doe children under the Establishment Clause (Count I) and the Free Exercise Clause (Count II) of the United States Constitution; the

[1] The distinction between compulsion and coercion drawn by plaintiffs is based on Chief Justice Rehnquist's concurrence in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 31 n.4 (2004) (Rehnquist, J., concurring) ("I think there is a clear difference between compulsion (Barnette) and coercion (Lee).") (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), as an example of compulsion, and Lee v. Weisman, 505 U.S. 577 (1992), as an example of coercion).

rights of the Doe parents under the federal Free Exercise Clause (Count III); the rights of both the Doe children and their parents under the Due Process and Equal Protection Clauses of the United States Constitution (Count IV); and the Doe parents' federal constitutional rights of parenthood, as well as the Doe children's concomitant rights (Count V). Plaintiffs also assert that defendants have violated the rights of the Doe children and parents under Part I, Article 6, of the New Hampshire Constitution (Count VI); the Doe childrens' rights to the free exercise of religion, established by RSA 169-D:23 (Count VII); and the Doe parents' state rights of parenthood, as well as the associated rights of the Doe children (Count VIII). Finally, in Count IX, plaintiffs assert that "the use of a Pledge of Allegiance containing the words 'under God' is void as against public policy." (First Am. Compl. ¶ 84.)

Plaintiffs ask the court to: (1) declare that, by having teachers lead students in reciting the Pledge of Allegiance, defendants have violated the various constitutional and statutory provisions identified above; (2) declare that RSA 194:15-c is void as against public policy; and (3) enjoin recitation of the Pledge of Allegiance in the public schools within defendants' jurisdictions.

As noted, the school districts filed a motion to dismiss plaintiffs' original complaint. Then, after plaintiffs filed their first amended complaint, the State of New Hampshire filed a supplemental memorandum supporting its earlier motion to dismiss, in which it addressed claims that were newly raised in plaintiffs' first amended complaint. The United States and the remaining intervenors filed renewed motions to dismiss in which they incorporated by reference arguments made in earlier dismissal motions, and added arguments to address claims raised for the first time in the first amended complaint. The school districts have not directly responded to the first amended complaint other than by assenting to its filing, but the parties all seem to be proceeding on the assumption that the school districts persist in their original motion to dismiss, as reiterated and embellished by the intervenors with respect to the amended complaint. The court will likewise construe the pending motions to dismiss as having been advanced by the school districts as well.

The United States says plaintiffs' claims amount to an "as applied" challenge to the federal Pledge statute, but that characterization seems inapt. The statute prescribes the content of the Pledge of Allegiance, but does not command any person to recite it, or to lead others in its recitation. Merely leading students in reciting the Pledge does not seem an "application" of

the federal Pledge statute to the Doe children. Teachers leading students in a Pledge recital are actually complying with New Hampshire's Pledge statute. Accordingly, the constitutionality of 4 U.S.C. § 4 "as applied" is not at issue.

The State of New Hampshire stands on a different footing. Plaintiffs argue that the school districts violated their constitutional rights by leading the Pledge in classes in which the Doe children are enrolled. Because all appear to agree, as a factual matter, that the Doe children's teachers acted in compliance with the mandate of RSA 194:15-c, determining the constitutionality of the teachers' actions turns on the constitutionality of RSA 194:15-c. That is precisely the question the State of New Hampshire is entitled to address.

The Legal Standard

A motion to dismiss for "failure to state a claim upon which relief can be granted," FED. R. CIV. P. 12(b)(6), requires the court to conduct a limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "The motion [should] be granted unless the facts, evaluated in [a] plaintiff-friendly manner, contain enough meat to support a reasonable expectation that an actionable claim may exist." Andrew Robinson Int'l, Inc.

v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Morales-Tañón v. P.R. Elec. Power Auth., 524 F.3d 15, 18 (1st Cir. 2008)).

Discussion

Count I

In Count I, plaintiffs claim that defendants violated the rights of the Doe children under the federal Establishment Clause by leading their classes in reciting the Pledge of Allegiance. Defendants move to dismiss, arguing principally that: (1) the Establishment Clause permits official acknowledgments of the nation's religious heritage and character; (2) the Pledge of Allegiance is a permissible acknowledgment of the nation's religious heritage and character; and (3) the purpose of the New Hampshire Pledge statute is to promote patriotism and respect for the flag.[2] Plaintiffs disagree, categorically.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. "The [Establishment] Clause[ ] appl[ies] to the States by incorporation into the Fourteenth Amendment." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 8 n.4 (2004) (citing

[2] As subsidiary matters, defendants further argue that the Pledge must be considered as a whole, and that Lee, 505 U.S. 577, is not controlling in this case because reciting the Pledge does not constitute an inherently religious practice.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)); see also Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008) (citation omitted).

Plaintiffs are distressed, primarily, that the phrase "under God" is included in the Pledge's text. They contend that inclusion of "under God" in the Pledge renders the New Hampshire Pledge statute unconstitutional under six different legal tests that have been employed in assessing Establishment Clause claims: (1) the "touchstone test" of neutrality found in McCreary County v. ACLU of Kentucky, 545 U.S. 844, 860 (2005); (2) the "endorsement test" posited by Justice O'Conner in Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); (3) the first two prongs of the familiar Lemon test, see Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); (4) the "outsider test" described in Santa Fe Independent School District v. Doe, 530 U.S. 290, 309 (2000); (5) the "imprimatur test" articulated by Justice Blackmun in Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring); and (6) the "coercion test" noted in Engel v. Vitale, 370 U.S. 421 (1962), and refined in Lee, 505 U.S. at 593.

The three federal appellate opinions addressing the constitutionality of public-school Pledge recitation all take slightly different analytical approaches. See Myers v. Loudoun

County Pub. Schs., 418 F.3d 395, 402 (4th Cir. 2005) (upholding the Virginia Pledge statute against an Establishment Clause challenge based upon "[t]he history of our nation" and "repeated dicta from the [Supreme] Court respecting the constitutionality of the Pledge"); Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (striking down school district's Pledge policy on Establishment Clause grounds based upon the coercion test found in Lee, 505 U.S. 577); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (upholding the Illinois Pledge statute by taking a "more direct" approach than the trial court, which "trudged through the three elements identified by the Court in Lemon [v. Kurtzman, 403 U.S. 602 (1971)]"). The Sherman court's own "more direct" approach achieved directness by starting from the premise that the words "under God" in the Pledge constitute a "ceremonial reference[ ] in civic life to a deity" of a sort that the nation's founders would not have considered the establishment of religion. Id. at 445.

A. Applying the Lemon Test

The Lemon test has its share of detractors. See, e.g., Sherman, 980 F.2d 445. Nevertheless, within the last decade, in a case involving an Establishment Clause challenge to a state law limiting local regulation of land use for religious purposes with respect to land owned by a religious denomination, the court of appeals for this circuit endorsed continued application of the

Lemon test ("[a]s a practical framework for analysis in cases such as this, the Supreme Court has adopted the three-part test articulated in Lemon v. Kurtzman"). Boyajian v. Gatzunis, 212 F.3d 1, 4 (1st Cir. 2000) (citing Lemon, 403 U.S. at 612-13). It is appropriate, then, to begin by applying the Lemon test.

The United States Supreme Court recently described the Lemon test:

> Lemon stated a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

Cutter v. Wilkinson, 544 U.S. 709, 718 n.6 (2005) (quoting Lemon, 403 U.S. at 612-13); see also Boyajian, 212 F.3d at 4 ("a law does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive government entanglement with religion") (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-39 (1987); Rojas v. Fitch, 127 F.3d 184, 187 (1st Cir. 1997)).

1. Purpose

The "first step in evaluating [the New Hampshire Pledge statute's] constitutionality is to ascertain whether it serves a 'secular legislative purpose.' " Boyajian, 212 F.3d at 5 (citation omitted). "The touchstone for [an] analysis [of legislative purpose] is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' " McCreary County, 545 U.S. at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (other citations omitted). Accordingly, "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary County, 545 U.S. at 860 (citations omitted) (emphasis added). "Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .' " Id. (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)). "By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents

that they are insiders, favored members . . . .” ’ ” McCreary County, 545 U.S. at 860 (quoting Santa Fe Indep. Sch. Dist., 530 U.S. at 309–310).

Defendants argue that the New Hampshire Pledge statute serves the secular legislative purposes of fostering an appreciation of history, and promoting patriotism and respect for the American flag. Plaintiffs counter by focusing on the legislative purpose of the act of Congress that inserted the phrase “under God” into the Pledge in 1954. Plaintiffs see this case as a direct challenge to the constitutionality of including “under God” in the Pledge statute, while defendants see the case as one primarily challenging a patriotic civic custom, in which the Pledge must be considered as a whole.

Defendants rely on Lynch v. Donnelly, 465 U.S. 668, 685 (1984), for the proposition that when conducting an Establishment Clause analysis, the focus must be not on religious symbols alone, but on their overall setting, echoing the court of appeals’ observation that “the context of a religious display is crucial in determining its constitutionality.” Knights of Columbus v. Town of Lexington, 272 F.3d 25, 33 (1st Cir. 2001) (comparing County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) with Lynch, 465 U.S. at 685). That principle, reasonably extended to the facts of this case, emphasizes that the context

in which religious words or symbols are employed is critical to any Establishment Clause analysis. Here, the context in which the disputed words appear is provided by the thirty-one words that make up the Pledge.

The New Hampshire Pledge statute plainly has a secular legislative purpose. Here, "an understanding of official objective emerges from readily discoverable fact, without [need of] any judicial psychoanalysis of a drafter's heart of hearts." McCreary County, 545 U.S. at 862 (citation omitted). The New Hampshire Pledge statute is titled "New Hampshire School Patriot Act." RSA 194:15-c. The statute's own words describe its purpose as continuing "the policy of teaching our country's history to the elementary and secondary pupils of this state." RSA 194:15-c, I. That is a secular purpose.

Moreover, the legislative history contains a far-reaching discussion of patriotism, see N.H.S. JOUR. 945-67 (2002), and places enactment of the statute in the context of a response to the attacks of September 11, 2001, see id. at 948, 953. That context 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.

With regard to the phrase "under God" in the Pledge, Senator O'Hearn stated, on the floor of the New Hampshire Senate:

> Justice Brennan of the Supreme Court wrote, "we have simply interwoven the motto 'In God we Trust' so deeply into the fabric of our civil polity that its present use may well not present that type of involvement [with religion] which the first amendment prohibits. . . 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."

N.H.S. JOUR. 958, supra (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring)). Senator Wheeler added: "We are not touching the words in the Pledge of Allegiance. It still says 'one nation under God'. That has not been removed. We are not expressing anything at the state level about God, one way or the other, so just forget about that." N.H.S. JOUR. 958, supra. Like the legislative discussions of patriotism, the legislators' disclaimers of religious motivation buttress the conclusion that the New Hampshire Pledge statute was enacted for patriotic, not religious, purposes.

Finally, the legislative history supports defendants' position in another way. Before the New Hampshire School Patriot Act (i.e., the New Hampshire Pledge statute) was enacted in 2002, RSA chapter 194 included a section titled "Lord's Prayer and

Pledge of Allegiance in Public Elementary Schools," RSA 194:15-a (1989), which provided that "a school district may authorize the recitation of the traditional Lord's prayer and the pledge of allegiance to the flag in public elementary schools," id. The New Hampshire School Patriot Act separated the Pledge of Allegiance from the Lord's prayer, leaving the prayer provision in RSA 195:14-a and creating a new section for the Pledge. Leaving aside the potential constitutional infirmities of the Lord's prayer statute, which were in fact discussed by the legislature when it enacted the new separate Pledge statute, see N.H.S. JOUR. 956-61, supra, the placement of the Pledge in a separate provision, apart from the Lord's prayer provision, certainly underscores the secular purpose of the New Hampshire Pledge statute.

2. Effect

"The second basic Establishment Clause concern is that of avoiding the effective promotion or advancement of particular religions or of religion in general by the government." Rojas, 127 F.3d at 189, abrogated on other grounds by Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). Under the Lemon effects test, "[i]t is beyond dispute 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, 505 U.S.

at 587 (quoting Lynch, 465 U.S. at 678) (other citations omitted). Moreover, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," Lee, 505 U.S. at 592 (citations omitted), and "prayer exercises in public schools carry a particular risk of indirect coercion." Id.

The 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. First, the sort of coercion at issue in Lee is not present in this case. The Supreme Court described the coercion in Lee this way:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of

> standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.

Id. at 593 (emphasis supplied).

Here, by contrast, objectors are not placed in a religious dilemma. The dilemma in Lee was that a student who objected to prayer was confronted, while seated at her graduation ceremony, with a prayer (a religious exercise) delivered by a rabbi. She, and all the other attendees were effectively rendered involuntary congregants, being led in prayer by a religious officiant. The student's choices were these: involuntary participation, silent acquiescence that bore all the hallmarks of participation, or active protest. And, the onus was placed on her to determine how to deal with her objection to the religious exercise being imposed. The New Hampshire Pledge statute sets up no such dilemma.

The statute directs schools to authorize a "period of time during the school day for the recitation of the pledge of allegiance" but provides that "[p]upil participation shall be voluntary." RSA 194:15-c, II. Thus, 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. That recognition somewhat distinguishes voluntary participation in the Pledge recital from the claim of voluntary participation in graduation ceremonies that the Court found unpersuasive in Lee, 505 U.S. at 594-95. And, as noted in Lee, to avoid being made an unwilling congregant, a student would have had to forego "one of life's most significant occasions." Id. at 595. Here, the Doe children forfeit no significant experience or occasion to avoid reciting the Pledge, or that portion of it to which they object. While I recognize that peer or social pressure probably does push students toward participation, by sheer dint of the number of students opting in rather than out, opting out of a Pledge recitation involves little more than exercising the right to demur.

But statutorily prescribed voluntariness is not the main point. The critical and dispositive difference is this: 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. See Myers, 418 F.3d at 407-08 (describing prayer as an "approach to Divinity in word or thought" or a "communication between an individual and his deity"). Rather, the Pledge, in content and function, is a civic patriotic statement — an affirmation of adherence to the principles for which the Nation stands.[3] Inclusion of the words "under God," in context, does not convert the Pledge into a prayer or religious exercise, as discussed in greater detail later. 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.

Because the New Hampshire Pledge statute does not coerce students to support or participate in a religious exercise, it does not run afoul of the second prong of the Lemon test.

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[3] In Elk Grove, the Supreme Court described recitation of the Pledge as "a patriotic exercise designed to foster national unity and pride" in the "ideals that our flag symbolizes," specifically, the "proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.' " 542 U.S. at 6 (quoting Texas v. Johnson, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting)).

3. Entanglement

The third prong of the Lemon test requires that a statute not foster excessive government entanglement with religion.[4] Plaintiffs do not argue that the New Hampshire Pledge statute encourages government entanglement with religion. Accordingly, defendants prevail on the third prong of the Lemon test.

4. Lemon Summary

The New Hampshire Pledge statute has a secular legislative purpose. It was enacted to enhance instruction in the Nation's history, and foster a sense of patriotism. Its primary effect neither advances nor inhibits religion. It does not foster excessive government involvement with religion. In other words, RSA 194:15-c satisfies all three prongs of the Lemon test. Accordingly, defendants are entitled to dismissal of Count I.

[4] While Lee was decided on the second prong of the Lemon test, the facts of that case provide a textbook example of impermissible government entanglement with religion. "A school official, the principal, decided that an invocation and a benediction should be given." Lee, 505 U.S. at 587. That same official selected the clergyman who led the prayers. Id. Beyond that, "the principal directed and controlled the content of the prayers." Id. at 588. A government official who chooses to include a prayer in a student activity, who selects the clergyman who delivers it, and who controls the content of the prayer entangles government and religion to a substantial degree.

B. Applying the Approach of the Fourth and Seventh Circuits

As noted, plaintiffs direct their challenge not at the Pledge as a whole, but at the two words, "under God," added in 1954. While application of the Lemon test is determinative of the Establishment Clause issue raised in Count I, the court turns, briefly, to different approaches taken by the Fourth and Seventh Circuits in characterizing the effect of the words "under God" in the Pledge.

In Myers, the court concluded that the Pledge does not constitute a prayer, reasoning as follows:

> Undoubtedly, the Pledge contains a religious phrase, and it is demeaning to persons of any faith to assert that the words "under God" contain no religious significance. See Van Orden [v. Perry], [545 U.S. 677, 695] (2005) (Thomas, J., concurring) ("words such as 'God' have religious significance"). The inclusion of those two words, however, does not alter the nature of the Pledge as a patriotic activity. The Pledge is a statement of loyalty to the flag of the United States and the Republic for which it stands; it is performed while standing at attention, facing the flag, with right hand held over heart. See also West Virginia v. Barnette, 319 U.S. 624, 641 (1943) (referring to the Pledge as a "patriotic ceremony"). A prayer, by contrast, is "a solemn and humble approach to Divinity in word or thought." Webster's Third New Int'l Dictionary 1782 (1986). It is a personal communication between an individual and his deity, "with bowed head, on bended knee." Newdow, 328 F.3d at 478 (O'Scannlain, J., dissenting from denial of rehearing en banc).

418 F.3d at 407-08 (parallel citations omitted). That reasoning is persuasive.

In Sherman, Judge Easterbrook posed the rhetorical question: "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?" Sherman, 980 F.2d at 445. His response began with a description of the phrase "under God" as a "ceremonial reference[ ] in civic life to a deity." Id. He continued by describing the history of such ceremonial references in significant historical documents,[5] noting that "[w]hen it decided Engel v. Vitale, [370 U.S. 421 (1962),] the first of the school-prayer cases, the [Supreme] Court recognized this tradition and distinguished ceremonial references to God from supplications for divine assistance." Id. at 446. Judge Easterbrook went on to invoke Justice Brennan's conclusion "that 'the reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of ceremonial deism protected from Establishment Clause scrutiny chiefly because it has lost through rote repetition any significant religious content.' " Id. at 447 (quoting Lynch, 465 U.S. at 716 (Brennan, J., dissenting)) (internal quotation marks and brackets omitted).

[5] The Sherman opinion cites, among others, the Declaration of Independence, the declarations in support of separation between church and state by James Madison and Thomas Jefferson, and Abraham Lincoln's Gettysburg Address and second inaugural address. Sherman, 980 F.2d at 446. Of Lincoln's second inaugural address, the court said: "Pupils who study this address with care will find 14 references to God among its 699 words." Id.

While the Fourth Circuit did not go so far as to adopt the Seventh Circuit's "ceremonial deism" view, both courts have persuasively concluded that the phrase "under God" does not transform the Pledge into a prayer, or its recitation into a religious exercise.

Of course, the Fourth and Seventh Circuits are not the only federal appellate courts to have addressed the issue. In Newdow v. United States Congress, the Ninth Circuit reached a different conclusion, deciding that, "[i]n the context of the Pledge, the statement that the United States is a nation 'under God' is a profession of a religious belief, namely a belief in monotheism," Newdow, 328 F.3d at 487, and recitation of the Pledge in a classroom, even with the opt-out required by Barnette, "places students in the untenable position of choosing between participating in an exercise with religious content or protesting," id. at 488.

I am of the view that the Fourth and Seventh Circuits got it right. 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. The line is often difficult to draw, of course, and in some senses the drawn line yet has some mobility.

When Congress added the words "under God," to the Pledge in 1954, its actual intent probably had far more to do with politics than religion — more to do with currying favor with the electorate than with an Almighty. (God, if God exists, is probably not so easily fooled.) In the intervening half century since the words were added, rote repetition has, as Justice Brennan observed, removed any significant religious content embodied in the words, if there ever was significant religious (as opposed to political) content embodied in those words. Today, the words remain religious words, but plainly fall comfortably within the category of historic artifacts — reflecting a benign or ceremonial civic deism that presents no threat to the fundamental values protected by the Establishment Clause.

Counts II and III

In Counts II and III, plaintiffs claim that defendants violated the rights of the Doe children and their parents under the Free Exercise Clause of the federal Constitution by leading the Doe children's classes in reciting the Pledge of Allegiance. Defendants argue that they are entitled to dismissal of plaintiffs' free-exercise claims because plaintiffs do not allege that the Doe Children have been subject to compulsion of any sort. Plaintiffs disagree, but do not develop an argument.

The First Amendment to the United States Constitution bars Congress from making any law prohibiting the free exercise of religion. U.S. CONST. amend. I. That bar applies to the states. See Elk Grove, 542 U.S. at 8 n.4; Parker, 514 F.3d at 103. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div. v. Smith, 494 U.S. 872, 877 (1990)). Under the Free Exercise Clause,

> the government may not, for example, (1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma.

Parker, 514 F.3d at 103 (citing Smith, 494 U.S. at 877).

The free-exercise claim appears to be that exposure to classroom recitation of the Pledge places an unconstitutional burden on a student's ability to freely believe or practice atheism or agnosticism (or polytheism). That claim fails for two reasons.

To begin, 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 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." Second, as the court of appeals explained in a case involving a substantially analogous free-exercise objection to curricular materials:

> Public 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. See Fleischfresser [v. Directors of Sch. Dist. 200], 15 F.3d [680,] 690 [(7th Cir. 1994)]; Mozert [v. Hawkins County Bd. of Educ.], 827 F.2d 1058,] 1063-65, 1070 [(6th Cir. 1987)]; see also Bauchman [ex rel. Bauchman v. West High Sch.], 132 F.3d [542,] 558 [(10th Cir. 1997)] ("[P]ublic schools are not required to delete from the curriculum all materials that may offend any religious sensibility." (quoting Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980)) (internal quotation marks omitted)). The reading of King and King [the

> book to which the school children in Parker objected on religious grounds] was not instruction in religion or religious beliefs. Cf. Barnette, 319 U.S. at 631 (distinguishing between compelling students to declare a belief through mandatory recital of the pledge of allegiance, which violates free exercise, and "merely . . . acquaint[ing students] with the flag salute so that they may be informed as to what it is or even what it means").

Parker, 514 F.3d at 106 (footnote, parallel citation omitted) (emphasis added). Here, 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.

Parker is also dispositive of the Doe parents' free-exercise claim. In Parker, the court of appeals cited with approval the Sixth Circuit's determination that "exposure to ideas through the required reading of books did not constitute a constitutionally significant burden on the plaintiffs' free exercise of religion." Parker, 514 F.3d at 105 (citing Mozert, 827 F.2d at 1065). The Parker court continued:

> [T]he [Mozert] court emphasized that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion," and reading or even discussing the books did not compel such action or affirmation.

Parker, 514 F.3d at 105 (quoting Mozert, 827 F.2d at 1066, 1069). Here, the court has determined that the Doe children have not been compelled to perform or to refrain from performing any act, and they have not been compelled to affirm or disavow any belief. Thus, the rights of their parents under the Free Exercise Clause have not been violated. As the court of appeals explained in Parker:

> 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." C.N. [v. Ridgewood Bd. of Educ.], 430 F.3d [159,] 185 [(3d Cir. 2005)]; see also Newdow, 542 U.S. at 16 (noting that the school's requirement that Newdow's daughter recite the pledge of allegiance every day did not "impair[ ] Newdow's right to instruct his daughter in his religious views").

Parker, 514 F.3d at 105-06 (parallel citations omitted). Like the parents in Parker, 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.

Because neither the Doe children nor the Doe parents have stated a claim under the Free Exercise Clause, defendants are entitled to dismissal of Counts II and III.

Count IV

In Count IV, plaintiffs claim that defendants violated their rights under the Due Process[6] and Equal Protection Clauses of the United States Constitution by leading the Doe children's classes in reciting the Pledge. More specifically, they assert that defendants: (1) have a duty to show equal respect to their beliefs, i.e., atheism or agnosticism; (2) breached that duty by leading public school students in affirming that God exists; and (3) created a social environment that perpetuates prejudice against atheists. Defendants argue that government action that makes no classification is not amenable to an equal-protection challenge. They further argue that because religion is not a suspect classification, their actions are subject to rational-basis review, a standard the New Hampshire Pledge statute easily meets. Plaintiffs disagree.

"The Equal Protection Clause of the Fourteenth Amendment guarantees that those who are similarly situated will be treated alike." In re Subpoena to Witzel, 531 F.3d 113, 116 (1st Cir.

[6] The phrase "due process" appears in the last sentence of Count IV, but plaintiffs do not otherwise develop a due-process claim. Defendants do not address due process in their motion to dismiss, nor do plaintiffs mention due process in their objection. As explained below, to the extent that plaintiffs have made a due-process claim at all, it is discussed along with Count V, in tandem with plaintiffs' "right-of-parenthood" claim. See Parker, 514 F.3d at 102 (discussing "[t]he due process right of parental autonomy").

2008) (citing City of City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

With regard to legislative enactments like the New Hampshire Pledge statute, "the classic violation of equal protection [is] a law [that] creates different rules for distinct groups of individuals based on a suspect classification." Wirzburger v. Galvin, 412 F.3d 271, 283 (1st Cir. 2005) (citing Strauder v. West Virginia, 100 U.S. 303 (1879)). The New Hampshire Pledge statute "do[es] not require different treatment of any class of people because of their religious beliefs," Wirzburger, 412 F.3d at 283, nor does it "give preferential treatment to any particular religion," id. Rather, it applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the pledge, for any or no reason.[7] Moreover, to the extent the New Hampshire Pledge statute may be construed as compelling agnostics and atheists to listen to their classmates recite the Pledge, the court has ruled that the Pledge is not a prayer or religious exercise, and, even

[7] The Wirzburger court also noted that the Supreme Court has "sometimes struck down facially neutral laws, which it recognized were crafted to avoid facial discrimination." 412 F.3d at 283 (citing Hunter v. Erickson, 393 U.S. 385, 387-91 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). The New Hampshire Pledge statute gives no indication in its terms or legislative history that it was enacted with a hidden purpose to discriminate against atheists or agnostics.

if it were, plaintiffs' constitutional rights are not violated by recitation of the Pledge in the presence of the Doe children.

Given plaintiffs' claim that defendants violated the Doe children's equal-protection rights by leading public-school students in reciting the Pledge, Count IV may, perhaps, be better understood as a claim of discriminatory treatment, as opposed to a facial challenge to the Pledge statute. Such a claim, however, is unavailing. "A requirement for stating a valid disparate treatment claim under the Fourteenth Amendment is that the plaintiff make a plausible showing that he or she was treated differently from others similarly situated." Estate of Bennett v. Wainwright, 548 F.3d 155, 166 (1st Cir. 2008) (citing Clark v. Boscher, 514 F.3d 107, 114 (1st Cir. 2008); Witzel, 531 F.3d at 118)). Moreover:

> To succeed on a claim of discriminatory treatment, a plaintiff must show that the defendant acted with discriminatory intent or purpose. Washington v. Davis, 426 U.S. 229, 239-40 (1976). That is, the plaintiff must establish that the defendant intentionally treated the plaintiff differently from others who were similarly situated. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A discriminatory intent or purpose means that the defendants "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Wayte v. United States, 470 U.S. 598, 610 (1985) (internal quotation marks omitted).

Witzel, 531 F.3d at 118-19 (parallel citations omitted). Here, plaintiffs have not alleged that the Doe children's teachers acted with a discriminatory intent.

Because the New Hampshire Pledge statute does not create rules for agnostics and atheists different from rules applicable to monotheists or polytheists, and because there are no allegations that the Doe children's teachers acted with a discriminatory intent, defendants are entitled to dismissal of the equal-protection claim stated in Count IV.

Count V

In Count V plaintiffs, claim that defendants violated the Doe parents' federal constitutional rights of parenthood (and their children's concomitant rights) by leading the children's classes in reciting the Pledge of Allegiance. Defendants counter that plaintiffs' parental-rights claim is foreclosed by the court of appeals' decision in Parker v. Hurley.

Plaintiffs base Count V on a "federal constitutional right of parenthood, which includes the right to instill the religious beliefs chosen by the parents, free of governmental interference." (First Am. Compl. ¶ 68.) But, they do not identify any specific constitutional provision guaranteeing such a right. Wisconsin v. Yoder, 406 U.S. 205 (1972), upon which

plaintiffs rest Count V, is a free-exercise case. See Yoder, 406 U.S. at 213. In Parker, the court of appeals for this circuit explained its view that in Yoder, "the Court did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently, given that those two sets of interests inform one [an]other." Parker, 514 F.3d at 98 (citing Yoder, 406 U.S. at 213-14). The court then followed the model it identified in Yoder, and analyzed jointly the "plaintiffs' complementary due process and free exercise claims." Parker, 514 F.3d at 101.

Following the analytical model established in Yoder and Parker, dismissal of plaintiffs' free-exercise claim compels dismissal of their due-process/parental-rights claim. The court can discern nothing of the latter that remains after dismissal of the former.

Count IX

In Count IX, plaintiffs ask the court to rule, without any colorable basis in law, that "the use of a Pledge of Allegiance containing the words 'under God' is void as against public policy" (First Am. Compl. ¶ 84), because if fosters divisiveness. Count IX is summarily dismissed for failure to state a claim on which relief can be granted.

Counts VI–VIII

Counts VI through VIII state claims under Part I, Article 6 of the New Hampshire Constitution (Count VI), RSA 169-D:23 (Count VII), and the common law of New Hampshire, as expressed in Sanborn v. Sanborn, 123 N.H. 740 (1983) (Count VIII). Because all of plaintiffs' federal claims have been dismissed, it is appropriate to reassess the court's exercise of jurisdiction over plaintiffs' remaining state claims. Camelio v. Am. Fed'n, 137 F.3d 666, 672 (1st Cir. 1998) (citing Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 256–57 (1st Cir. 1996)). Factors to consider include "fairness, judicial economy, convenience, and comity," Camelio, 137 F.3d at 672 (citation omitted), with a particular emphasis on comity, see id. (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)). Here, principles of comity counsel in favor of not exercising supplemental jurisdiction over plaintiffs' state-law claims. Accordingly, Counts VI through VIII are dismissed, without prejudice to refiling in a state court of competent jurisdiction.

Conclusion

For the reasons given, all three pending motions to dismiss (documents 46, 55, and 56) are granted. The Clerk of the Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

Steven J. McAuliffe
Chief Judge

September 30, 2009

cc: Michael A. Newdow, Esq.
Rosanna T. Fox, Esq.
David H. Bradley, Esq.
Eric B. Beckenhauer, Esq.
Gretchen Leah Witt, Esq.
Theodore C. Hirt, Esq.
Nancy J. Smith, Esq.
Eric C. Rassbach, Esq.
Kevin J. Hasson, Esq.
Bradford T. Atwood, Esq.
John A. Simmons, Sr., Esq.
Benjamin W. Bull, Esq.
David A. Cortman, Esq.
Jeremy D. Tedesco, Esq.
Michael J. Compitello, Esq.

DISTRICT COURT'S 9/30/2009 JUDGMENT

(DOCUMENT 61)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

The Freedom from Religion Foundation;
Jan Doe and Pat Doe, Parents; DoeChild-1,
Doe-Child-2, and DoeChild-3, Minor Children,
Plaintiffs

v. Case No. 07-cv-356-SM

Hanover School District,
Dresden School District, and
School Administrative Unit 70,
Defendants

The United States of America,
Intervenor-Defendant

The State of New Hampshire,
Intervenor-Defendant

Anna Chobanian, John Chobanian,
Kathryn Chobanian, Schuyler Cyrus,
Elijah Cyrus, Rhys Cyrus, Austin Cyrus,
Daniel Phan, Muriel Cyrus, Michael Chobanian,
Margarethe Chobanian, Minh Phan, Suzu Phan,
an the Knights of Columbus,
Intervenors-Defendant

J U D G M E N T

In accordance with the Orders of Chief Judge Steven J. McAuliffe dated August 7, 2008, granting in part the Federal Defendants' Motion to Dismiss; and September 30, 2009, granting the Motions to Dismiss by Defendants' Hanover School District, Dresden School

District and School Administrative Unit 70; Intervenors-Defendant Muriel Cyrus, et al; and Intervenor-Defendant the United States of America, judgment is hereby entered.

By the Court,

/s/ James R. Starr

James R. Starr, Clerk

September 30, 2009

cc: Michael A. Newdow, Esq.
Rosanna T. Fox, Esq.
David H. Bradley, Esq.
Eric B. Beckenhauer, Esq.
Gretchen Leah With, Esq.
Theodore C. Hirt, Esq.
Nancy J. Smith, Esq.
Eric C. Rassbach, Esq.
Kevin J. Hasson, Esq.
Bradford T. Atwood, Esq.
John A. Simmons, Sr., Esq.
Benjamin W. Bull, Esq.
David A. Cortman, Esq.
Jeremy D. Tedesco, Esq.
Michael J. Compitello, Esq.

CIVIL DOCKET FOR CASE #: 1:07−cv−00356−SM

APPEAL, CLOSED

U.S. District Court
District of New Hampshire (Concord)
CIVIL DOCKET FOR CASE #: 1:07−cv−00356−SM

The Freedom From Religion Foundation v. The Congress of the United States of America, et al.
Assigned to: Chief Judge Steven J. McAuliffe
Case in other court: CCA, 09−02473
Cause: 42:1983 Civil Rights Act

Date Filed: 10/31/2007
Date Terminated: 09/30/2009
Jury Demand: None
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: U.S. Government Defendant

Date Filed	#	Docket Text
10/31/2007	1	COMPLAINT against US Congress, USA, Hanover School District, Dresden School District, School Administrative Unit 70 (Filing fee $ 350 receipt number 345469) filed by Pat Doe, The Freedom From Religion Foundation, Jan Doe.(jeb) (Entered: 11/01/2007)
11/01/2007	2	Summons(es) and Waiver(s) Issued Electronically as to US Congress, USA, Hanover School District, Dresden School District, School Administrative Unit 70. **NOTICE: Counsel shall print and serve the summons(es) and waiver(s) and all attachments in accordance with Fed.R.Civ.P.4. NOTICE of Assignment to Magistrate Judge attached.** This case has been designated for Electronic Case Filing. All further submissions shall be filed in compliance with the Administrative Procedures for Electronic Case Filing. (Attachments:, # 1 Notice of ECF Designation, # 2 Notice of Assigment to Magistrate)(jeb) (Entered: 11/01/2007)
11/26/2007	3	MOTION for Michael Newdow to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 351049.) filed by Pat Doe, The Freedom From Religion Foundation, Jan Doe. Follow up on Objection on 12/13/2007. (Newdow, Michael) (Entered: 11/26/2007)
11/26/2007	4	CERTIFICATE OF SERVICE by Pat Doe, The Freedom From Religion Foundation, Jan Doe re: 3 MOTION for Michael Newdow to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 351049.) (Newdow, Michael) (Entered: 11/26/2007)
12/21/2007	5	Assented to MOTION to Extend Time to Answer to Jan. 18, 2008, *for Entry of Stipulated Briefing Schedule, and to Stay School District Defendants' Obligation to Answer* filed by US Congress, USA. (Attachments: # 1 Proposed Order)(Beckenhauer, Eric) (Entered: 12/21/2007)
12/26/2007	6	NOTICE of Attorney Appearance by David H. Bradley on behalf of Hanover School District, Dresden School District, School Administrative Unit 70. (kad) (Entered: 01/04/2008)
01/07/2008	7	NOTICE of Attorney Appearance by Theodore C. Hirt on behalf of US Congress, USA (Hirt, Theodore) (Entered: 01/07/2008)
01/08/2008	8	[FILED IN ERROR − See corrected Motion − doc no. 23] Assented to MOTION for Protective Order filed by Pat Doe, The Freedom From Religion Foundation, Jan Doe. (Attachments: # 1 Exhibit (Affidavit) Affidavits A−B# 2 Exhibit (Affidavit) Affidavits C−D# 3 Exhibit (Affidavit) Affidavit E)(Newdow, Michael) Modified on 1/24/2008 to add text in the brackets (jab). (Entered: 01/08/2008)
01/09/2008	9	Assented to MOTION for Leave to File Memorandum of Law in Excess of Page Limitation of Local Rule 7.1(a)(3) filed by US Congress, USA. (Attachments: # 1 Proposed Order)(Beckenhauer, Eric) (Entered: 01/09/2008)

01/18/2008	10	Assented to MOTION for Leave to File Amici Curiae Brief filed by American Center for Law and Justice. (Attachments: #1 Memorandum of Law)(Simmons, Sr., John) (Entered: 01/18/2008)
01/18/2008	11	AMICI CURIAE BRIEF In Support of the Federal Defendants' Motion to Dismiss by American Center for Law and Justice (jab) Modified on 4/4/2008 to add link to motion to dismiss (jab). (Entered: 01/18/2008)
01/18/2008	12	Assented to MOTION to Intervene as defendant filed by State of New Hampshire. (Attachments: #1 Memorandum of Law #2 Exhibit A − School District position)(Smith, Nancy) (Entered: 01/18/2008)
01/18/2008	13	Assented to MOTION to Exceed page limit for memoranda in support of dispositive motion filed by State of New Hampshire. (Smith, Nancy) (Entered: 01/18/2008)
01/18/2008	14	MOTION to Dismiss filed by State of New Hampshire. Follow up on Objection on 2/7/2008. (Attachments: #1 Memorandum of Law #2 Exhibit A − HB 1446 As Introduced#3 Exhibit B − April 4, 2002 Senate Educ. Committee Testimony)(Smith, Nancy) (Entered: 01/18/2008)
01/18/2008	15	Assented to MOTION to Intervene as Defendant filed by USA. (Attachments: #1 Memorandum of Law #2 Proposed Order)(Beckenhauer, Eric) (Entered: 01/18/2008)
01/18/2008	16	MOTION to Dismiss filed by US Congress, USA. Follow up on Objection on 2/7/2008. (Attachments: #1 Memorandum of Law #2 Newdow v. United States, No. 98−6585 (S.D. Fla. Dec. 1, 1998)#3 Newdow v. United States, No. 99−4136 (11th Cir. Jan 4, 2000))(Beckenhauer, Eric) (Entered: 01/18/2008)
01/18/2008	17	NOTICE of Attorney Appearance by Bradford T. Atwood on behalf of Muriel Cyrus, et al. (Atwood, Bradford) (Entered: 01/18/2008)
01/18/2008	18	MOTION for Eric C. Rassbach to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 365184.) filed by Muriel Cyrus, et al.. Follow up on Objection on 2/7/2008. (Atwood, Bradford) (Entered: 01/18/2008)
01/18/2008	19	MOTION for Kevin J. Hasson to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 365185.) filed by Muriel Cyrus, et al.. Follow up on Objection on 2/7/2008. (Atwood, Bradford) (Entered: 01/18/2008)
01/18/2008	20	Disclosure Statement by Muriel Cyrus, et al. disclosing no parent companies, and no merger agreement *regarding Knights of Columbus* (Atwood, Bradford) (Entered: 01/18/2008)
01/18/2008	21	Assented to MOTION to Intervene as Defendants filed by Muriel Cyrus, et al.. (Attachments: #1 Memorandum of Law in support of Assented−To Motion to Intervene#2 Exhibit A − Declaration of Cyrus#3 Exhibit B − Declaration of Chobanian#4 Exhibit C − Declaration of Phan#5 Exhibit D − Declaration of O'Reilly#6 Proposed Order Granting Intervention#7 Proposed Answer)(Atwood, Bradford) (Entered: 01/18/2008)
01/18/2008	22	MOTION to Dismiss *[PROPOSED]* filed by Muriel Cyrus, et al.. Follow up on Objection on 2/7/2008. (Attachments: #1 Memorandum of Law in support of Proposed Motion to Dismiss#2 Proposed Order Granting Dismissal)(Atwood, Bradford) (Entered: 01/18/2008)
01/22/2008	23	Assented to MOTION for Protective Order filed by The Freedom From Religion Foundation. [Replaced doc. no. 8] (Attachments: #1 Memorandum of Law #2 Proposed Order #3 Exhibit (Affidavit) #4 Exhibit (Affidavit) #5 Exhibit (Affidavit) #6 Exhibit (Affidavit) #7 Exhibit (Affidavit))(Newdow, Michael) Modified on 1/24/2008 to

		add: text in the brackets (jab). (Entered: 01/22/2008)
01/25/2008	24	**STIPULATED PROTECTIVE ORDER. Signed by Judge Steven J. McAuliffe. (jab)** (Entered: 01/27/2008)
01/25/2008	30	ANSWER to 1 Complaint filed by Defendant−Intervenors Muriel Cyrus, et al. (jab) (Entered: 02/14/2008)
02/08/2008	25	Assented to MOTION to File Amicus Brief filed by ALLIANCE DEFENSE FUND, CORNERSTONE POLICY RESEARCH. (Attachments: # 1 Memorandum of Law)(Compitello, Michael) (Entered: 02/08/2008)
02/08/2008	26	MOTION for David A. Cortman to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 01020000000000371807.) filed by ALLIANCE DEFENSE FUND, CORNERSTONE POLICY RESEARCH. Follow up on Objection on 2/28/2008. (Attachments: # 1 Exhibit (Affidavit))(Compitello, Michael) (Entered: 02/08/2008)
02/08/2008	27	MOTION for Jeremy D. Tedesco to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 01020000000000371827.) filed by ALLIANCE DEFENSE FUND, CORNERSTONE POLICY RESEARCH. Follow up on Objection on 2/28/2008. (Attachments: # 1 Exhibit (Affidavit))(Compitello, Michael) (Entered: 02/08/2008)
02/08/2008	28	MOTION for Benjamin W. Bull to Appear Pro Hac Vice (Filing fee $ 100, Receipt # 01020000000000371846.) filed by ALLIANCE DEFENSE FUND, CORNERSTONE POLICY RESEARCH. Follow up on Objection on 2/28/2008. (Attachments: # 1 Exhibit (Affidavit))(Compitello, Michael) (Entered: 02/08/2008)
02/12/2008	29	BRIEF/MEMORANDUM *AMICUS CURIAE BRIEF In Support of the Federal and State Defendants' Motions to Dismiss* by ALLIANCE DEFENSE FUND, CORNERSTONE POLICY RESEARCH (Compitello, Michael) Modified on 4/4/2008 to add link to motions to dismiss (jab). (Entered: 02/12/2008)
02/15/2008	31	CERTIFICATE OF SERVICE by Muriel Cyrus, et al. re: 30 Answer to Complaint (Rassbach, Eric) (Entered: 02/15/2008)
02/18/2008	32	Assented to MOTION to Exceed Page Limitation filed by The Freedom From Religion Foundation. (Attachments: # 1 Proposed Order)(Newdow, Michael) (Entered: 02/18/2008)
02/18/2008	33	Assented to MOTION to Exceed Page Limitation filed by The Freedom From Religion Foundation. (Attachments: # 1 Proposed Order)(Newdow, Michael) (Entered: 02/18/2008)
02/19/2008	34	RESPONSE to Motion re 22 MOTION to Dismiss *[PROPOSED]*, 16 MOTION to Dismiss, 14 MOTION to Dismiss filed by The Freedom From Religion Foundation. (Attachments: # 1 Appendix Appendix A − Colonial Protestantism, # 2 Appendix Appendix B − USSC Neutrality Majority Opinions, # 3 Appendix Appendix C − Legislative History of Under God, # 4 Appendix Appendix D − President Bush Letter, # 5 Appendix Appendix E − House Report 1693, # 6 Appendix Appendix F − Colonial Religious Tests, # 7 Appendix Appendix G − Framers on God in the Constitution, # 8 Appendix Appendix H − Memorial and Remonstrance USSC citations, # 9 Appendix Appendix I − 1954 Congresional Record Excerpts, # 10 Appendix Appendix J − Coercion versus Lee, # 11 Appendix Appendix K − H Res 431 (Loving v Virginia Resolution), # 12 Appendix Appendix L − Anti−Atheistic State Constitutional Provisions)(Newdow, Michael) (Entered: 02/19/2008)
02/21/2008	35	Assented to MOTION to Continue Pretrial Conference filed by US Congress, USA. Follow up on Objection on 3/10/2008. (Attachments: # 1 Proposed Order)(Beckenhauer, Eric) (Entered: 02/21/2008)

02/21/2008	36	Notice of Intent to Reply to Objection to 22 MOTION to Dismiss *[PROPOSED]*. Follow up on Reply on 3/10/2008. (Rassbach, Eric) (Entered: 02/21/2008)
02/21/2008	37	Notice of Intent to Reply to Objection to 16 MOTION to Dismiss. Follow up on Reply on 3/10/2008. (Beckenhauer, Eric) (Entered: 02/21/2008)
02/21/2008	38	Notice of Intent to Reply to Objection to 14 MOTION to Dismiss. Follow up on Reply on 3/10/2008. (Smith, Nancy) (Entered: 02/21/2008)
02/22/2008	39	Assented to MOTION to Extend Time to 3/11/2008 filed by Muriel Cyrus, et al.. (Attachments: # 1 Proposed Order)(Rassbach, Eric) (Entered: 02/22/2008)
03/05/2008	40	Assented to MOTION for Leave to File Reply Memorandum in Excess of Page Limitation of Local Rule 7.1(e)(1) filed by US Congress, USA. (Attachments: # 1 Proposed Order)(Beckenhauer, Eric) (Entered: 03/05/2008)
03/11/2008	41	REPLY to Objection to Motion re 14 MOTION to Dismiss filed by State of New Hampshire. (Smith, Nancy) (Entered: 03/11/2008)
03/11/2008	42	REPLY to Objection to Motion re 16 MOTION to Dismiss filed by US Congress, USA. (Beckenhauer, Eric) (Entered: 03/11/2008)
03/11/2008	43	REPLY to Objection to Motion re 22 MOTION to Dismiss *[PROPOSED]* filed by Muriel Cyrus, et al.. (Rassbach, Eric) (Entered: 03/11/2008)
08/07/2008	44	**///ORDER granting in part and denying in part 16 federal defendants' Motion to Dismiss; denying 22 Motion to Dismiss; denying 14 Motion to Dismiss. So Ordered by Chief Judge Steven J. McAuliffe. (lag) (Entered: 08/07/2008)**
08/15/2008	45	Assented to MOTION to Extend Time to Answer filed by Hanover School District, Dresden School District, School Administrative Unit 70. (Bradley, David) (Entered: 08/15/2008)
09/17/2008	46	MOTION to Dismiss filed by Hanover School District, Dresden School District, School Administrative Unit 70. Follow up on Objection on 10/6/2008. (Bradley, David) (Entered: 09/17/2008)
09/19/2008	47	Joint Assented to MOTION to Continue Pretrial Conference and Rule 26 Obligations filed by State of New Hampshire. Follow up on Objection on 10/6/2008. (Smith, Nancy) (Entered: 09/19/2008)
10/27/2008	48	[FILED IN ERROR − See Corrected Filing − Doc. No. 51] AMENDED COMPLAINT against all defendants filed by The Freedom From Religion Foundation.(Newdow, Michael) Modified on 11/14/2008 to add text in brackets (jab). (Entered: 10/27/2008)
11/03/2008	49	Consent to Submission of First Amended Complaint by Hanover School District, Dresden School District, School Administrative Unit 70 (Bradley, David) (Additional attachment(s) added on 11/3/2008: # 1 Consent to Submittion of First Amended Complaint − full document) (jab). (Entered: 11/03/2008)
11/03/2008	50	Corrective Entry to 49 Consent to Submission of First Amended Complaint. Entry corrected by attaching the full document to the docket entry (copy attached) (jab) (Entered: 11/03/2008)
11/06/2008	51	Assented to MOTION to Amend *Complaint* filed by The Freedom From Religion Foundation. (Attachments: # 1 Amended Complaint)(Newdow, Michael) (Entered: 11/06/2008)
11/17/2008	52	AMENDED COMPLAINT against Hanover School District , *Dresden School District, Muriel Cyrus, The United States of America*

		and the State of New Hampshire filed by The Freedom From Religion Foundation.(Newdow, Michael) (Entered: 11/17/2008)
12/04/2008	53	MEMORANDUM in Support re 44 ORDER filed by State of New Hampshire. (Smith, Nancy) Modified on 1/6/2009 to link to the Court's Order, not the school district's motion to dismiss (jab). (Entered: 12/04/2008)
12/04/2008	54	Assented to MOTION to Extend Time to December 19, 2008 *to Respond to Amended Complaint* filed by USA. (Attachments: # 1 Proposed Order)(Beckenhauer, Eric) (Entered: 12/04/2008)
12/04/2008	55	MOTION to Dismiss filed by Muriel Cyrus, et al.. (Attachments: # 1 Memorandum of Law)(Rassbach, Eric) (Entered: 12/04/2008)
12/19/2008	56	MOTION to Dismiss filed by USA. Follow up on Objection on 1/9/2009. (Attachments: # 1 Memorandum of Law)(Beckenhauer, Eric) (Entered: 12/19/2008)
12/21/2008	57	RESPONSE to Motion re 55 MOTION to Dismiss, 56 MOTION to Dismiss, 46 MOTION to Dismiss , *53 MOTION to Dismiss* filed by The Freedom From Religion Foundation. (Newdow, Michael) (Entered: 12/21/2008)
01/12/2009	58	REPLY to Objection to Motion re 55 MOTION to Dismiss filed by Muriel Cyrus, et al.. (Rassbach, Eric) (Entered: 01/12/2009)
01/12/2009	59	REPLY to Objection to Motion re 56 MOTION to Dismiss filed by USA. (Beckenhauer, Eric) (Entered: 01/12/2009)
09/30/2009	60	**///ORDER granting 46 , 55 and 56 motions to dismiss. So Ordered by Chief Judge Steven J. McAuliffe. (lag)** (Entered: 09/30/2009)
09/30/2009	61	**JUDGMENT is hereby entered in accordance with the Orders of Chief Judge Steven J. McAuliffe dated August 7, 2008 [Doc. No. 44] and September 30, 2009 [Doc. No. 60]. Signed by Clerk James R. Starr. *(Case Closed)* (jab)** (Entered: 10/01/2009)
10/24/2009	62	NOTICE OF APPEAL as to 60 Order on Motion to Dismiss,, by The Freedom From Religion Foundation.(Filing fee $ 455, receipt number 01020000000000559042.) [NOTICE TO COUNSEL: A Transcript Report/Order Form, which can be downloaded from the Forms &Notices section of the First Circuit website at www.ca1.uscourts.gov, MUST be completed and submitted to the U.S. Court of Appeals for the First Circuit.] (Newdow, Michael) (Entered: 10/24/2009)
10/27/2009	63	Appeal Cover Sheet as to 62 Notice of Appeal filed by The Freedom From Religion Foundation, et al. (jab) (Entered: 10/27/2009)
10/27/2009	64	Clerk's Certificate transmitting Record on Appeal to US Court of Appeals, documents numbered 44, 60, 61, 62, 63 and 64, re 62 Notice of Appeal. A copy of the Notice of Appeal mailed to all parties this date. (jab) (Entered: 10/27/2009)
11/02/2009	65	Assented to MOTION to Clarify 60 Order on Motion to Dismiss,, 61 Judgment, filed by State of New Hampshire. (Smith, Nancy) (Entered: 11/02/2009)
11/03/2009	66	**ORDER denying 65 Motion to Clarify 60 Order on Motion to Dismiss, 61 Judgment. So Ordered by Chief Judge Steven J. McAuliffe. (jab)** (Entered: 11/03/2009)
11/09/2009	67	NOTICE of Change of Address by Rosanna T. Fox on behalf of The Freedom From Religion Foundation (Fox, Rosanna) (Entered: 11/09/2009)

11/23/2009	68	Clerk's Supplemental Certificate transmitted to US Court of Appeals re 62 Notice of Appeal, with documents numbered 65 − 67. (jab) (Entered: 11/23/2009)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO. 09-2473

FFRF, et al. v. Hanover School District, et al.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, I filed the **APPELLANTS' OPENING BRIEF (WITH ADDENDUM)** electronically with the Clerk of the United States Court of Appeals for the First Circuit, using the CM/ECF system. Service was thus presumably made upon:

Lowell Vernon Sturgill Jr.
Theodore Charles Hirt
Gretchen Leah Witt
Counsel for Defendant - Appellee United States;

Nancy J. Smith
Counsel for Defendant – The State of New Hampshire;

Eric C. Rassbach
Kevin J. Hasson
Bradford T. Atwood
Counsel for Defendant - Appellee Muriel Cyrus, et al.

On 11/23/2009, Counsel for the School District Defendants, David Bradley, requested that he "be removed from the service list." Document 00115982637. That request was apparently granted by the Court's Order dated 01/22/2010.

/s/ - Michael Newdow

MICHAEL NEWDOW, Plaintiffs' counsel
USCA (FIRST CIRCUIT) BAR #1139132
PO BOX 233345
SACRAMENTO, CA 95831

(916) 424-2356
NewdowLaw@gmail.com

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

CASE NO. 09-2473

FFRF, et al. v. Hanover School District, et al.

CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, I emailed electronic copies of the **APPENDIX TO THE BRIEFS** to:

Lowell Vernon Sturgill Jr. (Lowell.Sturgill@usdoj.gov)
Theodore Charles Hirt (theodore.hirt@usdoj.gov)
Gretchen Leah Witt (Gretchen.Witt@usdoj.gov)
Counsel for Defendant - Appellee United States;

Nancy J. Smith (Nancy.Smith@doj.nh.gov)
Counsel for Defendant – The State of New Hampshire;

Eric C. Rassbach (erassbach@becketfund.org)
Kevin J. Hasson (khasson@becketfund.org)
Ben Kemmy (bkemmy@becketfund.org),
Counsel for Defendant - Appellee Muriel Cyrus, et al.

Each of the above individuals (or their representative) has consented in writing to accept email service. FRAP 25(c)(1)(D).

On 11/23/2009, Counsel for the School District Defendants, David Bradley, requested that he "be removed from the service list." Document 00115982637. That request was apparently granted by the Court's Order dated 01/22/2010.

/s/ - Michael Newdow

MICHAEL NEWDOW, Plaintiffs' counsel
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