COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
SJC No. 11317

JANE DOE and JOHN DOE, individually and as parents and next friends of DOECHILD-1, DOECHILD-2, and DOECHILD-3, and THE AMERICAN HUMANIST ASSOCIATION,

Plaintiffs-Appellants

v.

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT, THE TOWN OF ACTON PUBLIC SCHOOLS, and DR. STEPHEN E. MILLS, as Superintendent of Schools,

Defendants-Appellees

and

DANIEL JOYCE and INGRID JOYCE, individually and as parents and next friends of D. Joyce and C. Joyce, and THE KNIGHTS OF COLUMBUS, a Connecticut tax-exempt corporation,

Defendants-Intervenors/Appellees

ON DIRECT APPELLATE REVIEW FROM A JUDGMENT OF OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF THE DEFENDANTS-APPELLEES ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT, THE TOWN OF ACTON PUBLIC SCHOOLS, and DR. STEPHEN E. MILLS, as Superintendent of Schools

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ISSUES PRESENTED

1. Whether allowing the School Districts' students to voluntarily recite the Pledge of Allegiance, pursuant to Mass. Gen. L. c. 71, § 69 (fourth sentence) violates the Plaintiffs' equal protection rights contained in the Equal Rights Amendment to the Massachusetts Constitution.[1/]

2. Whether the Superior Court correctly found that the voluntary recitation by students in the School Districts of the Pledge of Allegiance, pursuant to Mass. Gen. L. c. 71, § 69 (fourth sentence), did not violate Mass. Gen. L. c. 76, § 5.

STATEMENT OF THE CASE

In this direct appeal from the Middlesex Superior Court, the plaintiffs-appellants Jane and John Doe (who identify themselves as atheists), their three minor children (who are students in the School Districts), and the American Humanist Association (collectively, the "Plaintiffs") ask this Court to reverse a June 2012 summary judgment decision of the

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[1/] The "Equal Rights Amendment" in Article 1 of the Massachusetts Declaration of Rights provides in relevant part that "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin." See Mass. Const., Article 106; Finch v. Commonwealth Health Insurance Connector Authority, 459 Mass. 655, 662 & 666 (2011).

Middlesex Superior Court (Haggerty, J.) (Appendix at 208-231).[2/] That decision, which was issued following extensive briefing and oral argument by the parties, declared that the voluntary recitation by students in the School Districts of the Pledge of Allegiance (pursuant to Mass. Gen. L. c. 71, § 69 (fourth sentence)) did not violate (i) the Plaintiff's equal protection rights under the Equal Rights Amendment, (ii) the School Districts' general nondiscrimination policy, or (iii) Mass. Gen. L. c. 76, § 5.

Following the entry of summary judgment in the Superior Court, the Plaintiffs' filed a notice of appeal. Thereafter, all parties successfully sought (or supported) direct appellate review of this case by this Court.

The Plaintiffs make only one constitutional claim to this Court - that the School Districts' compliance with Section 69, which allows either teachers and/or students the absolute right to determine whether or not to participate in the Pledge of Allegiance, is a violation of the Plaintiffs' "equal protection" rights found in the state's Equal Rights Amendment. See

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[2/] References to the Appendix hereafter will be as (A.) followed by the appropriate page and, if relevant, paragraph number.

Plaintiffs' Brief at 15-41. The Plaintiffs also argue that compliance with section 69 violates the requirements of Mass. Gen. L. c. 76, § 5 ("Section 5"). See Plaintiffs' Brief at 41-42.[3/]

In addition, it is well-established that equal protection standards under the Massachusetts Constitution are the same as under the Fourteenth Amendment (except in the context of gender based discrimination, which is not implicated in this matter). This is important since the Federal circuit courts (including the First Circuit Court of Appeals in 2010) have repeatedly, and without exception, held that a state law requiring the recitation of the Pledge of Allegiance (including the phrase "one nation under God") in public school classrooms does not violate the US Constitution (including the Equal

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[3/] The Plaintiffs raised two additional arguments in the Superior Court that they have not pursued in their brief to this Court - (i) that the School Districts should use the pre-1954 version of the Pledge of Allegiance in their schools and (ii) that Section 69 as applied by the School Districts violates the School Districts' general non-discrimination policy. Having not argued these claims in their opening brief to this Court, they are waived. See, e.g., Atwater v. Commissioner of Education and Manchester Essex Regional School District, 460 Mass. 844, 861 n. 13 (2011). The School District requests that it be given leave to file a supplemental brief should the Court decide to consider either of these issues *sua sponte*.

Protection Clause) and is lawful as long as the students can elect (as they can in the School Districts) not to participate.

STATEMENT OF THE FACTS

I. The Parties to this Appeal

A. The Plaintiffs

The adult plaintiffs, Jane and John Doe, reside in Acton, Massachusetts, with their three minor children the plaintiff Doechildren. (A. at 59, ¶ 3). Each of the Doechildren attends either the Town of Acton Public Schools or the Acton Boxborough Regional School District (collectively, the "School Districts"). (A. at 60, ¶ 9). All of the Does are atheists, in that they do not accept the existence of any type of God or gods. (A. at 8, ¶ 8). They also are humanists, which expands on atheism with "an affirmative naturalistic outlook." (A. at 8, ¶¶ 9 and 10).

The plaintiff American Humanist Association ("AHA") is a nonprofit membership organization that

promotes and defends Humanism. (A. at 7-8, ¶¶ 4, 9).[4/]

B. **The Defendants**

The defendant Town of Acton Public Schools provide the elementary public school education (kindergarten through grade 6) for residents of Acton, Massachusetts. (A. at 4, ¶ 5, and A. at 142, ¶ 2).

The defendant Acton Boxborough Regional School District is a public body that provides the middle and high school (grades 7 though 12) public school education for residents of Acton and Boxborough, Massachusetts. (A. at 4, ¶ 4, and A. 142 at ¶ 2).

During the relevant time frame, and to the current day, Dr. Stephen E. Mills was and is the Superintendent of both of the School Districts. (A. at 59, ¶ 6). Dr. Mills has both a Bachelor and a Doctorate degree from the University of Massachusetts (Amherst), and a Masters in Social Work from Boston University. (A. at 141-142, ¶ 1). As of today, he has been in public education in Massachusetts as a

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[4/] Although the Defendants have doubts whether the AHA has standing in this matter (see A. at 36, Fourth Affirmative Defense), given that the individual Plaintiffs appear to have standing and are represented by the same counsel, the Defendants did not move to dismiss the AHA for a lack of standing.

teacher, administrator or superintendent for approximately 35 years. (A. at 142, ¶ 1).

C. The Intervenors

While this matter was pending in the Superior Court, the Defendant-Intervenors Daniel and Ingrid Joyce, and their two minor children, along with the Knights of Columbus, intervened in this matter. (A. at 4 and 208 n. 4). The Joyce family lives in Acton, Massachusetts, and their children (like the Doechildren) attend the School Districts. (A. at 59-60, ¶¶ 7, 9). The defendant-intervenor Knights of Columbus is the world's largest lay Catholic fraternal organization. (A. at 211).

II. Substantive Facts

Mass. Gen. L. c. 71, § 69 (fourth sentence) ("Section 69") provides that "Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'"[5/] (A. at 58).

[5/] A detailed and scholarly history of the Pledge of Allegiance, and of Section 69, is provided in the Superior Court's decision in this matter. See A. at 217-222. In the interests of brevity, the Defendants incorporate this history into this brief.

Although not expressly addressed by the Legislature in Section 69, it is undisputed that student and teacher participation in the Pledge of Allegiance recitations administered by the School Districts is "totally voluntary" in that "any teacher or student may abstain themselves from participation in the Pledge of Allegiance for any or no reason, without explanation and without any form of recrimination or sanction." (A. at 142, ¶ 3; accord A. at 12, ¶ 24; A. at 209, 212, 213, 229; Plaintiffs' Brief at 10-11). In fact, the Plaintiffs admit that the Doechildren "often" exercise their right not to participate in the Pledge of Allegiance. See Plaintiffs' Brief at 30 n. 25.[6/]

As a review of the Plaintiffs' Brief and the Appendix show, the Plaintiffs do not claim that the Doechildren, or even the adult Doe parents, in all of the many years that the Doechildren have attended the School Districts have suffered even one incident of

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[6/] The School Districts' application of Section 69, such that reciting the Pledge of Allegiance is totally voluntary for students and teachers, is in full compliance with well-established precedent under the First Amendment to the US Constitution. See West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Opinion of the Justices to the Governor, 372 Mass. 874, 878-879 (1977); A. at 229.

personal insult or harassment as a result of electing to opt out of reciting the Pledge of Allegiance. (A. at 212 n. 9 - "The Doechildren do not claim that their atheist and Humanist views have caused others to single them out personally in a negative way" - and 214-215 n. 13 - the Plaintiffs "have not alleged that others have singled out the Doechildren in a negative way as a result of any Pledge-related choice.")

Indeed, the Plaintiffs have not provided evidence of any Massachusetts school child, in all of the many decades that Section 69 has been in effect throughout the Commonwealth, suffering an incident of personal insult or harassment as a result of electing to opt out of the Pledge of Allegiance.[7/]

[7/] The Plaintiffs did submit evidence of one student in another state, on one occasion during the midst of her court case to remove a religious prayer from the wall of her school, allegedly suffering a few seconds of verbal peer harassment during a recitation of the Pledge of Allegiance. (A. at 140). One isolated alleged incident over many decades in another state is of no relevance to the current matter (see A. at 190-193), except to highlight the lack of such incidents in the School Districts. The Defendants renew their Superior Court motion that this student's affidavit be stricken, or at least ignored by the Court. See A. at 209 n. 6 (the Superior Court finds this affidavit to be irrelevant to the motions for summary judgment).

SUMMARY OF THE ARGUMENT

The equal protection religion rights contained in the Massachusetts Equal Rights Amendment are protections against illegal government classifications based on religion. These rights under the Massachusetts Constitution are the exact same as the rights under the Federal Constitution's Equal Protection Clause. Importantly, the First Circuit recently rejected as a matter of law a claim that a New Hampshire statute providing for the recitation, on a voluntary basis, of the Pledge of Allegiance in the public schools violated the Equal Protection Clause. The First Circuit found no illegal classifications in the New Hampshire law, and thus no constitutional violation. For similar reasons, this Court should find that Section 69 does not violate the Equal Rights Amendment. (Brief, pp. 11-19)

The Pledge of Allegiance is not inherently religious in any way that is legally cognizable under the Equal Rights Amendment. This is clear based on a reading of the Massachusetts Constitution as a whole, as well as by a review of prior decisions of this Court and the Federal courts on the Pledge of Allegiance. (Brief, pp. 19-24)

What the Plaintiffs seek in this action is the right for any student (or the student's parents) to block a public school from any educational program that allegedly is offensive to their religious views, even if the student's involvement in this program is totally voluntary. For this Court to endorse this position would be, in addition to being legally with merit, highly prejudicial to public education in Massachusetts. (Brief, pp. 24-26)

Section 69, as applied, is legal on its face without the application by this Court of any form of scrutiny test. If the Court does apply a scrutiny test, it should be rational scrutiny, which Section 69 easily satisfies. In addition, Section 69, as applied, also satisfies strict scrutiny since serves a compelling governmental interest and is narrowly tailored. Indeed, it is hard to image a more narrow tailoring of a statute then to give the people affected by the statute (in this case students and teachers) the absolute right to refrain from complying with the statute for any or no reason at all. (Brief, pp. 27-36)

Finally, Section 69 does not violate Section 5 for many reasons, including that no student is denied

any advantages or privileges of education, since any and all students call elect not to participate in the recitation of the Pledge of Allegiance on any given day for any or no reason at all. (Brief, pp. 36-40)

ARGUMENT

I. THE VOLUNTARY RECITATION OF THE PLEDGE OF ALLEGIANCE UNDER CHAPTER 71, SECTION 69 IS CONSTITUTIONAL AND DOES NOT VIOLATE THE PLAINTIFF'S EQUAL PROTECTION RIGHTS CONTAINED IN THE EQUAL RIGHTS AMENDMENT.

This Court has held that:

> The equal protection clauses of the Fourteenth Amendment to the United States Constitution and art. 1 of the Massachusetts Declaration of Rights, as amended by art 106 of the Amendments, 'do not protect against burdens and disabilities as such but against their unequal imposition.'

Tarin v. Commissioner of the Division of Medical Assistance, 424 Mass. 743, 755 (1997), quoting Opinion of the Justices to the Senate, 423 Mass. 1201, 1232 (1996); accord Finch, 459 Mass. at 676 ("the right to equal protection recognizes that the act of classification is itself invidious and is thus constitutionally acceptable only where it meets an exacting test."); Opinion of the Justices to the Senate, 332 Mass. 769, 779-780 (1955) ("Equal protection of the laws requires of course that all

persons in the same category and in the same circumstances be treated alike.")

Moreover, the "standard for equal protection under our Declaration of Rights is the same as under the Fourteenth Amendment." See Gillespie v. City of Northampton, 460 Mass. 148, 158 n. 16 (2011); accord Finch, 459 Mass. at 666-667; Commonwealth v. Weston W., 455 Mass. 24, 30 n. 9 (2009); Brackett v. Civil Service Commission, 447 Mass. 233, 243 (2006); Tobin's Case, 424 Mass. 250, 252 (1997); Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 235 (1983).[8/]

Most importantly and recently, in Freedom From Religion Foundation v. Hanover School District, 626 F.3d 1 (2010), cert. den. 131 S. Ct. 2992 (2011), the First Circuit was faced with a New Hampshire law essentially identical to Section 69 (as applied by the School Districts). The First Circuit in a decision written by Chief Judge Lynch held in Freedom From Religion Foundation that this New Hampshire law

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[8/] Indeed, the Defendants know of no time that this Court has interpreted non-gender equal protection rights under the Massachusetts Constitution to exceed that found in the Fourteenth Amendment. This is in accord with the voters' goal in passing the Equal Rights Amendment which this Court has found was (in the context of classifications besides gender) simply to reaffirm prior jurisprudence. See Finch, 459 Mass. at 666-667.

requiring public schools to recite the Pledge of Allegiance, during the school day with voluntary student participation, was constitutional.[9/]

In rejecting the Equal Protection claim of the atheist plaintiff in that case, the First Circuit held:

> Under the Equal Protection Clause of the Fourteenth Amendment, the Constitution "guarantees that those who are similarly situated will be treated alike." In re Subpoena to Witzel, 531 F.3d 113, 118 (1st Cir. 2008). Invoking the Equal Protection Clause, [the plaintiff] contends that the School Districts have a duty to show equal respect for the Does' atheist and agnostic beliefs, that they are in breach of this duty by leading students in affirming that God exists, and that they created a social environment that perpetuates prejudice against atheists and agnostics. However, the New Hampshire Act does "not require different treatment of any class of people because of their religious beliefs," nor does it "give preferential treatment to any particular religion." Wirzburger v. Galvin, 412 F.3d 271, 283 (1st Cir. 2005). Rather, as the district court found, "it applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the pledge, for any or no reason." Freedom From Religion Foundation v. Hanover School District, 665 F.Supp. 2d 58, 72

[9/] In rejecting all of the plaintiffs' constitutional claims, the First Circuit also noted that "[e]very federal circuit court that has addressed a state pledge statute has rejected the claim of unconstitutionality." Freedom From Religion Foundation, 626 F.3d at 6 n. 13 (citing four circuit court cases).

(D.N.H. 2009). Therefore, [the plaintiff's] equal protection claim fails.

Freedom From Religion Foundation, 626 F.3d at 14.

Inasmuch as the Superior Court Judge correctly applied the prior rulings of this Court and the federal courts, the Plaintiffs' appeal should be dismissed.

A. Plaintiffs' Failure To Establish That Section 69 Creates A Classification That Disadvantages Them Requires Dismissal Of Their Equal Protection Claim

Quite simply, the fact that a students' recitation of the Pledge of Allegiance is entirely voluntary regardless of the reason or the student's religion is fatal to the Plaintiffs equal protection argument as a matter of law. The minor Plaintiffs are not classified (or treated) by the School Districts any differently than the other students.[10/]

Instead, it is undisputed that all public school students (whether they be Christian, Jewish, Muslim, Hindu or Atheist) in the School Districts may

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[10/] Nor is there any evidence that the other Plaintiffs were treated any differently by the Defendants than other similarly situated non-atheist parents or organizations. Moreover, there is no evidence that the Defendants even knew that the Plaintiffs were atheists. Indeed, given the Plaintiffs' decision to litigate this matter as the "Doe" family, the School Districts' employees still do not know the identity of the Doe family.

participate or not participate in the Pledge of Allegiance on any given day for any or no reason.[11/] As the Superior Court correctly concluded below, "'children are not *religiously* differentiated from their peers merely by virtue of their non-participation in the Pledge' given that children may choose not to participate for religious or non-religious reasons, or for 'no reason at all.'" (A. at 226, citing and quoting Freedom from Religion Fund, 626 F.3d at 11 (emphasis added by Superior Court; accord A. at 229).

The Plaintiffs do not even allege that section 69 or the School Districts implementation thereof creates any advantage or burden on any "classification" based on religion, creed or other protected status, which is the essential sina qua non for a valid equal

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[11/] Importantly, there are many reasons that a student might elect not to participate in a totally voluntary Pledge of Allegiance besides Atheism (or Humanism). For example, the student might not be a U.S. citizen, might be a Jehovah's Witness (as in the US Supreme Court case of Barnette), might oppose the Pledge on moral or philosophical grounds, might find the "indivisible" portion of the Pledge offensive to their views on state's rights or the Civil War, or simply might want (as many teenagers do) to avoid complying with the perceived wishes of adults.

protection argument.[12/] Indeed, in light of the fact that recitation of the Pledge of Allegiance is entirely voluntary, the individual students, not the statute (Section 69) or the School Districts, create any classification. Hence, the Plaintiffs equal protection claim fails.

The School Districts' lack of any different treatment or classification based on a protected status or classification is in sharp contrast to the classification fact patterns that have been found by this Court to violate the Equal Rights Amendment. E.g., Goodridge v. Department of Public Health, 440 Mass. 309 (2003) (a person cannot be denied the right to marry based on the gender of the person that he or she seeks to marry); Attorney General v. Massachusetts Interscholastic Athletic Association, 378 Mass. 342 (1979) (in the context of public school athletics, it is unlawful to absolutely ban male athletes from playing on female sports teams); see also Brackett v. Civil Service Commission, 447 Mass. 233 (2006)

[12/] There is a reason that (to the knowledge of the Defendants) no one has previously challenged on equal protection grounds a school district's voluntary recitation of the Pledge of Allegiance (besides in the Freedom From Religion Foundation case), there simply is no legal merit to such a claim.

(finding that an affirmative action hiring policy that favored certain applicants based on their race was an "inherently suspect" classification under the Equal Rights Amendment, but upholding the policy following a strict scrutiny analysis).[13/]

In 1977 (after the passage of the Equal Rights Amendment), two Supreme Judicial Court Justices wrote, concerning the exact Section 69 provision at issue in this matter, that:

> There is no constitutional obstacle to a provision for voluntary participation by students and teachers in a pledge of allegiance to the flag. We would construe the bill to provide an opportunity for such voluntary participation. So construed, it is not unconstitutional.

Opinion of the Justices to the Governor, 372 Mass. 874, 882 (1977) (separate opinion of Quirico and Braucher, J.) (citations omitted).

Finally, there is no factual support or legal merit to the Plaintiffs' argument that peer pressure inevitably makes a voluntary Pledge of Allegiance

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[13/] The Plaintiffs' Brief attempts to argue that its equal protection position is supported by the seminal US Supreme Court decisions in Brown v. Board of Education, 347 U.S. 483 (1954), and Loving v. Virginia, 388 U.S. 1 (1967). See Plaintiffs' Brief at 27, 31-33. This argument has no merit whatsoever, as Section 69 does not classify on the basis of a suspect classification, while Brown and Loving both concern explicit classifications of legal rights based on a person's race.

program unconstitutionally stigmatizing or coercive of religious beliefs. This Court has in the past confronted similar arguments in different contexts. For example, in Curtis v. School Committee of Falmouth, 420 Mass. 749, 759 & 763 (1995), cert. den. 516 U.S. 1067 (1996), this Court squarely acknowledged "the well-known existence of peer pressure in secondary schools" and then rejected that argument in upholding a public school system's voluntary condom education and distribution policy.

Quite simply, the Plaintiffs' arguments in this regard are legally without merit as "[p]arents have no right to tailor public school programs to meet their individual religious or moral preferences." See Curtis, 420 Mass. at 763; accord Parker v. Hurley, 514 F.3d 87, 106 (1st Cir.), cert. den. 555 U.S. 815 (2008) ("Public schools are not obligated to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.") Thus, nothing in the Equal Rights Amendment allows an equal protection challenge because a student (or a student's parents) seek to block

whatever governmental educational action they find offensive to their religious beliefs, especially when compliance with this government action by them is voluntary.

Accordingly, as the Plaintiffs' equal protection rights under the Equal Rights Amendment are not violated by the School Districts' compliance with Section 69 by allowing the students to voluntarily recite the Pledge of Allegiance, the Plaintiffs' claims under the Equal Rights Amendment must be rejected.

B. The Pledge Of Allegiance Is Not Inherently Religious As A Matter Of Law, And Thus Section 69 Does Not Violate The Equal Rights Amendment

Based on past precedent of this Court, as well as the terms of other provisions of the Massachusetts Constitution, the Court must reject the Plaintiff's claims, as the Pledge of Allegiance is simply not inherently religious in any legally cognizable way.

Indeed, Plaintiffs' claims that reciting the Pledge of Allegiance in schools is illegal in that it allegedly favors one religious belief over another and/or burdens the Plaintiffs' ability to practice their atheism are not claims for equal protection, but

instead are at their core claims under the Establishment and/or Free Exercise Clauses in the First Amendment to the US Constitution - claims which (as noted above) have been consistently rejected by the Federal Courts and claims that were not pled by the Plaintiffs in the Superior Court. See Freedom From Religion Foundation, 626 F.3d at 6-14.

As already noted above, the Plaintiffs' claim that the Massachusetts Constitution should be interpreted by this Court to grant greater equal protection rights for religion than those found under the Federal law is directly contrary to this Court's prior decisions in this area. In addition, this argument totally misunderstands the special role of religion in the Massachusetts Constitution. To that end, although the Plaintiffs frequently cite to the Equal Rights Amendment in their Brief to this Court, they totally ignore the remainder of the Massachusetts Constitution, even though it is well established that all of the parts of the Massachusetts Constitution "stand in equal footing" and "are to be construed and interpreted in combination with each other … as forming a single harmonious instrument." See Opinion of the Justices to the Senate and the House of

Representatives, 291 Mass. 578, 586 (1935); see also Bigney v. Secretary of the Commonwealth, 301 Mass. 107, 110 (1938) ("The Constitution and its Amendments are to be interpreted as a whole."); accord Opinion of the Justices to the Senate, 429 Mass. 1201, 1204-1205 (1999), quoting Powers v. Secretary of Administration, 412 Mass. 119, 124 (1992) (in construing the meaning of a provision in the Massachusetts Constitution, "every word and phrase in the Constitution was intended and has meaning.")

Moreover, as this Court surely knows, the Massachusetts Constitution has numerous provisions on religion in addition to the reference to "creed" in the Equal Rights Amendment. Among these other provisions are the statement that

> It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the SUPREME BEING, the great Creator and Preserver of the universe

(Mass. Const., Part I, Article II), the statement that

> the public worship of GOD and instructions in piety, religion and morality, promote the happiness and prosperity of a people and the security of a republican government

(Mass. Const., Amendments Article XI, amending Mass. Const., Part I, Article III), and a reference to

> the honor of GOD, the advantage of the Christian religion

(Mass. Const., Part II, Chapter 5, Article I).

Although the Equal Rights Amendment did replace and add certain language to Article 1 of the Massachusetts Constitution, it did not replace, amend or remove any of the above-quoted provisions mentioning religion or God. In this context, the Equal Rights Amendment cannot be construed as sought by the Plaintiffs without wrongfully ignoring these other Constitutional provisions that openly call for the role of God in public society.

In addition, the Pledge of Allegiance is not a prayer, nor does it promote any religion. Instead, it is one of many governmental actions or formalities that lawfully mention God or the Lord in passing. See Commonwealth v. Callahan, 401 Mass. 627, 638 (1988) (declaring lawful under the Massachusetts Constitution and Declaration of Rights the use of "[t]he words 'in the year of our Lord' on the indictment form and 'so help me God' in the oaths" as "[t]hey are simply two examples of many permissible, secular 'references to the Almighty that run through our laws, our public rituals, and our ceremonies.'"); Kent v. Commissioner

of Education, 380 Mass. 235, 238 (1980) (while striking down a school prayer law, the Court distinguished as lawful "those customary or traditional references to God which have become merely ceremonial and have lost devotional content"); Colo v. Treasurer and Receiver General, 378 Mass. 550, 560-561 (1979) ("The complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions.")[14/]

Accordingly, this Court in 1979 (several years after the passage of the state's Equal Rights Amendment) quite properly cited and quoted United States Supreme Court precedent declaring permissible "the motto 'In God We Trust' on our currency or the phrase 'Under God' in the pledge of allegiance, even though all of these have a religious dimension" in

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[14/] In addition, as correctly noted by the Interveners in their brief to the Court, the "under God" reference is one of political philosophy concerning human rights, not religion. This argument, and all other arguments made by the Interveners and/or by the amicus Alliance Defending Freedom/Massachusetts Family Institute that are not inconsistent with the Defendants' arguments in this brief are (in the interests of brevity) incorporated herein by reference. See Mass. R. App. P. 16(j).

holding lawful under both the Federal and the Massachusetts Constitutions the paid employment by the Massachusetts Legislature of Roman Catholic chaplains to give voluntary daily prayers.[15] Colo, 378 Mass. at 560-561.[16]

Accordingly, the Plaintiffs' claims must be dismissed as the Pledge of Allegiance as a matter of well-established law is simply not religious in any legally cognizable manner under the Equal Rights Amendment.

C. The Plaintiffs' Claims, If Accepted By This Court, Would Establish An Unprecedented Right Of Any Student Or Parent To Block Public School Teachings That Are Offensive To Their Religious Beliefs, Even If The Allegedly Offensive Teachings Are Made Totally Voluntary

At the core of the Plaintiffs' arguments to this Court is the theory that the minor Plaintiffs cannot lawfully be exposed to, even on a totally voluntary

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[15] Indeed, the Defendants believe that the Court regularly begins its public sessions with a brief, ceremonial and lawful invocation mentioning God.

[16] See also Kolodziej v. Smith, 412 Mass. 215, 220 (1992) (under both the Federal and Massachusetts Constitutions, an employer's requirement that its management employees attend a seminar that referred to religious texts was not a "religious activity" since "the seminar at issue here was in no sense a devotional service despite the fact that it promoted Scriptural passages as support for the lessons it sought to promote").

basis, words in school that appear to favor the beliefs of one religion (or religions) over the beliefs of the students' religion. E.g. Plaintiffs' Brief at 1 and 3. If this Court accepts this totally unprecedented argument, then substantial portions of current public school curriculum that may be offensive to certain majority or minority religious beliefs would also be unconstitutional - with resulting harm to all students and the ability of educators to educate students.

For example, Massachusetts public schools currently teach "human sexual education" to students as long as their parents can "exempt their children from any portion of said curriculum." See Mass. Gen. L. c. 71, § 32A. Under the Plaintiffs' legal theory, such sexuality education (about such topics as birth control methods and homosexuality) would be illegal (even if voluntary) since the topics are highly offensive to certain religious beliefs. Similarly, public schools could not expose students (even on a totally voluntary basis) to education on many other matters that might offend certain religious beliefs - such as the creation of the universe, the evolution of

species, or the inherent equality of women and homosexual people.[17/]

Furthermore, under the Plaintiffs' theory, schools probably could not have students read or recite such important historical documents as the Declaration of Independence (with its statement "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness"), or the Gettysburg Address (with its statement "that this nation, under God, shall have a new birth of freedom"), as well as any book or piece of literature (from Homer's *Odyssey* to *Heather Has Two Mommies*) that contains any language or themes that might be offensive to any student's religious beliefs, even if the reading was totally optional.

For these reasons, the Superior Court's judgment in favor of the Defendants should be affirmed.

[17/] In addition, under the Plaintiffs' theory public schools might not be able to conduct classes (even on optional basis) on a day (or day of the week) deemed sacred by the religious beliefs of one or more students, since such school days would be offensive to the beliefs of these students and could be viewed as indirectly coercing them to attend school in violation of their religious beliefs to avoid alleged stigmatization.

D. Even If This Court Does Subject Section 69 To Scrutiny, It Should Be To Rational Basis Scrutiny, Although This Law As Applied Also Satisfies Strict Scrutiny

For the many reasons stated above, the Court should reject the Plaintiffs' equal protection arguments on their face, without the need to perform a scrutiny test for Section 69, as the Plaintiffs' claims simply do not make out an equal protection violation under the Equal Rights Amendment. To that end, the Superior Court was incorrect in even subjecting Section 69 as applied to any form of equal protection scrutiny.

Nevertheless, *arguendo*, if the Court feels that Section 69 must pass a scrutiny test, the statute should be subjected to rational basis scrutiny. However, given the longstanding and compelling reasons for reciting the Pledge of Allegiance in our schools, Section 69 (especially since student participation is totally voluntary) can pass strict scrutiny as well.[18/]

[18/] Whenever a statute is challenged on equal protection grounds, the court must presume that the statute is constitutional. See Commonwealth v. Franklin Fruit Co., 388 Mass. 228, 235 (1983). "The person raising the constitutional challenge has the burden of proving the absence of any conceivable grounds which would support the statute." Id.

Of course, in conducting any scrutiny of Section 69, the issue is one of legality, and not whether this Court approves of Section 69 or wishes that the Legislature had drafted the law differently. See St. Germaine v. Pendergast, 416 Mass. 698, 703 (1993) ("A court is only to inquire into whether the legislature has the power to enact the statute and not whether the statute is wise or efficient.")

i. Any Scrutiny Should Be Rational Basis Scrutiny

As noted by the Court in Goodridge, in order to decide whether a potentially illegal statute is lawful under an equal protection analysis "we employ the rational basis test" unless the statute "uses a suspect classification." Goodridge, 440 Mass. at 330 (citations and internally quotation marks omitted).

As Section 69 (both as written and as applied) does not use a suspect classification, the only potentially proper equal protection test here is the rational basis test. The rational basis test is passed when, assuming *arguendo* that Section 69 creates a classification, "the classification drawn by the statute is rationally related to a legitimate state

interest." Police Department of Salem v. Sullivan, 460 Mass. 637, 641 (2011).[19/]

Moreover, the only possible distinction in this dispute is between students who want to say the Pledge of Allegiance and those who do not, which is not a distinction based on a suspect classification. See Gillespie, 460 Mass. at 158 ("Where a statute discriminates on the basis of a suspect classification, the statute is subject to strict judicial scrutiny. All other equal protection claims proceed under a rational basis analysis.")

Accordingly, the Superior Court was correct to judge the legality of Section 69, if it had to be scrutinized, under a rational basis test.

ii. The Legitimate State Interest In Section 69

The Pledge of Allegiance provision in Section 69, especially as applied, unquestionably serves a

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[19/] The propriety of using a rational basis test is also supported by the fact that a minor student "does not have a fundamental right to an education" under the Massachusetts Constitution. See Doe v. Superintendent of Schools of Worcester, 421 Mass. 117, 132 (1995), citing Marshfield Family Skateland, Inc. v. Marshfield, 389 Mass. 436, 445-446, appeal dismissed, 464 U.S. 987 (1983) ("government action which intrudes on interests deemed nonfundamental by court must simply be rationally related to a legitimate State objective to pass constitutional muster").

legitimate state interest. As the Court noted in 1977, the purpose of this provision is "to instill attitudes of patriotism and loyalty in these students." Opinion of the Justices, 372 Mass. at 879; accord Commonwealth v. Johnson, 309 Mass. 476, 484 (1941), quoting Nicholls v. Mayor and School Committee of Lynn, 297 Mass. 65, 68-69 (1937).

Moreover, in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 6 (2004), the US Supreme Court held that "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principals." Similarly, in Freedom From Religion Foundation, 626 F.3d at 10, the First Circuit held that the primary purpose of a state Pledge of Allegiance law for school children is "the advancement of patriotism through a pledge to the flag as a symbol of the nation." Even the Plaintiffs admit that the Pledge of Allegiance is "part of a flag-salute ceremony intended to instill values of patriotism and good citizenship." (A. at 10, ¶ 17; A. at 212).

At its core the Pledge of Allegiance is about being a virtuous citizen. Under the Massachusetts

Constitution, "public schools and grammar schools in the towns" are empowered to use education to promote "virtue … among the body of people, [as] being necessary for the preservation of their rights and liberties". Mass. Const., Part II, Chapter 5, § 2.

In addition, and as noted by the Superior Court in its decision, "[h]aving the public school children recite the Pledge each day has a rational basis in the Legislature's constitutional obligations

> to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments, among the people.

(A. at 21, quoting Mass. Const., Part II, Chapter 5, § 2).

The Superior Court was also correct in noting that Section 69

> is also rationally related to the statutory obligation of public schools to teach 'American history and civics … as required for the purpose of promoting civic service and a greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship.'

(A. at 21, quoting Mass. Gen. L. c. 71, § 2).

Importantly and as the Superior Court also found, the recitation of the Pledge of Allegiance with the "one nation under God" phrase in it is rationally related to the Legislature's and the School Districts' legal obligations "because the phrase serves as an acknowledgement of the Founding Fathers' political philosophy, and the historical and religious traditions of the United States. (A. at 228-229, citing Newdow v. Rio Linda Union School District, 597 F.3d 1007, 1023 & 1038 (9th Cir. 2010) and A. at 151 at ¶ 4; see also Intervenors' Brief to this Court). To that end, there is no evidence that the motive or purpose behind the passage of Section 69 was based in any way on religion; indeed, the Pledge of Allegiance mandate in Section 69 was first passed by the Legislature in 1935, roughly twenty years before the words "under God" were even added to the Pledge of Allegiance by the US Congress (and not by the Massachusetts Legislature). See A. at 11-14; see also McCleskey v. Kemp, 481 U.S. 279, 292 (1987) ("a defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination.")

Finally, Dr. Mills, the Superintendent of the School Districts and a highly experienced professional educator, opined in this matter that:

> compliance with the Pledge of Allegiance mandate in Section 69, on a totally voluntary participation basis, serves the compelling educational and societal interest of promoting among our young patriotism, virtue and national loyalty.

(A. at 142-143). In these days of frequent national and international conflicts, as well as terrorism, the interest of the state to try to instill "patriotism, virtue and national loyalty" in the youth is both legitimate and compelling.

iii. Section 69 As Applied Satisfies The Rational Basis Test

The Plaintiffs do not argue in their brief to the Court that Section 69 as applied does not satisfy a rational basis test, nor is there any factual basis for them to do so. The Superior Court correctly found that Section 69 as applied by the School Districts would satisfy a rational basis test since it is rationally related to a legitimate state interest. (A. at 227-229).

iv. Section 69 As Applied Satisfies The Strict Scrutiny Test

Even if, *arguendo*, the Court decides to apply a strict scrutiny test to Section 69 as applied by the Defendants, the statute is lawful. Under strict scrutiny, a statute is upheld if it has is "narrowly tailored to further a legitimate and compelling governmental interest." See Aime v. Commonwealth, 414 Mass. 667, 673 (1993).

As noted and discussed at length above, there is a legitimate state interest for this statute, to "instill attitudes of patriotism and loyalty" in students. See Opinion of the Justices, 372 Mass at 879. This interest is not only legitimate, it is compelling, a point that the Plaintiffs essentially concede in their Brief to this Court. See Plaintiffs' Brief at 35-36.

Instead, the Plaintiffs base their argument to this Court on a claim that Section 69 as applied by the Defendants is not "narrowly tailored." There is absolutely no legal merit to this claim since (unlike virtually any other law passed by the Legislature) Section 69 as applied is totally voluntary. In other words, Section 69 as applied only applies to those

students (and teachers) who elect to participate in the Pledge of Allegiance.

It is hard to image a more narrow tailoring of a law than to make compliance with it totally voluntary (for both students and teachers) for any or no reason.[20/] In other words, when a state has a compelling interest to enforce a statute it can do so, consistent with strict scrutiny and equal protection, as long as the subjects of the statute have the right (as they do here) to voluntarily remove themselves from the enforcement of the law for any or no reason.

Thus, although strict scrutiny can be a difficult standard for a statute to satisfy, it is met (and the statute is deemed lawful) when there is both a compelling interest and a narrow tailoring of the law - as is found here. See e.g. Blixt v. Blixt, 437 Mass. 649, 656-664 (2002), cert. den. 537 U.S. 1189

[20/] For the same reason, the Defendants believe that the Massachusetts statute that mandates "human sexual education" in the public schools is lawful even if this Court would to subject it to strict scrutiny; it reflects a legitimate and compelling governmental interest, while also being narrowly tailored by being voluntary in that any parent or guardian may "exempt their children from any portion of said curriculum." See Mass. Gen. L. c. 71, § 32A; see also A. at 143; Curtis, 420 Mass. at 754-763 (the Court upholds the legality of a public school condom distribution program in which "the students are free to decline to participate in the program.")

(2003) (concluding that the state's grandparent visitation statute was lawful under a strict scrutiny analysis).[21/]

Accordingly, it was proper for the Superior Court to enter summary judgment on behalf of the Defendants as Section 69 does not violate Plaintiffs' equal protection rights under the Equal Rights Amendment to the Massachusetts Constitution.

II. SECTION 69, AS ENFORCED ON A VOLUNTARY BASIS BY THE DEFENDANTS, IS NOT A VIOLATION OF SECTION 5

Chapter 71, Section 5 provides in relevant part as follows:[22/]

> No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.

The Plaintiff claims that the Defendants' enforcement of Section 69 violates Section 5 as the

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[21/] The Court should construe or limit the scope of Section 69, like any other statute under judicial review, in order to make it constitutional. See Opinion of the Justices, 372 Mass. at 882 (1977) (separate opinion of Quirico and Braucher, J.); e.g. Blixt, 437 Mass at 664; see generally Goodridge, 440 Mass. at 342 ("We preserve as much of the statute as may be preserved"). Thus, all parties agree in this case that the Court should construe Section 69 as applied, which is on a voluntary basis for all teachers and students.

[22/] While this case was pending, "gender identity" was added to Section 5 effective July 1, 2012.

Doechildren are being denied the "advantages" and "privileges" of participating in the Pledge of Allegiance due to their religion. See Plaintiffs' Brief at 41-42. There is no merit to this claim as Section 69 as applied is totally voluntary for students. Thus, the Defendants did not exclude or discriminate against anyone based on their religion or any other suspect classification. As the Doechildren can recite or not recite the Pledge of Allegiance (or any part of the Pledge of Allegiance) on any given day as they wish on a totally voluntary basis without having to provide any reason, there is no discrimination or exclusion here. Thus, the Plaintiffs have no viable claim under Section 5.

Moreover, as Section 69 is constitutional (when applied on a voluntary basis by the Defendants) for the reasons stated above in this brief, the Defendants must comply with its mandates just as they must comply with all other applicable state laws.[23/]

[23/] To that end, the parties stipulated that Dr. Mills is "responsible for enforcing all provisions of law and all rules and regulations relating to management of the public schools within the Town of Acton Public Schools and the Acton-Boxborough Regional School District." (A. at 59, ¶ 6).

In other words, as long as the School Districts' compliance with Section 69 does not violate the Equal Rights Amendment, then Section 5 is not violated by the School Districts' compliance with Section 69, since (as a matter of well-established rules of statutory construction) the scope of Section 5 must be interpreted if at all possible to permit the actions required by Section 69. See Johnson v. Johnson, 425 Mass. 693, 696 (1997) ("Sections of the same chapter are to be interpreted so as to constitute a harmonious and consistent body of laws" - thus the scope of Mass. Gen. L. c. 208, § 28, on the division of marital property, must be interpreted to be consistent with "explicit legislation" on this topic in Mass. Gen. L. c. 208, § 34).[24/]

Furthermore, it is a settled rule of statutory construction that "general statutory language must

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[24/] See Sullivan v. Chief Justice for Admin. and Management of the Trial Court, 448 Mass. 15, 27 (2006) (in determining whether or not there is an conflict between statutes, the court will give preference to a harmonious reading of the statutes); Adoption of Marlene, 443 Mass. 494, 500-501 (2005) (courts do not read one section of a statute as negating another); City of Boston v. Board of Education, 392 Mass. 788, 792 (1984) (competing statutes will be construed in a manner that gives reasonable effect to both, and implied repeal will be found only when the prior statute is so repugnant to and inconsistent with a later statute that both cannot stand.)

yield to that which is more specific." See TBI, Inc. v. Board of Health of North Andover, 431 Mass. 9, 18 (2000), quoting Risk Management Foundation of Harvard Medical Institutes, Inc. v. Commissioner of Insurance, 407 Mass. 498, 505 (1990). Indeed, in Hennessey v. Berger, 403 Mass. 648, 651 (1988), this Court held that a general state statute against discrimination was not violated by a specific requirement in another state statute, even if the two statutes were "arguably inconsistent". Thus, the specific requirement for reciting the Pledge of Allegiance in Section 69 can not violate the general nondiscrimination mandate of Section 5.

Moreover, as the Superior Court correctly found, the Pledge of Allegiance is not inherently religious. (A. at 222-224). Thus, its voluntary recitation does not deny the minor Plaintiffs any privileges or advantages of their education on the basis of religion, and therefore does not violate Section 5. (A. at 229-230).

Finally, there is no violation of Section 5 since (as the Superior Court noted and assumed) rights under Section 5 "equates with" the Equal Rights Amendment. Attorney General, 378 Mass. at 344 n. 5. (A. at

230).[25/] Accordingly, if this Court finds (as it should) that Section 69 as applied does not violate the Equal Rights Amendment then by definition Section 69 as applied does not violate the equivalent protections provided by Section 5.

Since the Defendants' administration of the Pledge of Allegiance as required by Section 69 on a totally voluntary basis is not, and cannot be, a violation of Section 5, summary judgment properly entered for the Defendants in the Superior Court. Accordingly, this Court should affirm on appeal the dismissal of this non-constitutional claim.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be affirmed and the Court should enter such further and additional relief, including

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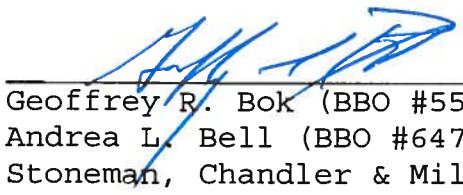
[25/] The Plaintiffs also assume that this legal proposition of equivalency is accurate, and do not argue otherwise. See Plaintiff's Brief at 41-42. As the parties assume the legal equivalency between Section 5 and the Equal Rights Amendment, this Court can and should (as it did in the Attorney General case) also assume this equivalency. See Attorney General 378 Mass. at 344 n. 5.

further and additional declaratory relief, as is just and proper.

Respectfully submitted,

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT, THE TOWN OF ACTON PUBLIC SCHOOLS, and DR. STEPHEN E. MILLS, as Superintendent of Schools,

By their attorneys,



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Dated: February 11, 2013

Certificate of Compliance With Rule 16(k)

Pursuant to Mass. R. App. P. 16(k), the undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(6), 16(e), 16(f), 16(h), 18, and 20.

2-11-2013 _____
Date

Geoffrey R. Bok

Certificate of Service

I hereby certify under the pains and penalties of perjury that on February 11, 2013, I served by first class mail, postage prepaid, two (2) copies of the foregoing Brief of the Defendants-Appellees on a counsel of record for the other parties in this matter:

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