

NOS. 05-17257, 05-17344, 06-15093

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED  
APR 23 2005

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Jan Roe and Rochild-2,  
Plaintiffs-Appellees

v.

Rio Linda Union School District,  
Defendant-Appellee  
and

United States of America and John Carey, et al.,  
Defendants-Intervenors-Appellants

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On Appeal from the United States District Court  
for the Eastern District of California  
(District Court No. CV-05-00017-LKK)  
Lawrence K. Karlton, District Judge

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**BRIEF *AMICUS CURIAE* OF THE FREEDOM FROM RELIGION  
FOUNDATION, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES  
AND IN FAVOR OF AFFIRMANCE**

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George Daly  
139 Altondale Avenue  
Charlotte NC 28207  
704-333-5196  
[gdaly1@bellsouth.net](mailto:gdaly1@bellsouth.net)  
N.C. Bar No. 1071

Attorney for *Amicus Curiae*  
Freedom From Religion  
Foundation, Inc.

## **CORPORATE DISCLOSURE STATEMENT**

The Freedom From Religion Foundation, Inc. is a non-profit charitable and educational corporation organized and existing under the laws of the State of Wisconsin. It has no parent corporation and no stock.

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## **STATEMENT OF *AMICUS CURIAE***

The Freedom From Religion Foundation, Inc. is a nationally recognized leading advocate promoting the constitutional separation of church and state on behalf of atheists, agnostics, and nonbelievers. It has more than 7,000 members, with representation in all 50 states and the District of Columbia. The issues presented in the case at bar are of great importance to the Foundation and its constituency, which includes the more than 30 million adult Americans (14%) who do not believe in a god or adhere to organized religion, according to the definitive American Religious Identification Survey by the Graduate Center, City University of New York, 2001.

Pursuant to *Fed. R. App. P.* 29(a), consent to the filing of this *amicus* Brief has been obtained from all parties to this appeal.

### **ARGUMENT**

#### **The Pledge Ceremony is a religious exercise**

Our nation has long recognized the dangerous cross-currents that lie at the confluence of religion and government. Government can corrupt religion, when it bends doctrine and practice to the needs of governmental power. As Madison put it,

[E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary

operation.

Madison, Memorial and Remonstrance Against Religious Assessments (1785), quoted in *Lee v. Weisman*, 505 U.S. 577, 590, 112 S. Ct. 2649 (1992). And, religion that believes too much in its own virtue can corrupt government, by demanding conformity, promoting intolerance, silencing dissent. Thus

The “first and foremost purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion.”

*Engel v. Vitale*, 370 U.S. 421, 431 (1962). As Senator Ervin, sometimes said to be The Last of the Founding Fathers, put it: “When religion controls government, political freedom dies; and when government controls religion, religious freedom dies.” Ervin, *Preserving The Constitution*, 247 (Michie, 1984).

The First Amendment ministers to the twin dangers of governmental piety and religious cowardice by creating a separation of powers temporal and spiritual, by guaranteeing the free exercise of religion and preventing governmental practices that respect an establishment of religion.

Our Constitution, which creates this separation of powers temporal and spiritual, is a notably secular document. It would be ironic if it were not. A government constituted to prevent religion and government from

corrupting each other could hardly invoke divine authority. And so the United States of America is the first nation to have been founded without deities being invoked. The Constitution never mentions God. It constituted a secular republic.

The Constitution specifically provides that religion is not to be a qualification for participation in our government. In 1787 almost all the States required religious affirmations for holding office or prevented those of certain religions altogether from public office.<sup>1</sup> Oaths then as now commonly invoked God as oath-helper.<sup>2</sup> But our Constitution stated:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U. S. Const., art. VI, cl. 3. This swept away all religious requirements for holding an office of the United States. A Quaker or an atheist or a

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<sup>1</sup> Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2101 (1996).

<sup>2</sup> See, e.g., N.C. Gen. Stat. § 11-1 (1777). “Oaths and affirmations to be administered with solemnity. Whereas, lawful oaths for discovery of truth are necessary and highly conducive to the important end of good government; and being most solemn appeals to Almighty God . . .”. Affirmation is allowed, N.C. Gen. Stat. § 11-3, but only when the Bible and the religious oath have been declined, N.C. Gen. Stat. § 11-4.



Mohammedan could now merely affirm that he would well and truly discharge the duties of office and support and defend the Constitution. This was a radical break with prevailing State practice.

The Constitution specifically stated the oath for President. It contained no reference to a deity.

I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

U. S. Const., art. II, sec. 1, cl. 8. Many Presidents have added “So Help Me God” at the end of their oath, but rather than make the constitutional oath religious, this practice illustrates the distinction between laws and people.

The Founders drafted and We ratified a secular Constitution. Our religious history is deservedly celebrated in the private sphere, but it has no place in the realm of government.

Is the daily repetition of the Pledge of Allegiance at Rio Linda an establishment of religion, prohibited by our secular Constitution? Or is it a patriotic ceremony that legitimately binds our children to our polity? Close attention to the Pledge ceremony, to both the text spoken and to the context in which it is spoken, will show that it is a religious ceremony.

The ritual hand over the heart and the speaking in unison, *see*, 4 U.S.C. § 4, and their daily recurrence tell the children that a matter of great

importance to the adult world is taking place. Recess and reading also recur every day but they have no ritual gesture, no voice in unison, no daily sameness. We all remember the Pledge we took in school.

A child who pledges allegiance personally assents to membership in our nation. The Pledge ceremony is a powerful bonding ritual between child and nation.

And to what nation does the child make this obeisance? To one nation “under” God, to a nation subject to God, to a nation that has its being and existence because of God. “Under” means subservient to. One holds office “under” a government.<sup>3</sup> A government exercises legislative power “over” a governmental unit.<sup>4</sup> Legal actions arise “under” a governing document.<sup>5</sup> This court’s jurisdiction is exercised “under” regulations

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<sup>3</sup> *See, e.g.*, U.S. Const., art. I, sec. 3, cl. 7 (“any Office of honor, Trust or profit under the United States”); *see id.*, sec. 6 (“No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office *under* the Authority of the United States. . . and no Person holding any Office *under* the United States, shall be a Member of either House during his Continuance in Office”) (emphases added).

<sup>4</sup> *See, e.g.*, U.S. Const., art. I, sec. 8, cl. 17 (“To exercise Legislation in all cases whatsoever, *over* such District (not exceeding ten miles square) . . .” (emphasis added)).

<sup>5</sup> *See, e.g.*, U.S. Const., art. III, sec. 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising *under* this Constitution . . .”) (emphasis added).

imposed by the Congress.<sup>6</sup> The United States is “under” the Constitution and laws<sup>7</sup> and treaties are made “under” its authority.<sup>8</sup> Notions of authority and hierarchy are instinct in the word “under.” When young school children pledge allegiance to a nation under God they pledge allegiance to a religious nation. They voluntarily assent to a view of history that holds the United States to be a nation under the authority of God.

“Under God” is not merely descriptive of our nation. It states a theological definition of our nation. In the Pledge ceremony children pledge loyalty to that definition. The Pledge ceremony is a religious ceremony, forbidden by our Constitution. U.S. Const., amndt. I; *Engle v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261 (1962); *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649 (1992).

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<sup>6</sup> U.S. Const., art. III, sec. 2, cl. 2 (“ . . . the supreme Court shall have appellate jurisdiction . . . , with such Exceptions, and *under* such Regulations, as the Congress shall make.”)(emphasis added).

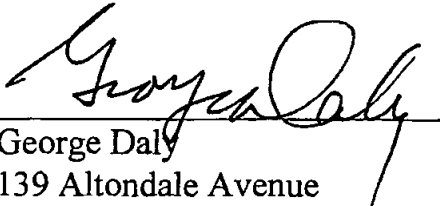
<sup>7</sup> U. S. Const., art. VI, cl. 1 (“All Debts . . . shall be valid against the United States *under* this Constitution . . .”)(emphasis added).

<sup>8</sup> U. S. Const., art. VI, cl. 2 (“...all Treaties made . . . *under* the Authority of the United States . . .”)(emphasis added).

## CONCLUSION

*Amicus* respectfully requests that the judgment below be affirmed.

Dated: July 21, 2006.



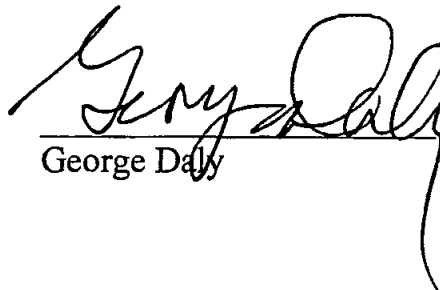
George Daly  
139 Altondale Avenue  
Charlotte NC 28207  
704-333-5196  
[gdaly1@bellsouth.net](mailto:gdaly1@bellsouth.net)  
N.C. Bar No. 1071

Attorney for *Amicus Curiae*  
Freedom From Religion  
Foundation, Inc.

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to *Fed. R. App. P.* 32(a)(7)(C) and Ninth Circuit Rule 32-1 that the foregoing *amicus* brief is proportionately spaced in 14 point type and contains 1,105 words according to the word count of my word processor.

July 21, 2006.



George Daly

## **PROOF OF SERVICE BY OVERNIGHT COURIER**

In Re: Brief *Amicus Curiae* of the Freedom from Religion Foundation, Inc., in Support of Plaintiffs-Appellees and in Favor of Affirmance

Caption: Jan Roe and Roechild-2, Plaintiffs-Appellees v. Rio Linda Union School District, Defendant-Appellee and United States of America and John Carey, et al., Defendants-Intervenors-Appellants

Filed: In the Ninth Circuit Court of Appeals (sent by Overnight Courier)

I am a citizen of the United States of America and I am employed in Omaha, Nebraska. I am over the age of 18 and not a party to the within action. My business address is 2311 Douglas Street, Omaha, Nebraska. On this date, I served two copies of the above-entitled document on the parties or their counsel shown below, by placing sealed envelopes in First Class Mail, addressed as follows:

Terence J. Cassidy  
Porter Scott Wieberg and Delehart  
2350 University Avenue, Suite 200  
Sacramento CA 95825

Lowell V. Sturgill, Jr.  
2504 East Meredith Drive  
Vienna VA 22181

Jill Bowen  
California Department of Justice  
1300 I Street, Suite 1101  
P.O. Box 944255  
Sacramento CA 94244-2550

Michael Newdow  
First Amendmist Church of True Science  
P.O. 23345  
Sacramento CA 92823

Anthony R. Picarello  
Becket Fund For Religious Liberty  
1350 Connecticut Avenue NW  
Suite 605  
Washington DC 20036

Benjamin D. DuPre  
Foundation For Moral Law  
One Dexter Avenue  
Montgomery AL 36104

Patrick T. Gillen  
Thomas More Law Center  
24 Frank Lloyd Wright Drive  
P.O. Box 393  
Ann Arbor MI 48106

Steven W. Fitscher  
The National Legal Foundation  
2224 Virginia Beach Blvd.  
Virginia Beach VA 23454

Peter D. Lepiscopo  
2635 Camino del Real South, Suite 109  
San Diego CA 92108

I certify under penalty of perjury that the foregoing is true and correct. Service and court filing executed on July 21, 2006, at Omaha, Nebraska.

  
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