Freedom From Religion Foundation v. Hanover School District
U.S. Court of Appeals for the First Circuit (Case No. 09-2473)

Case History

On October 31, 2007, the Freedom from Religion Foundation (FFRF), along with a New Hampshire family, filed suit against two New Hampshire school districts challenging the voluntary recitation of the Pledge of Allegiance and specifically the words "under God" in the Pledge.

While FFRF conceded that no student that objects to reciting the Pledge is required to do so, they argue that children that do not recite the Pledge "have been degraded from the equal rank of citizens on account of their religious beliefs." The Plaintiffs alleged that the Pledge "creates a societal environment where prejudice against Atheists . . . is perpetuated." The Plaintiffs also claimed, "it is inevitable that children will suffer harm as a result of this practice. Accordingly, *Defendants actually engage in child neglect (if not child abuse)*." (Emphasis added).

FFRF also objected to their tax dollars being used to "fund the Pledge," such as when members of Congress, school board members, teachers, and other governmental employees recite the Pledge in their official capacities. Plaintiffs argued, "[b]y placing the religious words 'under God' into the Pledge, Congress not only interfered with the patriotism and national unity the Pledge was meant to engender, but it actually fostered divisiveness . . . ." Among other things, the Plaintiffs sought an order requiring the removal of "under God" from the federal Pledge statute. ACLJ filed an amicus brief in support of the School Districts.

In September 2009, the court dismissed FFRF's claims, finding that the New Hampshire Pledge statute was enacted for patriotic, not religious, purposes and its recitation in schools does not constitute a "religious exercise." FFRF filed an appeal on October 30, 2009 to the United States Court of Appeals for the First Circuit. On April 7, 2010, the ACLJ filed an amicus brief on behalf of members of Congress and the Committee to Protect "Under God," in support of the school districts, as we did at the lower court.

Summary of the First Circuit's Opinion

After noting that the Constitution does not "require complete separation of church and state," the First Circuit held that the New Hampshire Statute did not violate the Establishment Clause under any of the tests set forth by the Supreme Court. Finding that the statute did not violate the *Lemon* test, the Court noted that "[t]he New Hampshire School Patriot Act's primary effect [was] not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation." The Court next held that the statute did not improperly *endorse* religion because, taken in context, the words "'under God' appear in a pledge to a flag—itself a secular exercise, accompanied by no other religious language or symbolism." Finally, the Court held that the NH statute did not violate the *coercion* test because reciting the Pledge is not a religious exercise and because not participating (i.e, sitting in silence) does not amount to participation (as does sitting silently during prayer). The Court then held that the statute did not violate the Free Exercise Clause of the First Amendment because "mere exposure" to religious content in a public school did not prohibit the children from freely believing in atheism/agnosticism and did not prevent the children's parents from instructing them differently. The Court also held that the statute did not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. FFRF petitioned the court to rehear the case but was denied.

The ACLJ's Position

The First Circuit's affirming of the District Court's opinion and dismissal of all of FFRF's claims in November 2010 was a clear victory for the ACLJ, its members, and our country's heritage. Our position, as the American Center for Law and Justice was that the phrase "under God" in the pledge accurately reflects the historical fact that this nation was founded upon a belief in God. Furthermore, declaring that the pledge was unconstitutional would contradict many pronouncements of the Supreme Court and individual justices that patriotic exercises with religious references are consistent with the establishment clause. There is a major difference between forbidden religious exercises and permissible patriotic exercises. The Supreme Court has consistently stated that patriotic exercises containing religious references such as the pledge are constitutional acknowledgements of our nation's religious heritage. The First Amendment does not compel the redaction of all references to God in the Pledge, patriotic music, and our country's foundational documents to suit atheistic and agnostic preferences, even when such materials are taught in public schools. We continue to hold that the FFRF failed to ever state a free exercise claim because the recitation of the pledge is not a religious exercise and it therefore cannot constitute a burden on the free exercise of religion. On April 7, 2011, FFRF filed a petition for writ of certiorari with the Supreme Court of the United States. Briefs in opposition to that Petition are due May 6 and the ACLJ plans to file another amicus brief in opposition to FFRF's petition.

Summary of FFRF's Petition for Writ of Certiorari

In their petition for Writ of Certiorari, the FFRF has asked the U.S. Supreme Court to declare unconstitutional the practice of requiring public school students to recite or listen to the religious Pledge of Allegiance.

In their petition, they argue that Congress "tampered" with the Pledge of Allegiance in 1954, at the request of several religious lobbying efforts by the Knights of Columbus and other groups adding "under God" into the previously secular pledge, first written in 1892.

Calling the lower courts in "hopeless disarray" in their petition over the issue of religion in public schools, the FFRF has asked the Supreme Court to clear up the confusion. They argue that the various circuit court decisions upholding the religious Pledge give "entirely different, contradictory, and illogical reasons" for allowing schools to "interfere with the religious views of its atheist students." "It is possible that what unifies these diverse holdings," Newdow, Counsel of Record for FFRF, suggests in the petition, "is that all of them manifest the evil that the Establishment Clause exists to stifle — i.e., 'political division along religious lines.'"

FFRF's furthers this assertion that to allow "under God" to remain in the pledge would "also deem constitutional" 'alternative" phrases like "under Jesus," "under Protestantism," "one Nation under the White Race," "one Nation under the Male Gender," or "one Nation under the Wealthiest Citizens."

He further argues that the insertion of "under God" into the pledge "divide[s] the American people on the basis of religious belief" for it allows teachers to encourage the children of non-believers to "stand up, place their hands over their hearts, and personally affirm the religious contention that God exists." The petition argues that whether the recitation of the pledge is voluntary or not, "there remains implicit in each Pledge recital the message that these children's parents' (and their own) religious views are wrong."

Although some lower courts have allowed the religious pledge on the basis that it is not a prayer, FFRF's petition points out that "[n]othing in the First Amendment limits laws 'respecting an establishment of religion' to prayer." Newdow argues that the pledge is indeed treated like a prayer when the words "under God" are inserted into the pledge. The petition also challenges the "bad history" behind many of the lower court decisions.

Although some judges have argued that the Pledge of Allegiance is merely an "acknowledgment" of our religious heritage, Newdow asks: "[W]hat does 'acknowledging' religion have to do with patriotism?

'Acknowledging' that the Framers believed there was a God is no more patriotic than 'acknowledging' that they were white, were male, were Protestant, or were rich. Especially when the purpose is to extol the virtues of one race, gender, wealth category or religious viewpoint over another (which is the manifest message of the 'under God' verbiage), it would seem to be the antithesis of patriotism to make such an 'acknowledgment.' "

"This case involves the nation's most disenfranchised religious minority," the petition continues. "Surely, no one seriously doubts that 'under God' in the Pledge would have been struck down had there been panels of Atheistic jurists hearing these cases. . . . [A]s is the case in the legislature, the representation of nonbelievers in the judiciary is woefully diminished as compared with their numbers in the population at large."

In the petition, Newdow opines: "It is hoped that this Court, in particular, will be sensitive to this problem, since each of the current justices is a member of a minority religion that, like Atheism, was also (at one time) despised and disenfranchised." He further argues: "In fact, the God that most public school teachers proclaim this nation to be 'under' each morning apparently advocates for murdering the plaintiffs here: 'Whoever blasphemes the name of the Lord shall surely be put to death.' " [Leviticus 24:16]

Although some of the lower courts argue that the religious pledge is permissible because there is no coercion involved, the New Hampshire law says individual participation is "voluntary." FFRF's petition disputes that claim. Pressure to conform and to please authorities is great among young schoolchildren. However, coercion is irrelevant, since "coercion" is not the Establishment Clause test. "This court has stated that '[t]he touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.' " Citing the McCollum, Engel, Abington, Stone, Wallace, Edwards, Lee, and Santa Fe Supreme Court decisions, Newdow argues: "[I]n every one of the nine cases heard by this court where there was even a hint of governmental infusion of religious dogma in the public schools, the Court has struck down the challenged activity."