No. 10-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC., *et al.*,

Plaintiffs-Appellees,

v.

BARACK OBAMA, *et al.*,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PETITION FOR REHEARING AND SUGGESTION OF REHEARING *EN BANC* BY PLAINTIFFS-APPELLEES

RICHARD L. BOLTON
Boardman, Suhr, Curry & Field LLP
One S. Pinckney Street, Fourth Floor
P. O. Box 927
Madison, WI 53701-0927
(608) 257-9521
Attorneys for Plaintiffs-Appellees

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1973

Short Caption: FREEDOM FROM RELIGION FOUNDATION, INC., et al. v. BARACK OBAMA, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):
Freedom From Religion Foundation, Inc.; Anne Nicol Gaylor, Annie Laurie Gaylor; Dan Barker; Phyllis Rose; and Jill Dean. Plaintiff Paul Gaylor has recently become deceased.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
Boardman, Suhr, Curry & Field LLP

(3) If the party or amicus is a corporation:

(i) Identify all its parent corporations, if any; and
Freedom From Religion Foundation, Inc. is a non-profit corporation. It has no parent corporation or stock.

(ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
None

Attorney's Signature: /s/ Richard L. Bolton Date: 5/27/11
Attorney's Printed Name: Richard L. Bolton
Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d): Yes [X] No [ ]
Address: One S. Pinckney Street, 4th Floor, P. O. Box 927
Madison, WI 53701-0927
Phone Number: (608) 257-9521 Fax Number: (608) 283-1709
E-Mail Address: rbolton@boardmanlawfirm.com
rev. 01/08 AK

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

PETITION FOR PANEL REHEARING

The plaintiffs-appellees petition the Court for rehearing pursuant to F.R.A.P. 40. The Court's Panel decision[1] of April 14, 2011, fundamentally changes the standing requirements in Seventh Circuit cases involving unwelcome exposure to government speech endorsing religion. The Panel majority concluded that actual legal coercion is necessary to support standing in cases involving government speech that endorses and promotes religion. In the absence of coercion, the Panel holds that unwelcome exposure to government speech constitutes no more than "hurt feelings," which are not redressable in federal court. The Panel decision conflicts with the Court's prior decisions holding that coercion is not a necessary element under the Establishment Clause. See Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005). The Panel decision also is contrary to all known decisions by the Supreme Court and other Circuit Courts. Adherence to the Panel's decision, therefore, will create uncertainty, confusion and inconsistency for district courts when deciding Establishment Clause issues involving unwelcome exposure to government speech endorsing religion.

The Panel decision also incorrectly equates all government speech, including government speech endorsing religion. The Panel notes that a "President frequently calls on citizens to do things that they prefer not to do -- to which, indeed, they may be strongly opposed on political or religious grounds. Yet no one supposes that the Republican Party has standing to ask the judiciary to redress the 'injury' inflicted when President Obama speaks to his own supporters and tries to influence the undecided." (A-5.) The Panel's example overlooks the "crucial difference" between speech which the Establishment Clause does not regulate, and government speech that endorses religion, which the Establishment Clause prohibits. See Freedom From Religion Foundation, Inc. v. Marshfield, 203 F.3d 487, 491 (7th Cir. 2000).

[1] The Panel's decision is included in the Appendix to this Petition.

The Panel's decision forecloses redress for government speech that unconstitutionally endorses religion without legal coercion. The Panel states that a "feeling of exclusion" arising from unwelcome exposure to government speech endorsing religion is not actionable. (A-6.) The Panel bases this conclusion on the Supreme Court's decision in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), a case in which taxpayer standing was addressed, but not unwelcome exposure. Subsequent Supreme Court decisions have consistently applied Justice O'Connor's endorsement test in cases involving unwelcome exposure to government speech or displays, which test focuses on the effect of government speech in making religion relevant to one's political standing.

The Panel's decision incorrectly requires that affirmative burdens be imposed on the plaintiffs, or at least that they have altered their conduct or incurred costs in time or money. According to the Panel, "the psychological consequence presumably produced by observation of conduct with which one disagrees is not an injury for the purpose of standing," even in cases involving unwelcome exposure to government speech endorsing religion. (A-8.) The Panel's conclusion fails to give effect to the crucial difference between government speech endorsing religion, which the Establishment Clause prohibits, and other subjects of government speech that are not governed by the First Amendment.

PETITION FOR REHEARING *EN BANC*

The plaintiffs-appellees alternatively petition for rehearing *en banc*. The Panel's decision conflicts with the Court's prior decisions, including Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005), as well as Books v. City of Elkhart, 235 F.3d 292 (7th Cir. 2000), in requiring coercion as a necessary predicate for standing in cases involving unwelcome exposure to government speech endorsing religion. The Panel's decision also conflicts with the known decisions of virtually every other Circuit Court of Appeals, as Judge Williams notes in her Concurrence. Finally, the Panel's decision conflicts with holdings by the United States Supreme Court recognizing that coercion is not a necessary element of a violation of the Establishment Clause, unlike the Free Exercise Clause. Engel v. Vitale, 370 U.S. 421, 430 (1962).

The Panel's decision also conflicts with decisions of this Court recognizing the distinction between government speech endorsing religion and other government speech. As the Court stated in Freedom From Religion Foundation, Inc. v. City of Marshfield, 203 F.3d 487, 491 (7th Cir. 2000), "there is a 'crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" The Court in Marshfield relied on the Supreme Court's recognition of this distinction in Board of Education v. Mergens, 496 U.S. 226, 250 (1990). The Court continues to adhere to this distinction, noting in Choose Life Illinois v. White, 547 F.3d 853, 859 (7th Cir. 2008), that the government's choice of message is generally not actionable, "subject to constitutional limitations . . . such as the Establishment Clause." The Seventh Circuit, the Supreme Court, and every other Circuit Court of Appeals, has consistently recognized that government speech endorsing religion, unlike other government speech, is redressable under the Establishment Clause.

ARGUMENT

I. ACTUAL LEGAL COERCION IS AN UNPRECEDENTED TEST FOR STANDING IN CASES INVOLVING EXPOSURE TO GOVERNMENT SPEECH ENDORSING RELIGION.

The Panel decision adopts a rule of standing that has been consistently rejected by the courts, including this Court. In Books v. Elkhart County, 401 F.3d at 862, for example, this Court held that the Establishment Clause neither requires coercion, nor a showing of special burdens or altered conduct, as a required element for standing in cases involving government speech endorsing religion. In fact, contrary to the Panel's decision in this case, the Court rejected the actual legal coercion test, which Judge Easterbrook propounded in his dissent in the Books decision.

The Panel decision in this case now adopts Judge Easterbrook's dissent in Books as the Court's majority decision, while suggesting that this analysis has not been previously considered by the Court. On the contrary, however, this Court has consistently rejected the concept of actual legal coercion as a necessary element of an Establishment Clause violation. By contrast, Judge Easterbrook has advocated the legal coercion test at least since his dissent in American Jewish Congress v. City of Chicago, 827 F.2d 120, 137 (7th Cir. 1987) (Easterbrook, J., Dissent), in which he stated that "force or funds" are essential elements of the Establishment Clause, although "plainly not the law today."

No other court is known to require coercion as a test for standing in government speech cases under the Establishment Clause. The district courts in the Seventh Circuit, therefore, look to unwelcome exposure to government speech or displays as the governing test for standing in such cases, based on this Court's precedents. Cf. Workman v. Greenwood Community School, 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010); Doe v. Elmbrook Joint Common School, 2010 U.S. Dist. LEXIS 72355 (E.D. Wis. 2010). As recently as last year, moreover, this Court

continued to recognize unwelcome exposure as the applicable test for standing in cases involving religious exercises, practices or words. Sherman v. Koch, 623 F.3d 501, 507 (7th Cir. 2010). See also Hinrichs v. Speaker of the House of Representatives of Indiana General Assembly, 506 F.3d 584, 590 n. 5 (7th Cir. 2007) (unwelcome exposure to religious message sufficient to establish standing).

The Supreme Court also has consistently recognized that a violation of the Establishment Clause is not predicated on coercion. See County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 597 n. 47 (1989), citing Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973). See also Engel v. Vitale, 370 U.S. 421, 430 (1962); Abington School District v. Schempp, 374 U.S. 203, 222-23 (1963); and Lee v. Weisman, 505 U.S. 577, 604-05 (1992) (J. Blackmun, concurring). In Allegheny, 492 U.S. at 597 n. 47, the Court expressly refused to reconsider its prior holdings and proceeded "to apply the controlling endorsement inquiry, which does not require an independent showing of coercion."

The Panel majority incorrectly construes the decision in Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), as adopting coercion as the touchstone for standing in government speech cases. In Newdow, the Supreme Court concluded as a prudential matter that the plaintiff did not have "domestic relations" standing to sue on behalf of his daughter because he was not the custodial parent. The Newdow decision did not involve a claim by Newdow to have had unwelcome exposure to government speech endorsing religion, nor did the Court purport to decide that coercion was a necessary element of a speech case.

After Newdow, this Court decided Books (II), finding that unwelcome exposure to government speech continued to be the applicable test for standing. Judge Easterbrook dissented

in that case because he wanted to impose a requirement of actual legal coercion. The Court majority did not adopt Judge Easterbrook's dissent.

Decisions by the Supreme Court subsequent to Newdow also have not required legal coercion for standing. For example, in McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005), the Court held that a Ten Commandments display impermissibly violated the Establishment Clause, despite the absence of coercion. In Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring), moreover, Justice Thomas advocated for the Court to adopt coercion as the applicable test under the Establishment Clause, which is a test that he considered far simpler to apply than "the various approaches this Court now uses." (Emphasis added.) The Court, however, has never adopted or applied Justice Thomas' coercion test, even subsequent to Newdow.

No known decision by any court, before or since Newdow, has conditioned standing on coercion in a government speech case.

The Panel decision ultimately rejects the endorsement test altogether as an analytical tool in government-sponsored speech or display cases. In doing so, the Panel decision conflicts with the prior decisions of this Court, prior decisions of the Supreme Court, as well as the consistent decisions of other Circuit Courts.

The Panel's adoption of a legal coercion requirement would actually preclude standing even in cases alleging government speech evincing disapproval and hostility toward religion. In Catholic League for Religious and Civil Rights v. San Francisco, 624 F.3d 1043 (9th Cir. 2010), the Court of Appeals found standing in a case in which the plaintiffs challenged a city resolution that was allegedly hostile to religion. The Court considered on the merits whether the City's resolution gave the appearance of endorsement or hostility toward religion. Despite the absence of coercion in that case, in which no one was made to pray or legally forced to do anything, the

Court found standing "even though nothing was affected but the religious or irreligious sentiments of the plaintiffs." Id. at 1050. According to the Court, the resolution by the City of San Francisco, "like a symbol conveys a message." Id.

The endorsement test has been consistently applied in cases involving government speech endorsing religion because such speech infringes upon the freedom of conscience of those who practice unpopular or minority religions, as well as those who are nonbelievers. Government speech that makes such persons feel like political outsiders is prohibited by the Establishment Clause. Government speech endorsing religion, or evidencing hostility to religion, is not sanctioned under the Establishment Clause by simple majoritarian rule, contrary to the Panel's misunderstanding.

II. SUPREME COURT PRECEDENT CLEARLY HOLDS THAT GOVERNMENT SPEECH ENDORSING RELIGION IS PROHIBITED UNDER THE ESTABLISHMENT CLAUSE.

The Panel concludes that government speech endorsing religion should be treated no different under the Establishment Clause than other government speech, contrary to all known precedent. As this Court noted in Marshfield, 203 F.3d at 491, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids," and private speech, as well as other government speech. See also Doe v. Small, 964 F.2d 611, 617 (7th Cir. 1992). In Santa Fe Independent School District v. Doe, 530 U.S. 290, 302 (2000), the Supreme Court also reiterated that the Establishment Clause forbids government speech endorsing religion.

The Supreme Court continues to recognize the distinction between government speech endorsing religion and other government speech. In Pleasant Grove v. Summum, 555 U.S. 460, 129 S. Ct. 1125, 1131-32 (2009), the Court recently acknowledged that although the Free Speech Clause of the First Amendment does not apply to government speech, this "does not mean that

there are no restraints on government speech. For example, government speech must comport with the Establishment Clause."

The Panel decision is contrary to the Supreme Court's prohibition on government speech endorsing religion, which prohibition cannot be squared with the Panel's requirement of actual legal coercion. Judge Easterbrook noted in his dissent in Books (II), that "words do not coerce," with direct legal force, so exposure to government speech and displays endorsing religion would never give rise to standing under this test. According to Judge Easterbrook in his dissent, such a display may give offense, either to persons outside the religious tradition or to those who believe that religion in government should be separated, yet "the insulted person lacks standing to sue." Here, the Panel's decision essentially adopts Judge Easterbrook's dissent in Books (II), whereby government-sponsored speech or displays would never be actionable without coercion.

The Panel's decision has unprecedented implications. No court, including the Supreme Court, has held that government speech endorsing religion is beyond the purview of the federal courts. Even the Supreme Court's decision in Valley Forge does not support the Panel's departure from established principles. Valley Forge did not involve claims of unwelcome exposure to government speech. Since that decision, moreover, courts have consistently held that Valley Forge does not mean that "psychological injury" is an insufficient basis for Article III standing in cases involving exposure to government speech endorsing religion. If this were not the case, then the many subsequent judicial decisions prohibiting government speech that endorses religion would have involved plaintiffs without standing, including the Supreme Court's decisions in County of Allegheny, and McCreary. In cases involving unwelcome exposure to government speech, "the spiritual, value-laden beliefs of the plaintiffs are most often directly affected by an alleged establishment of religion. Accordingly, rules of standing recognize that

non-economic or intangible injury may suffice to make an Establishment Clause claim justifiable." Suhre v. Haywood County, 131 F.3d 1083, 1087 (4th Cir. 1997).

The Panel's decision in this case will stand as more than just an outlier. The decision will create uncertainty for district courts in the Seventh Circuit confronted by the conflict with the prior decisions of this Court, as well as Supreme Court precedents, and precedent from all other Circuit Courts.

III. THE PLAINTIFFS' EXPOSURE TO GOVERNMENT SPEECH ENDORSING RELIGION IS NOT AN ATTENUATED INJURY.

District Court Judge Barbara Crabb found as matters of fact in this case that the plaintiffs' undisputed evidence established "their sense of exclusion and unwelcomeness, even inferiority, which they feel as a result of what they view as the federal government's attempt to encourage them to pray through a statute and a presidential proclamation." Judge Crabb also found as a matter of fact that the plaintiffs have had unwelcome exposure to the government-sponsored speech mandated by Act of Congress requiring the President to designate a National Day of Prayer every year. These findings of fact are entitled to deference on appeal, just as fact-finding by the trier of fact in any other proceeding.

Judge Crabb's findings fully support the conclusion that the plaintiffs' injuries in this case are no different than the injuries identified in previous religious speech cases. According to Judge Crabb, there is little difference between the type of injury alleged in this case and those recognized in the past. The Supreme Court's decision in Valley Forge, by contrast, has not been recognized for the proposition that exposure to government speech endorsing religion causes only non-actionable "psychological injury." In suits brought under the Establishment Clause, unwelcome exposure demonstrates injury sufficient to confer standing, unlike the situation in

Valley Forge, which did not involve exposure. See ACLU v. DeWeese, 633 F.3d 424, 429-30 (6th Cir. 2011).

The fact that exposure to government speech mandated by an Act of Congress may be widespread does not close the federal courthouse door to those persons whose rights of conscience have been infringed. To not recognize standing in this case because of the scope of the Government's intended audience would allow the Government unrestrained authority to promote religion at the highest levels of Government without legal redress. As Judge Crabb recognized, "to deny standing to persons who are, in fact, injured simply because many others are also injured, would mean that the most injurious and widespread actions could be questioned by nobody."

Presidential proclamations have an intended national audience that includes these plaintiffs. This does not mean that the plaintiffs' injuries are non-actionable "generalized grievances." On the contrary, the risk of establishing religion in violation of the Establishment Clause is enhanced by the mandated proclamations of national leaders to the largest possible audience. Judge Williams' concern in her concurrence overlooks the national effect of such proclamations. Even formal proclamations of a national religion otherwise would be non-redressable as a sort of generalized grievance.

The question of standing is not a function of numbers, but rather depends on exposure to the government's prohibited message of religious endorsement. The right to be free from exposure to government speech endorsing religion is an individual right protected by the Establishment Clause, "not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law.'" Judge v. Quinn, 612 F.3d 537, 545-46 (7th Cir. 2010), quoting Baker v. Carr, 369 U.S. 186, 208 (1962). Nor is this matter of conscience a right that is "more appropriately addressed in the representative branches" of government. See

O'Sullivan v. Chicago, 396 F.3d 843, 854 (7th Cir. 2005). The Establishment Clause is intended to protect minorities from the tyranny of majorities regarding the rights of conscience in matters of religious and non-religious beliefs.

The Panel's decision sidesteps the logic and legal support underlying Judge Crabb's decision by purporting to change the law in significant respects. The Panel decision adopts, without precedent, a requirement of coercion as an essential element of an Establishment Clause claim. The Supreme Court, this Court, and all other Circuit Courts, have previously rejected this revision. The Panel also purports to eliminate the "crucial difference" between government speech endorsing religion and other non-religious government speech.

The Panel's decision refuses to recognize standing in cases involving government speech endorsing religion because, according to the majority of the Panel, government speech endorsing religion is no longer to be prohibited in the Seventh Circuit by the Establishment Clause. This significant decision should be reconsidered by the Court *en banc*. The Panel's decision vitiates the long-recognized protections of the Establishment Clause in cases of government-sponsored speech or displays. The Court, acting as a whole, should carefully consider this revision of the law before the Seventh Circuit becomes the first court to declare government speech endorsing religion as beyond the scope of the Constitution and the courts.

Dated this 27th day of May, 2011.

BOARDMAN LAW FIRM, LLP
By:

/s/ Richard L. Bolton

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

This Petition complies with the page limitations of Fed. R. App. P. 40(b). The Petition contains 12 pages, excluding those parts of the Petition exempted by Fed. R. App. P. 32(a)(7)B)(iii).

This Petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Word 2007 in 12-point Times New Roman font in the body and 11-point Times New Roman Font in footnotes.

Dated this 27th day of May, 2011.

BOARDMAN LAW FIRM, LLP
By:

/s/ Richard L. Bolton
Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that I have filed electronically, pursuant to Circuit Rule 31(e), this Petition for Rehearing and Suggestion of Rehearing *En Banc* by Plaintiffs-Appellees and all of the appendix items that are available in non-scanned PDF format.

Dated this 27th day of May, 2011.

BOARDMAN LAW FIRM, LLP
By:

/s/ Richard L. Bolton

Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that I have on this day served two copies of the foregoing Petition for Rehearing and Suggestion of Rehearing *En Banc* by Plaintiffs-Appellants upon opposing counsel via federal express and e-mail to the following:

Lowell V. Sturgill, Jr.
Attorneys, Appellate Staff
Civil Division, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-3427

Dated this 27th day of May, 2011.

BOARDMAN LAW FIRM, LLP
By:

/s/ Richard L. Bolton
Richard L. Bolton, Esq.
Boardman, Suhr, Curry & Field LLP
1 South Pinckney Street, 4th Floor
P. O. Box 927
Madison, WI 53701-0927
Telephone: (608) 257-9521
Facsimile: (608) 283-1709
Attorneys for Plaintiffs

F:\DOCS\WD\26318\17\A1203489.DOCX