
HOUSE JOINT MEMORIAL 4023

State of Washington 58th Legislature 2003 Regular Session

By Representatives DeBolt and McMahan

Read first time 03/05/2003. Referred to Committee on Judiciary.

1 TO THE HONORABLE GEORGE W. BUSH, PRESIDENT OF THE UNITED STATES,
2 AND TO THE HONORABLE JOHN ASHCROFT, ATTORNEY GENERAL FOR THE UNITED
3 STATES, AND TO THE HONORABLE MEMBERS OF THE UNITED STATES SUPREME
4 COURT, AND TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE
5 OF REPRESENTATIVES, AND TO THE SENATE AND HOUSE OF REPRESENTATIVES OF
6 THE UNITED STATES, IN CONGRESS ASSEMBLED, AND TO THE HONORABLE GARY
7 LOCKE, GOVERNOR OF THE STATE OF WASHINGTON, AND TO THE HONORABLE
8 CHRISTINE GREGOIRE, ATTORNEY 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 Ninth Circuit Court of Appeals'
13 decision in *Newdow v. U.S. Congress* in June of 2002, holding that the
14 phrase in the Pledge of Allegiance, "one Nation under God," violates
15 the Establishment Clause, there is widespread confusion about whether
16 school districts may continue student recitations of the Pledge; and

17 WHEREAS, *Newdow v. U.S. Congress* was decided 2-1 by a three-judge
18 panel of the Court of Appeals for the Ninth Circuit, and the full court
19 has refused to reconsider the decision en banc; and

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

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

13 WHEREAS, The Ninth Circuit Court of Appeals' decision in *Newdow v.*
14 *U.S. Congress* has been stayed, and all school districts around the
15 nation, including those in Washington, may continue student recitations
16 of the Pledge of Allegiance with the phrase "one Nation under God"
17 included as long as the recitation is not mandatory with any person
18 having a religious or other objection to the recitation being allowed
19 to not participate; and

20 WHEREAS, The Ninth Circuit's decision in *Newdow v. U.S. Congress*
21 holding that the phrase in the Pledge of Allegiance, "one Nation under
22 God" violates the Establishment Clause ignored the clear statements of
23 a majority of current United States Supreme Court Justices who have
24 addressed the constitutionality of the Pledge of Allegiance and is
25 almost certain to be reversed by the Supreme Court by holding that the
26 Pledge of Allegiance poses no Establishment Clause problems; and

27 WHEREAS, The Pledge of Allegiance was originally printed in 1892 in
28 the magazine *Youth's Companion*; and

29 WHEREAS, The original text has been altered only twice, in 1923 the
30 words "the flag of the United States of America" were substituted for
31 the words "my flag," and in 1954 Congress added the words "under God";
32 and

33 WHEREAS, The phrase "under God" first appeared in President
34 Lincoln's Gettysburg Address, which concluded that "this nation, under
35 God, shall have a new birth of freedom - and that government of the
36 people, by the people, for the people, shall not perish from the
37 earth."; and

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

6 WHEREAS, In its early decisions addressing school prayer and Bible
7 reading, the Court was careful to distinguish between religious
8 exercises in public schools, which it held unconstitutional, and
9 patriotic exercises with religious references, which it said were
10 permissible; and

11 WHEREAS, In *Engel v. Vitale*, 370 U.S. 421 (1962), the Court struck
12 down a state law requiring school officials to open the school day with
13 prayer but explained:

14 There is of course nothing in the decision reached here that is
15 inconsistent with the fact that school children and others are
16 officially encouraged to express love for our country by
17 reciting historical documents such as the Declaration of
18 Independence which contain references to the Deity or ... a
19 Supreme Being, or ... belief in God. Such patriotic or
20 ceremonial occasions bear no true resemblance to the
21 unquestioned religious exercise that the [state] has sponsored
22 in this instance.

23 ; and

24 WHEREAS, In *Abington v. Schempp*, 374 U.S. 203 (1963), Justice
25 Brennan, concurring, indicated his belief that patriotic exercises with
26 religious references such as the Pledge of Allegiance did not violate
27 the Establishment Clause with the view that the religious references in
28 the Pledge and patriotic songs were without religious significance:

29 This general principle might also serve to insulate the various
30 patriotic exercises and activities used in the public schools
31 and elsewhere which, whatever may have been their origins, no
32 longer have a religious purpose or meaning. The reference to
33 divinity in the revised pledge of allegiance, for example, may
34 merely recognize the historical fact that our Nation was
35 believed to have been founded "under God." Thus reciting the
36 pledge may be no more of a religious exercise than the reading
37 aloud of Lincoln's Gettysburg Address, which contains an
38 allusion to the same historical fact.

1 ; and

2 WHEREAS, In *Lynch v. Donnelly*, 465 U.S. 668 (1984), a majority of
3 the Court, including current Justices Rehnquist and O'Connor recognized
4 that "there is an unbroken history of official acknowledgment by all
5 three branches of government of the role of religion in American life,"
6 and that "[o]ur history is replete with official references to the
7 value and invocation of Divine guidance in deliberations and
8 pronouncements of the Founding Fathers and contemporary leaders," and
9 the Court listed many examples of our "Government's acknowledgment of
10 our religious heritage," including Congress' addition of the words
11 "under God" in the Pledge of Allegiance in 1954:

12 [E]xamples of reference to our religious heritage are found in
13 the statutorily prescribed national motto "In God We Trust," 36
14 U.S.C. § 186, which Congress and the President mandated for our
15 currency, see 31 U.S.C. § 5112(d)(1) (1982 ed.), and in the
16 language "One nation under God," as part of the Pledge of
17 Allegiance to the American flag. That pledge is recited by
18 many thousands of public school children - and adults - every
19 year.

20 ; and

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

27 WHEREAS, In *Allegheny County v. American Civil Liberties Union*, 492
28 U.S. 573 (1989). Justice Kennedy, concurring and dissenting and joined
29 by Justices Rehnquist and Scalia, indicated his views about the
30 constitutionality of the Pledge of Allegiance while voicing strong
31 criticism of exactly the kind of formalistic approach taken by the
32 Ninth Circuit in *Newdow*, and stated that the Establishment Clause did
33 not ...

34 ... require a relentless extirpation of all contact between
35 government and religion. ... Government policies of
36 accommodation, acknowledgment, and support for religion are an
37 accepted part of our political and cultural heritage. ... "[W]e
38 must be careful to avoid the hazards of placing too much weight

1 on a few words or phrases of the Court," and so we have
2 "declined to construe the Religion Clauses with a literalness
3 that would undermine the ultimate constitutional objective as
4 illuminated by history."

5 ; and

6 WHEREAS, As proof of his point that a formalistic approach to the
7 Establishment Clause analysis is wrong, Justice Kennedy in *Allegheny*
8 *County v. ACLU* demonstrated that it would lead to a holding that the
9 Pledge of Allegiance is unconstitutional, an extreme result that
10 Justice Kennedy clearly thought undesirable and unwarranted ...

11 Either the endorsement test must invalidate scores of
12 traditional practices recognizing the place religion holds in
13 our culture, or it must be twisted and stretched to avoid
14 inconsistency with practices we know to have been permitted in
15 the past, while condemning similar practices with no greater
16 endorsement effect simply by reason of their lack of historical
17 antecedent. Neither result is acceptable. Like Thanksgiving
18 Proclamations, the reference to God in the Pledge of
19 Allegiance, and invocations to God in sessions of Congress and
20 of this Court, they constitute practices that the Court will
21 not proscribe, but that the Court's reasoning today does not
22 explain.

23 ; and

24 WHEREAS, Justice Scalia, since he has been on the Court, has
25 dissented from every Court decision upholding a strict separation
26 between church and state, See, e.g., *Edwards v. Aguillard*, 482 U.S. 578
27 (1987); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); and

28 WHEREAS, Justice Thomas' views on Establishment Clause
29 interpretation show quite clearly that he would also uphold the
30 Pledge's constitutionality, See, e.g., *Good News Club v. Milford Cent.*
31 *Sch.*, 533 U.S. 98 (2001); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S.
32 290, 318 (2000); and

33 WHEREAS, In sum, all Supreme Court precedents referring to the
34 Pledge of Allegiance have stated that it poses no Establishment Clause
35 problems, and more significantly, a majority of the current Supreme
36 Court Justices have indicated that they would uphold the
37 constitutionality of the Pledge; and

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

10 WHEREAS, The dissenting judge in the Ninth Circuit's decision in
11 *Newdow v. U.S. Congress*, Circuit Judge Ferdinand Fernandez, said
12 phrases such as "under God" or "In God We Trust" have "no tendency to
13 establish religion in this country," except in the eyes of those who
14 "most fervently would like to drive all tincture of religion out of the
15 public life of our polity."; and that "My reading of the [majority
16 ruling] suggests that upon *Newdow's* theory of our Constitution,
17 accepted by my colleagues today, we will soon find ourselves prohibited
18 from using our album of patriotic songs in many public settings ...
19 'God Bless America' and 'America the Beautiful' will be gone for sure,
20 and while use of the first and second stanzas of the Star Spangled
21 Banner will still be permissible, we will be precluded from straying
22 into the third. And currency beware!"; and

23 WHEREAS, It is critical that the Ninth Circuit Court of Appeals'
24 decision in *Newdow v. U.S. Congress* holding that the phrase in the
25 Pledge of Allegiance, "one Nation under God," violates the
26 Establishment Clause be reviewed and overturned by the United States
27 Supreme Court;

28 NOW, THEREFORE, Your Memorialists respectfully pray that officers
29 of the executive and legislative branches of both the federal and state
30 governments take immediate and determined action to ensure the Ninth
31 Circuit Court of Appeals' decision in *Newdow v. U.S. Congress* holding
32 that the phrase in the Pledge of Allegiance, "one Nation under God,"
33 violates the Establishment Clause is expeditiously and vigorously
34 appealed, briefed, and argued before the United States Supreme Court.

35 NOW, THEREFORE, Your Memorialists further respectfully and
36 specifically pray that Attorney General Christine Gregoire petition the
37 United States Supreme Court at the earliest opportunity to file an

1 amicus brief on behalf of the State of Washington urging the court to
2 overturn the Ninth Circuit Court of Appeals' decision in *Newdow v. U.S.*
3 *Congress*.

4 BE IT RESOLVED, That copies of this Memorial be immediately
5 transmitted to the Honorable George W. Bush, President of the United
6 States, the Honorable John Ashcroft, Attorney General for the United
7 States, the Honorable Members of the United States Supreme Court, the
8 President of the United States Senate, the Speaker of the House of
9 Representatives, each member of Congress from the State of Washington,
10 the Honorable Gary Locke, Governor of the State of Washington, and the
11 Honorable Christine Gregoire, Attorney General for the State of
12 Washington.

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