Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-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/INTERVENERS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF THE DEFENDANTS/INTERVENERS-APPELLEES, 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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the Knights of Columbus states that it has no parent corporation and that it does not issue stock.

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STATEMENT OF THE ISSUES

I. Whether the Superior Court correctly held that voluntary, optional recitation of the Pledge of Allegiance in the presence of Plaintiffs does not constitute religious discrimination against them in violation of the Equal Rights Amendment of the Massachusetts Constitution.

II. Whether the Superior Court correctly held that voluntary, optional recitation of the Pledge of Allegiance in the presence of Plaintiffs does not constitute religious discrimination against them in violation of G.L. c. 76, § 5.

STATEMENT OF THE CASE

Plaintiffs Jane and John Doe, their children, and the American Humanist Association filed an original complaint against Defendants Acton-Boxborough Regional School District, Town of Acton Public Schools, and Dr. Stephen E. Mills in the Middlesex Superior Court on November 10, 2010, A. 3, and an amended complaint on January 15, 2011. A. 27. Plaintiffs claimed that Defendants' practice of leading schoolchildren in the voluntary recitation of the Pledge of Allegiance in accordance with Massachusetts law violates the equal protection provision of the Commonwealth's

constitution (Mass. Const. amend. art. 106), the Commonwealth's educational access requirement (G.L. c. 76, § 5), and Defendants' own nondiscrimination policy. A. 15-25. The complaint demanded, *inter alia,* that the court: 1) declare that the Pledge of Allegiance violates the equal protection rights of humanists and atheists; 2) order the Defendants to forbid classroom recitation of the present form of the Pledge of Allegiance; 3) order the Defendants to endorse patriotic ceremonies only if those ceremonies do not refer to God; and 4) declare that removing "under God" from the Pledge of Allegiance does not violate the equal protection rights of individuals such as Interveners. A. 18-19.

Defendants filed an answer on July 7, 2011, A. 28, and a motion to dismiss on February 11, 2011, A. 4. The Superior Court denied the motion to dismiss on May 25, 2011. A. 4.

Daniel and Ingrid Joyce, and their children, along with the Knights of Columbus, filed a timely motion to intervene on October 21, 2011, seeking to protect their substantial interests at stake in this case. A. 4. Interveners filed an answer on October 25, 2011. A. 49. In January 2012, all parties filed

motions for summary judgment pursuant to Mass. R. Civ. P. 56 (A. 50; A. 171; A. 175), and the Superior Court heard the motions on February 13, 2012. A. 5. On June 5, 2012, the court allowed the Defendants' motions for summary judgment and denied Plaintiffs' motion. A. 208. On June 12, 2012, the court issued a judgment declaring that the daily Pledge recitation does not violate the State Equal Protection Clause, the nondiscrimination statute (G.L. c. 76, § 5), or Defendants' nondiscrimination policy. A. 232.

Plaintiffs subsequently filed a timely Notice of Appeal. A. 233. On appeal, Plaintiffs continue to pursue their Equal Protection and G.L. c. 76, § 5 claims, but no longer urge their claim based on Defendants' own non-discrimination policy. Pl. Br. 1.

STATEMENT OF FACTS

The material facts in this case are largely undisputed.[1]

[1] Interveners note, however, their disagreement with parts of Plaintiffs' statement of the facts, in particular Plaintiffs' tendentious "fact" that the Pledge is a religious statement that establishes a "theistic supremacy." Pl. Br. 8-9. Interveners also dispute Plaintiffs' factual claim that they have suffered an injury. Pl. Br. 10.

The Parties

Plaintiffs Jane Doe and John Doe are residents of the town of Acton. A. 59, ¶¶ 1-3. Their three children live with their parents. A. 59, ¶ 3. The children attend public schools in Acton that are governed and administrated by Defendants. A. 60, ¶ 9.

The Does hold to Humanism as their religious "world view." A. 63, ¶ 2; A. 70, ¶ 1. They reject belief in the existence of a deity. A. 63, ¶ 1; A. 70, ¶ 1. They believe that the content of the Pledge of Allegiance "directly contradicts the religious beliefs of [their] family." A. 65, ¶ 13, A. 71, ¶ 7.

Plaintiff American Humanist Association is a nonprofit membership organization incorporated in Illinois with a principal place of business in Washington, DC. A. 7.

Defendants Town of Acton-Boxborough Regional School District and Town of Acton Public Schools are public school systems in Acton. A. 59, ¶¶ 4-5. Defendant Stephen E. Mills, Superintendent of Schools, is chief executive officer of the Acton-Boxborough Regional School District and the Town of Acton Public Schools, and is responsible for enforcing all rules

and regulations relating to management of the Acton-Boxborough public schools. A. 59, ¶ 6.

Interveners D. Joyce and C. Joyce are Acton-Boxborough School District students and residents of the Town of Acton, located in Middlesex County, Massachusetts. Their parents, Daniel Joyce and Ingrid Joyce, are also residents of Acton. A. 59, ¶ 7. The Joyces believe that the Joyce children's education will be diminished if they are not able to say the full Pledge. A. 145.

The Knights of Columbus is a Connecticut tax-exempt corporation. A. 60, ¶ 8. The Knights have 41,000 members in Massachusetts, including the town of Acton, at least one of which has a child attending Acton-Boxborough public schools. A. 41, ¶ 5. The Knights were one of the organizations responsible for the adoption of the Pledge in its present form and have defended the constitutionality of the Pledge and its daily recitation in public schools in Massachusetts and around the country. A. 41, ¶ 5.

The Pledge

Massachusetts General Laws, c. 71, § 69 was amended in 1935 to require public schools to lead students in saying the Pledge of Allegiance. G.L.

c. 71, § 69 ("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.'").

In 1943, the Supreme Court held in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), that religious objectors could not be compelled to recite the Pledge, and this Court has confirmed that rule applies to Massachusetts public schools. *Attorney General* v. *Desilets*, 418 Mass. 316, 333 n.14 (1994).

Since 1954, the Pledge has consisted of the following language, codified at 4 U.S.C. § 4: "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." A. 60, ¶¶ 10-11.

When it amended the Pledge in 1954 to include the phrase "under God," Pub. L. No. 83-396, Congress stated in its official report that it did so in order to draw a contrast between the American system, which presumed preexisting rights that are secured, not created by the government, and the Soviet system, where the government saw itself as the creator of rights:

> 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. 83-1693, at 1-2 (1954); *see also id.* at 2 (describing contrast with Soviet system). *Cf.* Declaration of Independence, preamble ("[A]ll men are created equal, . . . [and] are endowed by their Creator with certain unalienable Rights"); 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) ("[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.").

In 2002, Congress reiterated this understanding when it amended the Pledge statute again. *See* Pub. L. No. 107-293 (2002) (amending Pledge statute to describe in greater detail Congress' reasons for including "under God" in the Pledge); *cf. Newdow* v. *Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1019 (9th Cir. 2010) (relying in part on 2002 amendment in decision upholding the Pledge).

The Present Dispute

Plaintiffs object to the content of the Pledge. A. 16. Specifically, Plaintiffs object to the words "under God," stating that they "feel excluded and marginalized" by the words, A. 66; A. 71, which they say "maintain a 'theistic supremacy'" in public schools. Pl. Br. 9. It is undisputed that Defendants do not compel any student to recite the Pledge. A. 66; A. 72; A. 74, 76, 78. Plaintiffs currently exercise their right to opt out of saying the words "under God." A. 75, 76, 78.

Plaintiffs, motivated by their beliefs about the Pledge, requested that Defendants end recitation of the Pledge in Defendants' schools that they attend. Defendants declined, explaining that they were bound by Massachusetts law to lead children in reciting the Pledge. A. 14, 142.

Plaintiffs then filed this lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal is the latest in a series of lawsuits in which Plaintiff American Humanist Association and others have attempted to make it illegal for public schools to lead students in voluntary recitation of the Pledge of Allegiance as it is defined by 4 U.S.C.

§ 4.[2] Every one of the previous lawsuits was dismissed, so Plaintiffs have taken a different tack here. Instead of suing under the *federal* Establishment Clause and Equal Protection Clause, they seek to have the Pledge invalidated under the *Commonwealth's* equal protection clause and antidiscrimination statute.

Both of Plaintiffs' remaining claims boil down to this claim: Having to hear other people voluntarily say the Pledge of Allegiance violates Plaintiffs' rights under the laws of Massachusetts. Yet since 1943, the federal Constitution has forbidden government officials from forcing anyone to say the Pledge, and Plaintiffs have freely exercised their right to opt out of saying the words they object to. Thus, this case is not about whether government may force Plaintiffs to do something, but instead about whether Plaintiffs can force *other* schoolchildren, including Interveners, not to say the Pledge even though they want to.

There are several reasons this novel claim must fail. First, Plaintiffs' claim that the Pledge, G.L. c. 71, § 69, and Defendants' Pledge policy classify

[2] *See, e.g.*, Brief of Am. Humanist Ass'n *et al.* as *Amici Curiae*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004).

students on the basis of religion is simply false. Neither the Pledge, nor G.L. c. 71, § 69, nor Defendants' Pledge policy make any classifications on their face, religious or otherwise.

In the same vein, Plaintiffs claim that the Pledge's reference to God creates a discriminatory "theistic supremacy" in Massachusetts schools. In reality, the Pledge is neither a prayer nor a creed, but a statement of America's guiding political philosophy. Including a reference to God in such a statement does not act to classify students on the basis of religion. (pp. 11-28 *infra*).

Second, because the challenged laws are facially neutral, to prevail Plaintiffs would have to show that Defendants *intentionally* discriminated on the basis of religion. But Plaintiffs presented no summary judgment evidence of intentional discrimination by Defendants, nor could they have. (pp. 28-29 *infra*).

Third, Plaintiffs did not offer any evidence of similarly situated individuals who were treated differently than them. That failure is by itself fatal to their Equal Protection claim. (pp. 30-31 *infra*).

Fourth, the Pledge withstands both rational basis scrutiny (an argument Plaintiffs have waived), and strict scrutiny. (pp. 31-38 *infra*).

Fifth, granting Plaintiffs' remedy would put Massachusetts law in conflict with federal law. (pp. 38-49 *infra*).

Finally, the Court should reject Plaintiffs' one-page argument that the Pledge statute, Massachusetts' Pledge law, and Defendants' Pledge policy have been invalidated by G.L. c. 76, § 5. Not only does Plaintiffs' argument violate the rule that different statutes should be harmonized if at all possible, it also founders for lack of discrimination. (pp. 49-50 *infra*).

ARGUMENT

I. Hearing other children voluntarily recite the Pledge of Allegiance does not implicate, much less violate, Plaintiffs' equal protection rights.

On appeal, Plaintiffs' remaining Equal Protection claim under Mass. Const. amend. art. 106, is quite narrow. Under Massachusetts law, which tracks federal Equal Protection jurisprudence, "[w]here a statute either burdens the exercise of a fundamental right protected by our State Constitution, or discriminates on the basis of a suspect classification, the statute

is subject to strict judicial scrutiny." *Finch* v. *Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 668-69 (2011) (citations omitted). "All other statutes . . . are subject to a rational basis level of judicial scrutiny." *Id.* at 669 (citations omitted).

Here, Plaintiffs do not claim that the exercise of a fundamental right has been burdened, so that claim has been waived. *See Finch*, 459 Mass. at 669 n.13 (fundamental right argument waived because not raised). Similarly, Plaintiffs make at most a cursory argument, Pl. Br. 43, that the federal Pledge statute, G.L. c. 71, § 69, or Defendants' Pledge practices would fail rational basis review, so any such claim is likewise waived. *See Shedlock* v. *Dept. of Corr.*, 442 Mass. 844, 865-66 (2004).

Thus, the only way Plaintiffs can prevail is to prove that the federal Pledge statute, G.L. c. 71, § 69, and Defendants' Pledge practices, taken together, discriminate on the basis of a suspect classification. That hurdle is insuperable because the laws in question do not contain classifications, nor do they concern religion. Indeed, all three laws are "neutral on [their] face," *Fedele* v. *Sch. Comm. of Westwood*, 412 Mass. 110, 116 (1992), and Plaintiffs

have not attempted to show that the facially neutral laws at issue were *intended* to discriminate on the basis of religion. *Id.*

Plaintiffs' claim of religious classification also fails because they have not even attempted to identify similarly situated others who have been treated differently than Plaintiffs. Without that showing their claim must fail.

A. The federal Pledge statute, Massachusetts' Pledge law and Defendants' Pledge policies do not on their face constitute a classification.

The linchpin of Plaintiffs' case is their claim that the Pledge of Allegiance creates separate classes of people based on religion. This is wrong for several reasons.[3]

1. The Pledge contains no language classifying people according to religion.

The first reason there is no classification is because the Pledge, the Massachusetts Pledge law, and

[3] As Plaintiffs note, Pl. Br. 17, whether religion constitutes a suspect class under Massachusetts law is a question of "first impression." This Court need not reach the question, because as we demonstrate, the Pledge does not create a classification nor does it concern religion. Plaintiffs' claim that the Superior Court improperly failed to treat religion as a suspect class, Pl. Br. 17, is false and also begs the question before the Court, *i.e.* does the Pledge create a classification on the basis of religion?

the Defendants' Pledge practices simply do not purport to classify people at all. Plaintiffs can point to no language in any of the three laws they challenge that purports to treat one group of people differently than another group of people. Yet this is the *sine qua non* of a facial classification in Equal Protection jurisprudence. *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 366 (2006) ("All other statutes, which neither burden a fundamental right nor discriminate on the basis of a suspect classification, are subject to a 'rational basis' level of judicial scrutiny.").

The only actual words Plaintiffs rely on to claim a discriminatory classification are "under God." Pl. Br. 8. But on their face those two words cannot be said to classify people into different groups, any more than the word "allegiance" can be said to classify people into groups of citizens and non-citizens.[4] In short, Plaintiffs' claim that the Pledge

[4] Plaintiffs' implied argument that the Superior Court found there was a classification, Pl. Br. 19, is not an accurate description of the Superior Court's decision. In truth the Court simply did not address whether the Pledge created a classification or not, focusing only on whether the Pledge concerned religion. A. 226. More importantly, since review in this Court is *de novo*, this Court must separately examine the record to determine whether a classification exists.

classifies people into different groups fails the common sense test.

First Circuit precedent confirms this. In an opinion by Chief Judge Lynch, the First Circuit dismissed an almost identical Equal Protection challenge to Pledge recitation in public school:

> Invoking the Equal Protection Clause, FFRF 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." . . . Therefore, FFRF's equal protection claim fails.

Freedom From Religion Found. v. *Hanover Sch. Dist.*, 626 F.3d 1, 14 (1st Cir. 2010).

Plaintiffs claim the First Circuit got Equal Protection jurisprudence wrong in the *Hanover* case, Pl. Br. 27 n.20, but this argument is based on their erroneous belief that "stigmatization alone" can

present an Equal Protection violation. *See infra* Section I.A.4.[5]

2. The right to opt out of the Pledge under *Barnette* does not create a classification.

Plaintiffs attempt to argue that the right to opt out of the Pledge established by *Barnette* itself creates a discriminatory classification. Pl. Br. 30 n.25 (*Barnette* opt-out "denies some students the fair opportunity to fully participate"). But the fact that saying the Pledge of Allegiance is entirely voluntary can hardly be held against it. All students are allowed to say the Pledge of Allegiance, and all are allowed to opt out of saying it. *Hanover*, 626 F.3d at 9 (schools may not require recitation of the Pledge).

There are many reasons students might opt out, and no one is asked to give a reason for opting out. The First Circuit's reasoning in *Hanover* is relevant

[5] Plaintiffs also argue, Pl. Br. 26, that federal Equal Protection jurisprudence is completely detached from Massachusetts Equal Protection jurisprudence, but this is plainly wrong. *See, e.g.*, *Commonwealth* v. *Weston W.*, 455 Mass. 24, 30 (2009) ("The standard for equal protection analysis under our Declaration of Rights is the same as under the Federal Constitution."). *Goodridge* did not diverge from this approach. *See Goodridge* v. *Department of Public Health*, 440 Mass. 309, 330 (2003) (describing method of equal protection analysis identical to federal analysis). Where Massachusetts law diverges is in its recognition of certain protected classes in Mass. Const. amend. art. 106. *See Finch*, 459 Mass. at 662.

to this point: "[C]hildren who choose not to recite the Pledge [do not] become outsiders based on their beliefs about religion." *Id.* at 10. Indeed, the First Circuit recognized that there are a number of reasons students might not want to say the Pledge. "These include political disagreement with reciting the Pledge, a desire to be different, a view of our country's history or the significance of the flag that differs from that contained in the Pledge, and no reason at all." *Id.* at 10-11.

3. The Pledge also does not classify people on the basis of religion because it is a statement of political philosophy, not a religious statement such as a creed or prayer.

Plaintiffs' claim that the Pledge of Allegiance creates a discriminatory classification based on religion also rests on the premise that the Pledge is religious in nature. But the Pledge of Allegiance is not a creed or a prayer. Rather, it is a statement of political philosophy, a patriotic exercise that does not classify religious believers or nonbelievers. The words "under God" do not turn the Pledge into a prayer any more than the words "God save this honorable Court" turn a hearing into a religious ceremony.

On this point, the Superior Court meticulously evaluated the history of both 4 U.S.C. § 4 and G.L. c. 71, § 69, in order to determine the intent of both legislatures and the characteristic of the Pledge as a whole. A. 215-222. The Superior Court concluded that "the Pledge is not a religious exercise, and, in that context, the daily recitation of 'under God' does not constitute an affirmation of a 'religious truth.'" A. 224. The court did not hold simply that the Pledge is constitutional because it "as a whole does not amount to a 'prayer,'" as Plaintiffs claim, Pl. Br. 20.

When analyzing what the Pledge does, the Court must look at the entire Pledge. Whether the Pledge creates distinctions based on religion or unfairly burdens any particular religious group depends on the meaning of its words, which are in turn influenced by its historical and modern context as a patriotic statement of philosophy. Viewed holistically, the Pledge demonstrates its own neutrality toward religious classes in three ways.

a. The Pledge does not purport to be a religious creed or prayer.

First, the plain text of the Pledge cannot be understood to be a religious creed or prayer. The Pledge does not set forth propositions about God, man,

and the State to be proved or disproved; it announces political presuppositions about the nature of American government. Thus, it is one of those "institutions" that "presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952) (Douglas, J., concurring). This indicates what is perhaps Plaintiffs' greatest mistake—their erroneous perception that the Pledge is designed to "declare" the existence of God. Pl. Br. 8. The Pledge's text does not purport to do anything of the sort.

b. The legislative history of the federal and Massachusetts Pledge statutes demonstrate that the Pledge is designed to be a statement of political philosophy, not a religious statement such as a creed or prayer.

Second, the legislative history of the Pledge shows that it was intended by Congress and by the Massachusetts legislature as a statement of political philosophy and loyalty to this nation. Congress made this clear at the time the words 'under God' were added to the Pledge. *See* H.R. Report No. 83-1693 (1954) ("The inclusion of God in our pledge . . . 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."). Congress reaffirmed that position in 2002 when it reenacted the language of the Pledge. Pub. L. 107-293, §1(1)-(16), 116 Stat. 2057, 2060; *see* H.R. Report No. 107-659 at 5 ("The Pledge of Allegiance is not a religious service or prayer, but is a statement of historical beliefs."). *See also* Op. at A. 217-222.

c. The historical context of the Pledge and the words "under God" show that it is a statement of political philosophy, not a religious statement.

Third, the context of the words "under God" in the nation's history demonstrates that it is a statement of political philosophy rather than a religious creed or prayer. Courts have consistently held that the Pledge is not a religious creed or prayer. *See*, *e.g.*, *Rio Linda*, 597 F.3d at 1014 ("we find the Pledge is one of allegiance to our Republic, not of allegiance to the God or to any religion"); *Hanover*, 626 F.3d at 8 ("The Pledge and the phrase "under God" are not themselves prayers, nor are they readings from or recitations of a sacred text of a religion.").

Plaintiffs claim these cases are "simply irrelevant" and fault the Superior Court for even examining them, wrongly claiming that the Superior Court had an "incorrect belief that the plaintiffs' arguments are identical to those in [*Hanover*] and [*Rio Linda*]." Pl. Br. 23-24 (citing Superior Court at A. 213 n.10). This misrepresents the Superior Court's decision, which expressly recognized that those decisions "do not serve as binding authority" and concerned different, federal constitutional claims. A. 213 n.10. But as the Superior Court held, it makes sense to read those cases as "instructive" because Plaintiffs' claim hinges on a common question: whether the Pledge is in fact religious. *Id.*

The first use of the phrase "under God" came in the earliest known compendium of English law, dating from the 13th Century. Bracton stated that "[t]he king must not be under man but under God and under the law, because law makes the king." Bracton, 2 De Legibus Et Consuetudinibus Angliae 33.[6] Since the King embodied the government in his person at that time, this first

[6] A variation of this phrase is carved into the pediment of the Harvard Law School Library: "*non sub homine sed sub deo et lege*." Surely the Harvard Law School does not thereby institute a religious classification.

English legal writer was already limiting government by declaring it to be "under God and the Law." *Id.* 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***." *Prohibitions Del Roy*, 77 Eng. Rep. 1342, 1343 (K.B.1608).

This understanding of the nature and limits of governmental power suffused the intellectual world of the Founders. For example, Thomas Jefferson's defense of the American Revolution in the Declaration of Independence proceeds from the "self-evident" truth that all persons "are endowed by their Creator with certain unalienable rights." *Declaration of Independence*, para. 2. Those unalienable rights justified the Revolutionaries' disregard of the positive law of England.

The phrase "under God" appears frequently in the writings of the Revolutionaries. George Washington

used the phrase "under God" itself 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 statement of the idea 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 blessing 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.

1 *Elliot's Debates* 100 (2d ed. 1854).

[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.

Similarly, at each stage of the abolitionist movement, its leaders called on those inalienable rights as a justification for their attacks on the constitutional order. Later Chief Justice Salmon P. Chase argued in his briefing on behalf of John Van Zandt, who had been charged with violating the Fugitive Slave Act, 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. *Vanzandt*, 2 McLean 596 (Ohio Cir. Ct. 1843). When the case reached the Supreme Court, Chase argued: "No court is bound to enforce unjust law; but to the contrary every court is bound, by prior and superior obligations, to abstain from enforcing such laws." Argument for the Defendant, *Jones* v. *Van Zandt*, 46 U.S. 215 (1847).[8]

President Lincoln, would have been aware of this tradition when he used the words "under God" in the Gettysburg Address, stating, "this nation, ***under God***, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall

[8] The Court rejected this argument on positive law grounds. *Id.*

not perish from this earth." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), *reprinted in Abraham Lincoln – Great Speeches* 104 (Dover Thrift Eds. 1991) (emphasis added).

From this history, it is incontestable that the concept of inalienable rights that precede the State has always been part of our national political philosophy and that the words "under God" are designed to invoke that philosophy.

Thus the words "under God" were not a newly-minted phrase that Congress added to the Pledge in 1954 to achieve the effect of forcing individuals to profess monotheism. Instead, they were added as a self-conscious effort to echo and reaffirm a political philosophy that has animated this country throughout its history, and that is reflected in seminal documents like the Declaration and Gettysburg Address. For example, Representative Rodin stated that "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."[9] In other words, the intended effect of the words "under God" in the Pledge is to evoke and conform the Pledge to the quintessential American political philosophy that recognizes the subservience of the State to the God-given, inalienable rights of individual citizens, not to draw distinctions between theists and non-theists.

* * *

Given these three factors – the plain text of the Pledge, the legislative history of the federal Pledge statute and the Massachusetts Pledge law, and the historical context surrounding the words "under God" – none of the laws Plaintiffs challenge can be said to be *religious* any more than they can be said to be *classifications*. And for these reasons, none of the challenged laws can be said to be discriminatory religious classifications on their face.

[9] 100 Cong. Rec. 7764 (1954) (statement of Rep. Rodin). *See also Sch. Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J. concurring) ("the reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.").

4. Plaintiffs' claim that the Pledge stigmatizes them does not rise to the level of an equal protection claim.

Plaintiffs argue that "[s]tigmatization alone" is enough to make out an equal protection claim. Pl. Br. 30. But the chief Supreme Court case Plaintiffs cite as support for their "stigmatization alone" rule stands for exactly the opposite proposition. Plaintiffs cite the following passage from *Allen* v. *Wright*, 468 U.S. 737 (1984), but leave out the part underlined below:

> There can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. See *Heckler* v. *Mathews*, 465 U.S. 728, 739–740, 104 S.Ct. 1387, 1395–1396, 79 L.Ed.2d 646 (1984). Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct, *ibid.*

Id. at 755 (emphasis added); *compare* Pl. Br. 30. Thus Plaintiffs ask this Court to adopt a "stigmatization alone" standard based on Supreme Court precedent that says stigmatization is *not* enough—plaintiffs must be "personally denied equal treatment." *Allen*, 468 U.S. at 755. As the First Circuit held in *Hanover*, Pledge recitation with a *Barnette* opt-out is equal treatment. The omitted language from *Allen* also negates the

applicability of Plaintiffs' other "stigmatization alone" authority. *Loving* v. *Commonwealth of Virginia,* 388 U.S. 1 (1967) and *Brown* v. *Bd. of Educ.*, 347 U.S. 483 (1954) both involved denial of equal treatment, not "stigmatization alone."[10]

B. Plaintiffs have not adduced any evidence of intentional discrimination by Defendants.

Since the federal Pledge statute, the Massachusetts Pledge law, and Defendants' Pledge policies are facially neutral, "it must appear, for the plaintiff to prevail, that the statute, as interpreted and implemented by the defendants, is *intended* to discriminate against [atheists and humanists]." *Fedele*, 412 Mass. at 116 (emphasis in original).

In this case, there is no evidence in the record that Massachusetts' Pledge law, as interpreted and implemented by Defendants through their Pledge policies, is intended to discriminate against atheists

[10] *In re Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004), which Plaintiffs cite as "*In Re Senate,*" Pl. Br. 30, is of course not precedential. *See Tobias* v. *Secretary*, 419 Mass. 665, 675 (1995) ("Opinions of the Justices do not have precedential value, and any question answered is fully open for consideration when later presented in a litigated case."). And it involved government denial of a "status that is specially recognized in society," not exposure to viewpoints with which the plaintiffs disagreed. 440 Mass. at 1208.

and humanists. As in *Fedele*, "[t]he summary judgment record contains no such appearance. Thus, there is no basis for a conclusion that [Plaintiffs have] been denied equal protection of the laws," nor is there any "basis to conclude that [Plaintiffs have] been discriminated against because of [their] religion." *Id.*

Indeed, the closest Plaintiffs get to arguing intentional discrimination is with respect to the federal Pledge statute. Pl. Br. 25-26, n.19 (citing statements of individual Congressmen). But unlike some lawsuits challenging the Pledge, the United States Congress is not a defendant here, and in any event the relevant state actors with respect to Plaintiffs are the Defendants who run their schools. Plaintiffs have offered absolutely no record evidence that Defendants have any discriminatory intent against atheists or humanists. Indeed, Defendants have assiduously adhered to the *Barnette* opt-out rule. A. 143.

C. Plaintiffs have not identified any similarly situated individuals who have been treated differently than they have been treated.

Plaintiffs' equal protection claim fails for another, independently fatal reason: they have not identified any similarly situated individuals whom

Defendants treated differently. "To establish an equal protection violation, a plaintiff must introduce sufficient evidence from which a jury reasonably could conclude that, compared with others similarly situated, the plaintiff was treated differently because of an improper consideration . . . ." *Hightower* v. *City of Boston*, 693 F.3d 61, 83 n.21 (1st Cir. 2012) (quotation omitted). *See also DuPont* v. *Comm'r of Corr.*, 448 Mass. 389, 399 (2007) ("An equal protection claim can only succeed if a plaintiff establishes that government action discriminates against similarly situated persons."). In *Barnes-Wallace* v. *City of San Diego*, --- F.3d ----, 2012 WL 6621341 (9th Cir. 2012), the Ninth Circuit denied atheists' equal protection claim against the City of San Diego for allowing the Boy Scouts to lease public park land, stating that the plaintiffs had failed to identify any similarly situated persons who had been treated differently. *See id.* at *13 ("[I]n order for a state action to trigger equal protection review at all, that action must treat similarly situated persons disparately.").

Here it is impossible for Plaintiffs to identify any children whom Defendants have treated differently

than Plaintiffs, since Defendants are treating all students equally. A. 142. Unable to point to direct discrimination, they instead claim that "discrimination is afoot." Pl. Br. 21. Their failure to adduce any such evidence at summary judgment undoes their Equal Protection claim.

II. The Pledge statute, Massachusetts' Pledge law, and Defendants' Pledge policy satisfy both strict and rational basis scrutiny.

As the Superior Court found, the correct standard to apply in this case is the rational basis standard. On appeal, Plaintiffs have waived any argument that the challenged laws do not satisfy rational basis scrutiny by failing to argue the point. Nevertheless, as set out below, the challenged laws satisfy both rational basis and strict scrutiny.

A. The Pledge easily satisfies rational basis scrutiny.

Statutes that do not burden a fundamental right or distinguish among citizens based on suspect classifications are subject to the rational basis test. *English* v. *New England Med. Ctr.*, 405 Mass. 423, 428 (1989). "[T]he rational basis test requires that 'an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the

disadvantaged class.'" *Goodridge*, 440 Mass. at 330 (quoting *English*, 405 Mass. at 429). The Pledge of Allegiance meets this standard.

It is a rational belief that when a society fosters traditions that inculcate loyalty and patriotism to a government deserving of that loyalty, its citizens will be less likely to act out against the State and each other. The words 'under God' add to those outcomes of the Pledge of Allegiance by reminding citizens that they are not pledging their allegiance to an all-powerful tyrant that can withdraw its favor at any time for any reason. Instead, they pledge their allegiance to a government that is all the more trustworthy in holding authority because it recognizes that it is not the source of that authority.

B. Reciting the Pledge also satisfies strict scrutiny.

The Pledge of Allegiance is "narrowly tailored to further a legitimate and compelling governmental interest" and is also "the least restrictive means available to vindicate that interest." *Finch*, 459 Mass. at 669 (quoting *Weston*, 455 Mass. at 35). The Commonwealth of Massachusetts has a compelling interest in affirming the limited nature of its power

and authority. This interest meets not only rational basis scrutiny, but promoting "patriotism and . . . instill[ing] a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation" is a compelling interest. *Commonwealth* v. *Johnson*, 309 Mass. 476, 484 (1941).

The school district's compelling interest is not just in promoting patriotism and loyalty, as Plaintiffs posit. Pl. Br. 35-36. The words 'under God' serve a compelling interest in themselves, of expressing the limited nature of the government, and the inalienability of the human rights stewarded by the government.

The acknowledged purpose of the Pledge is "to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation." *Johnson*, 309 Mass. at 484. Patriotism and orderly government "bear[] a real and substantial relation to . . . public health, safety, morals, [and] . . . general welfare." *Coffee-Rich, Inc.* v. *Comm'r of Public Health*, 348 Mass. 414, 422 (1965). This compelling interest is met, not only by the recitation of the

Pledge, but by the recitation of each of the words in the Pledge, as dictated by Congress. 4 U.S.C. § 4.

If this Court were to rule that this mere mention of God in a patriotic exercise is enough to violate the Massachusetts Constitution, it would undermine in at least four ways the ability of government to declare itself limited and the rights of its citizens inalienable.

First, a ban on the mere mention of God by those in government would silence the "mystic chords of memory" that bond Americans present to Americans past. Lincoln, First Inaugural Address, March 4, 1861, *reprinted in Great Speeches* at 61. Government actors (including Massachusetts courts) could no longer recall past statements of the founders, presidents, legislatures or courts that mentioned God. Since history is not within the power of any court to change, a court's only recourse is to stop the recounting of that history. But no court should enforce a rule that would require studied ignorance of the long history of American political statements that refer to God.

Second, disowning the phrase "one nation under God" would deprive government of perhaps the most

potent rationale it has for declaring human rights to be inalienable. Government could, of course, continue to make a natural rights argument by claiming that those rights inhere in the individual. But that argument ultimately reduces to a bald assertion with no supporting reasoning.[11] Reference to God ties individual human rights into a narrative that all Americans can at least understand, even if they may disagree with it. The most important aspect of referring to (rather than adopting) this narrative is that "presuppos[ing] a Supreme Being" is not the same thing as professing a belief in one.[12] Government does not state any theological proposition merely by referring to God in a political statement. Instead, by merely referring to God, government can make a powerful statement that it understands itself to be limited.

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[11] *See, e.g.*, Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 Harv. J. L. & Pub. Pol'y 81, 88-89 (2003) (describing "the inability of the [1946 UNESCO Committee on the Theoretical Bases of Human Rights] to establish a basis for human rights").

[12] *Zorach*, 343 U.S. at 313 (Douglas, J., concurring). It is difficult to attribute to Justice Douglas of all jurists the view that American institutions make a *theological* statement by presupposing a Supreme Being.

Third, not allowing government to make a natural rights argument prohibits it from appealing to "the better angels of our nature." Lincoln, First Inaugural Address, March 4, 1861, *reprinted in Great Speeches* at 61. Allowing government to espouse only positive law theories of human rights means that we are stuck with the Constitution we have. Any injustice in the Constitution could not be removed by government because its powers would proceed only from that same document. If, however, rights come from somewhere else, then, like any other act of government, the Constitution can be held to account.

Fourth, and perhaps most importantly, government should not be unnecessarily hampered in finding ways to declare its own limitations. The history of totalitarianism is a history of governments claiming the power to give rights to people and take them away at will. No court should lightly deny government the latitude to espouse a political philosophy that affirms the priority of individual rights.

The words 'under God' meet the 'least restrictive means' requirement for two reasons. First, they are not restrictive at all. Plaintiffs may disagree with these words based on the meaning they attribute to

them, but they do not restrict Plaintiffs' rights in any way. Plaintiffs may choose not to say them, not to believe them, even to speak against them, but the meaning of the words do not restrict Plaintiffs in any way; indeed, they declare that Plaintiffs have inalienable rights that cannot be taken away by their government. Plaintiffs have availed themselves of this governmentally-protected right to dissent. A. 75, 76, 78.

Second, and more practically, the words 'under God' are unique in the way that they draw on American history and tradition and also convey the meaning of centuries of historical teachings. This brief has demonstrated the unique role of those words throughout the history of American jurisprudence. *See supra* Section I.A.3.c.

This Court should be under no illusion: 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 President Lincoln's references to God be chiseled out of the walls of his Memorial, muting perhaps the greatest voice of 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 the flawed logic behind that claim. The Pledge of Allegiance is not discriminatory, and its recitation pursuant to state law in public schools should be affirmed in its entirety.

III. Plaintiffs' extreme interpretation of the Pledge and requested remedy would put the Massachusetts Constitution into conflict with federal law.

The interpretation of the Pledge that Plaintiffs espouse would put Massachusetts law into conflict with federal law. Their interpretation would violate the Supremacy Clause, run contrary to federal precedent interpreting the Pledge, and violate the rule that statutes should be interpreted to preserve their constitutionality. In addition, the remedy Plaintiffs request would violate the First Amendment by evincing hostility towards religion and preferring a particular set of religious views.

A. Adopting Plaintiffs' novel theory of the Pledge would violate the Supremacy Clause.

Plaintiffs protest at length that their lawsuit does not implicate federal law, Pl. Br. 38-41, but

conflict with federal law is inevitable because the Pledge is defined by federal statute, which dictates the language of the Pledge, and prescribes how the Pledge should be recited. 4 U.S.C. § 4 (2006). A Massachusetts ruling that conflicted with the federal law on the language of the Pledge would violate the Supremacy Clause, U.S. Const., art. VI., cl. 2, of the federal Constitution in two separate ways. It would (1) render "compliance with both federal and state regulations . . . a physical impossibility" and (2) would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Edgar* v. *MITE Corp.*, 457 U.S. 624, 631 (1982) (citations omitted). Changing the wording of the Pledge in Massachusetts schools would make it impossible for the Joyce children to comply with both the wording of the federal Pledge and a "Massachusetts" version.

Separately, removing words from the Pledge would present an obstacle to the "purposes and objectives of Congress." *Id.* When reaffirming the Pledge in 2002, Congress noted the controversy over the words "under God" and delineated the history of those words in American political thought. H.R. Report No. 107-659 at

5, 8 ("The Pledge of Allegiance is not a religious service or prayer, but is a statement of historical beliefs"). Omitting the words that Congress expressly chose to include would be a direct contradiction of Congress' purpose in promulgating the Pledge.[13]

Contrary to Plaintiffs' argument, it makes no difference that 4 U.S.C. § 4 does not mention education or classrooms. Pl. Br. at 39. The Pledge does not change depending on the setting. Congress intended the Pledge to be spoken in the same way no matter the context. And Congress was of course well aware that the Pledge is recited in schoolrooms across the country. In its 2002 re-enactment of the Pledge, Congress criticized the Ninth Circuit decision that had declared the Pledge unconstitutional. Pub. L. No. 107-293 (2002) ("The 9th Circuit Court of Appeals erroneously held . . . that . . . a school district's policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.").

[13] Indeed, any number of other federal statutes would be implicated were this Court to hold the national Pledge of Allegiance to violate the Commonwealth's Constitution. For example, presumably states could then claim the right to display an alternative version of the national flag, contrary to 4 U.S.C. § 1.

B. This Court and federal courts use the Pledge as an example of constitutional government speech.

Removing the words 'under God' from the Pledge would contradict not just federal statute, but Supreme Court precedent as well. In the Establishment Clause context, the Supreme Court has repeatedly referred to the Pledge in dicta as the standard for evaluating the permissibility of other government expression that employs religious imagery. For example, in *Lynch* v. *Donnelly*, the Supreme Court described the Pledge and its recitation as one of the many permissible "reference[s] to our religious heritage," both historical and contemporary, that create the context of any Establishment Clause analysis. 465 U.S. 668, 676 (1984). The Court then used the Pledge and other acknowledgments of religious heritage as a baseline of permissible government expression in the course of rejecting the Establishment Clause challenge at issue in *Lynch*. *See id.* at 686 ("If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of . . . our religious heritage, are equally offensive to the Constitution.").

Similarly, in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court used the Pledge to locate the boundary line of constitutional references to religion. The Court noted that the Pledge was a "nonsectarian reference[] to religion by the government" that the Court had "characteriz[ed] . . . as consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-03 (citations omitted). Accordingly, the Court used the Pledge to contextualize the practice of displaying a Christmas crèche in a certain way at the County's courthouse as "sectarian" and therefore impermissible, while allowing other, non-sectarian displays. *Id.*

Following the Supreme Court, every federal court with cause to review the constitutionality of the Pledge has upheld it under not only the Establishment Clause, but also the Equal Protection and Free Exercise Clauses.[14] This Court has also used the words

[14] *Hanover*, 626 F.3d 1; *Croft* v. *Perry*, 624 F.3d 157 (5th Cir. 2010) (Texas State Pledge); *Rio Linda*, 597 F.3d 1007; *Myers* v. *Loudoun Cnty. Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Sherman* v. *Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437 (7th Cir. 1992). In *Rio Linda* and *Hanover*, the plaintiffs brought free exercise and equal protection claims as well as Establishment Clause claims. Those claims were

'under God' as a measuring stick for appropriate state recognition of religion. For example, in *Colo* v. *Treasurer & Receiver General*, 378 Mass. 550, 560 (1979), this Court reached the same conclusion. In considering whether legislative chaplains violated the Establishment Clause, it approvingly cited *Schempp*, 374 U.S. at 213, and listed the words "Under God" as a benign practice that is permissible though it may have a "religious dimension." *Colo*, 378 Mass. at 560.

Plaintiffs want this Court to grant them a power under the Massachusetts Equal Rights Amendment they do not possess under the federal Establishment and Equal Protection Clauses. But their reasoning is no different here. They want to prohibit the government from using religious language that they dislike. But were Massachusetts to follow Plaintiffs' logic, religious and political dissenters would have a heckler's veto over all government speech.[15]

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dismissed as well. *See, e.g.*, *Newdow* v. *Congress of U.S.*, 383 F. Supp. 2d 1229, 1232 n.2 (E.D. Cal. 2005).

[15] Indeed, Jehovah's Witnesses like the *Barnette* plaintiffs could demand that any Pledge salute or other patriotic exercise be declared unconstitutional because it offended their religious beliefs as idol worship.

C. The federal Pledge statute and G.L. c. 71, § 69 should be construed to avoid unconstitutionality.

Holding that Pledge recitation violates the Massachusetts Constitution would unnecessarily violate the "old and deeply imbedded" principle that it is best to "construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative." *United States* v. *Lopez*, 514 U.S. 549, 562 (1995) (citations omitted); *see Baird* v. *Attorney General*, 371 Mass. 741, 745 (1977) (same).

Here, there are possible constructions of the federal Pledge statute and G.L. c. 71, § 69 that do not raise constitutional problems, namely that the Pledge as recited does not institute a religious classification, but is instead a statement of political philosophy. Since this is a plausible interpretation that does not raise constitutional questions, the Court should choose it over Plaintiffs' erroneous interpretation.

D. Plaintiffs' requested remedy would violate the federal Constitution by preferring one religion over another.

Plaintiffs claim that their views deserve protection as religious tenets. Pl. Br. 8. This claim places them

in the awkward position of asking the Court to show preference for their religious beliefs.

Yet one of the First Amendment's clearest commands is that government may not "prefer one religion over another." *Larson* v. *Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 15 (1947)). If Plaintiffs are truly a religious group, as they say they are, Pl. Br. 18 n.12, what they ask for is not equal treatment, but to have their preferred policy outcomes unconstitutionally favored over others'.

School curricula of many kinds are bound to have some reference to religion, and religion-related content cannot possibly be presented in a way that makes everyone happy all of the time. Religious views are by definition in conflict with one another, and courts and legislatures have wisely realized that they cannot possibly compromise in such a way as to accept all of them. There is no solution that does not offend someone.

Indeed, the Constitution "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. *Ark.*, 393 U.S.

97, 106 (1968). That is why courts have consistently rejected claims based on religious persons' objections to government speech,[16] including objections specifically to the Pledge.[17]

By contrast, Plaintiffs' logic would inevitably lead to the ban of all reference to religion in the public school curriculum because every view on religious questions would enjoy a veto. In the end, Plaintiffs cannot have it both ways. If they want protection as a religion, they must accept the protection all other religious observers receive: the right to opt out.

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[16] *See, e.g.*, *Crowley* v. *Smithsonian Inst.*, 636 F.2d 738, 742 (D.C. Cir. 1980) ("Although neither a State nor the Federal Government can constitutionally 'pass laws which aid one religion, aid all religions, or prefer one religion over another,' . . . it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'") (quoting *Everson*, 330 U.S. at 15; *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)) (evolution exhibit at museum did not establish humanism); *Brown* v. *Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1382 (9th Cir. 1994) (allowing objecting students to be taught about what parents believed to be witchcraft); *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir. 2008) (objecting parents did not have right to opt out of curriculum regarding sexual orientation).

[17] *See Myers*, 418 F.3d at 408 (rejecting claim that Pledge violated plaintiff's Anabaptist Mennonite beliefs). *Keplinger* v. *United States*, 2006 WL 1455747 (M.D. Pa. 2006) (rejecting claim that Pledge violated plaintiff's "non-Christian" belief that the "true name of worship" was "Yahweh").

E. Plaintiffs' requested remedy would violate the federal Constitution by evincing hostility towards religion.

Plaintiffs' requested remedy would also violate the command of both Religion Clauses forbidding government hostility towards religion. In a number of cases, the Supreme Court has considered 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]"); *Van Orden* v. *Perry*, 545 U.S. 677, 684 (2005) (plurality op.) (impermissible to "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage") (citation omitted).

In *Van Orden* v. *Perry*, 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 . . . ." 545 U.S. at 700 (Breyer, J., concurring). Rejecting a bright-line test in "difficult borderline cases," *id.*, 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)).

On balance, enjoining recitation of the Pledge would send a powerful message that the word "God"—and thus any words or concepts that arguably contain religious references—are unwelcome in a government context. This purported remedy would be just the sort of "hostility toward the religious viewpoint" that the Supreme Court has condemned. *Good News Club* v. *Milford Central Sch.*, 533 U.S. 98, 118 (2001); *cf. Boyajian* v. *Gatzunis*, 212 F.3d 1, 5 (1st Cir. 2000) ("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).

Nor is it a contradiction, as Plaintiffs argued in the Superior Court, to say that the Pledge of Allegiance is both a philosophical statement and that removing it would be a sign of hostility to religion. Indeed, Plaintiffs' only reason for seeking to remove

it is their claim that it has religious content. Therefore, if it is removed, it will be out of a motive of hostility toward religion, even though that motive would be based on erroneous views about what the Pledge actually means. Misprision of fact does not excuse a religion-hostile motive.

IV. Plaintiffs' cursory argument under G.L. c. 76, § 5 fails.

Plaintiffs devote only a page of their brief to their G.L. c. 76, § 5 claim, and with good reason. Plaintiffs ask this Court to hold that an earlier-enacted statute, G.L. c. 76, § 5, invalidates a later-enacted statute, G.L. c. 71, § 69.[18] But "if possible a statute is to be interpreted in harmony with prior enactments to give rise to a consistent body of law." *Thurdin* v. *SEI Boston, LLC*, 452 Mass. 436, 468 (2008) (collecting cases) (quotations and citations omitted). Even were this invalidation possible, as set forth above, Plaintiffs are not being discriminated against. Nor are they being deprived of any "privileges" or "advantages" of public education. G.L. c. 76, § 5. Since Plaintiffs participate in every part of the

[18] G.L. c. 76, § 5's predecessor statutes included the non-discrimination provision from at least 1855; G.L. c. 71, § 69 was amended in 1935 to include the Pledge requirement.

Pledge recitation except saying the words "under God," this claim amounts to an argument that Plaintiffs are being deprived of a "privilege" they say is unconstitutional. The claim is self-contradictory.

* * *

Plaintiffs' lawsuit confuses disagreement with discrimination. The mere fact that Defendants say something Plaintiffs disagree with does not mean Defendants are discriminating against Plaintiffs. In a diverse, pluralistic society, disagreement will always be present, especially regarding the content of the school day. But in the end schools still have to make decisions. Because Defendants are trying to promote patriotism, not classify people on the basis of religion, their practice of reciting Pledge should be upheld, and Interveners should be allowed to continue reciting the Pledge.

CONCLUSION

This Court should affirm the decision of the Superior Court.

Respectfully submitted,

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

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Dated: February 11, 2013

ADDENDUM

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TITLE 4—FLAG AND SEAL, SEAT OF GOVERNMENT, AND THE STATES

This title was enacted by act July 30, 1947, ch. 389, § 1, 61 Stat. 641

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AMENDMENTS

1951—Act Oct. 31, 1951, ch. 655, §11, 65 Stat. 713, added item for chapter 5.

POSITIVE LAW; CITATION

This title has been made positive law by section 1 of act July 30, 1947, ch. 389, 61 Stat. 641, which provided in part that: ''title 4 of the United States Code, entitled 'Flag and seal, Seat of Government, and the States', is codified and enacted into positive law and may be cited as '4 U. S. C., §—' ''.

REPEALS

Section 2 of act July 30, 1947, provided that the sections or parts thereof of the Statutes at Large or the Revised Statutes covering provisions codified in this Act are repealed insofar as the provisions appeared in former Title 4, and provided that any rights or liabilities now existing under the repealed sections or parts thereof shall not be affected by the repeal.

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 4

Title 4 Former Sections	*Revised Statutes Statutes at Large*	*Title 4 New Sections*
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CHAPTER 1—THE FLAG

Sec.
1. Flag; stripes and stars on.
2. Same; additional stars.
3. Use of flag for advertising purposes; mutilation of flag.
4. Pledge of allegiance to the flag; manner of delivery.
5. Display and use of flag by civilians; codification of rules and customs; definition.
6. Time and occasions for display.
7. Position and manner of display.
8. Respect for flag.
9. Conduct during hoisting, lowering or passing of flag.
10. Modification of rules and customs by President.

AMENDMENTS

1998—Pub. L. 105–225, §2(b), Aug. 12, 1998, 112 Stat. 1498, added items 4 to 10.

§ 1. Flag; stripes and stars on

The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be forty-eight stars, white in a blue field.

(July 30, 1947, ch. 389, 61 Stat. 642.)

SHORT TITLE OF 2009 AMENDMENT

Pub. L. 111–41, §1, July 27, 2009, 123 Stat. 1962, provided that: ''This Act [amending section 6 of this title] may be cited as the 'Korean War Veterans Recognition Act'.''

SHORT TITLE OF 2007 AMENDMENT

Pub. L. 110–41, §1, June 29, 2007, 121 Stat. 233, provided that: ''This Act [amending section 7 of this title and provisions set out as a note under section 7 of this title] may be cited as the 'Army Specialist Joseph P. Micks Federal Flag Code Amendment Act of 2007'.''

SHORT TITLE OF 2000 AMENDMENT

Pub. L. 106–252, §1, July 28, 2000, 114 Stat. 626, provided that: ''This Act [enacting sections 116 to 126 of this title and provisions set out as a note under section 116 of this title] may be cited as the 'Mobile Telecommunications Sourcing Act'.''

EXECUTIVE ORDER NO. 10798

Ex. Ord. No. 10798, Jan. 3, 1959, 24 F.R. 79, which prescribed proportions and sizes of flags until July 4, 1960, was revoked by section 33 of Ex. Ord. No. 10834, set out as a note under this section.

EX. ORD. NO. 10834. PROPORTIONS AND SIZES OF FLAGS AND POSITION OF STARS

Ex. Ord. No. 10834, Aug. 21, 1959, 24 F.R. 6865, provided:

WHEREAS the State of Hawaii has this day been admitted into the Union; and

WHEREAS section 2 of title 4 of the United States Code provides as follows: ''On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission.''; and

WHEREAS the Federal Property and Administrative Services Act of 1949 (63 Stat. 377), as amended [see chapters 1 to 11 of Title 40, Public Buildings, Property, and Works, and division C (except sections 3302, 3307(e), 3501(b), 3509, 3906, 4710, and 4711) of subtitle I of Title 41, Public Contracts] authorizes the President to prescribe policies and directives governing the procurement and utilization of property by executive agencies; and

WHEREAS the interests of the Government require that orderly and reasonable provision be made for various matters pertaining to the flag and that appropriate regulations governing the procurement and utilization of national flags and union jacks by executive agencies be prescribed:

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States and as Commander in Chief of the armed forces of the United States, and the Federal Property and Administrative Services Act of 1949, as amended [see Short Title of 1949 Act note under section 101 of Title 41, Public Contracts], it is hereby ordered as follows:

PART I—DESIGN OF THE FLAG

SECTION 1. The flag of the United States shall have thirteen horizontal stripes, alternate red and white, and a union consisting of white stars on a field of blue.

SEC. 2. The positions of the stars in the union of the flag and in the union jack shall be as indicated on the attachment to this order, which is hereby made a part of this order.

SEC. 3. The dimensions of the constituent parts of the flag shall conform to the proportions set forth in the attachment referred to in section 2 of this order.

PART II—REGULATIONS GOVERNING EXECUTIVE AGENCIES

SEC. 21. The following sizes of flags are authorized for executive agencies:

Size	*Dimensions of Flag*	
	Hoist (width)	*Fly (length)*
	Feet	*Feet*
(1)	20.00	38.00
(2)	10.00	19.00
(3)	8.95	17.00
(4)	7.00	11.00
(5)	5.00	9.50
(6)	4.33	5.50
(7)	3.50	6.65
(8)	3.00	4.00
(9)	3.00	5.70
(10)	2.37	4.50
(11)	1.32	2.50

SEC. 22. Flags manufactured or purchased for the use of executive agencies:

(a) Shall conform to the provisions of Part I of this order, except as may be otherwise authorized pursuant to the provisions of section 24, or except as otherwise authorized by the provisions of section 21, of this order.

(b) Shall conform to the provisions of section 21 of this order, except as may be otherwise authorized pursuant to the provisions of section 24 of this order.

SEC. 23. The exterior dimensions of each union jack manufactured or purchased for executive agencies shall equal the respective exterior dimensions of the union of a flag of a size authorized by or pursuant to this order. The size of the union jack flown with the national flag shall be the same as the size of the union of that national flag.

SEC. 24. (a) The Secretary of Defense in respect of procurement for the Department of Defense (including military colors) and the Administrator of General Services in respect of procurement for executive agencies other than the Department of Defense may, for cause which the Secretary or the Administrator, as the case may be, deems sufficient, make necessary minor adjustments in one or more of the dimensions or proportionate dimensions prescribed by this order, or authorize proportions or sizes other than those prescribed by section 3 or section 21 of this order.

(b) So far as practicable, (1) the actions of the Secretary of Defense under the provisions of section 24(a) of this order, as they relate to the various organizational elements of the Department of Defense, shall be coordinated, and (2) the Secretary and the Administrator shall mutually coordinate their actions under that section.

SEC. 25. Subject to such limited exceptions as the Secretary of Defense in respect of the Department of Defense, and the Administrator of General Services in respect of executive agencies other than the Department of Defense, may approve, all national flags and union jacks now in the possession of executive agencies, or hereafter acquired by executive agencies under contracts awarded prior to the date of this order, including those so possessed or so acquired by the General Services Administration, for distribution to other agencies, shall be utilized until unserviceable.

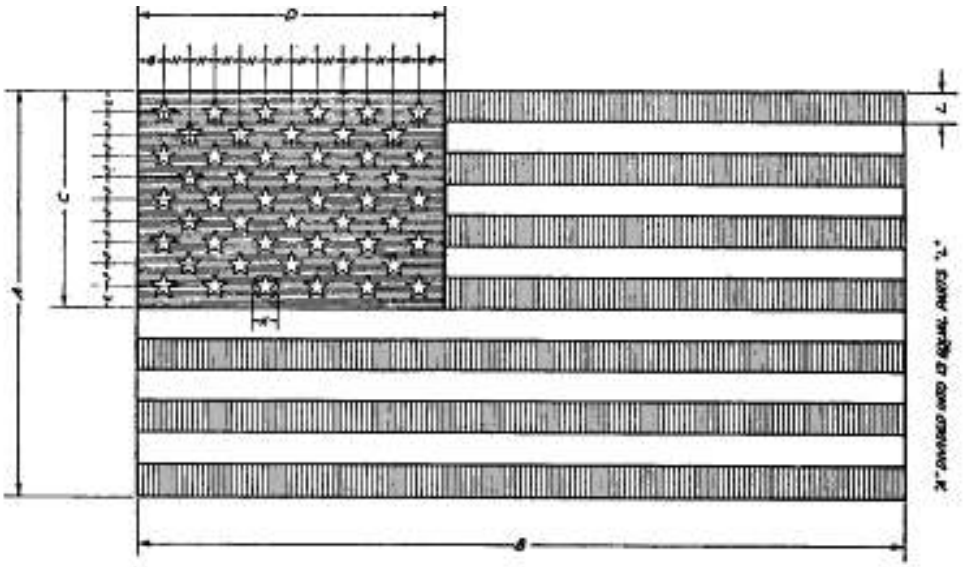
PART III—GENERAL PROVISIONS

SEC. 31. The flag prescribed by Executive Order No. 10798 of January 3, 1959, shall be the official flag of the United States until July 4, 1960, and on that date the flag prescribed by Part I of this order shall become the official flag of the United States; but this section shall neither derogate from section 24 or section 25 of this order nor preclude the procurement, for executive agencies, of flags provided for by or pursuant to this order at any time after the date of this order.

SEC. 32. As used in this order, the term ''executive agencies'' means the executive departments and independent establishments in the executive branch of the Government, including wholly-owned Government corporations.

SEC. 33. Executive Order No. 10798 of January 3, 1959, is hereby revoked.

DWIGHT D. EISENHOWER.



Standard proportions

Hoist (width) of flag 1.0	Fly (length) of flag 1.9	Hoist (width) of Union 0.5385 (7/13)	Fly (length) of Union 0.76	0.054	0.054	0.063	0.063	Diameter of star 0.0616	Width of stripe 0.0769 (1/13)
A	B	C	D	E	F	G	H	K	L

§ 2. Same; additional stars

On the admission of a new State into the Union one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding such admission.

(July 30, 1947, ch. 389, 61 Stat. 642.)

§ 3. Use of flag for advertising purposes; mutilation of flag

Any person who, within the District of Columbia, in any manner, for exhibition or display, shall place or cause to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature upon any flag, standard, colors, or ensign of the United States of America; or shall expose or cause to be exposed to public view any such flag, standard, colors, or ensign upon which shall have been printed, painted, or otherwise placed, or to which shall be attached, appended, affixed, or annexed any word, figure, mark, picture, design, or drawing, or any advertisement of any nature; or who, within the District of Columbia, shall manufacture, sell, expose for sale, or to public view, or give away or have in possession for sale, or to be given away or for use for any purpose, any article or substance being an article of merchandise, or a receptacle for merchandise or article or thing for carrying or transporting merchandise, upon which shall have been printed, painted, attached, or otherwise placed a representation of any such flag, standard, colors, or ensign, to advertise, call attention to, decorate, mark, or distinguish the article or substance on which so placed shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding $100 or by imprisonment for not more than thirty days, or both, in the discretion of the court. The words ''flag, standard, colors, or ensign'', as used herein, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, colors, standard, or ensign of the United States of America.

(July 30, 1947, ch. 389, 61 Stat. 642; Pub. L. 90–381, § 3, July 5, 1968, 82 Stat. 291.)

AMENDMENTS

1968—Pub. L. 90–381 struck out ''; or who, within the District of Columbia, shall publicly mutilate, deface, defile or defy, trample upon, or cast contempt, either by word or act, upon any such flag, standard, colors, or ensign,'' after ''substance on which so placed''.

§ 4. Pledge of allegiance to the flag; manner of delivery

The Pledge of Allegiance to the Flag: ''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.'', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left

shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

(Added Pub. L. 105–225, § 2(a), Aug. 12, 1998, 112 Stat. 1494; amended Pub. L. 107–293, § 2(a), Nov. 13, 2002, 116 Stat. 2060.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
4	36:172.	June 22, 1942, ch. 435, § 7, 56 Stat. 380; Dec. 22, 1942, ch. 806, § 7, 56 Stat. 1077; Dec. 28, 1945, ch. 607, 59 Stat. 668; June 14, 1954, ch. 297, 68 Stat. 249; July 7, 1976, Pub. L. 94–344, (19), 90 Stat. 813.

CODIFICATION

Amendment by Pub. L. 107–293 reaffirmed the exact language of the Pledge, see section 2(b) of Pub. L. 107–293, set out as a Reaffirmation of Language note below.

AMENDMENTS

2002—Pub. L. 107–293 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: ''The Pledge of Allegiance to the Flag, '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.', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.''

FINDINGS

Pub. L. 107–293, § 1, Nov. 13, 2002, 116 Stat. 2057, provided that: ''Congress finds the following:

''(1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: 'Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our King and country, a voyage to plant the first colony in the northern parts of Virginia,'.

''(2) On July 4, 1776, America's Founding Fathers, after appealing to the 'Laws of Nature, and of Nature's God' to justify their separation from Great Britain, then declared: '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'.

''(3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled 'Notes on the State of Virginia' wrote: 'God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.'

''(4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: 'If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!'

''(5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: 'Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

''(6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United States by declaring, 'a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.'

''(7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: 'It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—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.'

''(8) On April 28, 1952, in the decision of the Supreme Court of the United States in Zorach v. Clauson, 343 U.S. 306 (1952), in which school children were allowed to be excused from public schools for religious observances and education, Justice William O. Douglas, in writing for the Court stated: 'The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the State and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ''so help me God'' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ''God save the United States and this Honorable Court.'' '

''(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: '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.'

''(10) On July 20, 1956, Congress proclaimed that the national motto of the United States is 'In God We Trust', and that motto is inscribed above the main door of the Senate, behind the Chair of the Speaker of the House of Representatives, and on the currency of the United States.

''(11) On June 17, 1963, in the decision of the Supreme Court of the United States in Abington School District v. Schempp, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and Harlan, concurring in the decision, stated: 'But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which

the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.'

''(12) On March 5, 1984, in the decision of the Supreme Court of the United States in Lynch v. Donelly, 465 U.S. 668 (1984), in which a city government's display of a nativity scene was held to be constitutional, Chief Justice Burger, writing for the Court, stated: 'There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . . [E]xamples of reference to our religious heritage are found in the statutorily prescribed national motto ''In God We Trust'' (36 U.S.C. 186) [now 36 U.S.C. 302], which Congress and the President mandated for our currency, see (31 U.S.C. 5112(d)(1) (1982 ed.)), and in the language ''One Nation under God'', as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year . . . Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.'

''(13) On June 4, 1985, in the decision of the Supreme Court of the United States in Wallace v. Jaffree, 472 U.S. 38 (1985), in which a mandatory moment of silence to be used for meditation or voluntary prayer was held unconstitutional, Justice O'Connor, concurring in the judgment and addressing the contention that the Court's holding would render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words 'under God,' stated 'In my view, the words ''under God'' in the Pledge, as codified at (36 U.S.C. 172) [now 4 U.S.C. 4], serve as an acknowledgment of religion with ''the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'' '

''(14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in Sherman v. Community Consolidated School District 21, 980 F.2d 437 (7th Cir. 1992), held that a school district's policy for voluntary recitation of the Pledge of Allegiance including the words 'under God' was constitutional.

''(15) The 9th Circuit Court of Appeals erroneously held, in Newdow v. U.S. Congress (9th Cir. June 26, 2002), that the Pledge of Allegiance's use of the express religious reference 'under God' violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.

''(16) The erroneous rationale of the 9th Circuit Court of Appeals in Newdow would lead to the absurd result that the Constitution's use of the express religious reference 'Year of our Lord' in Article VII violates the First Amendment to the Constitution, and that, therefore, a school district's policy and practice of teacher-led voluntary recitations of the Constitution itself would be unconstitutional.''

REAFFIRMATION OF LANGUAGE

Pub. L. 107–293, § 2(b), Nov. 13, 2002, 116 Stat. 2060, provided that: ''In codifying this subsection [probably should be ''section'', meaning section 2 of Pub. L. 107–293, which amended this section], the Office of the Law Revision Counsel shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades.''

§ 5. Display and use of flag by civilians; codification of rules and customs; definition

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America is established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States. The flag of the United States for the purpose of this chapter shall be defined according to sections 1 and 2 of this title and Executive Order 10834 issued pursuant thereto.

(Added Pub. L. 105–225, § 2(a), Aug. 12, 1998, 112 Stat. 1494.)

HISTORICAL AND REVISION NOTES

Revised Section	*Source (U.S. Code)*	*Source (Statutes at Large)*
5	36:173.	June 22, 1942, ch. 435, § 1, 56 Stat. 377; Dec. 22, 1942, ch. 806, § 1, 56 Stat. 1074; July 7, 1976, Pub. L. 94–344, (1), 90 Stat. 810.

REFERENCES IN TEXT

Executive Order 10834, referred to in text, is set out as a note under section 1 of this title.

FREEDOM TO DISPLAY THE AMERICAN FLAG

Pub. L. 109–243, July 24, 2006, 120 Stat. 572, provided that:

''SECTION 1. SHORT TITLE.

''This Act may be cited as the 'Freedom to Display the American Flag Act of 2005'.

''SEC. 2. DEFINITIONS.

''For purposes of this Act—

''(1) the term 'flag of the United States' has the meaning given the term 'flag, standard, colors, or ensign' under section 3 of title 4, United States Code;

''(2) the terms 'condominium association' and 'cooperative association' have the meanings given such terms under section 604 of Public Law 96–399 (15 U.S.C. 3603);

''(3) the term 'residential real estate management association' has the meaning given such term under section 528 of the Internal Revenue Code of 1986 (26 U.S.C. 528); and

''(4) the term 'member'—

''(A) as used with respect to a condominium association, means an owner of a condominium unit (as defined under section 604 of Public Law 96–399 (15 U.S.C. 3603)) within such association;

''(B) as used with respect to a cooperative association, means a cooperative unit owner (as defined under section 604 of Public Law 96–399 (15 U.S.C. 3603)) within such association; and

''(C) as used with respect to a residential real estate management association, means an owner of a residential property within a subdivision, development, or similar area subject to any policy or restriction adopted by such association.

''SEC. 3. RIGHT TO DISPLAY THE FLAG OF THE UNITED STATES.

''A condominium association, cooperative association, or residential real estate management association

CHAPTER 71 PUBLIC SCHOOLS

Section 69 Display of national flags; pledge of allegiance; penalty for violation

Section 69. The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. 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". A flag shall be displayed in each classroom in each such schoolhouse. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.

CHAPTER 76SCHOOL ATTENDANCE

Section 5 - Place of attendance; violations; discrimination

[Text of section effective until July 1, 2012. For text effective July 1, 2012, see below.]

Section 5. Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. 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, religion, national origin or sexual orientation.

Chapter 76: Section 5. Place of attendance; violations; discrimination

[Text of section as amended by 2011, 199, Sec. 4 effective July 1, 2012. See 2011, 199, Sec. 9. For text effective until July 1, 2012, see above.]

Section 5. Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. 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.

CERTIFICATE OF SERVICE

I, J. Patrick Kennedy, hereby certify that on February 11th, 2013, two true copies of the Brief of the Interveners-Appellees, were served by priority mail, postage prepaid, upon the following counsel of record:

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/s/ J. Patrick Kennedy
J. PATRICK KENNEDY

CERTIFICATION OF COMPLIANCE

I, J. Patrick Kennedy, Counsel for the Appellees-Interveners, hereby certify that the Appellees-Interveners' brief complies with the rules of Court that pertain to the filing of briefs, including Mass. R. App. P. 16(a)(6); Mass. R. App. P. 16(e); Mass. R. App. P. 16(f); Mass. R. App. P. 16(h); Mass R. App. P. 18; and Mass. R. App. P. 20.

/s/ J. Patrick Kennedy
J. PATRICK KENNEDY

Dated: February 11, 2013

NO. SJC-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/INTERVENERS-APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF THE DEFENDANTS /INTERVENERS-APPELLEES, 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

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS