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March 22, 2005

*BY HAND DELIVERY*

Ms. Patricia Connor, Clerk  
United States Court of Appeals for the Fourth Circuit  
1100 East Main Street, Suite 501  
Richmond, Virginia 23219-3517

Re: *Myers v. Loudoun County*, No. 03-1364

Dear Ms. Connor:

Appellant respectfully submits this Rule 28(j) letter to address two issues raised at oral argument.

*First*, the Court asked whether Appellant, acting *pro se*, had standing to assert the Establishment Clause rights of his minor sons. There is no dispute that Appellant has standing to assert his own fundamental right to guide the religious future and education of his sons, which Appellant claims the challenged statute and policy violate by causing public schools to sponsor an exercise affirming the existence and authority of God. *See Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996).

Our post-argument research has disclosed that this Court and other Courts of Appeals have held or indicated that parents, acting *pro se*, may not assert the rights of their minor children. *See, e.g., Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 263-64 (4th Cir. 1998). This judge-made principle, however, has apparently been superseded in Virginia as a matter of Virginia law.

In *Coffey ex rel. Coffey v. Va. Birth-Related Neurological Injury Comp. Program*, 558 S.E.2d 563 (Va. Ct. App. 2002), the court held that a state agency had not erred in allowing a *pro se* parent to petition for certain benefits as her infant's next friend. Relying on Va. Code § 8.01-8, which generally permits parents to sue on behalf of their minor children, the court noted that the statute "contains no provision either requiring or authorizing the appointment of legal counsel for a minor who sues by his next friend." *Id.* at 566. Appellant respectfully submits that the judge-made principle applied in *Doe* should yield to the policy embodied in Virginia law as construed by the Virginia court.

*Second*, the Court asked whether Appellant had argued in district court, as an independent basis for relief, that the Pledge requirement violates the Establishment Clause because of the inclusion of "under God." Attached are copies of the memorandum filed by Appellant in the dis-

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trict court making that independent argument, with the pertinent text and footnote on page 10 marked for the Court's convenience.

Respectfully submitted,

*David Remes /eAM*

David H. Remes

Enclosures

cc:

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IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

EDWARD R. MYERS,

Plaintiff,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS,

Defendant.

Civil Action No. 02-1528-A

PLAINTIFF'S MEMORANDUM OF CORRECTIONS AND AMENDMENTS TO  
COMPLAINT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS FOR  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

I. The Virginia Pledge of Allegiance Requirement establishes a "God and Country" Style  
Civil Religion in Public Schools in Violation of the Establishment Clause.

Plaintiff argues that the Virginia Pledge of Allegiance statute fails all three prongs of the  
Lemon test and therefore must be ruled an unconstitutional violation of the establishment  
clause on its face.

A. Statute Advances Civil Religion

The God and Country variety of Civil Religion is a true religion, not an invention of the  
Plaintiff as asserted by Defendant.<sup>1</sup> This religion is partisan as illustrated by Wisconsin  
Governor Scott McCallum's chastisement of the Madison School Board's for attempting  
to reduce peer pressure by using an instrumental version of the national anthem to satisfy  
Wisconsin state law requiring all schools to offer the pledge or anthem daily.

"Most Wisconsinites are looking for ways to enhance our armed forces  
and support our country; some people are looking for ways to diminish our

<sup>1</sup> Memorandum in Support of Defendants Loudoun County Public Schools' and Dr. Edgar B. Hatrick's  
Motion to Dismiss Plaintiff's Complaint for Failure to State a Claim upon which Relief Can Be Granted,  
Section IV.A (page 19)

belief in God and country. It is disheartening, but in a free country you have patriots and you have the freedom for a few oddballs who place politics above patriotism.”<sup>2</sup>

Sociologist Robert Bellah first coined the phrase civil religion in a 1967 essay "Civil Religion in America." His writings provoked much academic research into religion and national identity, a connection that has existed since the arrival of the Pilgrims.<sup>3</sup> Civil religion has evolved through the course of American history as each significant historical event has been folded into this institution's fabric. The events of September 11, 2001 has renewed interest in expressing American experience in a spiritual dimension and civil religion has once again been on the ascent. The U.S. Secretary of Education, Rod Paige, implemented a synchronized "Pledge Across America" event on October 12, 2001 as civil religion's equivalent to a traditional religion's day of prayer. The objective, according to Secretary Paige, was to demonstrate national unity in the wake of the September 11<sup>th</sup> tragedies.<sup>4</sup>

Dr. Rowland Sherrill, chair of the Department of Religious Studies at Indiana University, discussed civil religion at the September 23 2002 FACS Faith & Public Life seminar in Indianapolis.<sup>5</sup>

Civil religion is the mysterious way that religion, politics, ideas of nationhood, patriotism, etc. — energized by faith outlooks — represents a national force. It gets very little careful thought. But, we live in it, and we appeal to it all of the time.

American civil religion is a form of devotion, outlook and commitment that deeply and widely binds the citizens of the nation together with ideas they possess and express about the sacred nature, the sacred ideals, the sacred character, and sacred meanings of their country -- its blessedness by God, and its special place and role in the world and in human history. Civil religion transcends denomination, and one need not even be a

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<sup>2</sup>Austin Cline, Separation of Church and State: Myths,

[http://atheism.about.com/library/FAQs/blfaq\\_cs\\_myth\\_pledge.htm](http://atheism.about.com/library/FAQs/blfaq_cs_myth_pledge.htm), (12/21/2002).

<sup>3</sup> For a history of civil religion see Richard V. Pierard, "Civil Religion: A Case Study Showing How Some Baptists Went Astray on the Separation of Church and State", Christian Ethics Today, (Issue 008, Volume 2, No. 4, November 1996) available online at [www.christianethicstoday.com/issue/008/Civil Religion By Richard V Pierard 008\\_4 .htm](http://www.christianethicstoday.com/issue/008/Civil_Religion_By_Richard_V_Pierard_008_4_.htm)

<sup>4</sup> Rod Paige, Policy letter to schools, available online at [www.ed.gov/News/Letters/011009.html](http://www.ed.gov/News/Letters/011009.html)

<sup>5</sup> Review of Dr. Rowland Sherrill remarks can be found online at [http://www.facsnet.org/issues/faith/sherrill\\_indy.php](http://www.facsnet.org/issues/faith/sherrill_indy.php)

religious believer to believe in the rightness of the country, but historically, Americans have viewed their country in religious terms.

There is a religious aura and coloration in the ways many Americans think about, live within and operate in relation to their ideas of their country as sacred entity. People believe the country has been specially blessed by God, and that means they, the Americans, have been blessed. Their country, and therefore they, have a special place and role in the world and in human history.

Civil religion is not to be confused with patriotism and nationalism, although the two are related and intersect. Civil religion involves the definition of patriotism — the love and commitment to one's homeland — that is built right into to civil religion. But only when you add on the religious significance and character of the country that warrants such love and commitment does it go from simple patriotism to civil religion.

Civil religion also relates to nationalism — a passionate adoration of the state, its governing authority and civil order. Civil religion adds to that the idea that the governing authority and civil order are sanctified in some way with spiritual or religious significance.<sup>6</sup>

Enlightenment philosopher Jean-Jacques Rousseau was one of the first proponents of civil religion.<sup>7</sup> But civil religion did not enter the common lexicon of ordinary use until journalists, commentators, and pastors began to use it to describe the national resurgence in national spiritualism and interfaith services after 9/11 events. Thousands of articles on the World Wide Web contain reference to this term. Many articles mention American Civil Religion in connection with discussion on the Pledge of Allegiance.<sup>8</sup>

One can see that American Civil Religion goes beyond patriotism and into religion by noting that it encapsulates all of Ninian Smart's seven dimensions,<sup>9</sup> outlined below, that are used in academia to identify belief systems that can be properly identified as a religion.

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<sup>6</sup> Ibid.

<sup>7</sup> Jean-Jacques Rousseau, *The Social Contract* (Chicago, 1952), chapter 8, book 4

<sup>8</sup> A Google web search performed on 12/29/2002 for documents containing the phrase "Civil Religion" returned 9,290 documents. Narrowing the search to documents that including the term "Pledge of Allegiance" and "Civil Religion" returned 327 documents.

<sup>9</sup> Ninian Smart, *Dimensions of the Sacred: An Anatomy of the World's Beliefs* (University of California Press.)

1. Ritual and Practical Dimension: Every religious tradition has some practices to which it adheres and which provide a spiritual awareness. American Civil Religion has liturgy, sacrament and ceremony in the fireworks displays at Independence Day events, the formal presidential inaugurations, the singing of the National Anthem at sporting events, and the recitation of the Pledge of Allegiance in schools.

2. Experiential and Emotional Dimension: All religions are responses to certain significant experiences of their founders and followers. For American Civil religion it is the American Revolution, the establishment of the American government, the Civil War, and subsequent periods of international strife, usually during periods of war.

3. Mythological or Narrative Dimension: In many traditions, stories and records of the past serve to establish and maintain a tradition. George Washington sailing across the Delaware, honest Abe Lincoln as savior of the nation, George Washington and the apple tree, Paul Revere's midnight ride and Ben Franklin's kite are but a few of the examples of this element in American Civil Religion.

4. Doctrinal and Philosophical Dimension: In the major belief systems, leaders and scholars have sought to provide a systematic explanation of what adherents are meant to believe. The Declaration of Independence and Bill of Rights state basic beliefs of American Civil Religion.

5. Ethical and Legal Dimension: Religious beliefs underpin a value system defined by laws that promote specific behaviors. For American Civil Religion the codes of moral conduct are enshrined in the constitution and the judicial precedence. This ethical code asserts how one should behave to be a good citizen of the nation or serve in office. For God and Country Civil Religionists, that moral code is based on Judeo-Christian tradition.

6. Social and Institutional Dimension: Many religious movements develop organizational structures that provide for the collective experience of their adherents and identify the group within the wider society. The American flag used as decoration is a sign of one's adherence to American Civil Religion. The placement of slogans like "In God We Trust"

on money or posting it in public buildings is one way that politicians pander to the civil religion faithful.

7. Material Dimension: Most religions have a material dimension that is manifested not only in the works of people (buildings, art, statuary) but also in the preservation of artifacts and sacred places. American Civil Religion includes monuments to founding fathers, the display of “Old Glory” and the exhibition of the original copy of the Declaration of Independence.

#### B. Pledge Statute Fosters Excessive Entanglement With Religious Right.

Supreme Court rulings and judicial precedents have uncoupling the Judeo-Christian faith from the American way of life by prohibiting public schools from prescribing devotional bible readings and saying of prayers.<sup>10</sup> The current judicial emphasis is on the objective teaching of religion versus the compulsory corporate practice of religion.

As historian Richard V. Pierard explains, “Evangelical Christians were convinced that that ‘Christian America’ had turned away from God, and they wanted to restore an earlier America where a more sectarian understanding of the deity prevailed, even if it were the bland God of civil religion”<sup>11</sup> The Virginia requirement that public schools lead students in a daily recitation of the pledge of allegiance, when viewed in conjunction with the state requirement that schools post the national motto and observe a moment of silence, is an end-run attempt to convert a benign non-exclusive civil religion that can encompass the

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<sup>10</sup> *Abington School District v. Schempp (1963)* In a combination of the Schempp and Murray v. Curlett cases, the Supreme Court extends the school prayer decision by barring government-sponsored recitation of the Lord’s Prayer or Bible reading in public schools. In Schempp, a Pennsylvania law allowed for the reading of ten Bible verses in the beginning of class each day. In Murray v. Curlett a Maryland law required the recitation of the Lord’s Prayer or the reading of a passage from the Bible during the school’s opening exercises. The Supreme Court holds that neither program has a secular purpose, but both have the primary effect of advancing religion.

<sup>11</sup> Richard V. Pierard, “Civil Religion: A Case Study Showing How Some Baptists Went Astray on the Separation of Church and State”, *Christian Ethics Today*, (Issue 008, Volume 2, No. 4, November 1996) available online at [www.christianethicstoday.com/issue/008/Civil Religion By Richard V Pierard\\_008\\_4\\_.htm](http://www.christianethicstoday.com/issue/008/Civil%20Religion%20By%20Richard%20V%20Pierard_008_4_.htm)

diversity of many different religious<sup>12</sup> into a partisan religion that uses an unholy alliance with government to establish a religious beachhead in the public schools<sup>13</sup>.

Evidence that the pledge is a religious exercise and not simply a patriotic ritual is found in the reaction of the public to those that do not worship the flag. Plaintiff suggested that students take a one-day-a-week holiday from saying the pledge to respect those that can't participate because of religion or foreign citizenship. The concept was promoted as Freedom Friday through a website [www.freedomfriday.org](http://www.freedomfriday.org). The outrage was stupendous. People denounced it as a terrorist attack on the American way of life much as recent editorials feared the end of patriotism should the courts agree to remove "Under God" from the pledge<sup>14</sup>. The response showed that the pledge is not just an expression of patriotism, but a sacred patriotic prayer to the God of civil religion.

God and Country Civil Religion believers see government as church—God is present in the actions of the country and America is God's new chosen people. Government must regulate personal choices to ensure collective morality. Thus hurricanes that strike the Florida Keys or earthquakes in San Francisco are considered divine retribution for a culture that tolerates homosexuality and abortion. Terrorist attacks occurred because our government has stopped promoting God in the public square and the schools.<sup>15</sup>

The connection between the Religious Right and the establishment of civil religion in Virginia comes through the promotion of the National Motto in public places. The chief lobbyist for the bill requiring the posting of the National Motto was Family Policy Network (FPN), a state chapter of American Family Association (AFA). This group has

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<sup>12</sup> Including Atheism.

<sup>13</sup> The promotion of Civil Religion via Virginia Statute began with the transfer of legislative political power from Democratic to Republican control during the 1990 s. The Religious Right political movement was a primary factor in this transformation and these statutes are the political payback. Plaintiff is neither a Democratic nor Republican, but Libertarian.

<sup>14</sup> *Newdow v. U.S. Congress* 292 F.3d 597 (9<sup>th</sup> Cir.)

<sup>15</sup> These are an amalgamation of the sentiments of Jerry Falwell and Pat Robertson, leaders in the Religious Right movement and promoters of civil religion as expressed on CBN's 700 Club program over the past few years.

a stated goal of getting God back into schools through the use of symbols such as the Pledge of Allegiance and display of the national motto.<sup>16</sup>

The entanglement of state government with religious groups results in a loss of freedom. Warren E. Barry, the author of the Virginia Bill requiring public schools to include a pledge ritual in their classrooms, said: "if they're going to that public school at public expense ... it's not too much that they at least stand and show some respect for the flag."<sup>17</sup> He later sent me this personal email: "I would imagine that the recent surge of patriotism combined with flying our flag has you subversives in a state of apoplexy. With sincerity [sic] but not good wishes."

### C. Pledge Requirement Does Not Have A Secular Purpose

Those with intense faith in civil religion justify the pledge practice in schools as a permissible pedagogical exercise. If the purpose of reciting the pledge were pedagogical instead of devotion to a religious liturgical ritual, the statute would offer children who have memorized the pledge after the first few weeks an opportunity to grow intellectually by learning new material. Rather than repeat the same 31 words each day for 13 years, children required to study American Civil Religion would spend the time to learn the Gettysburg address, the preamble to the Constitution, the opening lines of the Declaration of Independence, the Bill of Rights, and other defining documents of the country. The daily repetition requirement is evidence that the primary purpose of the pledge requirement is religious indoctrination rather than a pedagogical exercise.

Pedagogical exercises are based on results, not faith. Defendants have no evidence that daily recitation of the pledge in the classroom demonstrates an educational purpose. There are no studies or even anecdotal evidence that indicates that students that recite the pledge are better students, achieve higher test scores, go on to earn higher salaries, or are

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<sup>16</sup> American Family Association website ([www.afa.net](http://www.afa.net)) promotes a "Constitutional Amendment protecting the Pledge of Allegiance and our national motto, "In God We Trust." [to prevent] judges from declaring them illegal. On the page promoting a National Motto poster, the site says: "It is our hope that this poster will be a reminder of the historical centrality of God in the life of our republic. Now, more than ever, it is a message America needs to hear!" On the Family Policy Network site ([www.familypolicy.net](http://www.familypolicy.net)) the mission statement includes: "encouraging public support for honoring America's religious heritage."

<sup>17</sup> Sen. Barry's original bill demanded expulsion for students who refused to say the Pledge of Allegiance.

more civil than students who do not recite the pledge daily. It is faith in the righteousness of American Civil Religion and not factual evidence of any good fruits from this faith that drives the political demand for pledge recitation requirements.

The pledge is not a part of this country's founding documents. It is not a national treasure that symbolizes American unity given that it is but 50 years old in its current form. It is a recent fad that has been adopted by civil religionists desperate to get prayer back in public schools.

#### D. Invalidating the Daily Pledge Does Not Inhibit Practice of Civil Religion

The religious freedom of those who wish to practice civil religion in the classroom is not under attack. Every school has a flagpole and students are free to stop each morning and worship the flag regardless of the outcome of this court ruling. Virginia even has a moment of silence that would allow students to recite the pledge quietly without forcing it upon others who oppose being a spectator to the practice of this particular religion.

#### E. The Pledge Requirement Inhibits Practice of Plaintiff's Religion

The center of a religious faith is the description of the divine and his relationship with man. The Pledge of Allegiance contradicts Plaintiff's religion by teaching that God interacts with his people through a governmental institution within national borders<sup>18</sup>. Plaintiff wishes to teach his children that God's chosen people are the church, not a country, and that "There is neither Jew nor Greek, there is neither slave nor free, there is no male or female, for you are all one in Christ Jesus" (Gal 3:28). Plaintiff also believes, like the Plaintiffs in *West Virginia State Bd. of Educ. v. Barnette*, that the pledge is a violation of the Judeo-Christian commandment against idolatry since American Civil Religion teaches that salvation comes through a strong military and not through spiritual faith.

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<sup>18</sup> This is a broader objection to the pledge than the *Newdow* case in the 9<sup>th</sup> Circuit Court of Appeals which concentrated its objection to the phrase "Under God" as "taking a position with respect to the purely religious question of the existence and identity of God." It is the combination of "I pledge allegiance to the flag" and the "Under God" that creates the theological problems for Plaintiff. However, Plaintiff would still refuse to participate in a pledge ritual even if "Under God" were removed.

