COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11317

JANE DOE & OTHERS,

Plaintiffs/Appellants,

vs.

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT & OTHERS,

Defendants/Appellees.

ON DIRECT APPEAL FROM THE MIDDLESEX SUPERIOR COURT

BRIEF FOR AMICI CURIAE ALLIANCE DEFENDING FREEDOM AND MASSACHUSETTS FAMILY INSTITUTE

DAVID A. CORTMAN, GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@alliancedefendingfreedom.org

ANDREW D. BECKWITH, BBO No. 657747
MASSACHUSETTS FAMILY INSTITUTE
100 TradeCenter, Suite 625
Woburn, MA 01801
(781) 569-0400
andrew@mafamily.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitutional Provisions:

Statutes:

Other Authorities:

INTEREST OF AMICI

Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has been directly or indirectly involved in over 500 legal matters, including numerous cases before the United States Supreme Court involving the protection of religious freedom and our nation's schools. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

Alliance Defending Freedom and its allies represent thousands of Americans who desire to uphold traditional American expressions of patriotism that promote respect for our constitutional liberties and our nation's religious heritage. This case is of concern because it could promote the exclusion of all religious references from the public square. Consequently, Alliance Defending Freedom would show this Court that Mass. Gen. Laws ch. 71, § 69, which

permits students' voluntary recitation of the Pledge of Allegiance, does not implicate the Massachusetts Constitution's guarantee of equal rights.

Massachusetts Family Institute, Inc. ("MFI"), a not-for profit research and education corporation organized under the laws of the Commonwealth of Massachusetts, is dedicated to strengthening the family and upholding traditional moral values in the public policy and cultural arenas. MFI engages in research and education on a wide range of public policy issues to strengthen the well-being, health, and safety of families. It carries out this mission through the work of a team of professional staff and volunteers made up of physicians, lawyers, and university professors.

MFI represents thousands of Massachusetts families who desire to uphold the voluntary Pledge of Allegiance to the American flag in the schools of this Commonwealth. Voluntary recitation of the Pledge of Allegiance expresses appreciation for the many freedoms that Americans enjoy, as symbolized by our nation's flag, and appropriately memorializes our country's religious heritage. Accordingly, MFI seeks to uphold Mass. Gen. Laws ch. 71, § 69 and other

opportunities for students to engage in voluntary patriotic expression at school.

STATEMENT OF THE ISSUES

1. Whether rational basis review or strict scrutiny applies to Plaintiffs' challenge to Mass. Gen. Laws ch. 71, § 69.

2. Whether Mass. Gen. Laws ch. 71, § 69 violates Plaintiffs' right to equal protection of the laws under the Massachusetts Constitution and Mass. Gen. Laws ch. 76, § 5.

STATEMENT OF THE CASE

Plaintiffs, atheist students and their parents, filed an amended complaint in January 2011 alleging that Acton-Boxborough Regional School District (the "District") violated their right to equal protection of the laws under the Massachusetts Constitution and Mass. Gen. Laws ch. 76, § 5 ("Section 5"). The basis for this claim is the District's compliance with Mass. Gen. Laws ch. 71, § 69 (the "Pledge Statute"), which requires teachers to lead a daily recitation of the Pledge of Allegiance (the "Pledge") for those students who wish to participate.

Plaintiffs argued that reciting the Pledge, which includes the phrase "one Nation under God,"

discriminates against them in four ways.[1] First, Plaintiffs alleged that recitation of the Pledge "creat[ed] an official public atmosphere of disapproval of the[ir] religious views." *See, e.g.*, Amend. Comp. at 10, 12, 19. Second, Plaintiffs asserted that recitation of the Pledge caused them to "be marginalized and not fully accepted" by "suggesting [they] are outsiders and not fully part of ... mainstream society." *See, e.g.*, *id.* Third, Plaintiffs maintained that daily Pledge recitation "contribut[ed] to public hostility toward the Plaintiffs' [atheistic] religious class and religious views." *See, e.g.*, *id.* Fourth, Plaintiffs contended that the District's failure to remove "one Nation under God" from the Pledge deprives them of an educational "advantage and privilege."[2] *See id.* at 19.

Plaintiffs' amended complaint sought a declaration that the "regular, officially sponsored recitation" of the Pledge violated their rights to

---

[1] Plaintiffs also raised a claim under the District's nondiscrimination policy. *See* Amend. Compl. at 17. Because that claim is no longer at issue, it is not further discussed here.

[2] As the student Plaintiffs admit that they "often" participate in the Pledge, although sometimes "not fully," Appellees Br. at 30 n.25, it is clear they are not deprived of an educational benefit.

equal protection and that any subsequent District efforts to instill "patriotism and good citizenship" in students not include "any affirmation as to the existence or non-existence of a divinity." *Id.* at 20. They specifically requested a declaration that the language of the Pledge, minus the phrase "under God," comported with Massachusetts law. *Id.* And they requested an order requiring daily recitation of the Pledge in the District to "immediately cease." *Id.*

The parties ultimately filed competing motions for summary judgment. In granting summary judgment in favor of the District in June 2012, the Superior Court concluded that students' recitation of the Pledge was completely voluntary, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, No. MICV2010-04261-C, at 7 (Middlesex Sup. Ct. June 8, 2012), and that the Pledge, taken as a whole, is a political rather than a religious statement. *Id.* at 16-17. Because such patriotic expression did not implicate Plaintiffs' right to the free exercise of religion, the Superior Court applied rational basis review. *See id.* at 20.

The Superior Court held that granting students a voluntary opportunity to recite the Pledge easily surpassed that standard. The Pledge Statute not only

served to encourage "'social affections, and generous sentiments among the people,'" *id.* at 21 (quoting Mass. Const., Part II. ch. 5, § 2), it also taught children "'American history and civics'" and prepared "'pupils, morally and intellectually, for the duties of citizenship,'" *id.* (quoting Mass. Gen. Laws ch. 71, § 2). Moreover, the phrase "one Nation under God" served as a clear "acknowledgment of the Founding Fathers political philosophy, and the historical and religious traditions of the United States." *Id.* at 21-22.

In the end, Plaintiffs' equal protection claims failed before the Superior Court because the Pledge Statute "does not treat students differently but rather applies equally to all students." *Id.* at 22. The Superior Court held that students' voluntary recitation of "the Pledge does not constitute a daily affirmation of any religion's views." *Id.* at 23. Accordingly, it concluded that Plaintiffs decision "not to participate" in the Pledge did not deny them "an advantage and privilege of their education on the basis of religion." *Id.*

The Superior Court thus held that the Pledge's "under God" language did not violate Plaintiffs' right

to equal protection of the laws. *See id.* at 24. Plaintiffs noted a timely appeal of the Superior Court's summary judgment order. They then filed an application in August 2012 for direct appellate review, which this Court granted in October 2012.

STATEMENT OF THE FACTS

The facts of this case are not in dispute. Plaintiffs are atheists who either attend, or are the parents of children who attend, District schools. *Doe*, No. MICV2010-04261-C, at 3. Teachers in those schools lead students in a voluntary recitation of the Pledge on a daily basis. *Id.* Both parties recognize that recitation of the Pledge is solely intended "to instill values of patriotism and good citizenship" in children and that students have an unfettered "right to refuse" to participate in the Pledge recitation for any reason, or no reason at all. *Id.* at 5.

Plaintiffs ascribe to Humanist beliefs that deny the existence of a deity, adopt a "naturalistic outlook," and emphasize "rational analysis, logic, and empiricism." *Id.* at 3 (quotation omitted). In accordance with their Humanist beliefs, the student Plaintiffs cannot agree with the "one Nation under God" portion of the Pledge. Consequently, they

sometimes decline to join in the Pledge's recitation. *See* Appellees Br. at 30 n.25. Neither the District, nor any private party, has ever chastised or punished the student Plaintiffs for making this choice. *See Doe*, No. MICV2010-04261-C, at 5 n.9 ("The Doechildren [sic] do not claim that their atheist and Humanist views have caused others to single them out personally in a negative way ....").

SUMMARY OF THE ARGUMENT

Under this Court's caselaw, Plaintiffs' state equal protection and Section 5 claims should be analyzed under the same standard as the Fourteenth Amendment. *See* Argument Part I. Federal precedent, as well as that of this Court, indicates that Plaintiffs' claims are subject to rational basis review, not strict scrutiny, because the District allows students to opt out of Pledge recitation for any reason or no reason at all. *See* Argument Part II. This unfettered exemption conclusively establishes that the Pledge Statute does not impinge on Plaintiffs' fundamental right to the free exercise of religion. *See id.*

In order to prevail on their equal protection claims, Plaintiffs must demonstrate intentional

discrimination on the part of the General Court in establishing the Pledge Statute or the District in implementing it. *See* Argument Part III.A. Merely asserting the Pledge Statute negatively impacts them is not enough, *see* Argument Part III.A-B, Plaintiffs must leverage any evidence of disparate impact to show intentional discrimination by, for example, demonstrating an effect that can only be explained by purposeful discrimination. *See* Argument Part III.C.

But Plaintiffs fail to make a threshold showing that the Pledge Statute disparately impacts them in a negative manner. *See* Argument Part III.D. Considered in its entirety, the Pledge makes a political, rather than a religious statement, that does not discriminate against Plaintiffs' atheistic beliefs. *See* Argument Part III.D.1. And there are a myriad of secular and theistic reasons why students may decline to participate in reciting the Pledge. *See* Argument Part III.D.2.

Plaintiffs are thus unable to prove that the Pledge Statute negatively affects atheists in a disproportionate manner. *See* Argument Part III.D. As Plaintiffs have failed to disprove the presumption that the Pledge Statute is constitutional, this Court

should affirm the Superior Court's grant of summary judgment in the District's favor. *See* Conclusion.

ARGUMENT

I. This Court's Equal Protection Analysis Mirrors that Applied Under the Fourteenth Amendment.

Plaintiffs note two legal bases for their equal protection claims: Massachusetts' Equal Rights Amendment (the "ERA") and Section 5. The former precludes government from denying "[e]quality under the law" based on "sex, race, color, creed or national origin." Mass. Const. amend. Art. 106. While the latter prohibits public schools from denying students educational "advantages" and "privileges" based on "race, color, sex, gender identity, religion, national origin, or sexual orientation." Mass. Gen. Laws ch. 76, § 5.

Importantly, Plaintiffs recognize that the legal standard under Massachusetts' ERA and Section 5 are the same. *See* Appellees Br. at 41-42. And rightly so, for this Court has explained that with the ERA's passage, Massachusetts' "constitutional law has caught up to § 5." *Attorney General v. Mass. Interscholastic Athletic Ass'n, Inc.*, 378 Mass. 342, 344 n.5 (1979). The determinative question in this case is thus

whether the Pledge Statute or the District's practice of allowing students to voluntarily recite the Pledge violates Plaintiffs' rights under the ERA. *See* Appellees Br. at 42 ("Because the daily [Pledge] exercise violates Article 106, supra, it also violates G.L. c. 76, § 5.").

This Court's caselaw has long established that state ERA analysis generally mirrors that under the federal Equal Protection Clause of the Fourteenth Amendment. *See, e.g.*, *Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n*, 429 Mass. 721, 723 (1999) ("The [equal protection] standard under the Federal and State Constitutions is the same."); *Tobin's Case*, 424 Mass. 250, 252 (1997) ("For the purpose of equal protection analysis, our standard of review under ... the [ERA] is the same as under the Fourteenth Amendment to the Federal Constitution." (quotation omitted)); *Commonwealth v. Franklin Fruit Co.*, 388 Mass. 228, 235 (1983) ("Our standard of review is the same under the Fourteenth Amendment to the Federal Constitution as under the cognate provisions of the Massachusetts Declaration of Rights."). And Plaintiffs fail to provide any compelling justification for applying a different rule

here. *See, e.g.*, Appellees Br. at 30-33 (citing federal caselaw and drawing analogies to *Loving v. Virginia*, 388 U.S. 1 (1967) and *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

Plaintiffs do note that the ERA specifically forbids discrimination on the "basis of creed" in arguing that the ERA provides greater protection "of religious equality" than the federal Constitution. *Id.* at 27. But the Fourteenth Amendment prohibits the denial of equal protection on *any* ground, instead of forbidding discrimination of particular types. *See* U.S. Const. amend. XIV ("No state shall ... deny to any person within its jurisdiction the equal protection of the laws."). This renders it broader than the ERA, not narrower in scope.

Moreover, the United States Supreme Court (the "Supreme Court") established long ago that protection against religious discrimination lies at the heart of the Fourteenth Amendment. *See, e.g.*, *Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (establishing "race [and] religion" as "suspect" "classif[ications]"); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (prohibiting government from basing

negative treatment "upon an unjustifiable standard such as race, [or] religion").

A well-developed body of federal Fourteenth Amendment caselaw thus fully protects against discrimination on the basis of religion. This Court's prior rulings indicate that federal precedent applies to this case. *See, e.g.*, *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 243 (2006) (noting "[t]he standard for equal protection analysis under [Massachusetts'] Declaration of Rights is the same as under the Federal Constitution.").

II. Because the Pledge Statute Does Not Impinge on the Free Exercise of Religion, Plaintiffs' Equal Protection Claims are Subject to Rational Basis Review, Not Strict Scrutiny.

Under this Court's precedent, heightened scrutiny applies to "state laws [that] impinge on personal rights protected by the Constitution." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Lee v. Comm'r of Revenue*, 395 Mass. 527, 530-31 (1985) ("[C]lassification[s] involving ... a fundamental right must be supported by a compelling State interest."). And there is no doubt that the free exercise of religion qualifies as a "personal" or "fundamental" right. *See, e.g.*, *New Orleans v. Dukes*,

427 U.S. 297, 303 (1976); *Animal Legal Def. Fund, Inc. v. Fisheries & Wildlife Bd.*, 416 Mass. 635, 640 (1993). But Plaintiffs cannot demonstrate that the Pledge Statute contravenes their religious freedom.

At the outset, it is important to identify what the Pledge Statute is and what it is not. The United States Congress reaffirmed the current version of the Pledge in 2002, *see* Pub. L. No. 107-293, "as a common public acknowledgment of the ideals that our flag symbolizes," including our "proud traditions of freedom, of equal opportunity, [and] of religious tolerance." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) (quotation omitted). Recitation of the Pledge thus serves as "a patriotic exercise designed to foster national unity and pride in those principles." *Id.*

Government-sponsored patriotic speech, like the Pledge, "is an effort by the state to promote its own survival and along the way to teach those virtues that *justify* its survival." *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 444 (7th Cir. 1992). Congress may promote such patriotic expression "as its own point of view without coercing anyone to say the words." *Doe 3 v. Elmbrook Sch. Dist.*, 687 F.3d 840,

871 (7th Cir. 2012) (en banc) (Easterbrook, C.J., dissenting). Without question, the government speech doctrine generally allows officials to "hold their causes and values out as worthy subjects of approval and adoption, to persuade even though they cannot compel." *Sherman*, 980 F.2d at 444.

The Massachusetts General Court agreed with the principles Congress endorsed in the Pledge and viewed its daily recitation in schools as a valuable way of instilling patriotic values in young people. *See Opinions of the Justices to the Governor*, 372 Mass. 874, 879 (1977) (explaining the General Court intended the Pledge Statute "to instill attitudes of patriotism and loyalty in ... students"). Accordingly, the General Court passed the Pledge Statute, which requires teachers to lead a recitation of the Pledge daily for those students who voluntarily opt to participate. *See id.* at 880.

No "punishment of any kind may be imposed on a student who elects ... to abstain." *Id.* And it is undisputed that the District, in this case, makes no inquiries into the nature of students' reasons for not reciting the Pledge. *See, e.g.*, Appellants Br. at 10-

11 ("[P]laintiffs recognize that all children have the right to refuse participation in the [Pledge] ....").

The Pledge Statute thus has no effect on students' free exercise rights. Students who agree with the patriotic sentiments adopted by Congress and the General Court may voluntarily recite the Pledge. Other students are free to abstain for any reason or no reason at all. That their motivations range from the profound, such as segregation in the 1960s, to the petty, such as dislike of the teacher leading the Pledge, makes no difference. The District provides students with absolute freedom to comply with their beliefs regardless of whether they are political, personal, theistic, atheistic, or something else.

Courts have always regarded such unfettered exemptions as sufficient to protect individuals' free exercise rights. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 562 (1993) (Souter, J., concurring) (recognizing "substantive [religious] neutrality ... would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws"); *Wisconsin v. Yoder*, 406 U.S. 205, 235 (1972) (granting the Amish's "religious

claims for exemption from generally applicable education requirements").

Plaintiffs cannot redefine the free exercise of religion to preclude third parties from making statements with which they disagree. *See, e.g.*, *Elk Grove*, 542 U.S. at 33 (Rehnquist, C.J., concurring) (rejecting "a sort of 'heckler's veto' over a patriotic ceremony willingly participated in by other students"). That is not, and never has been, the law. *See, e.g.*, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038 n.33 (9th Cir. 2010) (explaining "the *Barnette* court ... did not hold that [objecting] students could ... prevent *other* students who had no such religious objection from reciting the Pledge"); *Sherman*, 980 F.2d at 445 ("Objection by the few does not reduce the silence the many who *want* to pledge allegiance to the flag 'and to the Republic for which it stands.'").

It is thus clear that the District's implementation of the Pledge Statute fully protects Plaintiffs' ability to live in accordance with their religious beliefs. Plaintiffs' arguments to the contrary are merely attempts to dress the forbidden "wolf" of a heckler's veto in "sheep's" clothing.

See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009) (rejecting a heckler's veto over government-sponsored speech); *Freedom From Religion Found. v. Obama*, 641 F.3d 803, 806-07 (7th Cir. 2011) (same). Because the Pledge Statute does not impinge on the Plaintiffs' fundamental right to the free exercise of religion, rational basis review, not strict scrutiny, applies. *See Cote-Whitacre v. Dep't of Public Health*, 446 Mass. 350, 366 (2006) ("[S]tatutes, 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.").

III. Plaintiffs' Contentions Fail to Establish An Equal Protection Violation Under State Law.

Plaintiffs recite a laundry list of ways in which the Pledge Statute allegedly "discriminates" against them. But they fundamentally misconstrue the protection against discrimination that Massachusetts' equal protection guarantee provides.[3] As this Court

[3] Plaintiffs make much of the fact that the Superior Court wrongly analyzed their claim under federal Establishment Clause standards. *See, e.g.*, Appellees Br. at 13-14. But this is hardly surprising given Plaintiffs' almost total reliance on coercion principles the Supreme Court outlined in *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Indep. Sch.*

recently explained, the ERA prohibits only "discrimination which is 'invidious.'" *Gillespie v. City of Northampton*, 460 Mass. 148, 159 (2011). Plaintiffs cannot establish that the Pledge Statute manifests or results in any invidious discrimination; consequently, their equal protections claims necessarily fail.

A. Intentional Discrimination is Required to Establish a Violation of Massachusetts' Equal Protection Guarantee.

Equal protection under the law requires that "'all persons similarly situated should be treated alike.'" *Id.* (quoting *Cleburne*, 473 U.S. at 439). This guarantee "creates no substantive rights." *Vacco v. Quill*, 521 U.S. 793, 799 (1997). It is not, for example, "a refuge from ill-advised laws." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 260 (1979) (quotation and alteration omitted). The "manner in which a particular law reverberates in a society;" in other words, its "calculus of effects;" is "a legislative and not a judicial responsibility." *Id.*

Dist. v. Doe, 530 U.S. 290 (2000). Such analysis is improper here both because Plaintiffs have raised "no Establishment Clause claims," Appellees Br. at 38, and because any potential coercion relates to a political statement, not a religious one. *See Rio Linda*, 597 F.3d at 1038-39; *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 406-407 (4th Cir. 2005); *infra* Part III.D.1.

at 272. Accordingly, Plaintiffs are entitled to "equal laws, not equal results." *Id.* at 273.

The concern of Massachusetts' equal protection guarantee is whether the "state purpose" underlying the Pledge Statute "is impermissibly discriminatory." *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 876 n.6 (1985). Not every form of inequality will do. "[P]urposeful discrimination is the condition that offends" the state and federal constitutions.[4] *Feeney*, 442 U.S. at 274 (quotation omitted).

Thus, without intentional discrimination no equal protection claim exists. *See, e.g.*, *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) ("[A] defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." (quotation omitted)); *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982) (noting equal protection guarantees may "be violated only by purposeful discrimination"); *Vill. of*

[4] To be clear, there is no requirement that Plaintiffs prove subjective intent to discriminate in order to establish a violation of the ERA. For instance, intentional discrimination may be shown by demonstrating disparate impact that can only be explained by a discriminatory purpose. *See infra* Part III.C. But Plaintiffs have not alleged sufficient facts to meet this standard. *See infra* Part III.D.

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.")

And the relevant definition of purposeful discrimination entails "more than intent as volition or intent as awareness of consequences." *Feeney*, 442 U.S. at 279. To show intentional discrimination, Plaintiffs must demonstrate that the General Court "selected or reaffirmed," or the District chose to comply with, the Pledge Statute "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon" students with atheistic beliefs. *Id.*

B. Plaintiffs Allege Disparate Impact Not Facial Discrimination.

Plaintiffs do not attempt to prove facial discrimination on the part of the General Court in passing the Pledge Statute, or on the District's part in implementing it. *See, e.g.*, Appellees Br. at 35 (admitting Pledge recitation "is intended to 'instill attitudes of patriotism and loyalty' in students" (quoting *Opinions of the Justices*, 372 Mass. at 879)). They aver instead that the Pledge Statute disproportionately impacts them in a negative manner.

See supra p. 4 (summarizing Plaintiffs' allegations that recitation of the Pledge creates an "atmosphere of disapproval," causing them not to feel "fully accepted," and contributing to "public hostility" against them).

This fact is amply illustrated by Plaintiff's amended complaint. From the outset of this case, Plaintiffs argued, for example, that "by continuing a practice" of voluntary Pledge recitation, the District created an environment that is inhospitable towards their atheist beliefs. *See, e.g.*, Amend. Comp. at 10; *see also id.* (alleging the District's Pledge practice "reinforces ... public prejudice against" atheists). But refusing to capitulate to Plaintiffs' demands to halt a statutorily-mandated practice that has spanned over seventy-five years is hardly evidence of facial discrimination. At most, it demonstrates the District's unwillingness to change its ways despite an awareness of the "discriminatory" consequences Plaintiffs allege.

The same is true of Plaintiffs' claim that voluntary recitation of the Pledge "contribut[es] to public hostility toward [their] religious class and religious views." *See, e.g.*, *id.* They rightly do not

contend that the District refused to stop voluntary recitation of the Pledge, and thus violate state law, to promote enmity towards atheists. Plaintiffs merely fault the District for failing to take affirmative steps to remedy what they regard as "the general public prejudice against atheists and Humanists." *Id.* at 5. But, in so doing, Plaintiffs ignore the essential fact that nothing in the ERA requires government to foster a social climate favorable to their beliefs.

Plaintiffs' failure to assert any facial discrimination on the part of the General Court or the District continues in their initial brief filed with this Court. They contend only that voluntary recitation of the Pledge is unconstitutional because it "stigmatizes non-theistic students on account of their religious beliefs and contributes to existing prejudices against" them. Appellant's Br. at 29. But arguments concerning the "fairness" of the Pledge Statute simply miss the point. *See, e.g.*, *id.* at 19.

Either intentional discrimination is present in this case or it is not. *See, e.g.*, *Feeney*, 442 U.S. at 277. Plaintiffs freely admit that the Pledge Statute was "intended specifically for the *purposes of*

instilling patriotism and loyalty" in students, Appellants Br. at 2 (emphasis added), not denigrating atheist beliefs. *See also id.* at 35 ("The daily exercise in question is intended to 'instill attitudes of patriotism and loyalty' in students." (quoting *Opinions of the Justices*, 372 Mass. at 879)). Thus, not even Plaintiffs suppose that the General Court or the District facially discriminated against them. They simply claim that voluntary recitation of the Pledge in public schools affects atheists negatively in a disproportionate manner.

Significantly, the only facial discrimination Plaintiffs do allege is on the part of Congress in amending the Pledge. *See id.* at 25 n.19 (accusing Congress of adding "the words 'under God'" to the Pledge "to indoctrinate schoolchildren in the belief that God exists"). Even if Plaintiffs were correct, and they are not, such intent is not attributable to the General Court, which maintained the Pledge Statute, nor the District, which implemented it.[5] *See*

[5] As the Ninth Circuit explained, Congress added the words "under God" to the Pledge in 1954 "primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government." *Rio Linda*, 597 F.3d at 1032. Plaintiffs

Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 9 (1st Cir. 2010) (refusing to analyze Congress' intent and looking to "the purpose of New Hampshire when it enacted" its own version of the Pledge Statute). Congress' motivations in establishing the current language of the Pledge are therefore clearly irrelevant to this Court's equal protection analysis.

C. Disparate Impact Must Be Tied to Discriminatory Intent In Order to Establish a Violation of Massachusetts' Equal Protection Guarantee.

The unintended consequences of the District's actions are alone incapable of denying Plaintiffs equal protection under state law. *See Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a ... discriminatory purpose, is unconstitutional [s]olely because it has a ... disproportionate impact."). As the Supreme Court has explained, "a neutral law does not violate the Equal Protection Clause solely because it results in a ... disproportionate impact." *Feeney*, 442 U.S. at 256.

---

appear to recognize this fact in certain portions of their brief. *See, e.g.*, Appellees Br. at 25 n.19, 37.

Disparate impact is unquestionably relevant to equal protection analysis, as it may serve as key evidence of purposeful discrimination. But it is not sufficient, in and of itself, to establish a violation of Massachusetts' equal protection guarantee. *See, e.g.*, *Coleman v. Court of Appeals of Md.*, 312 S. Ct. 1327, 1337 (2012) ("Although disparate impact may be relevant evidence of discrimination such evidence alone is insufficient to prove a constitutional violation even where the Fourteenth Amendment subjects state action to strict scrutiny." (quotation and alterations omitted)).

Many laws "affect certain groups unevenly, even though the law itself treats them no differently from all other members of the class described by the law." *Feeney*, 442 U.S. at 271-72. A certain degree of "disproportionate impact" results from every law as a natural byproduct of "the 'heterogeneity' of the Nation's population." *Vill. of Arlington Heights*, 429 U.S. at 266 n.15. Consequently, more than bare allegations of "unfair[ness]" are required to establish a violation of Plaintiffs' right to equal protection under state law. Appellants Br. at 19; *see Vill. of Arlington Heights*, 429 U.S. at 271 ("[T]hat

the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance.").

Any "invidious quality of governmental action claimed to be ... discriminatory must ultimately be traced to a ... discriminatory purpose." *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (quotations omitted). To be successful on their equal protection claims, Plaintiffs must therefore show that the disparate impact they allege reflects some kind of discriminatory intent on the part of government officials. *See, e.g.*, *Gen. Bldg. Contractors*, 458 U.S. at 390 ("'[E]ven if a neutral law has a disproportionately adverse impact upon a ... minority, it is unconstitutional ... only if that impact can be traced to a discriminatory purpose.'" (quoting *Feeney*, 442 U.S. at 272)).

Perhaps the best known case in which disparate impact was shown to demonstrate invidious intent is *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). In that case, a city ordinance in San Francisco allowed laundries to operate without governmental consent if they were located in buildings of brick or stone. But

laundries in wooden buildings required government sanction to operate. *See id.* at 368.

The San Francisco authorities authorized eighty non-Chinese persons to operate wooden laundries, but denied the same right to over two hundred of their Chinese counterparts. *See id.* at 374. The Supreme Court concluded that "no reason" for such "discrimination" existed "except hostility to the [Chinese] race and nationality." *Id.* It accordingly invalidated the ordinance as "a denial of the equal protection of the laws." *Id.*

Unlike the Chinese launderers in *Yick Wo*, Plaintiffs cannot demonstrate that the Pledge Statute disparately impacts them. *See infra* Part III.D. Plaintiffs are thus bereft of their only means of linking the Pledge Statute's substance or effect to some form of intentional discrimination.

D. Neither the Pledge Statute Nor the District's Practice of Voluntary Pledge Recitation Disparately Impacts Atheist Students.

The Pledge, which includes the phrase "one Nation under God," undoubtedly has a religious element. But, taken as a whole, it communicates a political message, not a religious one. Plaintiffs' bald assertion that atheists are uniquely unable to recite the Pledge is

simply unsupportable in fact. As a result, Plaintiffs are unable to demonstrate that the Pledge Statute disparately impacts them in a negative manner.

1. Taken as a Whole, the Pledge is a Political Declaration, Not a Religious Statement.

The Pledge, as established by Congress, states: "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." 4 U.S.C. § 4. Its emphasis clearly lies on "the Flag of the United States of America," "the Republic for which it stands," and the unique principles on which that "Nation" was founded. *Id.* Reciting the Pledge thus serves as a personal tribute to the nation's preeminent symbol, the constitutional republic it represents, and the unique values espoused by our system of government.

As the Ninth Circuit explained, the Pledge concisely summarizes our most cherished political principles:

> *one Nation under God*—the Founding Fathers' belief that the people of this nation are endowed by their Creator with certain inalienable rights; *indivisible*—although we have individual states, they are united in one Republic; *with liberty*—the government cannot take away the people's inalienable rights; *and justice for all*—everyone in

> America is entitled to "equal justice under the law" ....

Rio Linda, 597 F.3d at 1012.

The Pledge's reference to "one Nation under God" is not, as Plaintiffs seem to assume, an out-of-place allusion retained to irritate them. *See, e.g.*, Appellants Brief at 34-37. It reflects a core precept of the Founding Father's political philosophy: "individuals possess[] certain God-given rights which no government can take away." *Rio Linda*, 597 F.3d at 1013; *see also id.* at 1029 ("If the people would retain certain rights that did not emanate from the government, whence came those rights?").

Indeed, the principles of limited government on which this nation was founded depend on rights "derived from a source more powerful than, and entitled to more respect than, the government." *Id.* at 1029. The Founders identified the source of these inalienable rights "as the 'Creator," the 'Supreme Judge,' and 'Nature's God.'" *Id.* (quoting The Declaration of Independence). Although Plaintiffs may disagree with this notion, they cannot change such historical facts. *See, e.g.*, *id.* at 1030 (recognizing

that to justify rebellion against Great Britain the Founders "call[ed] upon divine inspiration").

The question of "whether government has only limited rights given to it by the people, or whether the people have only limited rights given to them by the government[,] remains one of the crucial debates around the world to this day." *Id.* at 1029. Retaining the phrase "one Nation under God" in the Pledge thus serves as "a powerful admission by the government of its own limitations." *Id.* at 1036. In sum, the Pledge's reference to God endorses "our form of government," *id.* at 1037, by emphasizing "that in America, the government's power is limited by a higher power." *Id.* at 1028.

That is not to say that the phrase "one Nation under God" lacks religious meaning. Such arguments are clearly disingenuous. *See Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 405 n.11 (4th Cir. 2005). Any reference to God is inherently religious, *id.* at 407, and Congress correctly noted in adding the phrase "under God" to the Pledge that "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." *Elk Grove*,

542 U.S. at 30 (O'Connor, J., concurring) (quoting H.R. Rep. No. 1693 of the 83rd Congress).

After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). It is good and right that government should recognize that fact. But government-sponsored acknowledgments of our nation's religious history and character do not morph political statements into religious exercises. *See Elk Grove*, 542 U.S. at 31 (O'Connor, J., concurring). "In reciting the Pledge, students promise fidelity to our flag and our nation, not to any particular God, faith, or church." *Hanover Sch. Dist.*, 626 F.3d at 10.

It is impossible to conclude otherwise after examining the Pledge's plain text. The only objects of students' allegiance are "the Flag of the United States of America," "the Republic for which it stands," and the "Nation." 4 U.S.C. § 4. Congress included "under God" as one of four descriptors, albeit an important one, of the "Nation" acclaimed by the Pledge. *Id.* Although the Pledge thus "contains a religious phrase, and it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance," their inclusion "does not

alter the *nature* of the Pledge as a patriotic activity." *Myers*, 418 F.3d at 407.

Virtually every court to consider this matter has reached the same conclusion. *See, e.g.*, *Elk Grove*, 542 U.S. at 6 (acknowledging the Pledge "is a patriotic exercise designed to foster national unity and pride in [American political] principles"); *Hanover Sch. Dist.*, 626 F.3d at 10 (noting Pledge exercises "advance[] ... patriotism through a pledge to the flag as a symbol of the nation"); *Rio Linda*, 597 F.3d at 1018 ("[T]he Pledge is designed to evoke feelings of patriotism, pride, and love of country ...."); *Myers*, 418 F.3d at 408 ("[T]he Pledge is by its nature a patriotic exercise ...."); *Sherman*, 980 F.2d at 446 ("The Pledge tracks Lincoln's Gettysburg Address ....").

And this Court is among their ranks. In *Opinions of the Justices to the Governor*, 372 Mass. 874 (1977), this Court considered the current language of the Pledge Statute, along with the present version of the Pledge. Following a description of the Pledge's "patriotic sentiments," this Court recognized that its content is designed to "instill attitudes of patriotism and loyalty." *Id.* at 878-79. Such

"patriotic feelings" are not religious. *Id.* at 879. The Pledge, taken as a whole, is thus clearly secular on its face.

Plaintiffs are free to disagree and decline to participate in the Pledge. But they cannot impose a constitutional duty on the District to "shield" them from exposure to political principles that they find "religiously offensive, particularly when the [District] imposes no requirement that [Plaintiffs] agree with or affirm those ideas, or even participate in discussions about them." *Hanover Sch. Dist.*, 626 F.3d at 14 (quotations omitted).

"The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons." *Sherman*, 980 F.2d at 444. Nonetheless, school districts generally retain the right "to set the curriculum in [their] own schools." *Id.* at 445. The District, in this case, accommodates religious objections to Pledge recitation by allowing students to opt out for any reason or no reason at all. *See, e.g.*, Appellees Br. at 10-11. All Plaintiffs are required to do is "respect the rights

of those students electing to participate." *Hanover Sch. Dist.*, 626 F.3d at 4.

2. Voluntary Pledge Recitation Does Not Have a Disparate Impact on Atheist Students.

Plaintiffs assume, without citation to any supporting evidence, that atheists are uniquely excluded when they decline to recite the Pledge. *Cf. id.* at 10. This is simply not the case. Individuals refuse to participate in the Pledge for any number of reasons, many of which are completely unrelated to religion. *See id.* at 11 ("There are a wide variety of reasons why students may choose not to recite the Pledge, including many reasons that do not rest on ... anti-religious belief."). Even amongst those who object to the Pledge on religious grounds, a long history of federal litigation establishes that objectors are more likely to be theists than atheists.

a. Students are Likely to Decline to Participate in the Pledge as a Secular Act of Political Protest.

For voluntary Pledge recitation to have a disparate impact on atheist students, Plaintiffs would have to show that it singles them out for exclusion. But Plaintiffs cite no evidence indicating that atheist students are uniquely burdened by other

pupils' recitation of the Pledge. And the variety of secular reasons why a student might decline to participate in the Pledge is self evident: "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," as "[e]ven students who agree with the Pledge may choose not to *recite*" it. *Id.*

Opposition to the American flag, the subject of the Pledge, on a variety of nonreligious fronts is well documented. The defendant in *Street v. New York*, 394 U.S. 576 (1969), for instance, burned the American flag to protest the government's failure to protect "civil rights leader James Meredith" who was "shot by a sniper in Mississippi." *Id.* at 578. In *Texas v. Johnson*, 491 U.S. 397 (1989), the flag burner's political ire focused instead on "the policies of the Reagan administration and of certain Dallas-based corporations." *Id.* at 399. Whereas in *United States v. Eichman*, 496 U.S. 310 (1990), flag burners' were protesting various aspects of the federal government's "domestic and foreign policy," as well as Congress' passage of the "Flag Protection Act." *Id.* at 312.

It stands to reason that any citizen so offended by the conduct of their government as to burn the American flag, its preeminent symbol, would also refused to participate in the Pledge, which promises allegiance to that object. *See id.* at 316 n.6 ("[A]t some irreducible level the flag is emblematic of the Nation as a sovereign entity."). Yet the vast majority of domestic flag burnings, as illustrated above, relate to wholly secular matters of politics. Religion does not enter into the equation at all.

In fact, there is a long history in this country, where free speech is one of our preeminent values, of virulent political disagreement. Part of that tradition entails Americans publicly dishonoring the flag to express opposition to the secular policies of government. Plaintiffs are consequently unable to demonstrate that daily Pledge recitation uniquely excludes students who object on religious grounds.

b. Theistic Students, Such as Jehovah's Witnesses, are Just as Likely to Object to the Pledge as Their Atheist Counterparts.

Plaintiffs are also wrong to suggest that atheistic Humanists are the only religious students

unable to support the Pledge's content.[6] Atheists' challenges to schoolroom recitations of the Pledge are a relatively new phenomenon. Much older, and much more common, are lawsuits filed by a particular group of theists, Jehovah's Witnesses. *See, e.g.* Patrick J. Flynn, *Writing Their Faith Into the Laws of the Land: Jehovah's Witnesses and the Supreme Court's Battle for the Meaning of the Free Exercise Clause*, 10 TEX. J. C.L. & C.R. 1, 1 (2004) (explaining "Jehovah's Witnesses brought most of th[e] original [free exercise] cases before the Supreme Court").

Jehovah's Witnesses' interpretation of the Ten Commandments precludes them from pledging fidelity to any object, including the American flag. *See* Neil M. Richards, *The "Good War," the Jehovah's Witnesses, and the First Amendment*, 87 VA. L. REV. 781, 787 (2001) (describing the Jehovah's Witnesses as "[a]n insular religious minority who refused to salute the flag"). Unlike Plaintiffs, they "were relentlessly persecuted, subjected to beatings, destruction of their property, boycotts of their businesses, and expulsion of their children from public schools." *Id.* at 783.

[6] In addition, Plaintiffs' contentions fail to account for the many atheist or agnostic students who have no religious objection to reciting the Pledge.

Indeed, this Court decided several cases involving the expulsion of Jehovah's Witness children from the Commonwealth's public schools based solely on their refusal to participate in the Pledge. *See Commonwealth v. Johnson*, 309 Mass. 476, 479 (1941) (noting defendants were "members of an association of Christian people called Jehovah's witnesses' who sincerely and honestly believe that participation in [Pledge] contravenes the law of Almighty God") (quotations omitted); *Nicholls v. Mayor & Sch. Comm. of Lynn*, 297 Mass. 65, 66 (1937) (explaining that Nicholls, a Jehovah's Witness, refused to participate in the Pledge because "according to his religious views, he could only adore and bow down to Jehovah").

The precedent of the United States Supreme Court further exemplifies Jehovah's Witnesses' widespread refusal to recite the Pledge based on the strength of their theistic beliefs. Initially, the Supreme Court refused to intervene when two Jehovah's Witness students were expelled from public schools in Pennsylvania because they believed participating in the Pledge was "forbidden by command of scripture." *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 592

(1940); *see also id.* at 592 n.1 (noting the students relied upon Exodus 20:3-5).

But a mere three years later, the Supreme Court changed course in a suit involving Jehovah's Witness children expelled from public schools in West Virginia. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629-30 (1943). Those students considered the American flag to be a "graven image" within the meaning of the Ten Commandments and the Pledge as a form of "bow[ing] down" to an idol. *Id.* at 629. The Supreme Court held that West Virginia's efforts to compel "the flag salute and pledge transcend[ed] constitutional limitations ... and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment ... to reserve from all official control." *Id.* at 642.

Jehovah's Witnesses' long struggle to have their theistic beliefs respected thus resulted in the Supreme Court's recognition of the free exercise rights we know today.[7] *See* Flynn, *supra* p. 38, at 1

[7] It is true that many of the Jehovah's Witnesses cases involved an earlier version of the Pledge that did not include the phrase "one Nation under God." But students whose religion deems the American flag an idol and the Pledge a form of worship are likely be more disconcerted by the Pledge's current language.

(recognizing the Jehovah's Witnesses cases "establish[ed] much of the First Amendment free exercise law still in use today"). Consequently, no doubt exists that the daily recitation of the Pledge in District schools affects objecting theists just as much as objecting atheists.

Plaintiffs' claims of exceptional exclusion are thus unsupportable in fact. Any student prone to political protest who vehemently objects to the conduct of the United States government is liable to decline participation in the Pledge. Opportunities for such nonreligious objections abound, including disagreement with the war in Afghanistan, the failure to stop mass killings in Darfur and Syria, or the refusal to ratify the Kyoto Protocol.

Furthermore, Plaintiffs' arguments fail to account for the wide variety of religious beliefs in this country. Religious groups like Jehovah's Witnesses refuse to participate in the Pledge for theistic reasons that are no less compelling than Plaintiffs' atheistic concerns. In short, Plaintiffs cannot establish that daily recitation of the Pledge

---

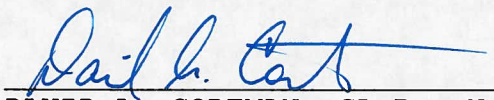
Noting the capitalization of both "Nation" and "God," Jehovah's Witnesses could view the Pledge as evincing a forbidden parity between God and the United States.

uniquely impacts religious students, let alone atheistic ones.

CONCLUSION

To prevail on appeal, Plaintiffs must overcome this Court's presumption that the Pledge Statute is constitutional. *See Franklin Fruit Co.*, 388 Mass. at 235. Plaintiffs' bald assertions of disparate impact, which dissipate upon light scrutiny, are simply incapable of carrying that burden. Accordingly, this Court should affirm the Superior Court's grant of summary judgment in the District's favor.

Respectfully submitted,



DAVID A. CORTMAN, GA Bar No. 188810
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste. D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@alliancedefendingfreedom.org

JEREMY D. TEDESCO, AZ Bar No. 023497
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
jtedesco@alliancedefendingfreedom.org

ANDREW D. BECKWITH, BBO No. 657747
MASSACHUSETTS FAMILY INSTITUTE
100 TradeCenter, Suite 625
Woburn, MA 01801
(781) 569-0400
andrew@mafamily.org

February 4, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), counsel hereby certifies that this brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to Massachusetts Rules of Appellate Procedure 16 and 20.

ANDREW D. BECKWITH, BBO No. 657747
MASSACHUSETTS FAMILY INSTITUTE
100 TradeCenter, Suite 625
Woburn, MA 01801
(781) 569-0400
andrew@mafamily.org

CERTIFICATE OF SERVICE

I, Andrew D. Beckwith, hereby certify under penalty of perjury that on February 1, 2013, I caused two true and accurate copies of this brief to be served upon the following counsel of record by first class mail:

GEOFFREY R. BOK
STONEMAN, CHANDLER & MILLER LLP
99 High Street, 16th Floor
Boston, MA 02110

J. PATRICK KENNEDY
BURKLEY, RICHARDSON & GELINAS, LLP
125 High Street
Oliver Street Tower, 16th Floor
Boston, MA 02110

ERIC C. RASSBACH
DIANA M. VERM
BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street NW, Suite 220
Washington, DC 20007

ANDREW D. BECKWITH, BBO No. 657747
MASSACHUSETTS FAMILY INSTITUTE
100 TradeCenter, Suite 625
Woburn, MA 01801
(781) 569-0400
andrew@mafamily.org

STATUTORY ADDENDUM

Mass. Const. Amend. Art. 106.

Article CVI. Article I of Part the First of the Constitution is hereby annulled and the following is adopted:

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Gen. Laws Ch. 71, § 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.

Mass. Gen. Laws Ch. 76, § 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.

4 U.S.C. § 4

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.

Pub. L. No. 107-293

REAFFIRMATION—REFERENCE TO ONE NATION UNDER GOD IN THE PLEDGE OF ALLEGIANCE

An Act To reaffirm the reference to one Nation under God in the Pledge of Allegiance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

<< 4 USCA § 4 NOTE >>

SECTION 1. FINDINGS.

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), 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), 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.

SEC. 2. ONE NATION UNDER GOD.

(a) REAFFIRMATION.—Section 4 of title 4, United States Code, is amended to read as follows:

<< 4 USCA § 4 >>

“§ 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.”.

<< 4 USCA § 4 NOTE >>

(b) CODIFICATION.—In codifying this subsection, 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.

SEC. 3. REAFFIRMING THAT GOD REMAINS IN OUR MOTTO.

(a) REAFFIRMATION.—Section 302 of title 36, United States Code, is amended to read as follows:

<< 36 USCA § 302 >>

“§ 302. National motto
“ ‘In God we trust’ is the national motto.”.

<< 36 USCA § 302 NOTE >>

(b) CODIFICATION.—In codifying this subsection, the Office of the Law Revision Counsel shall make no change in section 302, title 36, United States Code, but shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Motto for decades.

Approved November 13, 2002.