
HOUSE JOINT MEMORIAL 4006

State of Washington 61st Legislature 2009 Regular Session

By Representatives Warnick, McCune, and Johnson

Read first time 01/23/09. Referred to Committee on Judiciary.

1 TO THE HONORABLE BARACK OBAMA, PRESIDENT OF THE UNITED STATES, AND
2 TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF
3 REPRESENTATIVES, AND TO THE SENATE AND HOUSE OF REPRESENTATIVES OF THE
4 UNITED STATES, IN CONGRESS ASSEMBLED, AND TO THE ATTORNEY GENERAL FOR
5 THE UNITED STATES, AND TO THE HONORABLE MEMBERS OF THE UNITED STATES
6 SUPREME COURT, AND TO THE HONORABLE CHRISTINE O. GREGOIRE, GOVERNOR OF
7 THE STATE OF WASHINGTON, AND TO THE HONORABLE ROB MCKENNA, ATTORNEY
8 GENERAL FOR THE STATE OF WASHINGTON:

9 We, your Memorialists, the Senate and House of Representatives of
10 the State of Washington, in legislative session assembled, respectfully
11 represent and petition as follows:

12 WHEREAS, In the wake of the 9th Circuit Court of Appeals' decision
13 in *Newdow v. U.S. Congress* in June of 2002, holding that the phrase in
14 the Pledge of Allegiance, "one Nation under God," violates the
15 Establishment Clause and a growing secular movement, concerned
16 citizens, and civic groups, such as the Fraternal Order of Eagles fear
17 court decisions such as *Newdow* may strip the words "under God" from the
18 Pledge of Allegiance; and

19 WHEREAS, *Newdow v. U.S. Congress* was decided 2-1 by a 3 judge panel

1 of the Court of Appeals for the 9th Circuit, and the full court has
2 refused to reconsider the decision en banc; and

3 WHEREAS, Shortly after the 9th Circuit's ruling that the Pledge of
4 Allegiance was unconstitutional, the United States Senate approved a
5 resolution "expressing support for the Pledge of Allegiance" and asking
6 Senate counsel to "seek to intervene in the case" with the Resolution
7 passing 99-0; and

8 WHEREAS, Senator Dianne Feinstein issued a press release
9 immediately after the 9th Circuit's ruling on the Pledge of Allegiance
10 which said, "I find the 9th Circuit Court's opinion embarrassing at
11 best, and I hope that this decision is promptly overturned by the
12 United States Supreme Court. This nation from its foundation has had
13 a belief in God, and has a long tradition of expressing that belief.";
14 and

15 WHEREAS, The Supreme Court of the United States ruled correctly
16 denying Newdow standing; and

17 WHEREAS, Newdow and others have renewed their commitment to bring
18 forward other law suits, either eliminating the use of the Pledge of
19 Allegiance or the elimination of the words "under God"; and

20 WHEREAS, The Pledge of Allegiance was originally printed in 1892 in
21 the magazine, Youth's Companion; and

22 WHEREAS, The original text has been altered only twice, in 1923 the
23 words "the flag of the United States of America" were substituted for
24 the words "my flag," and in 1954 Congress added the words "under God";
25 and

26 WHEREAS, The phrase "under God" first appeared in President
27 Lincoln's Gettysburg Address, which concluded that "this nation, under
28 God, shall have a new birth of freedom, and that government of the
29 people, by the people, for the people, shall not perish from the
30 earth."; and

31 WHEREAS, The United States Supreme Court has given abundant
32 guidance to the lower courts on the constitutionality of the Pledge of
33 Allegiance and has considered the words "one Nation under God" in the
34 pledge to be one of many permissible illustrations of the Government's
35 acknowledgment of the Nation's religious heritage; and

36 WHEREAS, In its early decisions addressing school prayer and Bible
37 reading, the Court was careful to distinguish between religious

1 exercises in public schools, which it held unconstitutional, and
2 patriotic exercises with religious references, which it said were
3 permissible; and

4 WHEREAS, In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court struck
5 down a state law requiring school officials to open the school day with
6 prayer but explained: "There is of course nothing in the decision
7 reached here that is inconsistent with the fact that school children
8 and others are officially encouraged to express love for our country by
9 reciting historical documents such as the Declaration of Independence
10 which contain references to the Deity or ... a Supreme Being, or ...
11 belief in God. Such patriotic or ceremonial occasions bear no true
12 resemblance to the unquestioned religious exercise that the [state] has
13 sponsored in this instance"; and

14 WHEREAS, In *Abington v. Schempp*, 374 U.S. 203 (1963), Justice
15 Brennan, concurring, indicated his belief that patriotic exercises with
16 religious references such as the Pledge of Allegiance did not violate
17 the Establishment Clause with the view that the religious references in
18 the Pledge and patriotic songs were without religious significance:
19 "This general principle might also serve to insulate the various
20 patriotic exercises and activities used in the public schools and
21 elsewhere which, whatever may have been their origins, no longer have
22 a religious purpose or meaning. The reference to divinity in the
23 revised pledge of allegiance, for example, may merely recognize the
24 historical fact that our Nation was believed to have been founded
25 "under God." Thus reciting the pledge may be no more of a religious
26 exercise than the reading aloud of Lincoln's Gettysburg Address, which
27 contains an allusion to the same historical fact"; and

28 WHEREAS, In *Lynch v. Donnelly*, 465 U.S. 668 (1984), a majority of
29 the Court, including Justices Rehnquist and O'Connor recognized that
30 "there is an unbroken history of official acknowledgment by all 3
31 branches of government of the role of religion in American life," and
32 that "[o]ur history is replete with official references to the value
33 and invocation of Divine guidance in deliberations and pronouncements
34 of the Founding Fathers and contemporary leaders," and the Court listed
35 many examples of our "Government's acknowledgment of our religious
36 heritage," including Congress' addition of the words "under God" in the
37 Pledge of Allegiance in 1954: "[E]xamples of reference to our
38 religious heritage are found in the statutorily prescribed national

1 motto "In God We Trust," 36 U.S.C. § 186, which Congress and the
2 President mandated for our currency, see 31 U.S.C. § 5112(d)(1) (1982
3 ed.), and in the language "One nation under God," as part of the Pledge
4 of Allegiance to the American flag. That pledge is recited by many
5 thousands of public school children - and adults - every year"; and

6 WHEREAS, In *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice
7 O'Connor, concurring, stated even more explicitly her opinion that the
8 words "under God" in the Pledge do not violate the Constitution because
9 they "serve as an acknowledgment of religion with 'the legitimate
10 secular purpose of solemnizing public occasions, and expressing
11 confidence in the future'."; and

12 WHEREAS, In *Allegheny County v. American Civil Liberties Union*, 492
13 U.S. 573 (1989). Justice Kennedy, concurring and dissenting and joined
14 by Justices Rehnquist and Scalia, indicated his views about the
15 constitutionality of the Pledge of Allegiance while voicing strong
16 criticism of exactly the kind of formalistic approach taken by the 9th
17 Circuit in *Newdow*, and stated that the Establishment Clause did not ...
18 ... require a relentless extirpation of all contact between government
19 and religion. ... Government policies of accommodation, acknowledgment,
20 and support for religion are an accepted part of our political and
21 cultural heritage. ... "[W]e must be careful to avoid the hazards of
22 placing too much weight on a few words or phrases of the Court," and so
23 we have "declined to construe the Religion Clauses with a literalness
24 that would undermine the ultimate constitutional objective as
25 illuminated by history."; and

26 WHEREAS, As proof of his point that a formalistic approach to the
27 Establishment Clause analysis is wrong, Justice Kennedy in *Allegheny*
28 *County v. ACLU* demonstrated that it would lead to a holding that the
29 Pledge of Allegiance is unconstitutional, an extreme result that
30 Justice Kennedy clearly thought undesirable and unwarranted: "Either
31 the endorsement test must invalidate scores of traditional practices
32 recognizing the place religion holds in our culture, or it must be
33 twisted and stretched to avoid inconsistency with practices we know to
34 have been permitted in the past, while condemning similar practices
35 with no greater endorsement effect simply by reason of their lack of
36 historical antecedent. Neither result is acceptable. Like
37 Thanksgiving Proclamations, the reference to God in the Pledge of

1 Allegiance, and invocations to God in sessions of Congress and of this
2 Court, they constitute practices that the Court will not proscribe, but
3 that the Court's reasoning today does not explain"; and

4 WHEREAS, Justice Scalia, since he has been on the Supreme Court,
5 has dissented from every Supreme Court decision upholding a strict
6 separation between church and state, See, e.g., *Edwards v. Aguillard*,
7 482 U.S. 578 (1987); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290
8 (2000); and

9 WHEREAS, Justice Thomas' views on Establishment Clause
10 interpretation show quite clearly that he would also uphold the
11 Pledge's constitutionality, See, e.g., *Good News Club v. Milford Cent.*
12 *Sch.*, 533 U.S. 98 (2001); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.
13 290, 318 (2000); and

14 WHEREAS, In sum, all Supreme Court precedents referring to the
15 Pledge of Allegiance have stated that it poses no Establishment Clause
16 problems, and more significantly, a majority of the current Supreme
17 Court Justices have indicated that they would uphold the
18 constitutionality of the Pledge; and

19 WHEREAS, In *Sherman v. Community Consolidated Sch. Dist.*, 980 F.2d
20 437 (7th Cir. 1992), the only other lower federal appellate court to
21 have considered the question concluded easily that the Supreme Court
22 would uphold the Pledge, rejected an Establishment Clause challenge to
23 the words "under God" in the Pledge, and referring to the Supreme
24 Court's various statements about the constitutionality of the Pledge,
25 the court said "[i]f the [Supreme] Court proclaims that a practice is
26 consistent with the establishment clause, we take its assurances
27 seriously."; and

28 WHEREAS, The dissenting judge in the 9th Circuit's decision in
29 *Newdow v. U.S. Congress*, Circuit Judge Ferdinand Fernandez, said
30 phrases such as "under God" or "In God We Trust" have "no tendency to
31 establish religion in this country," except in the eyes of those who
32 "most fervently would like to drive all tincture of religion out of the
33 public life of our polity."; and that "My reading of the [majority
34 ruling] suggests that upon Newdow's theory of our Constitution,
35 accepted by my colleagues today, we will soon find ourselves prohibited
36 from using our album of patriotic songs in many public settings ...
37 'God Bless America' and 'America the Beautiful' will be gone for sure,

1 and while use of the first and second stanzas of the Star Spangled
2 Banner will still be permissible, we will be precluded from straying
3 into the third. And currency beware!"; and

4 WHEREAS, In a new case, *Newdow v. Congress of the United States*,
5 filed in the U.S. District Court in California (Cause No. 2:05-cv-
6 00017-LKK-DAD) after the U.S. Supreme Court refused to hold the words
7 "under God" unconstitutional, the court granted legal standing to two
8 families represented by Sacramento attorney Michael Newdow, the atheist
9 who lost the previous pledge case before the Supreme Court, and ruled
10 that the pledge's reference to one nation "under God" violates
11 schoolchildren's right to be "free from a coercive requirement to
12 affirm God" a move that sets the stage for another Supreme Court
13 showdown over the daily classroom ritual;

14 NOW, THEREFORE, Your Memorialists respectfully pray that officers
15 of the executive and legislative branches of both the federal and state
16 governments continue their efforts to ensure that the words "under God"
17 remain in the Pledge of Allegiance.

18 BE IT RESOLVED, That copies of this Memorial be immediately
19 transmitted to the Honorable Barack Obama, President of the United
20 States, the Attorney General for the United States, the Honorable
21 Members of the United States Supreme Court, the Honorable Christine O.
22 Gregoire, Governor of the State of Washington, the Honorable Rob
23 McKenna, Attorney General for the State of Washington, the President of
24 the United States Senate, the Speaker of the House of Representatives,
25 and each member of Congress from the State of Washington.

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