Appeal No. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

THE FREEDOM FROM RELIGION FOUNDATION; PAT DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3; JAN DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3

Plaintiffs-Appellants

v.

UNITED STATES; THE STATE OF NEW HAMPSHIRE; MURIEL CYRUS; A.C., Minor; J.C., Minor; K.C., Minor; S.C., Minor; E.C., Minor, R.C., Minor; A.C., Minor; D.P., Minor; MICHAEL CHOBANIAN; MARGARETHE CHOBANIAN; MINH PHAN; SUZU PHAN; KNIGHTS OF COLUMBUS

Defendants-Appellees

DRESDEN SCHOOL DISTRICT; HANOVER SCHOOL DISTRICT

Defendants

On Appeal from the United States District Court for the District of New Hampshire, Hon. Steven J. McAuliffe, Civil Action No. 1:07-cv-356

BRIEF OF DEFENDANTS-APPELLEES MURIEL CYRUS *ET AL.*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees Muriel Cyrus *et al.* state that none of the Defendants-Appellees Muriel Cyrus *et al.* has a parent corporation or issues any stock.

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FACTUAL AND PROCEDURAL BACKGROUND

Because the case was resolved on motions to dismiss, the facts are drawn primarily from the face of the Plaintiffs' Complaint.

I. The Plaintiffs

Plaintiff Jan Doe is an atheist; Plaintiff Pat Doe an agnostic. APP011. Their three children (Plaintiffs DoeChild-1, -2, and -3) are also atheists or agnostics who attend public schools in the Defendant Hanover School District or Dresden School District. APP011-012. Although Plaintiffs have stipulated that the children have never been compelled to recite the Pledge, APP014-015, the children and their parents object to the use of the words "under God" by other public schoolchildren who voluntarily recite the Pledge. APP012-013. Accordingly, Plaintiffs asked their children's schools to forbid recitation of the Pledge in their children's classes. APP013. When the schools declined, Plaintiffs filed this lawsuit, seeking a declaration that reciting the Pledge in public schools is unconstitutional, and an injunction that would prevent other students from reciting the Pledge. APP020.

II. The Cyrus Defendants

Defendants-Appellees Muriel Cyrus, *et al*. ("Cyrus Defendants"), are schoolchildren in Hanover public schools who wish to continue saying the Pledge of Allegiance in its entirety, along with their parents. APP042. They are joined by the

Knights of Columbus, a fraternal organization that helped introduce the phrase "under God" into the Pledge. *Id.*

III. The Pledge and the New Hampshire School Patriot Act

The Pledge of Allegiance is set forth in 4 U.S.C. § 4 (2002):

> I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

This federal statute simply sets forth the official text of the Pledge and the preferred formalities accompanying its recitation; it does not require any person to recite the Pledge.

In New Hampshire, recitation of the Pledge in public schools is governed by the New Hampshire School Patriot Act, which provides that any participation in reciting the Pledge "shall be voluntary":

> I. As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.
>
> II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.
>
> III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

N.H. Rev. Stat. Ann. § 194:15-c (2002).

IV. Proceedings in the District Court

On October 31, 2007, Plaintiffs filed suit against the United States Congress, the United States of America, the Hanover School District, the Dresden School District and School Administrative Unit 70. Docket No. 1. Plaintiffs raised claims under the Establishment, Free Exercise, and Equal Protection Clauses, the Equal Protection component of the Fifth Amendment, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, Article 6 of the New Hampshire Constitution, New Hampshire School Patriot Act, and N.H. Rev. Stat. Ann. § 169-D:23 ("No child under the supervision of any state institution shall be denied the free exercise of his religion"). Docket No. 1.

Shortly after the complaint was filed, several parties intervened to defend the Pledge:

- The United States intervened to defend the constitutionality of the federal Pledge statute (4 U.S.C. § 4). APP040.
- The State of New Hampshire intervened to defend the constitutionality of the New Hampshire School Patriot Act. APP041.
- A group of Hanover public school students and their parents intervened in order to defend their interest in continuing to say the Pledge in its entirety. APP042.
- The Knights of Columbus, a Catholic lay organization that was instrumental in the inclusion of the words "under God" in the Pledge, intervened in its own right and on behalf of its Hanover members who want their children to continue saying the Pledge. APP042.

All intervenors filed motions to dismiss. Docket Nos. 14, 16, 22. On August 7, 2008, the District Court dismissed all of the claims against the federal defendants. Docket No. 44. However, the United States remained a party in its capacity as a Defendant-Intervenor. Plaintiffs filed an amended complaint on November 14, 2008. APP001.

In their nine-count amended complaint, Plaintiffs claimed that reciting the Pledge in public schools violates the Establishment Clause (Count I), the Free Exercise Clause (Counts II-III), and the Due Process and Equal Protection Clauses (Count IV) of the federal constitution, as well as their federal constitutional right of parenthood (Count V). APP013-017. Plaintiffs also made parallel claims under the New Hampshire Constitution and state law (Counts VI-VIII), along with a claim that the use of the words "under God" in the Pledge is "void as against public policy" (Count IX). APP017-019.

The Defendant school districts and all Intervenors filed motions to dismiss the amended complaint. Docket Nos. 46, 53, 55, and 56. On September 30, 2009, the district court issued a 36-page order granting the motions to dismiss all claims. ADD001.

On appeal, Plaintiffs press only their federal Establishment Clause, Free Exercise, Equal Protection, and fundamental right of parenthood claims. Appellants' Brief ("Br.") ii-iii.

INTRODUCTION AND SUMMARY OF ARGUMENT

At bottom, this is a lawsuit about what the word "God" means within the specific context of the Pledge of Allegiance. To resolve this appeal, the Court must evaluate a spectrum of competing interpretations.

At one end of the spectrum are the Plaintiffs. For them, the word "God," whether in the Pledge or another context, *always* has a "purely religious" meaning, and ineluctably refers to a revealed deity. Br. 3. In fact, to them the phrase "under God" does more than just *presuppose* a "Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). For Plaintiffs, using the word "God" always and everywhere affirmatively *proclaims* "the existence of God" as a theological truth. Br. 19.

At the other end of the spectrum is the view of the district court. In this view, "rote repetition" has rendered the word "God" in the Pledge meaningless, leaving it to "fall comfortably within the category of historic artifacts—reflecting a benign or ceremonial civic deism." ADD025. In this view, the word "God" is constitutional only because it means nothing.

In between these two ends of the spectrum lies the Ninth Circuit's more nuanced (and, we submit, correct) interpretive approach. In the recently decided *Newdow* v. *Rio Linda Union School District*, the Court, after making a thorough examination of the text, history, and context of the Pledge, explained that there are two interpretive strands at work in the term "under God." One strand sees the use

of "God" in the Pledge as the same as "Nature's God" in the Declaration of Independence. *Rio Linda*, 2010 WL 816986 at *16 (9th Cir. Mar. 11, 2010). "Nature's God" did not refer to the Christian or Jewish God—or for that matter, any revealed deity—but to an ancient philosophical concept that the Founders saw as the foundation of limited government. This idea, one form of what academic philosophers call *philosophical theism*, has been used throughout Anglo-American legal history, at the Founding, and ever since, to ground a natural rights political philosophy that limits the power of government. To say that government is "under God" is to say that our inalienable rights come not from the government but from something higher than government—from the "Creator" or "Nature's God." *See* Section I.A *infra*.

The second and related interpretive strand in the Ninth Circuit's opinion is that patriotic references to "God" in a public ceremony like Pledge recitation constitute "a recognition of the historical principles of governance" in our nation. *Rio Linda* at *8. In our culture, these ceremonial references lend a "note of importance" to the Pledge and its recitation. *Id.* at *2. That importance arises in large part from the practice of using the term "God" to make the natural rights philosophical argument, but also in part from the nation's long history of public references to God. The Pledge does not assert any religious doctrine. Yet it is not meaningless. In addition to grounding a natural rights political philosophy, the second role for the

word "God" in the Pledge is to sound the "mystic chords of memory" that bond Americans present to Americans past. Abraham Lincoln, First Inaugural Address, March 4, 1861, *reprinted in* Abraham Lincoln, Great Speeches 61 (Dover Thrift Eds. 1991). The Pledge is thus, in its characteristically apothegmatic way, invoking both a natural rights philosophy that still guides our nation today, and serving as an act of national memory.

The Ninth Circuit's interpretation is far truer to the complex reality of the Pledge than either the simplistic "God"-means-Jesus approach or the "God"-means-nothing approach. First, the political philosophy embodied in the concept of a Nation "under God" is so deeply ingrained in American law and culture that the Establishment Clause cannot be fairly read to exclude it. Using the word "God" to invoke a philosophy of natural rights is not just something that the Pledge of Allegiance has done since 1954. It came before that, in Lincoln's Gettysburg Address, and before that in Washington's orders to his troops on the eve of the Founding, and before that in the Declaration of Independence. Indeed, the concept is found in the very first compendium of medieval English law, and dates all the way back to classical thinkers like Aristotle, Seneca, and Cicero.

The Constitution itself embraces the natural rights philosophy that the Pledge embodies, stating that it is designed to "***secure*** the Blessings of Liberty," not to ***create*** them in the first place. U.S. Const., preamble. It similarly affirms, in the

Ninth and Tenth Amendments, the existence of natural rights that precede the positive law. And ever since the Founding, all three branches of government have frequently and consistently used the term "God" to ground these same ideas.

Thus, when Congress added "under God" in 1954 (and re-enacted the Pledge in 2002), it was not writing on a blank slate. Far from it, Congress expressly invoked the nation's longstanding political philosophy of natural rights, and tied the phrase "under God" directly to that philosophy. To declare in this context that the Constitution forbids the word "God" in the Pledge of Allegiance, and forbids willing public school students from saying it, smacks of both historical revisionism and a hostility to religion that should not be adopted by this (or any) Court.

Indeed, this Court should recognize this lawsuit for what it really is: one more battle in counsel Dr. Newdow's personal Crusade to purge the word "God" from public life.[1] The Supreme Court has never adopted such an extreme interpretation

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[1] Dr. Newdow has, in addition to this lawsuit, sued to try to remove the phrase "under God" from the Pledge several times:

- *Newdow* v. *United States*, No. 98-CV-6585 (S.D. Fla. 1998), *aff'd*, 207 F.3d 662 (11th Cir. 2000) (table case);
- *Newdow* v. *Congress of the U.S.*, No. CIVS-00-0495-MLS/PAN, (E.D. Cal. 2000), *rev'd*, 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom. Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004);
- *Newdow* v. *Rio Linda Union Sch. Dist.*, --- F.3d ---, 2010 WL 816986 (9th Cir. Mar. 11, 2010).

He has sued to try to remove "In God We Trust" from United States currency:

- *Newdow* v. *United States Congress*, 435 F.Supp.2d 1066 (E.D. Cal. 2006), *aff'd sub nom. Newdow* v. *Lefevre*, --- F.3d ---, 2010 WL 816971 (9th Cir. Mar. 11, 2010) (This despite telling Justice O'Connor at oral argument that the Court could "easily distinguish" use of "In God We Trust" on currency from recitation of the Pledge. Transcript of Oral Argument at 47, *Elk Grove*, 542 U.S. 1.)

He has sued to try to prevent Presidents Bush and Obama from saying "So help me God" at the end of the inaugural oath:

- *Newdow* v. *Bush*, 355 F.Supp.2d 265 (D.D.C.), *emergency motion for injunction pending appeal denied*, 2005 WL 89011 (D.C. Cir.), *application for injunction pending appeal denied*, No. 04A623 (2005) (regarding 2005 inauguration);

- *Newdow* v. *Roberts*, No. 09-5126 (D.C. Cir. argued Dec. 15, 2009) (regarding 2009 inauguration).

He has sued to try to ban any invocation or benediction at inaugural ceremonies:

- *Newdow* v. *Bush*, 89 Fed. Appx. 624 (9th Cir. 2004) (regarding 2001 inauguration)

- *Newdow* v. *Bush*, 355 F.Supp.2d 265

- *Newdow* v. *Roberts*, No. 09-5126 (D.C. Cir. argued Dec. 15, 2009)

And he has sued to try to prohibit Congress from hiring legislative chaplains and engaging in legislative prayer:

- *Newdow* v. *Eagen*, 309 F.Supp.2d 29 (D.D.C.), *dismissed for want of prosecution*, 2004 WL 1701043 (D.C. Cir. 2004) (claiming right to observe government without being forced to "confront religious dogma he finds offensive.").

Despite the use of considerable judicial and attorney resources, Dr. Newdow has not prevailed in any of these lawsuits.

of the Establishment Clause, and, indeed, has repeatedly rejected it. Here, where "God" is used as a term of philosophy and history rather than theology, the Establishment Clause does not forbid it.

The Court should affirm the decision below for the same reasons the Ninth Circuit upheld the Pledge: that "God" in the Pledge is both the "Nature's God" of the Declaration of Independence and a way to invoke the collective memory of the nation.

ARGUMENT

I. The Pledge does not violate the Establishment Clause.

Government action "does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive government entanglement with religion." *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (citing *Lemon* v. *Kurtzman,* 403 U.S. 602 (1971)). Because Plaintiffs make no entanglement argument, we address only the first two: the "primary effect" element (Part I.A), and the "purpose" element (Part I.B). The School District's Pledge policy satisfies both elements.

A. The Pledge does not have the primary effect of advancing religion because "under God" is a statement of a natural rights political philosophy, not a theological creed.

In addition to the purpose prong of *Lemon* and *Boyajian*, Plaintiffs claim the Pledge fails some seven other Establishment Clause "tests": the neutrality, effects, coercion, endorsement, imprimatur, outsider and divisiveness tests. Br. ii-iii. Because these tests are all permutations of the "primary effects" test of *Lemon* and *Boyajian*, we address them together.

Under *Lemon* and *Boyajian*, the Pledge does not have the effect of advancing religion as long as it "does not endorse an individual *religious* faith, it does not provide a direct financial subsidy to any *religious* organization, it does not inject

religious activity into a nonreligious context, and it does not 'place [the state's] prestige, coercive authority, or resources' behind *religious* faith in general[.]" *Boyajian*, 212 F.3d at 10 (quoting *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 9 (1989)) (emphases supplied; first alteration original). The common thread in each of these prohibitions is that they involve "religious" content.

Thus, in deciding whether the Pledge advances religion, this Court first must determine whether the Pledge as a whole, and the phrase "under God" in particular, is a religious statement. If the Pledge is not religious, its recitation does not violate the Establishment Clause.

As explained below, the Pledge is not a religious creed but a statement of political philosophy and national memory. This is evident from (1) the usage of the word "God" throughout American history; (2) the usage of the word "God" by all three branches of American government; and (3) the usage of the word "God" by Congress in amending (and re-enacting) the Pledge. Because the Pledge is a statement of both political philosophy and national memory, its primary effect is neither to endorse religion nor to coerce religious observance.

1. Three competing interpretations of "God" in the Pledge.

There are several competing meanings for the word "God" in the Pledge: (1) the "religious creed" interpretation, (2) the "meaningless through rote repetition" interpretation, and (3) the "philosophy and memory" interpretation.

Since the Pledge is a statute, 4 U.S.C. § 4, the Court should interpret its language, like that of other statutes, as a whole. *See In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24, 39 (1st Cir. 2009) (court "interpret[s] statutes according to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole") (internal quotation omitted). *Cf. Rio Linda* at *2, 7-11, 23 (Pledge must be examined "as a whole"). The Court should also seek to give the Pledge statute "a constitutional as opposed to an arguably unconstitutional interpretation whenever fairly possible." *IMS Health Inc.* v. *Ayotte*, 550 F.3d 42, 63 (1st Cir. 2008) (citations omitted). And the Court should interpret the Pledge statute to have "operative effect," so that "if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Morales* v. *Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 59 (1st Cir. 2008) (quotation omitted).[2]

a. The "religious creed" interpretation.

At one end of the interpretive spectrum are the Plaintiffs, for whom the words "under God" are "purely religious." Br. 3. Once those words were "spatchcocked" into the Pledge, they transformed it into the "Monotheistic Pledge." *Id.* On this view, the term "God" is *always* religious, no matter the context. Reciting the

[2] Moreover, "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Cotting* v. *Godard*, 183 U.S. 79, 107 (1901).

Pledge at school is little different from saying "under Jesus" or reciting the Apostles' Creed. Br. 35, 49.

b. The "meaningless through rote repetition" interpretation.

At the other end of the spectrum is the interpretation adopted by the district court: that through rote repetition the Pledge—and specifically the words "under God"—have lost any meaning they originally had, rendering the Pledge a "historic artifact[.]" ADD025. Under this view, the Pledge—presumably both the phrase "under God" and the other parts of the Pledge—meant something only in the past. Today they are merely vestiges of beliefs that earlier Americans espoused.

The Fourth Circuit has noted that the "meaningless through rote repetition" interpretation does not adequately account for how and when "under God" became meaningless:

> The phrase "ceremonial deism" is somewhat disconcerting because it suggests that, when "initially used" phrases like "in God we trust" and "under God" "violated the Establishment Clause because they had not yet been rendered meaningless by repetitive use." *Sherman v. Community Consolidated Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir.1992) (Manion, J., concurring). Moreover, "ceremonial deism" provides no account for why only words with religious connotations lose meaning, and not words like "liberty, and justice for all."

Myers v. *Loudoun County Pub. Schs.*, 418 F.3d 395, 405 n.11 (4th Cir. 2005).

The confusion may stem from the very term "ceremonial deism." The term is an entirely legal invention, coined by Yale Law School Dean Eugene Rostow in a 1962 lecture. It was not mentioned by any Supreme Court justice until Justice

Brennan did so in his dissent from *Lynch* in 1984. The full court used the term twice in *County of Allegheny* v. *ACLU*, 492 U.S. 573, 595 n.46, 603 (1989). The last time any member of the Court mentioned the term was in Justice O'Connor's concurrence in *Elk Grove*, in 2004. Davison M. Douglas, *Ceremonial Deism*, in Encyclopedia of American Civil Liberties 258-259 (Paul Finkelman, ed., 2006).

When used outside the Establishment Clause context, "Deism" has specific theological content: it is "the belief that there is a good and wise Supreme Being who created the world but no longer intervenes in it . . . ." Alasdair MacIntyre, *Deism*, in The Concise Encyclopedia of Western Philosophy and Philosophers 96 (J.O. Urmson & Jonathan Rée eds., 2d ed. 1991). It is thus strange to invoke "Deism," which connotes specific and controversial views about the nature of God (*e.g.*, non-intervention in human affairs), as a benign category under the Establishment Clause. *See also* ADD0025 (referring to "benign or ceremonial civic deism").

It could be that Rostow, by using the word "ceremonial," meant to refer to the memorial aspect of references to "God." And by "deism" he may have meant the broader term "theism." Whatever the case, it is not clear that using "ceremonial deism" as a euphemism for "meaningless" helps make sense of this area of the law.

c. The "philosophy and memory" interpretation.

At a point along the spectrum between the Plaintiffs' interpretation and the district court's is the Ninth Circuit's explanation: the "God" of the Pledge is both a statement of philosophical theism, like "Nature's God" in the Declaration of Independence, and an act of national memory. *Rio Linda* at *16.

Like the reference to "Nature's God" in the Declaration, the Pledge does *not* invoke a religious deity—like the Christian, Jewish, or Muslim God, who is known by *revelation*—but rather a philosophical concept whose existence must be argued for using *reason* alone.[3] Nature's God is Aristotle's Unmoved Mover, an "unknowable, varied source," *Rio Linda* at *16, whose existence is considered, in Jefferson's words, "self-evident" to human reason. This God is not a religious idea, but a philosophical one.

Thus, while this political philosophy, wherever expressed, refers to "God," it does so from reason, not revelation. It explains that our rights are inalienable pre-

[3] To be sure, this "Philosophers' God" is not posited as a separate entity somehow competing with, say, Jewish or Christian theology. Rather, the Philosophers' God is a notion of divinity limited to what may be known by reason alone. This stripped down concept of deity is sufficiently potent to ground our rights, but nowhere near potent enough to ground a theocracy. Believers inevitably find this intellectual portrait of God unsatisfying, and so move on to seek more detailed revelation. Thus Pascal famously noted in his *Memorial* the distinction between a revealed deity and the "God of the philosophers" derived by reason: "'God of Abraham, God of Isaac, God of Jacob,' not the God of philosophers and scholars." Blaise Pascal, Pensées 285 (A. J. Krailsheimer trans., Penguin 1995). Put simply, there is no such thing as the First Church of the Philosophers' God.

cisely because they inhere in a human nature that has been "endowed" with such rights by its "Creator." Recognition and acknowledgement of that premise is hardly an impermissible purpose. If it were, that would lead to the absurd result that publicly acknowledging the traditional grounding of our rights in the dignity of the individual would somehow violate those very rights. And reading aloud the Delcaration of Independence would be unconstitutional. In reality, the Pledge as a whole is a distillation of American political philosophy, and the prepositional phrase "under God" recalls its historic, natural-rights premise.

As explained below, the Ninth Circuit's interpretation of "under God" is supported (1) by the way "God" has been used throughout American history as the foundation for a political philosophy of natural rights; (2) by the way "God" has been used by all three branches of American government; and (3) by the way "God" was used by Congress in 1954 (and 2002) when it enacted (and re-enacted) the Pledge.

2. Like "Nature's God" in the Declaration of Independence, "God" in the Pledge refers to the longstanding premise of the Anglo-American political philosophy of natural rights.

The phrase "under God" was not coined by Congress in 1954. Indeed, the first recorded use of the phrase "under God" in Anglo-American legal history is in the earliest known compendium of English law, dating from the 13th Century. Bracton states that "[t]he king must not be under man but under God and under the law, be-

cause law makes the king." Bracton, 2 De Legibus Et Consuetudinibus Angliæ 33.[4] Since the King embodied the government in his person at that time, this first English legal writer was already limiting government by declaring it to be "under God and the Law."

In 1607, Sir Edward Coke cited Bracton's phrase to justify his power as Chief Justice of the Court of Common Pleas to overrule the King's findings with respect to the common law:

> With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed* ***sub Deo et Lege***. [That the King ought not be under man, but under God and the Law.]

Prohibitions del Roy, 12 Coke's Reports 63, 65 (emphasis added). Thus Coke used Bracton's "under God and the Law" formulation to limit the King's power to rule unilaterally.

Blackstone, whom the Supreme Court has repeatedly relied on as "the preeminent authority on English law for the founding generation,"[5] held that the "law of nature" had its source in a "supreme being" and that this law was "impressed" into every human being. William Blackstone, Commentaries on the Law of England

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[4] A variation of this phrase is carved into the pediment of Langdell Library at Harvard Law School: "NON SVB HOMINE SED SVB DEO ET LEGE".

[5] *Alden* v. *Maine*, 527 U.S. 706, 715 (1999); *see also*, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 313-14 (2004); *Reid* v. *Covert*, 354 U.S. 1, 26 (1957).

§ 2, 38-39 (5th ed. 1773). Blackstone maintained that all laws derived their authority not from human power but from the higher "law of nature":

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Id. at 41. Blackstone's formulation thus puts human laws "under God," denying their validity if they run contrary to the law of nature.

Blackstone's understanding of the nature and limits of governmental power suffused the intellectual world of the Founders. As Alexander Hamilton wrote in arguing for defiance of British oppression: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole *volume* of human nature by the hand of the Divinity itself and can never be erased or obscured by mortal power." Alexander Hamilton, The Farmer Refuted (1775), *quoted in* Ron Chernow, Alexander Hamilton 60 (2004) ("Chernow")(emphasis original).

The Declaration of Independence is perhaps the paradigmatic restatement of this philosophy. Jefferson's defense of the American rebellion proceeds from the "self-evident" truth that all persons "are endowed by their Creator with certain unalienable rights." The Declaration of Independence, para. 2. Proceeding from this premise, the Declaration explains that these God-given rights provided a basis for

Americans to reject a tyrannical government and assume the "equal station to which the Laws of Nature and of Nature's God entitle them." *Id*. at para. 1.

Of course, Jefferson and the other Founders were not writing on a blank slate. Jefferson later said that the Declaration aimed to capture "the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc." Letter to Henry Lee (May 8, 1825), *quoted in* Carl Becker, The Declaration of Independence 402 (1953). Thus, when Jefferson wrote of the "equal station to which the Laws of Nature and of Nature's God entitle[d]" Americans, he was expressly alluding not only to Blackstone's formulation, but also to Cicero's famous distillation of the *lex naturae*, of which "God himself is [the] author":

> True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. This law cannot be contradicted by any other law, and is not liable either to derogation or abrogation. Neither the senate nor the people can give us any dispensation for not obeying this universal law of justice. It needs no other expositor and interpreter than our own conscience. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations this universal law must forever reign, eternal and imperishable. It is the sovereign master and emperor of all beings. God himself is its author, its promulgator, its enforcer. And he who does not obey it flies from himself, and does violence to the very nature of man.

Marcus Tullius Cicero, De re publica III, xxii. *See also Rio Linda* at *17 n.23.

The Declaration also alludes to Locke's understanding of the right of a people to rebel against the government if it violates the law of nature: "I will not dispute now, whether princes are exempt from the laws of their country; but this I am sure, they owe subjection to the laws of God and nature. Nobody, no power, can exempt them from the obligations of that eternal law." John Locke, II Two Treatises of Government 246 (Rivington 1824) (1690) § 195. And a few paragraphs later: "Whence it is plain, that shaking off a power, which force, and not right, hath set over any one, though it hath the name of rebellion, yet is no offence before God, but is that which he allows and countenances, though even promises and covenants, when obtained by force have intervened . . . ." *Id.* at 247, § 196. Jefferson similarly relied on the thoughts of English political thinker Algernon Sidney, who wrote: "The liberties of nations are from God and nature, not from kings." Algernon Sidney, 1 Discourses Concerning Government 440 (Hamilton & Balfour 1750). Sidney was executed by the State for writing these words.

The specific phrase "*under* God" appears throughout the writings of the Revolutionaries, who were firm in their belief that the Revolution was to be carried out "under God." Washington used the phrase in his General Orders issued on July 2, 1776 (when the Declaration had been agreed but not yet published):

> The fate of unborn Millions will now depend, ***under God,*** on the Courage and Conduct of this army—Our cruel and unrelenting Enemy leaves us no choice

> but a brave resistance, or the most abject submission; this is all we can expect—We have therefore to resolve to conquer or die … .[6]

Seven days later, Washington used the phrase "under God" again in his General Orders of July 9, 1776, when he ordered the Declaration of Independence to be read to all the troops: "The General hopes this important Event will serve as a fresh incentive to every officer, and soldier, to act with Fidelity and Courage, as knowing that now the peace and safety of his Country depends (***under God***) solely on the success of our arms … ."[7]

At the conclusion of the peace, the Continental Congress commissioned James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth to draft an "Address to the States, by the United States in Congress Assembled." The Address, written in Madison's hand, ended with a resounding affirmation of the idea of that rights inhere in human nature and proceed from an "Author":

> Let it be remembered, finally, that it has ever been the pride and boast of America, that ***the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights*** on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states.

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[6] George Washington, July 2, 1776 General Orders, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3g/gwpage001.db&recNum=301 (emphasis added).

[7] George Washington, July 9, 1776 General Orders, *available at* http://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3g/gwpage001.db&recNum=308 (emphasis added).

1 Elliot's Debates 100 (2d ed. 1854) (emphasis added). Madison and Hamilton thus agreed that the American Revolution was a fight for "the rights of human nature," rights which had an "Author."

Indeed, the Founders rooted religious disestablishment itself in natural rights philosophy. The Virginia Statute for Religious Freedom, drafted by Jefferson, disestablished the Anglican church in the new state:

> Be it enacted by General Assembly that no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever….

Virginia Statute for Religious Freedom (1786), *codified at* Va. Code Ann. § 57-1. That same statute grounded disestablishment in the natural rights of man:

> [W]e are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Id.

The Constitution itself is rooted in this philosophy of natural rights. The Preamble to the Constitution describes one of the purposes of the Constitution as ***"secur[ing]*** the Blessings of Liberty to ourselves and our Posterity." U.S. Const., preamble (emphasis added). The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others ***retained*** by the people." U.S. Const., amend. IX.(emphasis added). And the Tenth Amendment states that "[t]he powers not delegated to the United States by

the Constitution, nor prohibited by it to the states, are ***reserved*** to the states respectively, or to the people." U.S. Const., amend. X (emphasis added). All three of these texts imply a pre-existing body of rights and powers that the Constitution is allocating among the people, the three branches of the federal government, and the state governments. These pre-existing rights are "secure[d]," "retained," and "reserved" by the Constitution—not "created" by it. None of those words make sense unless they refer to pre-existing rights and powers that "We, the People" already possess and are allocating to government through the Constitution.

The ratification debate also reflected the prevailing philosophy of natural rights. For example, one of the main arguments against the Constitution was that it contained no Bill of Rights. Defenders of the Constitution argued that there was no need for a Bill of Rights, because the Constitution indicated that the people had retained their rights. In The Federalist No. 84, Alexander Hamilton argued that a Bill of Rights was unnecessary because the Preamble made clear that: "the people surrender nothing; and as they retain every thing they have no need of particular reservations." *Id.* Although the two sides to the ratification debate disagreed over how to protect the people's pre-existing rights, both agreed that the people had them, and that the government was instituted to secure and protect them.

The fight against slavery was similarly predicated on the Founders' natural rights philosophy. In 1785 Hamilton helped found the nation's first abolitionist so-

ciety, the New York Society for Promoting the Manumission of Slaves. At its opening meeting the following statement was read: "The benevolent creator and father of men, having given to them all an equal right to life, liberty, and property, no sovereign power on earth can justly deprive them of either." Chernow at 214.

In fact, the entire abolitionist movement was premised on the idea that slaves, like other human beings, had rights bestowed by God, and that the government, and even the positive law of the United States Constitution, had no right to take them away. In a celebrated case involving a man charged with violating the Fugitive Slave Act, later Chief Justice Salmon P. Chase defended his client by arguing that "[t]he law of the Creator, which invests every human being with an inalienable title to freedom, cannot be repealed by any interior law which asserts that man is property." Argument for the Defendant, *Jones* v. *Van Zandt*, 2 McLean 597 (Ohio Cir. Ct. 1843). When the case reached the Supreme Court, Chase argued: "No court is bound to enforce unjust law; but, on the contrary, every court is bound, by prior and superior obligations, to abstain from enforcing such law." Argument for the Defendant, *Jones* v. *Van Zandt*, 46 U.S. 215 (1847).

Lincoln's Gettysburg Address continued and embraced this same political philosophy, proclaiming that "this nation, *under God*, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, The Gettysburg Address (Nov. 19,

1863), *reprinted in* 7 The Collected Works of Abraham Lincoln 23, 23 (Roy P. Basler ed., 1953) (emphasis added).[8]

More recently, natural rights were asserted as the basis for the civil rights struggle. Thus the Rev. Martin Luther King, Jr. could describe the natural rights declared in the Declaration of Independence and the Gettysburg Address as a "promissory note to which every American was to fall heir." "I Have A Dream," *quoted in* Eric J. Sundquist, King's Dream 68 (2009). Professor Sundquist writes that King used the term "God's children" in the speech to remind his religiously diverse listeners "that the nation's political foundations, though hardly theocratic, nonetheless rested on 'the Laws of Nature and Nature's God.'" Sundquist at 130.

* * *

This history demonstrates beyond contest that long before the Declaration of Independence, and also ever since, our national ethos has included the natural rights philosophy that human beings have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. In this way, the Pledge, like the Declaration and the Gettysburg Address, is a statement of political philosophy, not of theology. *See Rio Linda* at *15-19 (interpreting Pledge in light of natural rights philosophy of government).

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[8] *Cf.* 100 Cong. Rec. 7764 (1954) ("These two words ['under God' in the amended Pledge] are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America.") (statement of Rep. Rodin).

The words "under God" were not a newly minted phrase or idea that Congress added to the Pledge in 1954 to achieve the effect of steering individuals to faith. Instead, they were added as a self-conscious effort to echo and re-affirm the political philosophy that has animated this country throughout its history and that is reflected in seminal documents like the Declaration and Gettysburg Address. This philosophy is not premised upon religious revelation, but upon the existence of a power known through reason, a power higher than the State. Therefore the primary effect of the words "under God" in the Pledge is not a recitation of a religious creed, but an affirmation of the quintessential American political philosophy that recognizes the subservience of the State to the God-given inalienable rights of individual citizens. *See Rio Linda* at *15-19.

3. All three branches of the federal government have long used the terms "God" or "under God" to refer to this political philosophy of natural rights.

Viewing the 1954 Amendment of the Pledge in the context of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *Lynch* v. *Donnelly*, 465 U.S. 668, 674 (1984), makes especially clear that the primary effect of the phrase "under God" in the Pledge is not to advance religion, but to reaffirm a political philosophy of inalienable rights and limited government.

Executive Branch. The Executive Branch has repeatedly affirmed the political philosophy of inalienable rights and limited government by reference to the concept of "God," most notably in the speeches of our Presidents. For example, with one exception (Washington's brief second inaugural in 1793), every single presidential inaugural address includes some reference to God—whether as the source of rights, of blessing to the country, or of wisdom and guidance. Examples include the following:

- "[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation . . . ." John Adams, Inaugural Address (Mar. 4, 1797), *reprinted in* David Newton Lott, The Presidents Speak: The Inaugural Addresses of the American Presidents from George Washington to George Walker Bush 10, 15 (M. Hunter & H. Hunter eds. 2002).

- "We admit of no government by divine right, believing that so far as power is concerned the Beneficent Creator has made no distinction amongst men; that all are upon an equality . . . ." William Henry Harrison, Inaugural Address (Mar. 4, 1841), *reprinted in* Lott at 81, 82.

- "The American people stand firm in the faith which has inspired this Nation from the beginning. We believe that all men have a right to equal justice under law and equal opportunity to share in the common good. We believe that all men have the right to freedom of thought and expression. We believe that all men are created equal because they are created in the image of God." Harry S. Truman, Inaugural Address (Jan. 20, 1949), *reprinted in* Lott at 288, 289.

- "[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* Lott at 306, 306.

- "We are a nation under God, and I believe God intended for us to be free." Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* Lott at 340, 344.

- "When our founders boldly declared America's independence to the world and our purpose to the Almighty, they knew that America, to endure, would have to change." William Jefferson Clinton, First Inaugural Address (Jan. 20, 1993), *reprinted in* Lott at 362, 362.

This history demonstrates that the Executive Branch has repeatedly drawn upon theistic language and imagery to reaffirm the political philosophy that our government is a limited one, bound to respect the inalienable rights of its people because those rights are God-given. For that reason, it is not surprising that President Eisenhower viewed the addition of the words "under God" to the Pledge as falling squarely within this tradition:

> "The[] words ['under God'] will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded."

Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus, Aug. 17, 1954, *reprinted in "Under God" Under Attack,* Columbia, Sept. 2002, at 9. Thus, to find that reciting the Pledge violates the Constitution would cast great doubt on the constitutionality not only of reciting or studying the Declaration of Independence, but also of declaiming any number of presidential speeches, many of which acknowledge God as the source of our citizens' inalienable rights.

Legislative branch. In 1789, when the first Congress submitted the Establishment Clause and the rest of the Bill of Rights to the States for ratification, it also established the office of legislative chaplain, *see Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983), and called upon President Washington to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many and signal favors of Almighty God." Annals of Congress, 90, 92, 949, 958-59 (Joseph Gales ed., 1789).

Later Congresses have continued these practices and added others. For example, Congress has made "In God we trust" the national motto. 36 U.S.C. § 302. It has adopted the Star Spangled Banner, including its religious language, as the National Anthem. *Elk Grove*, 542 U.S. at 30 (noting Congress' adoption of the Star Spangled Banner as the National Anthem, which includes religious language) (Rehnquist, C.J., concurring). And it has approved religious references on numerous monuments throughout the capital. For example, inside the Lincoln Memorial one wall is inscribed with the Gettysburg Address, including the words "under God." The other wall bears Lincoln's Second Inaugural Address. The Address, perhaps the greatest oration in American history, turns on Lincoln's suggestion that both North and South were being punished for the violation of human rights by chattel slavery:

> If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which having continued through His

> appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him? Fondly do we hope—fervently do we pray—that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil be sunk, and until every drop drawn with the lash, shall be paid by another drawn with the sword, as it was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

Lincoln, Second Inaugural Address, March 5, 1864, *reprinted in* Great Speeches at 107. All of these actions tap into—and memorialize—the Founders' political philosophy, acknowledging that the State is not the source of our inalienable rights.

Judicial Branch. The Supreme Court has joined its sister branches in reflecting and reinforcing the traditional American political philosophy that the State is subservient to the God-given inalienable rights of its citizens. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas: Our "institutions presuppose a Supreme Being," *Zorach*, 343 U.S. at 313, precisely because they presuppose the existence of a source of rights that is prior to the State.[9] For the same reason, Chief Justice Marshall established the tradition of opening Supreme Court for business with the words "God save the United States

[9] Since *Zorach*, the Court has repeatedly reaffirmed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch*, 465 U.S. at 675; *Marsh*, 463 U.S. at 813; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672 (1970); *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 213 (1963).

and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

The Supreme Court has also recounted in detail how the Framers did not view references to or invocations of God, such as the foregoing, as an "establishment" of religion. *See, e.g.*, *County of Allegheny*, 492 U.S. at 671-73 (opinion of Kennedy, J.); *Lynch*, 465 U.S. at 675-78 (1984); *Marsh*, 463 U.S. at 792. Quite the contrary, "[t]he institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *McGowan* v. *Maryland*, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

Plaintiffs' attack on the Pledge is at war with this principle. Again, if voluntarily reciting the Pledge is now suddenly unconstitutional because it refers to a nation "under God," then voluntarily reciting the Declaration of Independence or the Gettysburg Address (as schoolchildren have done for generations) must also be unconstitutional, since those documents similarly refer to the Creator as the source of our rights. The courts should respect not only our national ethos, but the consistent interpretation of the Establishment Clause reflected in the expression and conduct of all three branches.

4. When Congress amended the Pledge in 1954 (and re-enacted it in 2002), it expressly called on this political philosophy of natural rights.

When Congress added the words "under God" in 1954, and re-enacted the Pledge in 2002, it expressly drew on this longstanding political philosophy of natural rights.

The words "under God" were first added in 1954 at the height of the Cold War. As the House Report explained, Congress added those words with the express purpose of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual":

> At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.[10]

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[10] H.R. Rep. No. 83-1693, at 1-2 (1954); *see also* S. Rep. No. 83-1287, at 2 (1954) (describing similar sentiments of Senator Ferguson, author of the Senate proposal); 100 Cong. Rec. 7332 (1954) (statement of Rep. Bolton). The House Report also quotes from other proponents of the political philosophy of natural rights. William Penn, for example, said, "'Those people who are not governed by God will be ruled by tyrants.'" H.R. Rep. No. 83-1693, at 2 (1954); *see also* 100 Cong. Rec. 7333 (statement of Rep. Oakman (quoting William Penn)). And George Mason explained: "'All acts of legislature apparently contrary to the natural right and justice are, in our laws, and must be in the nature of things considered as void. The laws of nature are the laws of God, whose authority can be superseded by no power on

Soviet legal theory, by contrast, rejected the philosophy of natural rights, maintaining that all rights are derived from the state:

> [N]atural law doctrine is rejected. There are no civil rights derived from sources other than positive law. As positive law is created by the state, all civil rights are to be granted by the state. Though the Human Rights Covenants, to which the Soviet Union is a party, undisputably derive human rights from the "inherent dignity of the human person," Soviet doctrine continues denying that anything like innate rights can exist.

Georg Brunner, *Civil Rights*, *in* Encyclopedia of Soviet Law 124-5 (Ferdinand Joseph Maria Feldbrugge, Gerard Pieter van den Berg & William B. Simons, eds.) (2d ed. 1985).

The legislative history is replete with references to "times such as these," 100 Cong. Rec. 7336 (1954) (statement of Rep. O'Hara); "communism," *id.* at 7332 (statement of Rep. Bolton); "the conflict now facing us," *id.* at 7333 (statement of Rep. Rabaut); "a time in the world," *id.* at 7338 (statement of Rep. Bolton); and "this moment in history," *id.* at 5750 (statement of Rep. Rabaut). Individual legislators repeatedly argued for the phrase "under God" as an express rejection of Communist political philosophy and re-affirmation of American political philosophy. As Congressman Wolverton observed in urging the inclusion of "under God" in the Pledge:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every

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earth.'" H.R. Rep. 83-1693, at 2 (1954); *see also* 100 Cong. Rec. 7333 (statement of Rep. Oakman (quoting George Mason)).

> human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual....

100 Cong. Rec. 7336 (1954) (statement of Rep. Wolverton).

This was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different *philosophical* visions of human nature—and therefore of human freedom—that underlay the two systems.

When Congress re-enacted the Pledge in 2002, its references to the political philosophy of natural rights were just as prominent. Congress made numerous findings grounding the Pledge on the idea of "Laws of Nature, and of Nature's God," and the idea that people "are endowed by their Creator with certain unalienable Rights." *Rio Linda* at *12. As the Ninth Circuit concluded:

> These findings make it absolutely clear that Congress in 2002 was not trying to impress a religious doctrine upon anyone. Rather, they had two main purposes for keeping the phrase "one Nation under God" in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.

Id. at *15.

In short, when Congress amended the Pledge in 1954 and reaffirmed it in 2002, it was expressly drawing on the political philosophy of the Founders, embodied most prominently in the Declaration of Independence. It contended simply that people who recognize a higher power than the State live in greater freedom. By

adopting the phrase "under God" in the Pledge, Congress achieved the permissible effect of bringing the Pledge within the "natural rights" philosophy of Washington, Hamilton, Jefferson, Madison, and Lincoln—the philosophy on which the American system is based—and rejecting the Soviet view that all rights are conferred at the pleasure of the State.

5. Because the Pledge is a statement of political philosophy, it does not have the primary effect of either endorsing religion or coercing religious observance.

In light of this context and history, neither the Pledge as a whole, nor the phrase "under God," has the "principal or primary effect" of advancing religion. *Boyajian*, 212 F.3d at 6. This is so for three reasons: (a) the Pledge is not a religious statement; (b) a reasonable observer would not view the Pledge as endorsing religion; and (c) reciting the Pledge does not coerce religious observance. *See Boyajian*, 212 F.3d at 10 (discussing endorsement and coercion as effects forbidden by *Lemon*'s second prong).

a. The Pledge is not religious.

A threshold inquiry for any Establishment Clause claim is whether the object of the government's endorsement (such as the Pledge) is religious in nature. The government can and does endorse *non-religious* viewpoints all the time. The government "is entitled to say what it wishes, and to select the views that it wants to express." *Summum*, 129 S.Ct. 1125, 1131 (2009) (quoting *Rosenberger* v. *Rector and*

Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)). It can choose paintings for a government-sponsored art gallery, programs for government-sponsored radio program, or philosophical statements to be chiseled on government buildings. Indeed, the Pledge itself endorses the ideas that our nation is indivisible, that there are things such as "liberty" and "justice," and that they are available to "all." If the Pledge is not religious, "endorsement" is not a problem.

The Ninth Circuit rightly held that the message of the Pledge is not religious:

> The phrase "under God" is a recognition of our Founder's political philosophy that a power greater than the government gives the people their inalienable rights. Thus, the Pledge is an endorsement of our form of government, not of religion or any particular sect.

Rio Linda at *23; *see also* Section I.A-B *supra*. Because the Pledge is a statement of political philosophy, not a religious statement, the government can endorse the ideas in it as much as it likes; it "is entitled to say what it wishes[.]" *Pleasant Grove City* v. *Summum*, 129 S.Ct. 1125, 1131 (2009) (quoting *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995)). The endorsement inquiry can stop with recognition that the Pledge is not a religious statement.

b. A reasonable observer would not view the Pledge as endorsing religion.

Even assuming the Court inquires further, the Pledge still complies with the endorsement test. In her concurrence in *Elk Grove*, Justice O'Connor reaffirmed two principles that govern application of the endorsement test. First, the "the endorse-

ment test … assumes the viewpoint of a reasonable observer." *Elk Grove*, 542 U.S. at 34 (O'Connor, J. concurring) (internal citation omitted).

> Second, because the 'reasonable observer' must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.

Id. at 35 (citation omitted).

The Supreme Court has already strongly suggested how this test applies to the Pledge. It has "characteriz[ed] [the Pledge] as consistent with the proposition that government may not communicate an endorsement of religious belief," and has intimated that the Pledge is "consistent with" the endorsement test. *County of Allegheny*, 492 U.S. at 602-03. This Court should, accordingly, follow the Supreme Court's lead and find that the Pledge and its recitation pass the endorsement test.

But even assuming this Court were writing on a blank slate, an "objective observer" would not find voluntary recitation of the Pledge to endorse religion in light of the Pledge's "origins and context" and "its place in our Nation's cultural landscape." *Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring). As demonstrated throughout this brief, the Pledge is a patriotic and political statement rather than a prayer or an affirmation of a religious belief. A reasonable observer would understand the words "under God," taken in the context of both the entirety of the Pledge and its origins and historic uses, to be a statement that the government of

the United States is subordinated to the "Laws of Nature and Nature's God." The words are, in essence, a daily mini-declaration of the thoughts expressed in the Declaration of Independence itself. *See* Section I.A *supra*.

The reasonable observer would also know that philosophers have a long history of referring to God as that which stands at the beginning of reason, the "Unmoved Mover" to which all other movements may be traced. *See* Aristotle, Metaphysics at 12.7 (1072b), *reproduced in* Introduction to Aristotle 321 (Richard McKeon, ed., 2d. ed. 1973) (using the term "God" to describe his famous "first mover" that, he reasoned, "exists of necessity, and in so far as it exists by necessity, its mode of being is good")[11] This God of the Philosophers, or Nature's God, is not known as a specifically revealed personality but rather as the explanation and source of our rights. *See* Section I.A, *supra*. In short, a reasonable observer familiar with the history and context of the Pledge would not perceive endorsement.

This Court must likewise reject Plaintiffs' attempt to convert the endorsement test into a subjective one. Plaintiffs sincerely believe that the Pledge is an "en-

[11] *See also* Seneca, De consolationae ad Helviam, VIII, 2-6. ("Wherever we betake ourselves, two things that are most admirable will go with us—universal Nature and our own virtue. Believe me, this was the intention of the great creator of the universe, whoever he may be, whether an all-powerful God, or incorporeal Reason contriving vast works, or divine Spirit pervading all things from the smallest to the greatest with uniform energy, or Fate and an unalterable sequence of causes clinging one to the other—this, I say, was his intention, that only the most worthless of our possessions should fall under the control of another. All that is best for a man lies beyond the power of other men, who can neither give it nor take it away.").

dorsement of Monotheism," but just believing doesn't make it so. APP014. The endorsement test turns not on the Plaintiffs' subjective observations, but on the observations of an objective, reasonable observer. Were it otherwise, "[n]early any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement." *Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring); *see also id.* at 33 (Rehnquist, C.J. and O'Connor, J., concurring). Relying on an objective observer has two important consequences.

First, contrary to Plaintiffs's assertions, it is possible for different people to interpret the Pledge differently. Just like the Ten Commandments monument at issue in *Summum*, the word "God" in the Pledge "may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 129 S.Ct. at 1135. "Under God" is "open textured": it is subject to a wide range of interpretations. H.L.A. Hart, The Concept of Law 124 (1961). Plaintiffs have made what Hart called the formalist response, "respond[ing] to that ambiguity in one of the two ways that Hart predicted—to ignore the ambiguity and insist that the term has one and only one meaning, monotheism—and even more precisely the God of Christianity." Anthony R. Picarello, Jr., *Establishing Anti-Foundationalism Through the Pledge of Allegiance*, 5 First Amendment L. Rev. 183, 186 n.8 (2006). (citing Hart at 126-27). Plaintiffs may not force the Court to adopt their *idée fixe*.

Second, the Supreme Court has held that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Epperson* v. *Arkansas*, 393 U.S. 97, 106 (1968). Courts, including this Court, have consistently rejected claims based on religious persons' objections to government speech: "Public schools are not obliged 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." *Parker* v. *Hurley*, 514 F.3d 87,106 (1st Cir. 2008).[12]

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[12] In *Altman* v. *Bedford Central School District*, for example, the Second Circuit rejected plaintiffs' Establishment Clause challenge to an Earth Day ceremony as a form of Earth worship, holding that "Respect . . . does not inevitably suggest religion." 245 F.3d 49, 78 (2d. Cir. 2001). Similarly, in *Fleischfresser* v. *Directors of School District 200*, the Seventh Circuit held that "it is not enough that certain stories in the series strike the parents as reflecting the religions of Neo-Paganism or Witchcraft, or reference Christian holidays. The Establishment Clause is not violated because government action happens to coincide or harmonize with the tenets of some or all religions." *Id.*, 15 F.3d 680, 689 (7th Cir.1994) (quotation omitted). *See also Kunselman* v. *Western Reserve Local Sch. Dist.*, 70 F.3d 931, 932 (6th Cir. 1995) (school's "Blue Devil" mascot did not advance religion); *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017, 1035 (10th Cir. 2008) (symbolism of city seal displaying crosses "is not religious at all"); *Crowley* v. *Smithsonian Institution*, 636 F.2d 738, 742-43 (D.C. Cir. 1980) (museum exhibit on evolution did not establish a religion of "Secular Humanism"). This principle has also been extended to challenges to the Pledge. *See Myers*, 418 F.3d at 408 (rejecting claim that Pledge violated plaintiff's Anabaptist Mennonite beliefs); *Keplinger* v. *United States*, 2006 WL 1455747 at *4 (M.D. Pa. May 23, 2006) (rejecting challenge to Pledge based on plaintiff's "non-Christian" belief that the "true name of worship" was "Yahweh").

Here, Plaintiffs ask specifically that the School District tailor the Pledge to match their religious beliefs. APP011 (claiming that Plaintiffs cannot attend government meetings "without being given the message that their religious beliefs are wrong"); APP015 (Pledge must be amended to "show equal respect to Plaintiff's religious beliefs"). The Court should reject their request.

Third, the fact that some of the Plaintiffs are children does not change the analysis. The "reasonable observer" standard does not become the "reasonable schoolchild" or "reasonable parent" standard when those observing the challenged governmental practice happen to be children. If a child does not understand what she is being exposed to, the remedy is an explanation of the practice rather than its termination. *See Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive."); *Rio Linda* at *23 (same).

c. Reciting the Pledge does not have the primary effect of coercing religious observance.

This Court should reject Plaintiffs' claim, Br. 29, that Plaintiffs have been subject to religious "coercion" of the sort that violated the Establishment Clause in *Lee* v. *Weisman*, 505 U.S. 577 (1992) and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000). Unlike here, those cases involved government-

sponsored prayer, not a statement of political philosophy. As the Ninth Circuit pointed out, "The Pledge is not a prayer and its recitation is not a religious exercise." *Rio Linda* at *23. Since "[c]hildren are coerced into doing all sort of things in school," *Lee* is applicable only where a religious observance is involved. *Id.* at *24. *Cf. Myers*, 418 F.3d at 407-8 ("the Pledge is a statement of loyalty" rather than a prayer, which "is a personal communication between an individual and his deity").

Plaintiffs have argued that there is a difference between compelled speech and coerced speech, *cf.* ADD004 n.1. But here at least, this is a distinction without a difference. New Hampshire law ensures that no child is compelled or coerced to say "under God" as part of the Pledge, or even to say the Pledge at all:

> II. … Pupil participation in the recitation of the pledge of allegiance shall be voluntary.
>
> III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate.

N.H. Rev. Stat. Ann. § 194:15-c.

Plaintiffs admit that their children were never "actually compelled" to say the words "under God," nor have they alleged that they ever did say the Pledge. APP014. Plaintiffs also make no claim that the School District is doing anything other than what is prescribed by the New Hampshire School Patriot Act. Thus Plaintiffs' position is that remaining silently seated while others voluntarily recite

the Pledge is inherently coercive; reciting the Pledge cannot be voluntary. If this is so, then removing the words "under God" from the Pledge would offer no remedy, because some students believe that pledging allegiance is idol worship. If Plaintiffs' theory of coercion were correct, then the Jehovah's Witness plaintiffs in *West Virginia Board of Education* v. *Barnette* were being coerced even after the Court ruled in their favor. In *Barnette*, of course, the remedy given was not to outlaw the Pledge altogether, but to allow the Jehovah's Witness children to opt out of participating. 319 U.S. 624, 629 (1943). Since that is precisely the choice Plaintiffs have, they can claim no coercion, nor any license to silence the speech of others.

Moreover, mere exposure to religious ideas contrary to Plaintiffs', or any other merely subjective "feeling" Plaintiffs have, can amount to legally cognizable "coercion" within the meaning of the Establishment Clause. *See Parker*, 514 F.3d at 106 (1st Cir. 2008); Section I.A.5.b *supra.*

Perhaps most tellingly, Plaintiffs have not brought a compelled or coerced speech claim under the Free Speech Clause, which looks to whether a government action "effects a forced association between the speaker and a particular viewpoint." *Pharmaceutical Care Management Ass'n* v. *Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (citing *Wooley* v. *Maynard*, 430 U.S. 705, 715 (1977)). *Cf. Bennett* v. *Yoshina*, 140 F.3d 1218, 1227-28 (9th Cir. 1998) (refusal to tailor ballot counting to voter's demands did not constitute "coerced speech"); *Choose Life Illinois, Inc.*

v. *White*, 547 F.3d 853, 862 (7th Cir. 2008) (describing *Wooley* as a "coerced speech" case). Given how willing they have been to bring a variety of claims before the Court, this omission indicates that Plaintiffs don't really believe that they are being coerced to say something they don't want to.

6. Stripping "under God" from the Pledge would demonstrate hostility towards religion and engender religiously based divisiveness.

In addition to considering "endorsement" and "coercion" in Establishment Clause cases, the Supreme Court has occasionally asked whether a particular action would demonstrate hostility toward religion or create religiously based divisiveness. *See Lynch*, 465 U.S. at 673 (stating that the Constitution "forbids hostility toward any [religions]"). In *Van Orden* v. *Perry*, for example, Justice Breyer's controlling concurrence expressed a concern that "the relation between government and religion" be "one of separation, but not of mutual hostility and suspicion . . . ." *Van Orden*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring). Rejecting a bright-line test in "difficult borderline cases," Justice Breyer emphasized that judges must evaluate whether their "conclusion[s]" would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," or whether their holdings would "encourage disputes . . . thereby creat[ing] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704 (citing *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 717-729 (2002)) (Breyer, J., dissenting)).

Contrary to Plaintiffs' two-sentence argument on this point (Br. 34), this "hostility" test cuts strongly in favor of upholding the Pledge. In *Van Orden* Justice Breyer relied on the test to *reject* an Establishment Clause violation. Both options before this Court—enjoining recitation of the Pledge or allowing it to continue—have the potential to create division. But on balance, leaving the Pledge as it is will create less. *See* David Stout, *Congress Defiant Over Ban on Pledge of Allegiance*, N.Y. Times (June 27, 2002) (describing widespread negative reaction to Ninth Circuit decision invalidating Pledge). Plaintiffs admit as much. Br.39 (describing "political firestorm"). Indeed, enjoining recitation of the Pledge would send a powerful message that the word "God"—and thus any words or concepts that are even arguably religions—are unwelcome in a government context. This is just such "hostility toward the religious viewpoint" that the Supreme Court has condemned. *Good News Club*, 533 U.S. at 118. *Cf. Boyajian*, 212 F.3d at 5 ("This does not mean that the law's purpose must be unrelated to religion—that would amount to a requirement that the government show a callous indifference to religious groups.") (quotation omitted).

Another "determinative" factor indicating that the Pledge is not "divisive" in Justice Breyer's view is the fact that reciting the Pledge has gone largely "unchallenged" during the 56 years it has included the words "under God." *Van Orden*, 545 U.S. at 702. It is hardly surprising that a practice of such ubiquity has resulted

in some litigation, but approximately five lawsuits brought in 56 years is a very low number. The ratio of litigation to the frequency and ubiquity of the activity is exceptionally low, and certainly lower than the Ten Commandments monument at issue in *Van Orden*. Indeed, one can easily apply the text of Justice Breyer's opinion to the Pledge itself:

> Those [56] years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [Pledge] as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief."

Id. at 702 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)) (third and fourth alterations in original).

Like the monument in *Van Orden*, reasonable observers are likely to have seen the Pledge "as part of what is a broader moral and historical message reflective of a cultural [and political] heritage," not as an attempt to establish a particular religion. *Id.* at 703. As demonstrated in Section I.A *supra*, this "heritage" is one bequeathed by the Founders that should not be spurned lightly.

B. The predominant purpose of the Pledge is not to advance religion but to express American values and encourage patriotism.

Reciting the Pledge not only has a primarily secular effect, but also serves a secular legislative purpose. Under *McCreary County*, a government action has a secular legislative purpose if, in light of its history and context, its "ostensible and

predominant purpose" is something other than "advanc[ing] religion." *McCreary County* v. *ACLU of Kentucky*, 545 U.S. 844, 860 (2005). Here, the relevant governmental purpose is entirely secular—namely, to foster patriotism and express American values.

1. The relevant purpose under the Establishment Clause is the School District's purpose in enacting the Pledge policy, not Congress's purpose in adding and later reaffirming the words "under God."

The first question to answer in determining purpose is "whose purpose"? The purpose cannot be a private person's, or even an individual legislator's: "ultimately it is the purpose of the government *decision-makers* that is most important." *ACLU* v. *Grayson County, Kentucky*, 591 F.3d 837, 850 (6th Cir. 2010) (emphasis added). *See also Modrovich* v. *Allegheny County, Pa.*, 385 F.3d 397, 411 (3d Cir. 2004) ("[O]ur focus is on the motivations of the current County officials who have *power over* the decision.") (emphasis added); *Green* v. *Haskell County Bd. of Comm'rs*, 568 F.3d 784, 800 n.10 (10th Cir. 2009) n. 10 ("focus is on the government actor's conduct rather than the private citizen's.") Thus where there are several different government actors involved, it is the government imposing the policy complained of that must answer.

The relevant government here—the one actually leading Pledge recitation, and the one with the power to remedy Plaintiffs' alleged injury—is Hanover School District, not the State of New Hampshire or the United States. Plaintiffs did not sue

the State. Their claims against the United States were dismissed for lack of standing, and they have not appealed from that ruling. Docket No. 44. Thus only the School District's purpose is relevant.

2. The School District's purpose was to comply with state law, not to advance religion.

As an initial matter, Plaintiffs nowhere claim that the *School District's* purpose for leading Pledge recitation was religious. Br.21-24 (referring only to Congress's purpose in 1954). Indeed, Plaintiffs allege only that the School District leads the Pledge recitation "[p]ursuant to" the New Hampshire School Patriot Act. APP10.

That is because the only "ostensible and predominant purpose" a "reasonable observer" could see in the School District would be in the mandatory implementation of the New Hampshire School Patriot Act. That law describes recitation of the Pledge as "a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state." N.H. Rev. Stat. Ann. § 194:15-c. Mere compliance with a state patriotic observance statute evinces a secular purpose. *See Elk Grove*, 542 U.S. at 30; *Rio Linda* at *6 (secular purpose was "to encourage the performance of patriotic exercises in public school"). Indeed, the School District's apparent lack of enthusiasm for defending the district court's judgment on appeal, *see* Letter of David H. Bradley (filed Nov. 23, 2009), indicates that its purpose in leading Pledge recitation was nothing more than mere compliance with state law.

Plaintiffs have also conceded that the *State*'s purpose in enacting the New Hampshire School Patriot Act was entirely secular. Br. 21. Thus the only thing Plaintiffs have to go on is their estimation of Congress's purpose in 1954. But it is hard to imagine, absent some theory of the transmigration of purposes, how Congress's purpose in 1954 could be attributed to the School District in 2010. Nor do Plaintiffs make an effort to explain the connection. Br. 21-24. For example, had New Hampshire instead required the School District to recite the preamble to the Declaration of Independence—a practice Plaintiffs would presumably also oppose—it would make no sense for this Court to look to the statements of individual signers of the Declaration in order to divine their purpose for using terms such as "Nature's God," "Creator," and the like. The relevant purpose would be that of the State or the School District.

3. Congress's purpose in enacting the Pledge as a whole was to express national values and encourage patriotism.

Even assuming Congress's purpose were attributable to the School District, there would be no Establishment Clause violation. Plaintiffs argue, based on language in the House Report and in President Eisenhower's signing statement, that Congress's predominant purpose in 1954 was to make a creedal statement about the existence of a revealed deity. Br. 21-24.

There are two major errors in this approach. First, as the Ninth Circuit pointed out in *Rio Linda*, the relevant purpose is that of the Pledge "as a whole"—not just

the phrase "under God." *Rio Linda* at *7-11. *Cf. In re Pharmaceutical Industry Average Wholesale Price Litigation*, 588 F.3d 24, 39 (1st Cir. 2009) (Court "interpret[s] statutes according to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole") (internal quotation omitted). When viewed as a whole, the Pledge is a statement of various ideals of American political philosophy: loyalty ("allegiance"); republicanism ("to the Republic"); union ("one nation"; "indivisible"); and freedom and equality ("liberty and justice for all"). Viewed in this context, the words "under God" are an additional statement of political philosophy, in this case an invocation of the natural rights philosophy described in the Declaration of Independence.

Second, Plaintiffs err by cherry-picking the historical record regarding the phrase "under God." As explained below, a full view of the historical record indicates Congress added the phrase "under God" to express the nation's longstanding commitment to a political philosophy of natural rights.

4. Congress's purpose in adding and later reaffirming the words "under God" was to express a political philosophy of natural rights.

As Justice O'Connor concluded, even a cursory examination of the legislative history and context of the 1954 Amendment reveals a secular purpose. *Elk Grove*, 542 U.S. at 41 (O'Connor, J., concurring) ("[T]hose legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and the dignity of

the human being.'") (quoting H.R. Rep. No. 1693, 83d Cong., 2d Sess., 1). In particular, as explained above (in Section I.A.4), the legislative history reveals that the words "under God" were added to the Pledge at the height of the Cold War, not to promote religious beliefs, but with the purpose of "textually reject[ing] the communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 1693, at 2.

By adding the words "under God," Congress served the permissible secular purpose of orienting the Pledge within the Framers' political philosophy that Americans have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. As the House of Representatives Report put it: "Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 1693, at 1-2.

Moreover, as the *Rio Linda* court pointed out, Congress's purpose must be derived in the first instance from the *2002* version of the Pledge statute, since that is the law in force at the time the lawsuit began. *Rio Linda* at *11. Reviewing the new statute, the Ninth Circuit held that:

> These findings make it absolutely clear that Congress in 2002 was not trying to impress a religious doctrine upon anyone. Rather, they had two main purposes

> for keeping the phrase "one Nation under God" in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse.

Id. at *15. In *Boyajian*, this Court took the same approach to Massachusetts' Dover Amendment, holding that "Our task is to consider the validity of the statute before us, not the one enacted fifty years ago." *Id.*, 212 F.3d at 7 (citing *Walz*, 397 U.S. at 688 n.8 (1970)).

This approach leads to the same conclusion: Congress included the phrase "under God" in order to tap into and memorialize the nation's longstanding commitment to a political philosophy of natural rights. The "God" of the Pledge is not the God of any particular religion, but "Nature's God"—the source of our natural rights and the foundation of limited government. Discussing and expressing a philosophy of inherent, fundamental rights is a secular purpose that is not only permissible, but admirable in a free society.

II. Hearing other children say the Pledge does not violate Plaintiffs' Free Exercise, Equal Protection or "parenthood" rights.

Plaintiffs' additional arguments are ancillary to the appeal. Plaintiffs' claim that voluntary recitation of the Pledge in school violates their right to free exercise of religion contradicts both *Barnette* and multiple courts of appeals. *See*, *e.g.*, *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1534 (9th Cir. 1985) (rejecting Free Exercise claim where school district refused to remove book from public school

curriculum despite parents' religious objections); *Fleischfresser*, 15 F.3d at 690 (same). If religious objections to curriculum content sufficed to make out a Free Exercise claim, public schools would be hard-pressed to teach anything at all. *Cf.* Section I.A.5.b *supra*. The solution in *Barnette*—which involved a Free Exercise claim—is to allow students to opt out of saying the Pledge.

Plaintiffs' Equal Protection claim founders for two reasons. First, Plaintiffs have shown no differential treatment, the touchstone of any Equal Protection claim. *See In re Subpoena to Witzel*, 531 F.3d 113, 118-119 (1st Cir. 2008) ("plaintiff must establish that the defendant intentionally treated the plaintiff differently from others who were similarly situated.") Their children are treated exactly the same as the other children who say the Pledge—they are given the free choice to participate or not, as their consciences dictate. Plaintiffs admit, as they must, that "it is a threat of conscience, rather than a threat of police action, that keeps them" from saying the Pledge. Br. 62. But without differential treatment, they cannot claim that they have been denied equal protection of the laws.

Second, their argument proves far too much. Plaintiffs' theory would render even their preferred version of the Pledge unconstitutional under the Equal Protection Clause, since Jehovah's Witnesses believe that reciting either version of the Pledge is idol worship. *Barnette*, 319 U.S. at 629. That they hear others engage in idol worship cannot be enough to raise an Equal Protection claim.

Finally, on appeal Plaintiffs do not flesh out their vague "general right of parenthood" claim any more than they did before the district court, devoting all of four sentences to it. Br. 63. The Court is not required to address claims Plaintiffs don't bother to explain. *See United States* v. *Gonzalez-Velez*, 587 F.3d 494, 502 n.4 (1st Cir. 2009) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

CONCLUSION

Thousands of schoolchildren visit the Lincoln Memorial every year. Their teachers lead them up the steps to see the statue of Lincoln and to read the words carved into the walls of the Memorial. On the left is the Gettysburg Address, with its reference to a "nation under God." On the right is the Second Inaugural Address, with its claim that the carnage of the Civil War was punishment for American law's transgression against the laws of Nature and Nature's God. As they look up at Lincoln's words, these schoolchildren are being taught certain values. But the values they are learning are not any one religion's; they are the values of the Republic. They are receiving a political, not a theological, education.

The Court should be under no illusions: Plaintiffs claim that their children should not have to hear teachers and classmates voluntarily recite a political statement solely because it mentions God. The logic of their claim would require that

similar words of Lincoln be chiseled out of the walls of his Memorial, muting perhaps the greatest voice for freedom this country has ever known. To avoid saying the "offensive" word "God," teachers would have to remain silent about the natural law underpinnings of the American Revolution, the Constitution, abolitionism, and the civil rights movement.

But this Court need not accept Plaintiffs' claim or its logic. Whatever test may apply here, the Court should declare that the Establishment Clause does not bar the government from proclaiming a political philosophy and using the word "God" to do it. Nor does it require Americans to forget their past.

The Court should therefore affirm the judgment below on the basis that the Pledge (a) reiterates the venerable American political philosophy of natural rights and , and (b) is a memorial of that philosophy's place in American history.

Respectfully submitted,

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THE BECKET FUND FOR RELIGIOUS LIBERTY

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2010, the foregoing brief was served on all counsel by means of the Court's CM/ECF system.

Dated: April 7, 2010

s/ Eric C. Rassbach
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman typeface.

Dated: April 7, 2010

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