S-0819.1

SENATE JOINT MEMORIAL 8005

State of Washington 61st Legislature 2009 Regular Session

By Senators Holmquist, Roach, Hewitt, Morton, Carrell, McCaslin, King, Becker, Stevens, Delvin, Swecker, and Benton

Read first time 01/29/09. Referred to Committee on Government Operations & Elections.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREAS, In *Abington v. Schempp,* 374 U.S. 203 (1963), Justice Brennan, concurring, indicated his belief that patriotic exercises with religious references such as the Pledge of Allegiance did not violate the Establishment Clause with the view that the religious references in the Pledge and patriotic songs were without religious significance: "This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. 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"; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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