No. _____

IN THE
Supreme Court of the United States

THE FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,
DRESDEN SCHOOL DISTRICT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school district's policy of having its teachers lead students in a daily Pledge of Allegiance that declares the United States to be "one Nation under God" is consistent with the Establishment Clause of the First Amendment and the associated mandates of equal protection.

LIST OF ALL PARTIES

Plaintiffs/Petitioners

(1) The Freedom From Religion Foundation
(2) Pat Doe (Parent and Next Friend of DoeChild-1, DoeChild-2, and DoeChild-3)
(3) Jan Doe (Parent and Next Friend of DoeChild-1, DoeChild-2, and DoeChild-3)
(4) DoeChild-1
(5) DoeChild-2
(6) DoeChild-3

Defendants/Respondents

(1) The Hanover School District
(2) The Dresden School District
(3) The United States of America
(4) The State of New Hampshire
(5) Muriel Cyrus
(6) A.C., Minor
(7) J.C., Minor
(8) K.C., Minor
(9) S.C., Minor
(10) E.C., Minor
(11) R.C., Minor
(12) A.C., Minor
(13) D.P., Minor
(14) Michael Chobanian
(15) Margarethe Chobanian
(16) Minh Phan
(17) Suzu Phan
(18) Knights of Columbus

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

WEBSITES

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is available at *Freedom From Religion Foundation v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010). It is reprinted in Appendix A.

JURISDICTION

The First Circuit filed its decision on November 12, 2010, and entered an order denying petitioners' motion for rehearing on December 28, 2010. Appendix B. By writ of certiorari, this Court has jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeals' decision.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The constitutional provisions and statutes involved in this case are set out in Appendix E.

STATEMENT OF THE CASE

The Pledge of Allegiance was first introduced in 1892. It was intended to be a patriotic oath that, as reflected in the phrase "one nation indivisible," would unify our people. In the mid-1950s, however, that phrase was altered. Wishing to distinguish our American form of government from that of our Soviet Cold War rivals, Congress added the two words "under God" to the Pledge. In so doing, it divided the American people on the basis of religious belief.

Since that time, agents of the government (i.e., public school teachers) have done as Congress intended, leading children throughout the country in reciting the amended (Monotheistic) version of the

Pledge. In New Hampshire, that activity occurs pursuant to N.H. Rev. Stat. Ann. ("RSA") § 194:15-c, also known as "the New Hampshire School Patriot Act." With its mandatory language, that act provides that "[a] school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance." "Pupil participation," however, "shall be voluntary."

The lead plaintiff in this case is the Freedom From Religion Foundation ("FFRF"), a national association of Atheists and Agnostics. FFRF works to end the prevalent anti-Atheist bias in this country by supporting the separation of church and state. Joining FFRF is a family of Atheists and Agnostics. This family is comprised of Jan Doe (an FFRF member), Pat Doe, and their three children. The family lives in New Hampshire, where each child has been attending public school since kindergarten. In their classrooms, the mandate of RSA § 194:15-c has been followed. Thus, on the order of 2,400 times already, agents of the government (i.e., public school teachers) have encouraged this non-believing couple's young children to stand up, place their hands over their hearts, and personally affirm the religious contention that God exists. Plaintiffs contend that – whether the children participate or not – there remains implicit in each Pledge recital the message that these children's parents' (and their own) religious views are wrong.

FFRF and the Does filed suit to end that practice on the grounds that it violates the Establishment Clause and the associated principle of equal protection. After an adverse ruling in the District Court, they filed an appeal in the U.S. Court of Appeals for the First Circuit.

RULING OF THE COURT OF APPEALS

The U.S. Court of Appeals for the First Circuit ruled that it is permissible under the Establishment Clause for public school teachers to lead impressionable children in reciting the Pledge of Allegiance (with the "under God" verbiage).

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Whether governmental agents should lead impressionable children in personally affirming that our nation is "under God" has already been characterized by this Court as a "matter[] of great national significance," *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004), and "a weighty question of federal law." *Id.* at 17. In view of the following, Petitioners respectfully submit that the time is ripe for this important question of federal law to be settled by this Court.

(A) THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE REMAINS "IN HOPELESS DISARRAY"

In the nearly three decades since the Court appeared "willing to alter its analysis from Term to Term in order to suit its preferred results," *Lynch v. Donnelly*, 465 U.S. 668, 699 n.4 (1984) (Brennan, J., dissenting), its Establishment Clause jurisprudence

has remained "in hopeless disarray." *Rosenberger v. University of Virginia*, 515 U.S. 819, 861 (1995) (Thomas, J. concurring). Thus, the lower courts continue to "struggl[e] mightily to articulate when government action has crossed the constitutional line," *American Atheists, Inc. v. Duncan*, 616 F.3d 1145, 1156 (10th Cir. 2010), attributing this difficulty to "the Supreme Court's failure to 'prescribe a general analytic framework within which to evaluate Establishment Clause claims.'" *Id.* (citation omitted). Similarly, "the Court's Establishment Clause jurisprudence is often derided as inconsistent," *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1074 (9th Cir. 2010) (Reinhardt, J., dissenting), "rife with confusion," *Croft v. Perry*, 624 F.3d 157, 165 (5th Cir. 2010), with "no clear consensus among our sister circuits," *Pelphrey v. Cobb County*, 547 F.3d 1263, 1274 (11th Cir. 2008), and "less-than-clear Supreme Court precedent," *Skoros v. City of New York*, 437 F.3d 1, 43 (2nd Cir. 2006) (Straub, J., concurring and dissenting).

The "disarray" of the Court's Establishment Clause jurisprudence is reflected in the five Court of Appeals decisions that have upheld the "under God" language. Although consistent in outcome ("Every federal circuit court that has addressed a state pledge statute has rejected the claim of unconstitutionality." *Freedom*, 626 F.3d at 6 n.13), the bases for those rulings are remarkably diverse. To be sure, a consistent outcome stemming from a variety of approaches usually suggests that the outcome is correct. However, when it is realized that each approach would also validate "one Nation under Jesus" or "one Nation under Protestantism," the possibility is great that the identity of the holdings is

not the important unifying feature of the various opinions. Rather, it is possible that what unifies these diverse holdings is that all of them manifest the evil that the Establishment Clause exists to stifle – i.e., "political division along religious lines." *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971). Accordingly, a careful examination by this Court is warranted to ensure that the constitutional guarantee of religious freedom is not being weakened by an ever-growing number of appellate decisions.

In fact, the diversity of arguments appears to be nothing more than the proverbial mud being tossed in the hope that some will stick. In this case alone, at least nine reasons were given to conclude that "under God" in the Pledge is permissible. Again, every one of those reasons would also deem constitutional the two alternative (i.e., "under Jesus" and "under Protestantism"[1]) phrases just mentioned:

(1) "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." 626 F.3d at 8.

(2) "[T]he New Hampshire Act has a secular purpose--the promotion of patriotism." *Id.* at 9.

(3) "[T]here is no claim that a student is required to advance a belief in theism (or monotheism)." *Id.* at 10.

(4) "[T]he recitation of the Pledge in New Hampshire public schools is meant to further 'the policy of

[1] Or, for that matter, "one Nation under the White Race," "one Nation under the Male Gender," or "one Nation under the Wealthiest Citizens," reflecting other characteristics of the nation's founders.

teaching our country's history.'" *Id.* (citing RSA § 194:15-c).

(5) "[C]hildren are not religiously differentiated from their peers merely by virtue of their non-participation in the Pledge." *Id.* at 11.

(6) "Taken in the context of the words of the whole Pledge, the phrase 'under God' does not convey a message of endorsement." *Id.*

(7) "[A] student who remains silent during the saying of the Pledge engages in overt non-participation by doing so." *Id.* at 13-14.

(8) "[T]he Doe children allege mere exposure to the religious content of the Pledge." *Id.* at 14.

(9) "[T]he New Hampshire Act … '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.'" *Id.* (citing to the opinion of the District Court).

The same holds true for the other circuits' Pledge panels – i.e., the Christian and Protestant versions of the Pledge would be permissible using their arguments as well. In *Sherman v. Community Consolidated Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993), for example, after shifting the onus of the Bill of Rights from the government to the individual:

> Government … retains the right to set the curriculum in its own schools and insist that those who cannot accept the result exercise their right under *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070, 45

> S. Ct. 571 (1925), and select private education at their own expense.

id. at 445, the panel relied upon what this Court has called "cursory dicta inserted in unrelated cases." *Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968). In view of the Court's consistent rulings striking down the governmental infusion of religion into the public schools (*see* at page 29, *infra*), commentary on the appropriateness of this reliance seems desirable.

Sherman also alluded to what first appeared in Justice Brennan's dissent in *Lynch*: "ceremonial deism." After writing, "I remain uncertain about these questions," Justice Brennan continued:

> I would suggest that … the references to God contained in the Pledge of Allegiance to the flag can best be understood … as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content.

465 U.S. at 716 (Brennan, J., dissenting) (footnote omitted). Since then, "ceremonial deism" has been mentioned in only two other Supreme Court cases. In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), the plurality, *id*. at 595 n.46 and 603, and Justice O'Connor (in concurrence), *id*. at 630, basically referenced the term in passing. Although some analysis was offered by Justice O'Connor in the second case, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37-44 (2004) (O'Connor, J., concurring), no other justice joined her opinion. Accordingly, any high court authority for "ceremonial deism" is meager at best.

In *Sherman*, in fact, Judge Manion took issue with the concept. "A civic reference to God," he wrote, "does not become permissible under the First Amendment only when it has been repeated so often that it is sapped of religious significance." 980 F.2d at 448 (Manion, J., concurring). Otherwise, he argued, "ceremonial deism" would imply that, in 1954, the Pledge "violated the Establishment Clause because [it] had not yet been rendered meaningless by repetitive use." *Id*. Moreover:

> Why only "under God"? Why not "indivisible", "liberty and justice for all"? Do not these equally repeated phrases also lose their meaning under the logic of "ceremonial deism"? The answer, quite simply, is that a court cannot deem any words to lose their meaning over the passage of time. Each term used in public ceremony has the meaning intended by the term.

Id. In view of Judge Manion's comments, formal analysis of "ceremonial deism" by this Court is needed to determine whether he or the *Sherman* panel majority correctly interpreted that concept.

Judge Manion would have applied another technique: the "if-then" test. This test (which also would validate "under Jesus" and "under Protestantism") currently has the potential to rationalize almost any governmental endorsement of religion. Starting with one accepted practice, the "if-then" test simply uses that practice as a benchmark, and allows for the progressive degradation of the Constitution's protections. This, it may reasonably be argued, is in large part responsible for the "hopeless

disarray" of the Court's Establishment Clause law. After all, with approval granted for the use of taxpayer funds to have clergy reciting prayers before each session of the nation's legislature, *Marsh v. Chambers*, 463 U.S. 783 (1983), what governmental action could not be deemed permissible if so desired?

> If legislative prayer based upon the Judeo-Christian tradition is permissible under *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L. Ed. 2d 1019 (1983), and a Christmas nativity scene erected by a city government is permissible under *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L. Ed. 2d 604 (1984), then certainly the less specific reference to God in the Pledge of Allegiance cannot amount to an establishment of religion.

980 F.2d at 448 (Manion, J., concurring). Interestingly, this Court in *Lynch* itself, 465 U.S. at 692-93, also used *Marsh* to apply the "if-then" test: "These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 463 U.S. 783 (1983)."

The unending and circular nature of the "if-then" test can be appreciated by looking at *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir 2010). There, the Court's opening prayer – i.e., "God save the United States and this honorable Court" – was challenged in an emergency motion. The only panel member to address this matter wrote, "The traditional prayer before this Court's sessions (and before the Supreme

Court's sessions) is analogous to … the legislative prayers upheld in *Marsh*." 603 F.3d at 1021 (Kavanaugh, J. concurring). Yet, in *Marsh*, this Court had pointed to that "traditional prayer" to support its approval of prayer in the legislature:

> In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

Marsh, 463 U.S. at 786.

Of course, this strategy can be used not only to weaken the Constitution's guarantee of religious freedom, but to strengthen it as well, especially vis-à-vis the Pledge. Paraphrasing Judge Manion's passage, a court could also write:

> If having students on the brink of adulthood, with their parents at their sides, listening on only one occasion to a prayer recited solely by an invited guest is impermissible under *Lee v. Weisman*, 505 U.S. 577 (1992) and prayer initiated by students themselves, recited during the raucous environment of an extracurricular football game, is impermissible under *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000), then certainly having the government's own agents asking children as young as five years old to personally affirm God's existence on a daily basis must be impermissible as well.

Therefore, this Court's review is needed to determine the propriety of – or the appropriate limitations for – this "if-then" approach.

The next circuit court Pledge decision was *Myers v. Loudoun County Public Schools*, 418 F.3d 395 (4th Cir. 2005). There, the oft-repeated "we are a religious people whose institutions presuppose a Supreme Being" quote from *Zorach v. Clauson*, 343 U.S. 306, 312 (1954), was heard. As usual, however, the subsequent clarification went unheeded:

> [W]e stated in *Zorach v. Clauson*, 343 U.S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being." … [But] if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government.

McGowan v. Maryland, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

Unsurprisingly, *Myers* also turned to *Marsh v. Chambers* for support, contending that it is a "paradigmatic example of the role of history in the Court's Establishment Clause jurisprudence." "Paradigmatic" is certainly a strange adjective to use for a case that others have referenced as "carving out an exception for the specific practice in question," *Rosenberger v. University of Virginia*, 515 U.S. 819, 872 n.2 (1995) (Souter, J., dissenting), such that it "fits into a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine." *Kurtz v. Baker*, 829 F.2d 1133, 1147 (1987) (R.B. Ginsburg, J., dissenting). Furthermore, this Court had decided *Santa Fe* five years before the Fourth Circuit decided *Myers*. With the 2000 decision

having scribed, "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer," *Santa Fe*, 530 U.S. at 313, the Court's comments on the continuing validity of *Marsh* will be quite helpful.

As with *Sherman*, the *Myers* panel never actually applied any of this Court's Establishment Clause tests. Instead, references were made to such historical facts as "The Constitution itself claims it was completed in the 'Year of Our Lord' 1787," 418 F.3d at 404, and "[t]he First Congress 'urged President Washington to proclaim a day of public thanksgiving and prayer.'" *Id.* (citation omitted). The probative value of these references, however, is debatable. For example, applying the first reference would also support a Pledge made to "one Nation under Jesus." As for President Washington's Thanksgiving proclamation, the associated history strongly militates against that episode having significant precedential import.[2] Thus, this case will allow the Court to better clarify how the founding history applies in Establishment Clause analyses.

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[2] *See* Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?* 38 Cap. U. L. Rev. 409, 451-54 (2009) (hereafter "Newdow: *Question*"), (revealing that each of the next three Presidents concluded that the nation's chief executive ought not engage in such activity, and that – after James Madison announced that "[r]eligious proclamations by the Executive recommending thanksgivings & fasts . . . imply a religious agency, making no part of the trust delegated to political rulers" (citation omitted), no further presidential Thanksgiving proclamation was made until the Civil War).

Myers also reached its conclusion by arguing that "under God" in the Pledge is not "a threat to establish a religion." 418 F.3d at 405. The Establishment Clause, however, does not speak of "a religion," but of "religion" generally. Furthermore, it is concerned not with establishments, but with laws "respecting" establishments. "A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Lemon*, 403 U.S. at 612.[3] The lower courts need guidance on whether the Clause's phraseology needs to be strictly construed.

Focusing on "prayer" was one more of the *Myers*' straw men. 418 F.3d at 406-408. This Court has demonstrated in numerous cases – including five in the public school context (*McCollum v. Board of Education*, 333 U.S. 203 (1948) (religious teachers); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible readings); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (teaching evolution); *Stone v. Graham*, 449 U.S. 39 (1980) (Ten Commandments postings); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (teaching "creation science")) – that nothing in the First Amendment limits laws "respecting an establishment of religion" to prayer.

Moreover, "[r]epeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Employment Div. v. Smith*, 494 U.S.

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[3] That Chief Justice Burger also included the article ("a") while reviewing "[t]he language of the Religion Clauses of the First Amendment," 403 U.S. at 612, shows how pervasive is the "a religion" error.

872, 887 (1990). If the sole expert on the Pledge of Allegiance to whom this Court has cited,[4] along with least one President,[5] believe that the Pledge is a prayer, is it proper for the lower courts to definitively declare it is not?

After *Myers* (like *Sherman*) collected "cursory dicta inserted in unrelated cases," *Permian Basin*, 390 U.S. at 775, it then placed in italicized type that "*not one Justice has ever suggested that the Pledge is unconstitutional*." 418 F.3d at 406. This was a rather extraordinary statement, especially since *Myers* surveyed the multiple opinions from *Elk Grove*. Among those was only one dictum that ought to be binding upon the lower courts: "[A]s a matter of our precedent, the Pledge policy is unconstitutional." *Elk Grove*, 541 U.S. at 49 (Thomas, J., concurring). To be sure, Justice Thomas concluded that he felt the Establishment Clause was not violated by the "under God" language. However, no other justice joined him in his concurrence. Thus, the lower courts need to know whether to place greater value on a justice's

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[4] *See* Dr. John W. Baer. *The Pledge of Allegiance: A Short History* ("In 1954, Congress after a campaign by the Knights of Columbus, added the words, 'under God,' to the Pledge. The Pledge was now both a patriotic oath and a public prayer."). Accessed on March 6, 2011 at http://oldtimeislands.org/pledge/pledge.htm. Dr. Baer was cited in *Elk Grove*, 542 U.S. at 6 n.1.

[5] According to President George W. Bush, pledging allegiance involves "humbly seeking the wisdom and blessing of Divine Providence." *Letter of November 13, 2002 to the Hawaii State Federation of Honpa Hongwanji Lay Americans*.

assessment of this Court's precedent, or to the disagreement that justice may have with it.

In fact, the value to ascribe to isolated statements from members of this Court is an issue that is in dire need of review. A concurring judge in Myers went so far as to say that "the Court and many Justices individually have unequivocally stated, albeit in dicta, that the Pledge of Allegiance to a 'Nation under God' does not violate the Constitution." 418 F.3d 409 (Motz, J., concurring). Judge Motz followed this statement with, "[T]he Justices of the Supreme Court have stated, repeatedly and expressly, that the Pledge of Allegiance's mention of God does not violate the First Amendment." *Id.* at 411. It seems obvious, therefore, that this tribunal needs to counsel the lower courts regarding interpretations of its ancillary statements.

A novel tack was taken in the next Pledge decision, *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010). After finding no religious purpose behind the State's Pledge recitation statute (a finding to which the plaintiffs had stipulated), and after spending a short paragraph never addressing the statute's religious effects, the federal Pledge statute was analyzed. This analysis was performed by looking at Congress's 2002 reaffirmation of the Pledge, in which the history of the 1954 insertion of "under God" was revised beyond recognition. If ever there were a "sham" used to justify an act of Congress, *McCreary County v. ACLU,* 545 U.S. 844, 864 (2005) ("the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective"), it is that found in the 2002 reaffirmation. Because *Rio Linda's* 136-page dissent shows this beyond question, Petitioners here will

simply point out that (i) the House Report accompanying the 1954 act which added the "under God" language to the Pledge clearly enunciated the purpose of the addition: to "further acknowledge the dependence of our people and our Government upon the moral directions of the Creator,"[6] and (ii) the President reinforced that notion as he signed the bill into law: "From this day forward, the millions of our school children will daily proclaim … the dedication of our Nation and our people to the Almighty."[7] With clearer examples of a religious purpose difficult to imagine, this case presents the Court with an excellent opportunity to note the parameters by which the federal judiciary ought to gauge an apparent legislative whitewash of history.

The final federal appellate Pledge case was *Croft v. Perry*, 624 F.3d 157 (5th Cir. 2010). There, the generic statements in *Elk Grove* – that a constitutional Pledge of Allegiance is designed to be "a public acknowledgment of the ideals that our flag symbolizes" and that the recitation of such a constitutional Pledge serves as "a patriotic exercise designed to foster national unity and pride in those principles," *Elk Grove*, 542 U.S. at 6 – were taken to imply that the "under God" language was embraced by those dicta. *Croft*, 624 F.3d at 164 ("Although dicta, we do take such pronouncements from the Supreme Court seriously."). It would be beneficial for the lower courts to hear from this Court whether expanding such general statements in this manner is appropriate, or whether doing so is unjustified.

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[6] H.R. Rep. No. 83-1693 at 1-2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340.

[7] 100 Cong. Rec. 8618 (1954).

Croft employed a litany of other questionable means to "hold that the pledge survives this constitutional challenge." *Id.* at 165. For instance, after noting that "'[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,'" *id.* at 165-66 (citation omitted), the *Croft* panel decided that a claim that people are "under God" does not favor monotheistic belief. Is this correct? If the claim were that we are "under Jesus," would the Fifth Circuit be justified in concluding that this new phrase does not favor Christianity?

That "acknowledging" our "religious heritage" is a patriotic secular activity was the next Croft contention. Surely this totally counterintuitive notion needs more than a naked *ipse dixit* to be accepted. First of all, what does "acknowledging" religion have to do with patriotism? "Acknowledging" that the Framers believed there was a God is no more patriotic than "acknowledging" that they were white, were male, were Protestant, or were rich. Especially when the purpose is to extol the virtues of one race, gender, wealth category or religious viewpoint over another (which is the manifest message of the "under God" verbiage), it would seem to be the antithesis of patriotism to make such an "acknowledgment."

Furthermore, even assuming, *arguendo*, that the decision to "acknowledge" a deity was to reflect our "heritage," and not (as the 83rd Congress openly admitted) to espouse "dependence … upon the moral directions of the Creator … [and] to deny … atheistic … concepts"[8]), it would appear that Congress's

[8] *See* note 6, *supra*.

decision to insert only that aspect of our "heritage" into the Pledge raises constitutional concerns in its own right. This Court ought, perhaps, to decide whether placing Monotheism above all other aspects of our nation's "heritage" – such as our ingenuity, industry, and strength (or, perhaps, our respect for religious freedom and equality) – is, by itself, a "law respecting an establishment of religion.

Along these lines, the idea that "'under God' acknowledges but does not endorse religious belief," *Croft,* 624 F.3d at 169, seems highly questionable. "If this is simply 'acknowledgment,' not 'endorsement,' of religion, the distinction is far too infinitesimal for me to grasp." *Wallace v. Jaffree*, 472 U.S. 38, 88 n.3 (1985) (Burger, C.J., dissenting) (citation omitted). Addressing this distinction – or the lack thereof – is crucial to providing some structure for reasoned analysis by the lower courts.

Croft also included the argument that "coercion requires a formal religious exercise." 624 F.3d at 169-70. This argument, which seems to have evolved on its own, makes little sense, especially in the context of the Pledge. If anything, does not the intrusion of religious matter within a patriotic act increase the coercion involved? After all, it adds yet another coercive factor: Wishing to avoid any appearance (especially amongst one's peers) of being unpatriotic. This Court has yet to adequately address that dynamic.

In sum, the lower courts have been using myriad tests and approaches to construe the Establishment Clause. With none of these seeming to have any principled basis, and all (given sufficient public support) capable of denigrating any minority religious faith, guidance would clearly be of benefit.

(B) THIS CASE INVOLVES THE NATION'S MOST DISENFRANCHISED RELIGIOUS MINORITY

It is certainly unlikely that many Jewish judges would uphold the "one Nation under Jesus" version of the Pledge that was previously mentioned. Nor would any Catholic judge be inclined to uphold "one Nation under Protestantism." This highlights Justice Blackmun's concern that "bias [of] this Court according to the religious and cultural backgrounds of its Members [is] a condition much more intolerable than any which results from the Court's efforts to become familiar with the relevant facts." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 614 n.60 (1989). It also highlights the reality that this "intolerable" condition (at least as it applies to the Courts of Appeals) is precisely what exists. Surely, no one seriously doubts that "under God" in the Pledge would have been struck down had there been panels of Atheistic jurists hearing these cases.

In *Batson v. Kentucky*, 476 U.S. 79, 85-86 (1986), this Court stated that, in a criminal trial, a "defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." Surely, the same applies to litigants seeking to uphold their basic rights before the nation's judges. Yet, as is the case in the legislature,[9] the representation of nonbelievers in the

[9] "Perhaps the greatest disparity between the religious makeup of Congress and the people it represents, however, is in the percentage of … those who describe their religion as atheist, agnostic or 'nothing in particular.'" *Faith on the Hill: The Religious Composition of the 112th Congress*, accessed on February 25, 2011 at

judiciary is woefully diminished as compared with their numbers in the population at large.[10] Similar diminished representation has been of major concern for blacks, women, Latinos, Catholics, Native Americans, Asians, Jews and gays. Petitioners, however, are unaware of a single official committee or task force that has been called to examine this matter as it pertains to the Atheist community.

This, of course, is hardly unexpected. After all, the Monotheistic majority has repeatedly been permitted to "use the machinery of the State to practice its beliefs." *Abington Sch. Dist.*, 374 U.S. at 226. In so doing – especially within the public schools – the disenfranchisement of the nation's Atheists is perpetuated. What else would one expect as those children, inculcated daily with the notion that America prefers those who believe in God, grow up to become tomorrow's elected and appointed leaders?

It is hoped that this Court, in particular, will be sensitive to this problem, since each of the current justices is a member of a minority religion that, like Atheism, was also (at one time) despised and disenfranchised. In the colonial era, for instance, there was a literal hatred of Catholics,[11] and anti-Catholic discriminatory laws were codified in every

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http://pewforum.org/Government/Faith-on-the-Hill--The-Religious-Composition-of-the-112th-Congress.aspx.

[10] Except for Justice David Davis – who is simply listed as "Not a member of any church" – each of the 112 past and current justices has been affiliated with a Monotheistic faith. http://www.infoplease.com/ipa/A0101281.html (*accessed on February 25, 2011).*

[11] *See, e.g.,* C. H. Van Tyne, *The Influence of the Clergy, and of Religious and Sectarian Forces on the American Revolution*, 19 Am. Hist. Rev. 44, 60 (1913).

one of the thirteen original colonies.[12] Fortunately, waves of Catholic immigration, combined with the centrality of the church in Catholic life, empowered Catholics to end the official discriminatory practices of the past. Thus, as an example, support was garnered to eliminate public school teacher-led daily readings from the King James Version of the Bible.[13]

Atheists, however, have not immigrated in significant numbers, and (with their characteristic aversion to forming churches) have no central religious entity to empower them. Thus, they can only rely on the equal protection of the laws – enforced by the courts – to have their rights upheld. Nonetheless, perhaps as evidenced by the five Court of Appeals decisions upholding "under God," Atheists continue to face major hurdles in obtaining that protection. This is also likely evidenced by the fact that eight states– today in 2011 – still maintain *constitutional* provisions that overtly discriminate against disbelief in God.[14]

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[12] *See* Newdow: *Question*, note 2, *supra*, at 486.

[13] Newdow: *Question*, at 488-499. Of course, this controversy was completely eliminated by *Abington v. Schempp*. Of interest, however, is that the arguments made by Catholics seeking to end the Protestant readings in the mid-1800s were virtually identical to those being made by Atheists today. *See* Newdow, *Question*, at 491.

[14] These provisions (found in the state constitutions of Arkansas, Maryland, Mississippi, North Carolina, Pennsylvania, South Carolina, Tennessee and Texas) are provided in Appendix F. Although legal nullities, *see Torcaso v. Watkins*, 367 U.S. 488 (1961), the fact that none of the state legislatures has seen fit to remove these offensive clauses is extremely telling.

The result is not unexpected. Atheists are viewed unfavorably by more than half of their fellow Americans merely on the basis of their deeply-felt religious views.[15] For 47% of the population, nonbelievers are incapable of being moral.[16] Thus, "symbolic boundaries that clearly and sharply exclude atheists in both private and public life"[17] are often drawn. "[N]ot only [are] atheists … less accepted than other marginalized groups but … attitudes toward them have not exhibited the marked increase in acceptance that has characterized views of other racial and religious minorities over the past forty years."[18]

Such prejudices are certainly not surprising among "a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. After all, the majority's holy book teaches "Do not be yoked together with unbelievers. For what do righteousness and wickedness have in common?"[19] Also, "The fool hath said in his heart, There is no

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[15] Accessed on February 24, 2011 at http://pewforum.org/Public-Expresses-Mixed-Views-of-Islam-Mormonism.aspx.

[16] Pew Research Center poll (March 20, 2002), *Americans Struggle with Religion's Role at Home and Abroad*. Accessed on March 20, 2011 at http://people-press.org/report/150/americans-struggle-with-religions-role-at-home-and-abroad.

[17] Penny Edgell, Joseph Gerteis & Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*. American Sociological Review (April, 2006) Vol. 71, pages 211-34 at 212.

[18] *Id*.

[19] 2 Corinthians 6:14.

God. They are corrupt, they have done abominable works, there is none that doeth good."[20] In fact, the God that most public school teachers proclaim this nation to be "under" each morning apparently advocates for murdering the plaintiffs here: "Whoever blasphemes the name of the Lord shall surely be put to death."[21]

Of course, we don't murder Atheists. Nor do we any longer take their children from them[22] or bore through their tongues.[23] But it appears that we do continue to relegate them to second-class status in violation of the Constitution. Granting this Petition will allow the Court to determine if that appearance is the reality, and, if so, to aid in putting an end to one more long-standing circumstance "directly subversive of the principle of equality." *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

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[20] Psalm 14:1; Psalm 53:1.

[21] Leviticus 24:16. "[B]lasphemy against the Almighty [includes] denying his being." 4 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769*, at 59 (1979).

[22] "[W]henever … it is found, that a father (for example) … professes atheistical, or irreligious principles, … the Court of Chancery will interfere, and deprive him of the custody of his children." Joseph Story, 2 *Commentaries on equity jurisprudence : as administered in England and America* (1836) at 575.

[23] "[I]t was not until 1908 that the District of Columbia invalidated its blasphemy laws, which punished a first offense with a fine plus boring through the tongue; a second offense with a doubling of the fine plus burning the letter 'B' into the forehead; and a third offense with death." Newdow, *Question*, at 432-33.

(C) THIS CASE INVOLVES AN IMPORTANT QUESTION REGARDING FEDERALISM AND STATUTORY ANALYSIS

Congress's admission that it added "under God" to the Pledge to "further acknowledge the dependence of our people and our Government upon the moral directions of the Creator … [and] to deny … atheistic … concepts" has already been noted. *See* page 16, *supra*. So, too, has President Eisenhower's vision that "millions of our school children will daily proclaim … the dedication of our Nation and our people to the Almighty." *Id*. But there is much more.

Rep. Louis C. Rabaut, the chief sponsor of the bill (who placed in the Congressional Record the extraordinary claim that "an atheistic American … is a contradiction in terms"[24]), stated that his goal was to remind Americans that "the fundamental basis of our Government is the recognition that all lawful authority stems from Almighty God."[25] Sen. Homer Ferguson, the chief sponsor in the Senate, explained that he brought the measure to "specifically acknowledge that we are a people who do believe in and want our Government to operate under divine guidance."[26] Rep. Oliver Bolton suggested that President Eisenhower have "a Protestant, a Catholic, and a Jew" in a photo commemorating the signing of the Bill.[27] At the official ceremony celebrating the

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[24] 100 Cong. Rec. 1700 (1954).
[25] 100 Cong. Rec. 17, A2515-16 (1954).
[26] 100 Cong. Rec. 8617 (1954).
[27] Dwight D. Eisenhower Presidential Library, Reports to the President on Pending Legislation (Bill File) June 14, 1954 – June 18, 1954, Box No. 22.

new law, "Onward, Christian Soldiers!" was played as members of both houses of Congress joined to recite the new pledge, simultaneous with the flag ascending the flagpole.[28]

Thus, "openly available data suppor[t] a commonsense conclusion," *McCreary*, 545 U.S. at 863, that the chief purpose for introducing the "under God" language into the Pledge was not only to have school children recite that phrase, but also to have them influenced by its religious meaning. Inasmuch as "[b]y and large, public education in our Nation is committed to the control of state and local authorities," *Epperson*, 393 U.S. at 104, it is also clear that Congress was expecting state and local authorities to serve as the conduits by which those purposes would be effectuated. *See also Bd. of Educ. v. Rowley*, 458 U.S. 176, 208 n.30 (1982) ("It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. 'Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level.'" (citation omitted)). Thus, the history just alluded to is highly relevant to the "purpose prong" of the *Lemon* test.[29]

The First Circuit, however, refused to consider that history, writing that, "[t]he constitutionality of the federal Pledge statute, 4 U.S.C. § 4, is not at issue in this appeal." *Freedom*, 626 F.3d at 6. This is

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[28] *Id*. at 8617.

[29] For a far more extensive account demonstrating the irrefutably religious sentiments behind Congress's 1954 addition of "under God" to the Pledge, *see Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1048-57 (9th Cir. 2010) (Reinhardt, J., dissenting).

puzzling, inasmuch as the District Court, in its Order of September 30, 2009 (from which the appeal was taken) began:

> The parties remaining as defendants in this case are the Hanover School District and the Dresden School District. All other individuals and institutions named in the caption of this order are intervenors and, as such, have the right **to be heard on** only two issues: the **constitutionality of 4 U.S.C. § 4 (sometimes referred to below as "the federal Pledge statute"),** and the constitutionality of N.H. REV. STAT. ANN. ("RSA") § 194:15-c (sometimes referred to below as "the New Hampshire Pledge statute").

Appendix D at App. 56 (emphasis added).

The First Circuit continued by writing:

> FFRF argues that Congress had an impermissible religious purpose when it added the words "under God" to the text of the Pledge in 1954, and that this fact must be considered in our analysis. Even if so, the argument does not go to the first factor. We look at the purpose of New Hampshire when it enacted the statute in 2002 …. Because FFRF has stipulated that New Hampshire had a secular purpose, its claim of impermissible governmental purpose clearly fails on the first prong of Lemon.

Freedom, 626 F.3d at 6 (footnote omitted). This decision to refuse to consider Congress's purpose in

applying the first prong of the *Lemon* test in this matter is one of enormous importance and merits the Court's review. Can "government" avoid its obligations and violate individual rights by divvying up its responsibilities in this way? If so, are not all the civil rights upheld by this Court at risk? If a white racist Congress included segregating black and white children as part of 4 U.S.C. § 4, would its ignoble purposes be sheltered from examination because New Hampshire deemed Pledge recitations to be "a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state"? RSA § 194:15-c(I). Surely, that cannot be the case.

II. THE COURTS OF APPEALS HAVE DECIDED AN IMPORTANT FEDERAL QUESTION IN WAYS THAT CONFLICT WITH THE RELEVANT DECISIONS OF THIS COURT

(A) THE CIRCUIT COURTS HAVE IGNORED THIS COURT'S "TOUCHSTONE"

This Court has stated that "[t]he touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" *McCreary*, 545 U.S. at 860 (citation omitted). Yet each of the five circuits that have heard Pledge challenges have ignored that command, which the Court has repeated in at least **thirty-five** Establishment Clause opinions over the past nearly fifty years. *See* District Court Document 34-3.

Obviously, as between the religious view that there is a God and the religious view that God is non-existent, the claim that we are "one Nation under God" cannot possibly be considered "neutral." In other words, if, under the Establishment Clause, "government may not … lend its power to one or the other side in controversies over religious … dogma," *Smith*, 494 U.S. at 877, then the issue of neutrality as it relates to the Pledge of Allegiance – which has been repeatedly ignored by the Courts of Appeals – needs to be examined by this Court.

(B) THE CIRCUIT COURTS HAVE DEPARTED FROM AN UNBROKEN STRING OF THIS COURT'S PUBLIC SCHOOL ESTABLISHMENT CLAUSE DECISIONS

The infusion of religious belief at issue in this case occurs in the public schools, where "[t]he vigilant protection of constitutional freedoms is nowhere more vital." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). After all, "Schools cannot expect their students to learn the lessons of good citizenship when the school authorities themselves disregard the fundamental principles underpinning our constitutional freedoms." *Doe v. Renfrow*, 451 U.S. 1022, 1027-28 (1981) (Brennan, J., dissenting).

The First Circuit was obviously aware of the heightened concern for the public school venue: "Special considerations are involved when a claim involves public school students. In the Establishment Clause context, public schools are different, in part because the students are not adults, and in part because a purpose of a public school is to inculcate

values and learning." *Freedom*, 626 F.3d at 8. The panel even referenced *Edwards*, 482 U.S. at 583-84, where the Court famously explained why it "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."

In fact, in every one of the nine cases heard by this court where there was even a hint of governmental infusion of religious dogma in the public schools, the Court has struck down the challenged activity. *McCollum* (religious instruction); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (class prayer); *Abington* (Bible reading); *Epperson* (prohibited teaching of evolution); *Stone* (Ten Commandment posters); *Wallace* (moments of silence or prayer); *Edwards* (teaching "creation science"); *Lee* (graduation prayer); *Santa Fe* (prayer at football games). It would seem that the Circuit Court judges ought to follow the principles found in nine out of nine Supreme Court holdings.

The First Circuit also noted that what might be permissible in other contexts will often be struck down when the public school environment is involved. *Freedom*, 626 F.3d at 8 (contrasting *Marsh v. Chambers* with five public school cases). Yet it then ruled in a manner contrary to the principle it recognized. Especially with four other circuits having reached a similar conclusion, it is essential for this Court to review this apparent jurisprudential error, now becoming institutionalized across the nation.

(C) THE CIRCUIT COURTS HAVE DEPARTED FROM THIS COURT'S REFUSAL TO ACCEPT THE "AS A WHOLE" PLOY

In each of the nine school cases just mentioned, the challenged governmental practice could have readily been disregarded by considering only a larger, secular "whole." Yet, the Court has never engaged in that process (which would gut the Establishment Clause of any value whatsoever). In fact, when Chief Justice Burger addressed "focusing exclusively on the religious component of the statute rather than examining the statute as a whole," *Wallace*, 472 U.S. at 88 (Burger, C.J., dissenting), the Court refused to alter its focus, obviously realizing that to do otherwise would deprive students of the protections the Clause is intended to provide.

Despite the foregoing, three Courts of Appeals, in just the past year, have used the "as a whole" technique. *See Freedom*, 626 F.3d at 10 ("[W]e must consider the text as a whole"); *Croft*, 624 F.3d at 168 ("[W]e rejected the argument that we must look to the primary effect of the amendment inserting the words 'one state under God' rather than to the primary effect of the pledge as a whole."); *Rio Linda*, 597 F.3d at 1014 ("[W]e must examine the Pledge as a whole, not just the two words the Plaintiffs find offensive"). Whether this reversal of the lesson of *Wallace* is warranted is another reason for the Court to grant this Petition.

CONCLUSION

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Respectfully submitted,

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No. _____

IN THE
Supreme Court of the United States

THE FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Petitioners,

v.

UNITED STATES, ET AL.,
DRESDEN SCHOOL DISTRICT, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF APPENDICES

Appendix A

Court of Appeals' Opinion Filed November 12, 2010

No. 09-2473

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, ET AL.,
Plaintiffs, Appellants,

v.

HANOVER SCHOOL DISTRICT, ET AL.,
Defendants, Appellees.

On Appeal from the United States District Court
for the District of New Hampshire

[Hon. Steven J. McAuliffe, U.S. District Judge]

Before

Lynch, Chief Judge,
Howard and Thompson, Circuit Judges.

Michael Newdow with whom Rosanna Fox was on brief for appellants.

Nancy J. Smith, Senior Assistant Attorney General, with whom Michael A. Delaney, Attorney General, was on brief for appellee State of New Hampshire.

Lowell V. Sturgill, Jr., Attorney, Civil Division, with whom Tony West, Assistant Attorney General, Thomas P. Colantuano, United States Attorney, and Robert M. Loeb, Attorney, Civil Division, were on brief for appellee United States.

Kevin J. Hasson with whom Eric Rassbach and Luke Goodrich were on brief for appellees Muriel Cyrus et al.

Steven W. Fitschen on brief for The National Legal Foundation, amicus curiae.

Jay Alan Sekulow, Stuart J. Roth, Colby M. May, Shannon Demos, Tessa L. Dysart, and John Anthony Simmons, Sr., on brief for American Center for Law & Justice et al., amicus curiae.

John A. Eidsmoe, Roy S. Moore, and Benjamin D. DuPré on brief for Foundation for Moral Law, amicus curiae.

Jeremy D. Tedesco and David A. Cortman on brief for Alliance Defense Fund and Cornerstone Policy Research, amicus curiae.

November 12, 2010

LYNCH, Chief Judge. The question presented is whether the New Hampshire School Patriot Act, N.H. Rev. Stat. Ann. § 194:15-c ("the New Hampshire Act"), which requires that the state's public schools authorize a period during the school day for students to voluntarily participate in the recitation of the Pledge of Allegiance, violates the First or Fourteenth Amendment to the Constitution of the United States. We hold that the statute is constitutional and affirm entry of judgment for defendants.

I. Plaintiffs are The Freedom From Religion Foundation, its members Jan and Pat Doe, and their three children who attend New Hampshire public schools (collectively "FFRF"). Jan and Pat Doe identify themselves as atheist and agnostic, respectively, and their children as either atheist or agnostic. At the time the amended complaint was filed in 2008, the eldest child was in sixth grade and attended a middle school jointly administered by New Hampshire's Hanover and Dresden school districts, while the younger two children were enrolled in a public elementary school operated by the Hanover district. Pursuant to the New Hampshire Act, the Pledge of Allegiance ("the Pledge") is routinely recited in the Doe children's classrooms under the leadership of their teachers.[1]

[1] FFRF alleges that the Doe children "have all been led by their public school teachers in recitations of the Pledge of Allegiance." First Am. Complt. ¶ 43, ECF No. 52. New Hampshire has not contested this. The parties have not provided any other specific information about the

The full text of the New Hampshire Act, enacted in 2002, is as follows:

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

N.H. Rev. Stat. Ann. § 194:15-c.

Several aspects of the statute are worth note. By expressly requiring that student participation in the

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operation of the statute such as the procedures used or the number of students who participate.

recitation of the Pledge be voluntary, New Hampshire has created a framework in which a school or educator would violate state law by any actions that rendered student participation involuntary. In addition, the statute allows any student not to participate in the recitation of the Pledge regardless of the student's reasons for non-participation. Those who do not participate may either stand silently or remain seated. The only obligation imposed on non-participants is that they respect the rights of those students electing to participate.

The New Hampshire Act itself does not identify the words of the Pledge or otherwise specify which words should be used. The parties accept that the words of the Pledge that are used in New Hampshire schools are those codified in federal law: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God,[2] indivisible, with liberty and justice for all." 4 U.S.C. § 4 ("the federal Pledge statute"). The Pledge, which dates to 1892,[3] was first

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[2] Throughout the opinion, we refer to "God" as used in the text of the Pledge.

[3] In 1892, as part of the commemoration of the 400th anniversary of Christopher Columbus's discovery of America, a national magazine for youth proposed that students in school recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004) (citing J. Baer, The Pledge of Allegiance: A Centennial History,

codified in 1942 to clarify the "rules and customs pertaining to the display and use of the flag of the United States of America." *See* Act of June 22, 1942, Pub. L. No. 77-623, 56 Stat. 377. The words "under God" were added in 1954. *See* Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249.[4]

The procedural history of the case before us is not complicated. On November 1, 2007, FFRF filed a lawsuit against the United States Congress and United State of America ("the Federal Defendants"), the Hanover School District and Dresden School District ("the School Districts"), and School Administrative Unit 70.[5] FFRF sought a declaration

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1892-1992, at 3 (1992)) (internal quotation marks omitted).

[4] The taking of a pledge of allegiance pre-dates Christianity. Certain Athenian males, at puberty, took a longer pledge, the opening three sentences of which were: "We will never bring disgrace to this, our city, by any act of dishonesty or cowardice, nor ever desert our suffering comrades in ranks. We will fight for the ideals and sacred things of the city, both alone and with many; we will revere and obey the city's law and do our best to incite a like respect and reverence in those above us who are prone to annul and set them at naught. We will strive unceasingly to quicken the public's sense of civic duty, that thus, in all these ways, we will transmit this city not only not less, but greater, better, and more beautiful than it was transmitted to us." Pledge of Allegiance, Lapham's Quarterly, Fall 2010, at 98.

[5] FFRF's claim against School Administrative Unit 70, which controls the high schools that the Doe children will eventually attend, was dropped in the amended complaint.

that the federal Pledge statute and the recitation of the Pledge in New Hampshire's public schools violated various provisions of the U.S. Constitution, the New Hampshire Constitution, and federal and state law,[6] and requested injunctive relief to ensure the end of these violations.[7]

The State of New Hampshire, the United States of America, and Muriel Cyrus--a student in the Hanover School district, joined by a group of other students, five of their parents, and the Knights of Columbus--filed motions to intervene to assist in the defense of the New Hampshire Act.[8] The court granted these motions.

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[6] Specifically, FFRF sought a declaration that Congress violated the Establishment and Free Exercise Clauses in passing the Act of 1954, which added the words "under God" to the Pledge; that the words "under God" in the Pledge violated the Establishment and Free Exercise Clauses of the First Amendment, the Equal Protection component of the Fifth Amendment, and The Religious Freedom Restoration Act (RFRA); and that the School Districts, in having their agents lead the recitation of the Pledge, violated the Establishment and Free Exercise Clauses of the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the RFRA, Article 6 of the New Hampshire Constitution, and other provisions of New Hampshire state law.

[7] FFRF asked the court to "demand" that Congress act to remove the words "under God" from 4 U.S.C. § 4; that the United States use its power to remove the words "under God" from 4 U.S.C.§ 4; and that the School Districts cease and desist using the Pledge.

[8] Although the United States was already a defendant with respect to FFRF's claim that 4 U.S.C. § 4 is

On August 7, 2008, the Federal Defendants filed a motion to dismiss the claims against them, which the court granted.[9] The constitutionality of the federal Pledge statute, 4 U.S.C. § 4, is not at issue in this appeal.

FFRF filed an amended complaint on November 17, 2008, naming only the School Districts as defendants. FFRF alleged that the School Districts had or would violate the rights of the Doe children under the First Amendment's Establishment and Free Exercise Clauses; the rights of the Doe parents under the Free Exercise Clause; the rights of both the Doe children and their parents under the Due Process and Equal Protection Clauses; and the Doe parents' federal constitutional rights of parenthood, as well as the Doe children's concomitant rights.[10] The United States, New

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unconstitutional on its face, it was not a defendant with respect to FFRF's claims challenging the recitation of the Pledge in New Hampshire schools, and it therefore moved to intervene as a defendant against what it took to be an as-applied challenge to 4 U.S.C. § 4. While the district court allowed the United State to intervene, it ultimately rejected the argument that the federal statute was being "applied," as the statute merely prescribes the text of the Pledge and does not command any person to recite it or lead others in its recitation.

[9] The Federal Defendants' motion also requested dismissal of the claims against the School Districts on the grounds that FFRF failed to state a claim, but this part of the motion was denied, as the School Districts had not filed a motion to dismiss.

[10] FFRF also advanced a variety of state law claims that are not before us on appeal.

Hampshire, and Cyrus then renewed their motions to dismiss.[11]

On September 30, 2009, the district court dismissed all of FFRF's federal claims on their merits,[12] and issued a final judgment in favor of the United States, the School Districts, and Cyrus.

FFRF filed a timely notice of appeal from the district court's dismissal of its federal claims against the School Districts.

II.

The issue on appeal is whether the New Hampshire Act requiring that its public schools provide a period for the voluntary recitation of the Pledge violates the Establishment Clause, Free Exercise Clause, Equal Protection Clause, or Due Process Clause. We review de novo the district court's dismissal of FFRF's amended complaint under Rule 12(b)(6), accepting as true all well-pleaded facts in the complaint and drawing all reasonable inferences in the plaintiffs' favor. Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 325 (1st Cir.

[11] The district court construed these motions to dismiss as having been advanced by the School Districts as well.

[12] Having done so, the court found that principles of comity counseled in favor of not exercising supplemental jurisdiction over the remaining state law claims and dismissed the state claims without prejudice.

2009). The issue is one of law.[13] No material facts are in dispute.

A. The Pledge Does not Violate the Establishment Clause

Under the Establishment Clause, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Although applicable originally only against the federal government, the Establishment Clause was incorporated to apply to the states by the Fourteenth Amendment. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947).

In determining whether a law runs afoul of this prohibition, the Supreme Court has articulated three interrelated analytical approaches: the three-prong analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); the "endorsement" analysis, first articulated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), and applied by a majority of the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); and the "coercion" analysis of *Lee v. Weisman*, 505 U.S. 577,

[13] Every federal circuit court that has addressed a state pledge statute has rejected the claim of unconstitutionality. *See Croft v. Perry*, No. 09-10347, 624 F.3d 157, 2010 U.S. App. LEXIS 21372, 2010 WL 3991719 (5th Cir. Oct. 13, 2010); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010); *Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395 (4th Cir. 2005); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992).

587 (1992).[14] Before applying the three approaches to the case before us, we first address a few general matters.

FFRF's argument is that the School Districts' Pledge practices pursuant to the New Hampshire Act are religious for purposes of the First Amendment because the Pledge itself is a religious exercise in that it uses the phrase "under God." FFRF argues that despite the voluntary nature of any student participation in the Pledge, the result is nonetheless the establishment by the state of religion.

As to the first part of the argument, we begin with the unremarkable proposition that the phrase "under God" has some religious content. In our view, mere repetition of the phrase in secular ceremonies does not by itself deplete the phrase of all religious content.[15] A belief in God is a religious belief. That

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[14] There is an abundance of commentary from courts and others as to the relationship between these three analytical approaches. *See, e.g.*, *Freethought Soc. of Greater Philadelphia v. Chester County*, 334 F.3d 247, 256-62 (3rd Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 370-71 (4th Cir. 2003); *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002). We bypass the question.

[15] Even those who find no Establishment Clause violations under the doctrine of "ceremonial deism" do not necessarily deny that the phrase has some religious content. *See*, *e.g.*, *Sherman*, 980 F.2d at 445-47. Justice Brennan, dissenting in *Lynch v. Donnelly*, 465 U.S. 668, 104 S. Ct. 1355, 79 L. Ed. 2d 604 (1984), famously said: "I would suggest that such practices as . . . the references to God contained in the Pledge of Allegiance can best be understood . . . as a form a 'ceremonial deism,' protected

the phrase has some religious content is demonstrated by the fact that those who are religious, as well as those who are not, could reasonably be offended by the claim that it does not. *See Myers v. Loudoun County Pub. Sch.*, 418 F.3d 395, 407 (4th Cir. 2005) ("Undoubtedly, the Pledge contains a religious phrase, and it is demeaning to persons of any faith to assert that the words 'under God' contain no religious significance."); *see also Van Orden v. Perry*, 545 U.S. 677, 695-96 (2005) (Thomas, J., concurring) ("[W]ords such as 'God' have religious significance. . . . Telling either nonbelievers or believers that the words 'under God' have no meaning contradicts what they know to be true.").

That the phrase "under God" has some religious content, however, is not determinative of the New Hampshire Act's constitutionality. This is in part because the Constitution does not "require complete separation of church and state." *Lynch*, 465 U.S. at 673. The fact of some religious content is also not dispositive because there are different degrees of religious and non-religious meaning. The Supreme Court has upheld a wide variety of governmental actions that have some religious content. *See, e.g., Van Orden*, 545 U.S. at 681 (upholding the display of the Ten Commandments on the Texas State Capitol grounds); *County of Allegheny*, 492 U.S. at 578-79

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from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." *Id.* at 716 (Brennan, J., dissenting) (footnote omitted). We understand Justice Brennan to have considered the context and circumstances of the usage of the phrase.

(upholding the display of a Chanukah menorah outside a government building); *Lynch*, 465 U.S. at 670-72 (upholding the display of a Nativity scene in a public Christmas display); *Marsh v. Chambers*, 463 U.S. 783, 784-86 (1983) (upholding a state legislature's practice of opening each day with a prayer led by a chaplain paid with state funds).

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. That fact does not itself dispose of the constitutional question either. There are many religiously infused practices that do not rise to the level of prayer that are clearly prohibited by the Establishment Clause. In the public school context, the Supreme Court has struck down the teaching of creation science, *Edwards v. Aguillard*, 482 U.S. 578 (1987), and the display of a Ten Commandments poster, *Stone v. Graham*, 449 U.S. 39 (1980).

Special considerations are involved when a claim involves public school students. In the Establishment Clause context, public schools are different, in part because the students are not adults, and in part because a purpose of a public school is to inculcate values and learning. "Recognizing the potential dangers of school-endorsed religious practice," the Supreme Court has "shown particular 'vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools.'" *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 264 (1990) (alteration in original) (quoting *Edwards*, 482 U.S. at 583-584). For example, while the Court has upheld a state

legislature's practice of opening each day with a prayer led by a chaplain paid with state funds, *Marsh*, 463 U.S. at 784-86, it has repeatedly found that prayers, invocations, and other overtly religious activities in public schools violate the Establishment Clause. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (invalidating a school policy of permitting the delivery of student-led prayer before high school football games); *Lee*, 505 U.S. 577 (invalidating the delivery of an invocation by a member of the clergy at graduation ceremonies); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating a period of silence for meditation or voluntary prayer); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) (invalidating a required Bible reading before each school day); *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating the saying of a daily prayer).

The question is where along this spectrum of cases falls the voluntary, teacher-led recitation of the Pledge, including the phrase "under God," by pupils in New Hampshire's public schools. We turn to the Court's different analytical measures for Establishment Clause claims.

1. The Three-factored Lemon Analysis

Under the *Lemon* analysis,[16] a court must consider three factors: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 674 (1970)) (citation omitted). As FFRF does not allege entanglement, the third prong is not at issue here.

FFRF concedes that the New Hampshire Act has a secular purpose--the promotion of patriotism--but insists that this does not end the inquiry. FFRF argues that Congress had an impermissible religious purpose when it added the words "under God" to the text of the Pledge in 1954, and that this fact must be considered in our analysis. Even if so, the argument does not go to the first factor. We look at the purpose of New Hampshire when it enacted the statute in 2002, in the aftermath of the tragedy of September 11, 2001. Because FFRF has stipulated that New

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[16] Although the *Lemon* analysis has been often criticized, including by members of the Supreme Court, *see Freethought Soc.*,334 F.3d at 256 (collecting cases), the Court has never expressly rejected it in cases such as this, and we have continued to apply it in the First Circuit. *See, e.g., Boyajian v. Gatzunis*, 212 F.3d 1, 4 (1st Cir. 2000). The Lemon factors have, in the years since their first use in 1971, been described as "no more than helpful sign posts." *Van Orden v. Perry*, 545 U.S. 677, 685, 125 S. Ct. 2854, 162 L. Ed. 2d 607 (2005) (quoting *Hunt v. McNair*, 413 U.S. 734, 741, 93 S. Ct. 2868, 37 L. Ed. 2d 923 (1973)).

Hampshire had a secular purpose,[17] its claim of impermissible governmental purpose clearly fails on the first prong of *Lemon*.

FFRF argues, under the second factor, that the principal or primary effect of the New Hampshire Act is the advancement of religion. The Pledge's affirmation that ours is a "nation, under God" is not a mere reference to the fact that many Americans believe in a deity, nor to the undeniable historical significance of religion in the founding of our nation. As the Supreme Court recognized in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), to recite the Pledge is to "declare a belief" and "affirm[] . . . an attitude of mind." *Id.* at 631, 633. In reciting the Pledge, a student affirms a belief in its description of the nation.[18] For this reason, it is unconstitutional under the Free Speech Clause to require that students recite the Pledge in public schools. *See id.* at 642 ("If there is any fixed star in our constitutional constellation, it is that no official,

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[17] There is no claim that New Hampshire articulated a patriotic purpose as a subterfuge meant to avoid First Amendment strictures.

[18] *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 156, 228 (2004) ("To affirm this description necessarily affirms the propositions included in that description: that there is a God, and only one, of such a nature that a nation can be under that God."). *But see Elk Grove*, 542 U.S. at 26 (Rehnquist, C.J., concurring in the judgment) ("[T]he Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.").

high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

In looking at the effect of the state's creation of a daily period for the voluntary recitation of the Pledge, we must consider the text as a whole and must take account of context and circumstances. *See, e.g., Van Orden*, 545 U.S. at 701 (Breyer, J., concurring in the judgment) ("[T]o determine the message that the text here conveys, we must examine how the text is used. And that inquiry requires us to consider the context of the display."); *County of Allegheny*, 492 U.S. at 598 ("[T]he effect of a créche display turns on its setting."). It takes more than the presence of words with religious content to have the effect of advancing religion, let alone to do so as a primary effect.

As to context, there is no claim that a student is required to advance a belief in theism (or monotheism), nor is there any claim that a student is even encouraged by the faculty to say the Pledge if the student chooses not to do so.

By design, the recitation of the Pledge in New Hampshire public schools is meant to further "the policy of teaching our country's history to the elementary and secondary pupils of this state." N.H. Rev. Stat. Ann. § 194:15-c. "The very purpose of a national flag is to serve as a symbol of our country." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004) (quoting *Texas v. Johnson*, 491 U.S. 397, 405 (1989)) (internal quotation marks omitted). As the

Court has observed, "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." *Id.* In reciting the Pledge, students promise fidelity to our flag and our nation, not to any particular God, faith, or church.

The New Hampshire School Patriot Act's primary effect is not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation.

2. The Endorsement Analysis

Under the related endorsement analysis, courts must consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion. *County of Allegheny*, 492 U.S. at 593-94. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny*, 492 U.S. at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)). A practice in which the state is involved may not "send[] the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Santa Fe*, 530 U.S. at 309-

10 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

At the heart of FFRF's claim is its argument that those students who choose not to recite the Pledge for reasons of non-belief in God are quite visibly differentiated from other students who stand and participate. The result, FFRF argues, is that the recitation of the Pledge makes the Doe children outsiders to their peer group on the grounds of their religion.

FFRF's premise is that children who choose not to recite the Pledge become outsiders based on their beliefs about religion. That premise is flawed. Under the New Hampshire Act, both the choice to engage in the recitation of the Pledge and the choice not to do so are entirely voluntary. The reasons pupils choose not to participate are not themselves obvious. There are a wide variety of reasons why students may choose not to recite the Pledge, including many reasons that do not rest on either religious or anti-religious belief. 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. Even students who agree with the Pledge may choose not to recite the Pledge. Thus, the Doe children are not religiously differentiated from their peers merely by virtue of their non-participation in the Pledge.

Furthermore, the constitutionality of a state statute does not turn on the subjective feelings of plaintiffs as to whether a religious endorsement has

occurred. Rather, in the endorsement analysis, the court assumes the viewpoint of an "objective observer acquainted with the text, legislative history, and implementation of the statute." *Santa Fe*, 530 U.S. at 308 (quoting *Wallace*, 472 U.S. at 73, 76 (O'Connor, J., concurring in the judgment)).[19] Indeed, in a wide variety of contexts, the law rejects tests relying on subjectivity and utilizes the analytic device of asking how a reasonable and objective observer would view the matter in question. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-

[19] Because it makes no difference to the outcome, we need not get into the nuances of which observer is at play: for instance, whether the relevant observer is any adult, the parent, the student, the mature student, or the immature student. There are cases in which the Supreme Court has assumed the viewpoint of a high school student affected by the state action. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000) (referring to the view of "an objective Santa Fe High School student"); *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 249-52, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) (referring to an objective observer in the position of a secondary school student). But the Second Circuit has cautioned: "We cannot conclude that it makes equal sense to treat a first or second grader as the 'objective observer' who can take account of the text, history, and implementation of a challenged policy." *Skoros v. City of New York*, 437 F.3d 1, 23 (2d Cir. 2006); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 115, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001) ("[T]o the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, the relevant community would be the parents, not the elementary school children.") (internal citation omitted).

781 (1995) (O'Connor, J., concurring in part and concurring in the judgment) ("In this respect, the applicable observer is similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things,' but is 'rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment.'") (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* 175 (5th ed. 1984)).

Adopting the view of the objective observer fully aware of the relevant circumstances, we conclude there has been no endorsement of religion. The state legislature passed the New Hampshire Act in the aftermath of September 11, 2001 with the intent of fostering patriotism, *see, e.g.*, N.H.S. Jour. 945-67 (2002), and that is the statute's effect. Taken in the context of the words of the whole Pledge, the phrase "under God" does not convey a message of endorsement.

The importance of context in the endorsement inquiry is made clear by two cases in which the Supreme Court has addressed the display of crèches at Christmas. In the first case, *Lynch*, the Court concluded that although a crèche displayed by the city was itself religious, the fact that it was located in a broader holiday display clarified to the reasonable observer that the city was, as part of the holiday, simply acknowledging religion with the crèche and not endorsing it. *Lynch*, 465 U.S. at 679-80. By contrast, the Court in *County of Allegheny* concluded that a display of a crèche in a county

courthouse with an angel bearing a banner proclaiming "Gloria in Excelsis Deo," with no surrounding secular objects to change the message conveyed, was an unconstitutional endorsement of religion. *County of Allegheny*, 492 U.S. at 598.

Along this spectrum, the two word phrase "under God" in the thirty-one words of the Pledge is much closer to the crèche at issue in *Lynch*. The phrase is surrounded by words that modify its significance--not by changing its meaning, but rather by providing clarity to the message conveyed and its purpose. *Cf. Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) ("Although the religious and indeed sectarian significance of the crèche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display."). Here, the words "under God" appear in a pledge to a flag--itself a secular exercise, accompanied by no other religious language or symbolism.

We reject FFRF's claim of unconstitutional endorsement.

3. The Coercion Analysis

Relying heavily on *Lee*, FFRF finally argues that the recitation of the Pledge in public school classrooms unconstitutionally coerces the Doe children to "recite a purely religious ideology."

Lee invalidated a public school's practice of inviting members of the clergy to give a nonsectarian prayer at its graduation ceremonies. *Lee*, 505 U.S. at

581-82. Although attendance at the ceremonies and participation during the prayer were voluntary, the Court found that there was indirect pressure on attending students to stand or maintain respectful silence during the prayer, and that because silence during prayer signifies participation, this practice was unconstitutional. *Id.* at 598. *Lee* held that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Id.* at 587.

Coercion need not be direct to violate the Establishment Clause, but rather can take the form of "subtle coercive pressure" that interferes with an individual's "real choice" about whether to participate in the activity at issue. *Lee*, 505 U.S. at 592, 595. In public schools, this danger of impermissible, indirect coercion is most pronounced because of the "young impressionable children whose school attendance is statutorily compelled." *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring). As *Lee* stated, "prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there." *Lee*, 505 U.S. at 592.

FFRF contends that the Pledge, while not a prayer, is more problematic than the prayer at issue in *Lee*. It argues that the students in this case are younger and more impressionable; that they are led by teachers whom they respect as authorities, rather than by a member of the clergy whom they do not know; that those who participate are encouraged to verbalize the words, rather than merely listen; that

the Pledge occurs every day, rather than once or twice in their school career; that a refusal to participate in the recitation of the Pledge is more obvious than refusing to listen to a prayer; and that unlike at a graduation ceremony, the students do not have their parents next to them to support them in their non-participation. These concerns do not make the New Hampshire Act unconstitutional. At least two factors distinguish *Lee* from this case.

First, like other courts that have reviewed the Pledge, we think it relevant that the religious content of the phrase "under God" is couched in a non-religious text.[20] This fact is not dispositive, but it is significant. It removes the case from the direct

[20] In addressing the claim that the recitation of a pledge of allegiance including the phrase "under God" is unconstitutional under Lee, other courts have reasoned that the cases are fundamentally different because saying such a pledge is not itself a religious exercise. *See, e.g.*, *Croft*, 2010 U.S. App. LEXIS 21372, 2010 WL 3991719, at *10 ("A pledge of allegiance to a flag is not a prototypical religious activity."); *Rio Linda*, 597 F.3d at 1038 ("We agree that the students in elementary schools are being coerced to listen to the other students recite the Pledge. They may even feel induced to recite the Pledge themselves. . . . But the main distinction is this: Here, the students are being coerced to participate in a patriotic exercise, not a religious exercise."); *Myers*, 418 F.3d at 408 ("The indirect coercion analysis discussed in *Lee*, *Schempp*, and *Engel*, simply is not relevant in cases, like this one, challenging non-religious activities. Even assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism.").

scope of Lee, where the Court explained: "These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise . . . ." *Lee*, 505 U.S. at 586 (emphasis added). Recitation of the Pledge is not a formal religious exercise.

Second, the logic of *Lee* does not apply directly to the case before us. The *Lee* finding of unconstitutional coercion can be read to result from a three-step analysis involving two premises and a conclusion. The Court found that students were being coerced into silence during the saying of the prayer; that silence was, in the eyes of the community, functionally identical to participation in the prayer; and that therefore, students were being functionally coerced into participation in the prayer in violation of the Constitution.[21]

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[21] *See Lee v. Weisman*, 505 U.S. 577, 593, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) ("The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. . . . There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it. Finding no violation

A key premise is different here. While in *Lee*, "the act of standing or remaining silent was an expression of participation in the rabbi's prayer," *Lee*, 505 U.S. at 593, silence by students is not an expression of participation in the Pledge. Rather, a student who remains silent during the saying of the Pledge engages in overt non-participation by doing so, and this non-participation is not itself an expression of either religious or non-religious belief.

FFRF's claim of unconstitutional coercion under *Lee* fails.

B. The Pledge Does Not Violate the Free Exercise Clause

Under the Free Exercise Clause, the government may not "(1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma." *Parker v. Hurley*, 514 F.3d 87, 103 (1st Cir. 2008). The First Amendment's prohibition on laws "prohibiting the free exercise" of religion is incorporated against the states by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

FFRF contends that the recitation of the Pledge in the Doe children's classrooms violates their ability

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under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting.").

to freely believe in atheism or agnosticism, and places an unconstitutional burden on the Doe parents' free exercise right to instill their religious values in their children. This claim is foreclosed by *Parker*.

In *Parker*, we explained that "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them." *Parker*, 514 F.3d at 106. Because the Doe children allege mere exposure to the religious content of the Pledge, they cannot state a claim under the Free Exercise Clause, nor can their parents, as "the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." *Id.* at 105.

C. The Pledge Does Not Violate the Equal Protection Clause

Under the Equal Protection Clause of the Fourteenth Amendment, the Constitution "guarantees that those who are similarly situated will be treated alike." *In re Subpoena to Witzel*, 531 F.3d 113, 118 (1st Cir. 2008). Invoking the Equal Protection Clause, 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.

D. The Pledge Does Not Violate the Due Process Clause

FFRF's final allegation is that the recitation of the Pledge in the Doe children's classrooms violates the Doe parents' fundamental constitutional right of parenthood protected by the Due Process Clause of the Fourteenth Amendment. FFRF argues that this right is embraced within the general right of parenthood recognized by *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Because this claim is adverted to in a perfunctory manner, unaccompanied by any effort at developed argumentation, it is waived. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). In any event, the claim lacks merit, as "the substantive due process clause . . . does not give [parents] the degree of control over their children's education that their requested relief seeks." *Parker*, 514 F.3d at 102-03.

III.

We hold that the New Hampshire School Patriot Act and the voluntary, teacher-led recitation of the Pledge by the state's public school students do not violate the Constitution. We affirm the order and judgment of the district court dismissing FFRF's complaint.

Appendix B

District Court's Order of Dismissal
August 7, 2008

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

The Freedom from Religion Foundation;
Jan Doe and Pat Doe, Parents;
DoeChild-1, DoeChild-2, and DoeChild-3,
Minor Children,
Plaintiffs

v. Civil No. 07-cv-356-SM
Opinion No. 2008 DNH 141

The Congress of the United States
of America; The United States of
America; The Hanover School District;
The Dresden School District; School
Administrative Unit 70
Defendants

The State of New Hampshire
Intervenor

Anna Chobanian; John Chobanian;
Kathryn Chobanian; Schuyler Cyrus;
Elijah Cyrus; Rhys Cyrus; Austin
Cyrus; Daniel Phan; Muriel Cyrus;
Michael Chobanian; Margarethe Chobanian;
Minh Phan; Suzu Phan; and the Knights of
Columbus,
Intervenors

O R D E R

This suit poses a constitutional challenge both to the inclusion of the words "under God" in the Pledge of Allegiance ("Pledge"), and to the practice of reciting the Pledge in the elementary school attended by the children of Jan Doe and Pat Doe. Before the court are motions to dismiss filed by: (1) the Congress of the United States of America and the United States of America ("federal defendants") (document no. 16); (2) the State of New Hampshire (document no. 14); and (3) a group of defendants that includes eight students in the Hanover School District ("HSD"), parents of five of those students, and the Knights of Columbus (document no. 22).[1] For the reasons given, the federal defendants' motion is granted in part, and the other motions are denied.

The Legal Standard

A motion to dismiss for "failure to state a claim upon which relief can be granted," FED. R. CIV. P. 12(b)(6), requires the court to conduct a limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). When considering a motion to dismiss under Rule 12(b)(6), the court "must assume the truth of all well-plead facts and give the plaintiff[s] the benefit of all reasonable inferences therefrom." *Alvarado Aguilera v. Negrón*, 509 F.3d 50, 52 (1st Cir. 2007) (quoting

[1] The HSD, the Dresden School District, and SAU 70 have not moved to dismiss.

Ruiz v. Bally Total Fitness Holding Corp., 496 F.3d 1, 5 (1st Cir. 2007)). However, the court need not "credit 'bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like.'" *Brown v. Latin Am. Music Co.*, 498 F.3d 18, 24 (1st Cir. 2007) (quoting *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996)). "[A] complaint is properly dismissed for failure to state a claim 'only if the facts lend themselves to no viable theories of recovery.'" *Garnier v. Rodríguez*, 506 F.3d 22, 26 (1st Cir. 2007) (quoting *Phoung Luc v. Wyndham Mgmt. Corp.*, 496 F.3d 85, 88 (1st Cir. 2007)).

Background

The following facts are drawn from the complaint, and, for the purposes of deciding the motions to dismiss, are assumed to be true. Jan Doe and Pat Doe ("the Doe parents") are the mother and father of DoeChild-1, DoeChild-2, and DoeChild-3 ("the Doe children"). The Doe children are enrolled in a public elementary school operated by the Hanover School District ("HSD"). None of the three is enrolled in the middle school(s) operated by the Dresden School District ("DSD") or the high school operated by School Administrative Unit ("SAU") 70, although the complaint alleges that they will be at some point in the future.

Jan and Pat Doe describe themselves as atheist and agnostic, respectively.[2] Each of the Doe children

[2] Jan and Pat Doe may or may not be members of plaintiff Freedom From Religion Foundation; the relevant

is said to be either an atheist or an agnostic. The Pledge of Allegiance ("Pledge") is routinely recited in the classrooms of the Doe children, and in the classrooms of schools operated by the DSD and SAU 70.

As adopted by Congress, the Pledge reads:

> 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. The words "under God" were added to the Pledge by act of Congress in 1954. *See* Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (hereinafter "1954 Pledge statute"). While 4 U.S.C. § 4 prescribes the text of, and manner in which the Pledge should be recited, it prescribes no penalties, and does not in any way compel recitation of the Pledge.

In New Hampshire, recitation of the Pledge is governed by state law, which provides:

> I. As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.

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paragraph of the complaint is ambiguous on that point. (*See* Compl. § 9.)

> II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.
>
> III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

RSA 194:15-c.

None of the Doe children has been overtly compelled to recite the Pledge or the words "under God." The Doe parents asked the principal of their childrens' school to assure them that the Pledge would not be recited, but the principal declined to do so. This suit followed.

Rather than setting out their legal claims concisely in discrete counts, plaintiffs have done so in narrative form. It is necessary, then, for the court to attempt to identify the legal grounds upon which plaintiffs are seeking relief. A fair reading of the

complaint suggests that plaintiffs are asserting the following causes of action, designated by traditional "counts."

Count I (Compl. ¶ 37) is a claim by the Doe children that the HSD violated their rights under the Free Exercise Clause of the First Amendment to the United States Constitution by allegedly requiring recitation of the Pledge by other students in their classrooms.

Count II (Compl. ¶ 37) is a claim by the Doe children that the HSD burdened their exercise of religion in violation of the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb, by allegedly requiring recitation of the Pledge by other students in their classrooms.

Count III (Compl. ¶ 38) is a claim by the Doe children that the HSD violated their rights under the First Amendment's Establishment Clause by officially endorsing monotheism and, thus, stigmatizing them for their atheistic or agnostic beliefs.

Count IV (Compl. ¶ 39) is a claim by the Doe children that the HSD, the DSD, and SAU 70, breached their respective constitutional obligations under Part I, Article 6, of the New Hampshire Constitution by officially endorsing monotheism.[3]

[3] In a footnote in their complaint, plaintiffs state: "To preclude unnecessary repetition, Article 6 (Morality and Piety) of the New Hampshire Constitution will not be mentioned further. However, Plaintiffs assert that each of

Count V (Compl. ¶¶ 42-43) is a claim by the Doe parents that the HSD abridged their parental rights to instill their own religious beliefs in their children.

Count VI (Compl. ¶¶ 44-45) is a claim by the Doe children that the HSD abridged their rights to acquire religious values from their parents, without governmental interference.

Count VII (Compl. ¶¶ 46-50) is a claim by the Doe children that the HSD violated their rights under the Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution by endorsing the religious notion that God exists, and perpetuating prejudice against atheists or agnostics, such as themselves.

Count VIII (Compl. ¶ 51) is a claim by the Doe children that the HSD subjected them to neglect (if not abuse) within the meaning of 42 U.S.C. § 5106g(2) by exposing them to emotional harm occasioned by their required presence in a classroom in which other students recite the Pledge.

Count IX (Compl. ¶¶ 52-63) is a claim by the Doe parents that employees of the HSD, the DSD, SAU 70, and the United States of America (including members of Congress), violated their rights as

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the relevant claims made pursuant to the federal constitutional provisions likewise apply to the State Constitution." (Compl. ¶ 39.) That is not enough, see FED. R. CIV. P. 8(a)(2), and plaintiffs' claims are limited to those they state expressly.

taxpayers under the First Amendment's Establishment Clause by reciting the Pledge, participating in government functions during which the Pledge is recited, and printing and distributing written materials (including the United States Code) that include the Pledge.

Count X (Compl. ¶ 64) is plaintiffs' claim that the United States Congress violated the First Amendment's Establishment Clause when it passed the 1954 Pledge statute.

Count XI (Compl. ¶ 65-66) is plaintiffs' claim that the 1954 Pledge statute is invalid under RFRA.

Count XII (Compl. ¶ 67) is plaintiffs' claim that the HSD, the DSD, and SAU 70, violated the First Amendment's Establishment clause by implementing RSA 194:15-c, requiring teachers in their schools to lead recitations of the Pledge as a patriotic exercise.

Count XIII (Compl. ¶ 67) is plaintiffs' claim that the HSD, the DSD, and SAU 70, violated the First Amendment's Free Exercise clause by implementing RSA 194:15-c, requiring recitation of the Pledge in its schools as a patriotic exercise.

Count XIV (Compl. ¶ 67) is plaintiffs' claim that the HSD, the DSD, and SAU 70, violated Part I, Article 6, of the New Hampshire Constitution by implementing RSA 194:15-c, requiring recitation of the Pledge in its schools as a patriotic exercise.

Count XV (Compl. ¶ 68) is a claim by the Doe children that the HSD violated RSA 169-D:23 by denying them the right to freely exercise their religion.

Count XVI (Compl. ¶ 71) is plaintiffs' claim that the 1954 Pledge statute is void as against public policy because, rather than engendering patriotism and national unity, including the words "under God" in the text of the Pledge actually fosters divisiveness.

In their prayers for relief, plaintiffs ask the court to: (1) declare that Congress violated the First Amendment's Establishment and Free Exercise Clauses when it passed the 1954 Pledge statute; (2) declare that 4 U.S.C. § 4 violates the First Amendment's Establishment and Free Exercise Clauses, the Equal Protection guarantee of the Fifth Amendment, and RFRA, by virtue of its including the words "under God" in the text of the Pledge; (3) declare that by having their agents lead students in reciting the Pledge, the HSD, the DSD, and SAU 70, violated the First Amendment's Establishment and Free Exercise Clauses; the Fourteenth Amendment's Equal Protection Clause; RFRA; Part I, Article 6, of the New Hampshire Constitution; RSA 169-D:23, and RSA 194:15-c;[4] (4) order Congress to

[4] The claim that the HSD, the DSD and SAU 70 violated RSA 194:15-c, New Hampshire's pledge statute, does not square with the body of plaintiffs' complaint, in which they contend that RSA 194:15-c itself violates the federal constitution, and that various defendants violated their federal constitutional rights not by ignoring RSA 194:15-c, but by complying with its mandate.

immediately remove the words "under God" from the Pledge; (5) order the United States to use its power to remove the words "under God" from 4 U.S.C. § 4; and (6) order the HSD, the DSD, and SAU 70, to cease and desist from using the Pledge in the schools they operate.

Plaintiffs originally sued the Congress of the United States of America ("Congress"), the United States of America ("the United States"), the HSD, the DSD, and SAU 70. Subsequently, the court granted motions to intervene filed by: (1) the United States, seeking to defend the constitutionality of 4 U.S.C. § 4; (2) the State of New Hampshire, seeking to defend the constitutionality of RSA 194:15-c; and (3) eight HSD students (and the parents of five), and the Knights of Columbus, all seeking "to protect their substantial interest in defending, against Plaintiffs' constitutional challenge, the constitutionality of the Pledge of Allegiance that is recited daily in Hanover's public schools" (Mot. to Intervene (document no. 21) at 1).

Discussion

A. The Federal Defendants' Motion to Dismiss

As noted above, plaintiffs bring three claims against the federal defendants, asserting that: (1) Congress violated the Establishment Clause by passing the 1954 Pledge statute (Count X); (2)

Congress violated (the later-enacted) RFRA when it passed the 1954 Pledge statute (Count XI); and (3) members of Congress, along with employees of the United States, have violated the Establishment Clause by reciting the Pledge as constituted in 1954, participating in events at which the Pledge was recited, and printing and distributing written materials that include the Pledge (Count IX).

The federal defendants move to dismiss on a variety of grounds both jurisdictional and substantive. The court begins with the jurisdictional issues.

First, Counts X and XI, which assert claims against the United States Congress, plainly must be dismissed for lack of jurisdiction. Article I, Section 6, Clause 1, of the national constitution provides that "for any Speech or Debate in either House [of Congress], [members] shall not be questioned in any other Place." Thus, "the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation." Newdow v. U.S. Congress, 328 F.3d 466, 484 (9th Cir. 2002), rev'd on other grounds by Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (citing Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 503 (1975)). "Because the words that amended the Pledge were enacted into law by statute, the district court may not direct Congress to delete those words," id., and Congress may not be "questioned [about them] in any other Place," id., as a defendant in a lawsuit or otherwise. Accordingly, Counts X and XI are dismissed for want of subject matter jurisdiction.

Count IX is dismissed as well, to the extent it seeks relief against the United States of America, because the Doe parents are without standing to bring the claim asserted against the United States.

The U.S. Supreme Court has recently reiterated the principles governing standing to sue for alleged violations of the Establishment Clause:

> Article III of the Constitution limits the judicial power of the United States to the resolution of "Cases" and "Controversies," and "'Article III standing . . . enforces the Constitution's case-orcontroversy requirement.'" DaimlerChrysler Corp. v. Cuno, 547 U.S. ---, ----, 126 S. Ct. 1854, 1861 (2006) (quoting Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 11 (2004)). . . .
>
> "[O]ne of the controlling elements in the definition of a case or controversy under Article III" is standing. ASARCO Inc. v. Kadish, 490 U.S. 605, 613 (1989) (opinion of KENNEDY, J.). The requisite elements of Article III standing are well established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." Allen v. Wright, 468 U.S. 737, 751 (1984).

Hein v. Freedom From Religion Found., Inc., 127 S. Ct. 2553, 2562 (2007) (parallel citations omitted) (holding that taxpayers lacked standing to assert Establishment Clause challenge to religious activities of White House Office of Faith-Based and Community Initiatives).

In Count IX the Doe parents allege injury in that some portion of their federal taxes are used to support recitation of the Pledge by federal employees, participation by federal employees in government functions at which the Pledge is recited, and the printing and distribution of various written materials that include the Pledge. Regarding taxpayer standing, the Supreme Court explained:

> As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. . . .
>
> We have consistently held that this type of interest is too generalized and attenuated to support Article III standing. . . . Because the interests of the taxpayer are, in essence, the interests of the public-at-large, deciding a constitutional claim based solely on taxpayer standing "would be[,] not to decide a judicial ontroversy, but to assume a position of authority over te governmental acts of another and co-equal epartment, an authority which plainly we

do not ossess." [Frothingham v. Mellon], [262 U.S.] at 489; see also Alabama Power Co. v. Ickes, 302 U.S. 464, 478-479 (1938).

In Doremus v. Board of Ed. of Hawthorne, 342 U.S. 429, 433 (1952), we reaffirmed this principle, explaining that "the interests of a taxpayer in the moneys of the federal treasury are too indeterminable, remote, uncertain and indirect to furnish a basis for an appeal to the preventive powers of the Court over their manner of expenditure." We therefore rejected a state taxpayer's claim of standing to challenge a state law authorizing public school teachers to read from the Bible because "the grievance which [the plaintiff] sought to litigate . . . is not a direct dollars-and cents injury but is a religious difference." Id., at 434. In so doing, we gave effect to the basic constitutional principle that

> "a plaintiff raising only a generally available grievance about government–claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large-does not state an Article III case or controversy."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-574 (1992).

Hein, 127 S. Ct. at 2563-64 (parallel citations omitted).

In Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., the Supreme Court also rejected a determination by the court of appeals that plaintiffs in an Establishment Clause case "had established standing by virtue of an injury in fact to their shared individuated right to a government that shall make no law respecting the establishment of religion." 454 U.S. at 482 (holding that taxpayers lacked standing to assert an Establishment Clause challenge to the donation of surplus government property to a sectarian college). In the words of the Court:

> This Court repeatedly has rejected claims of standing predicated on "'the right, possessed by every citizen, to require that the Government be administered according to law . . . .' Fairchild v. Hughes, 258 U.S. 126, 129 [1922]." Baker v. Carr, 369 U.S. 186, 208 (1962). See Schlesinger v. Reservists Committee to Stop the War, supra, 418 U.S. [208,] 216-222 [(1974)]; Laird v. Tatum, 408 U.S. 1 (1972); Ex parte Levitt, 302 U.S. 633 (1937). Such claims amount to little more than attempts "to employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." Flast v. Cohen, 392 U.S. [83], 106 [(1968)].

. . . .

[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.

. . . .

The complaint in this case shares a common deficiency with those in Schlesinger and [United States v.] Richardson[, 418 U.S. 166 (1974)]. Although respondents claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Valley Forge, 454 U.S. at 482-86 (parallel citations omitted).

The general principles outlined in Hein and Valley Forge are subject to an exception, announced in Flast v. Cohen. In that case, the Supreme Court "noted that the Establishment Clause of the First Amendment specifically limits the taxing and spending power conferred by Art. I, § 8," 392 U.S. at 105, and held that

> a taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power.

Id. at 105-06. As the Court further explained:

> [A] taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, s 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. This requirement is consistent with the limitation imposed upon state-taxpayer standing in federal courts in Doremus v. Board of Education, 342 U.S. 429 (1952).

Flast, 392 U.S. at 102 (parallel citations omitted, emphasis added).

Here, the Doe parents allege that: (1) they pay federal income and sales taxes (Compl. ¶ 52); (2) "[s]ome of the federal tax dollars paid by [them] and utilized in connection with Defendants' maintenance and utilization of the Pledge of Allegiance are apportioned under the taxing and spending clause of Article I, Section 8 of the Constitution of the United States" (¶ 53); (3) "numerous federal . . . governmental employees – using governmental facilities – recite the now-sectarian Pledge of Allegiance while being paid from the government coffers" (¶ 56); (4) "tax moneys are also used to perpetuate the notion that 'real Americans' believe in God, and those who do not believe in God are second-class citizens, to be 'tolerated' by our society" (¶ 58); (5) "[f]ederal tax money is also used for the printing and distribution of the United States Code (including 4 U.S.C. § 4) as well as pamphlets, etc., that contain the Pledge of Allegiance" (¶ 60); (6) "[f]ederal . . . tax moneys are used when the Pledge is recited at federal . . . governmental functions" (¶ 61); and (7) "[f]ederal tax money is also used to support the 'Pause for the Pledge of Allegiance' (Pub. L. 99 Stat. 97) annual festivities" (¶ 62).[5]

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[5] Plaintiffs describe the "Pause for the Pledge of Allegiance" in the following way:

> Sponsored by the National Flag Day Foundation, this event involves the participation of thousands of Maryland school

Under even the most generous reading of plaintiffs' complaint, it simply does not contain allegations sufficient to bring the Doe parents' claims within the Flast exception. See Flast, 392 U.S. at 85-86 (holding that taxpayers had standing to assert Establishment Clause challenge to federal statute appropriating funds "used to finance instruction . . . in religious schools, and to purchase textbooks and other instructional materials for use in such schools"); Hein, 127 S. Ct. at 2569-70 (declining to extend Flast exception to executive branch expenditures); Valley Forge, 454 U.S. at 479-80 (same). While generally alleging that some federal funds appropriated under the Article I Taxing and Spending Clause support recitation or publication of the Pledge, plaintiffs identify only a single congressional action, a joint resolution "urg[ing] all Americans to participate on [National Flag Day] by reciting in unison the Pledge of Allegiance to our Nation's Flag, at seven o'clock post meridian eastern daylight time on June 14, 1985." Act of June 20, 1985, Pub. L. No. 99-54, 99 Stat. 97. That Act, however, was not an exercise of Congress's taxing and spending power; it appropriated no funds at all. Because the sole congressional action upon which the

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children, a high school choir, use of governmental buildings, a concert given by the 229th Maryland Army National Guard band, and a "Fly-over" by the A-10 "Thunderbolt" jets of the 104th Fighter Squadron 175th Wing Maryland Air National Guard. The estimated cost to taxpayers of the Fly-over, alone, is on the order of $10,000.00. (Compl. ¶64, n.7).

Doe parents rely in Count IX was not an exercise of Congress's taxing and spending power, their claim does not fall within the Flast exception.

Because the Doe parents lack standing to bring the claim asserted against the federal defendants in Count IX, this court lacks jurisdiction to adjudicate it. See United Seniors Ass'n, Inc. v. Philip Morris USA, 500 F.3d 19, 26 (1st Cir. 2007) ("As we conclude that United Seniors failed to establish Article III standing . . . we lack the requisite subject matter jurisdiction to reach the district court's determination on the merits.") (citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998)). Accordingly, Count IX is dismissed as to the federal defendants.

Notwithstanding the dismissal of all claims against the federal defendants, however, the United States remains a party to this case, in its limited role as an intervenor. The Rule of Civil Procedure governing intervention provides, in part, that "the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute." FED. R. CIV. P. 24(A)(1). The United States may intervene by right under 28 U.S.C. § 2403(a), which provides, in pertinent part:

> In any action, suit or proceeding in a court of the United States . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court . . . shall permit the United States to intervene for presentation

> of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party . . . to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(Emphasis added.) "The scope of this statutory intervention is limited to presenting evidence and arguments in support of the constitutionality of the [challenged] statute." Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 215 n.17 (S.D. Tex. 1982) (citing Smolowe v. Delendo Corp., 36 F. Supp. 790, 792 (S.D.N.Y. 1940)).

Given the limited role of the United States as an intervenor, it is not appropriate to reach the United States' arguments concerning: (1) plaintiffs' standing to sue the DSD or SAU 70; or (2) FFRF's associational standing to sue any of the defendants in this case. On the other hand, if and when the HSD, the DSD, and SAU 70, engage on the merits, the United States will be heard on the constitutionality of 4 U.S.C. § 4, but only on that issue.

B. The State of New Hampshire's Motion to Dismiss

The State of New Hampshire's status is similar to that of the United States — it is an intervenor for the limited purpose of presenting evidence and

providing argument related to the constitutionality of RSA 194:15-c. See FED. R. CIV. P. 24(a)(1); 28 U.S.C. § 2403(b); Vietnamese Fishermen's Ass'n, 543 F. Supp. 198, 215 n.17. Like the United States, the State of New Hampshire will be heard at the appropriate time on the statute's constitutionality. But, consistent with 28 U.S.C. § 2403(b), the State of New Hampshire will not be heard on any of the other issues raised in its motion to dismiss, such as: (1) this court's jurisdiction to decide state-law questions; and (2) plaintiffs' standing to assert that RSA 194:15-c violates the federal constitution. Accordingly, the State of New Hampshire's motion to dismiss is denied, but with the understanding that argument presented in that motion relating to the constitutionality of RSA 194:15-c will be taken into account at such time as that issue is joined by the remaining parties in interest.

C. The Third Motion to Dismiss

A third motion to dismiss has been filed by several HSD students, their parents, and the Knights of Columbus. As noted above, these parties "request[ed] leave to intervene . . . to protect their substantial interest in defending . . . the constitutionality of the Pledge of Allegiance that is recited daily in Hanover's public schools." As with the motions to dismiss filed by the other intervenors, to the extent the motion raises other issues, such as standing, it is denied. But, to the extent the motion addresses the constitutionality issue, the intervenors' argument will be taken into account at such time as

that issue is joined by the remaining parties in interest.

Conclusion

For the reasons given, the federal defendants' motion to dismiss (document no. 16) is granted to the extent that the federal defendants are dismissed from the case as parties in interest, but the motion is otherwise denied. The remaining two motions to dismiss (document nos. 14 and 22) are denied to the extent they address issues other than the constitutionality of the Pledge, related practices and state statutory provisions. As the case progresses, and the parties in interest engage on the constitutionality of the Pledge and related practices, those portions of the three motions to dismiss addressing that issue will be accepted as memoranda of law in support of the argument for constitutionality. Accordingly, the intervenors need do nothing more to be heard on the issue of constitutionality, but, of course, are free to file supplemental memoranda as appropriate.

SO ORDERED.

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Steven J. McAuliffe
Chief Judge

August 7, 2008

Appendix C

District Court's Order of Dismissal
September 30, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

The Freedom from Religion Foundation;
Jan Doe and Pat Doe, Parents;
DoeChild-1, DoeChild-2, and DoeChild-3,
Minor Children,
Plaintiffs

v. Civil No. 07-cv-356-SM
Opinion No. 2009 DNH 142

The Hanover School District and
The Dresden School District,
Defendants

The United States of America,
Intervenor

The State of New Hampshire,
Intervenor

Anna Chobanian; John Chobanian;
Kathryn Chobanian; Schuyler Cyrus;
Elijah Cyrus; Rhys Cyrus; Austin
Cyrus; Daniel Phan; Muriel Cyrus;
Michael Chobanian; Margarethe Chobanian;
Minh Phan; Suzu Phan; and the Knights of
Columbus,
Intervenors

O R D E R

The parties remaining as defendants in this case are the Hanover School District and the Dresden School District. All other individuals and institutions named in the caption of this order are intervenors and, as such, have the right to be heard on only two issues: the constitutionality of 4 U.S.C. § 4 (sometimes referred to below as "the federal Pledge statute"), and the constitutionality of N.H. REV. STAT. ANN. ("RSA") § 194:15-c (sometimes referred to below as "the New Hampshire Pledge statute").

Background

The school districts moved to dismiss the claims against them "for the reasons set forth in the Federal Government's Memorandum in Support of the Federal Defendants' Motion to Dismiss . . . as to the constitutionality of 4 U.S.C. § 4 and the State of New Hampshire's Memorandum of Law in Support of Motion to dismiss . . . as to the constitutionality of RSA 194:15-c." (Mot. to Dismiss (document no. 46), at 1-2.) Thereafter, plaintiffs filed their first amended complaint (document no. 52). The following facts are drawn from that complaint.

Jan Doe and Pat Doe ("the Doe parents") are the mother and father of DoeChild-1, DoeChild-2, and DoeChild-3 ("the Doe children"). At the time the complaint was filed, the eldest Doe child attended a middle school jointly administered by the Hanover and Dresden school districts. The two younger Doe

children were enrolled in a public elementary school operated by the Hanover district.

Jan and Pat Doe describe themselves as atheist and agnostic, respectively. Both are members of the Freedom from Religion Foundation. Each of the Doe children is said to be either an atheist or an agnostic, and each is said to either deny or doubt the existence of God.

The Pledge of Allegiance ("Pledge") is routinely recited in the Doe childrens' classrooms, under the leadership of their teachers. As provided by Congress, the Pledge reads:

> 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. While the statute prescribes the text of the Pledge, and describes the preferred formalities attendant to its recitation, the statute includes no other mandate. That is, the statute does not compel recitation of the Pledge under any circumstances or by any person.

In New Hampshire, recitation of the Pledge in schools is governed by state law, which provides:

> I. As a continuation of the policy of teaching our country's history to the elementary and

secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.

II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.

III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

RSA 194:15-c.

Plaintiffs stipulate that no Doe child has been compelled to recite the Pledge or its included phrase, "under God." (Plaintiffs do assert, however, that

while the Doe children have not been compelled to recite the Pledge, they have been coerced.[27]) The Doe parents asked the principals of their childrens' schools to provide assurances that the Pledge would not be recited in their childrens' classes, but have received no such assurance.

Plaintiffs claim that by leading the Doe childrens' classes in reciting the Pledge of Allegiance in the manner prescribed by RSA 194:15-c, defendants have violated the rights of the Doe children under the Establishment Clause (Count I) and the Free Exercise Clause (Count II) of the United States Constitution; the rights of the Doe parents under the federal Free Exercise Clause (Count III); the rights of both the Doe children and their parents under the Due Process and Equal Protection Clauses of the United States Constitution (Count IV); and the Doe parents' federal constitutional rights of parenthood, as well as the Doe children's concomitant rights (Count V). Plaintiffs also assert that defendants have violated the rights of the Doe children and parents under Part I, Article 6, of the New Hampshire Constitution (Count VI); the Doe childrens' rights to the free

[27] The distinction between compulsion and coercion drawn by plaintiffs is based on Chief Justice Rehnquist's concurrence in Elk Grove Unified School District v. Newdow, 542 U.S. 1, 31 n.4 (2004) (Rehnquist, J., concurring) ("I think there is a clear difference between compulsion (Barnette) and coercion (Lee).") (citing W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), as an example of compulsion, and Lee v. Weisman, 505 U.S. 577 (1992), as an example of coercion).

exercise of religion, established by RSA 169-D:23 (Count VII); and the Doe parents' state rights of parenthood, as well as the associated rights of the Doe children (Count VIII). Finally, in Count IX, plaintiffs assert that "the use of a Pledge of Allegiance containing the words 'under God' is void as against public policy." (First Am. Compl. ¶ 84.)

Plaintiffs ask the court to: (1) declare that, by having teachers lead students in reciting the Pledge of Allegiance, defendants have violated the various constitutional and statutory provisions identified above; (2) declare that RSA 194:15-c is void as against public policy; and (3) enjoin recitation of the Pledge of Allegiance in the public schools within defendants' jurisdictions.

As noted, the school districts filed a motion to dismiss plaintiffs' original complaint. Then, after plaintiffs filed their first amended complaint, the State of New Hampshire filed a supplemental memorandum supporting its earlier motion to dismiss, in which it addressed claims that were newly raised in plaintiffs' first amended complaint. The United States and the remaining intervenors filed renewed motions to dismiss in which they incorporated by reference arguments made in earlier dismissal motions, and added arguments to address claims raised for the first time in the first amended complaint. The school districts have not directly responded to the first amended complaint other than by assenting to its filing, but the parties all seem to be proceeding on the assumption that the school districts persist in their original motion to dismiss,

as reiterated and embellished by the intervenors with respect to the amended complaint. The court will likewise construe the pending motions to dismiss as having been advanced by the school districts as well.

The United States says plaintiffs' claims amount to an "as applied" challenge to the federal Pledge statute, but that characterization seems inapt. The statute prescribes the content of the Pledge of Allegiance, but does not command any person to recite it, or to lead others in its recitation. Merely leading students in reciting the Pledge does not seem an "application" of the federal Pledge statute to the Doe children. Teachers leading students in a Pledge recital are actually complying with New Hampshire's Pledge statute. Accordingly, the constitutionality of 4 U.S.C. § 4 "as applied" is not at issue.

The State of New Hampshire stands on a different footing. Plaintiffs argue that the school districts violated their constitutional rights by leading the Pledge in classes in which the Doe children are enrolled. Because all appear to agree, as a factual matter, that the Doe children's teachers acted in compliance with the mandate of RSA 194:15-c, determining the constitutionality of the teachers' actions turns on the constitutionality of RSA 194:15-c. That is precisely the question the State of New Hampshire is entitled to address.

The Legal Standard

A motion to dismiss for "failure to state a claim upon which relief can be granted," FED. R. CIV. P. 12(b)(6), requires the court to conduct a limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "The motion [should] be granted unless the facts, evaluated in [a] plaintiff-friendly manner, contain enough meat to support a reasonable expectation that an actionable claim may exist." Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co., 547 F.3d 48, 51 (1st Cir. 2008) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Morales-Tañón v. P.R. Elec. Power Auth., 524 F.3d 15, 18 (1st Cir. 2008)).

Discussion

Count I

In Count I, plaintiffs claim that defendants violated the rights of the Doe children under the federal Establishment Clause by leading their classes in reciting the Pledge of Allegiance. Defendants move to dismiss, arguing principally that: (1) the Establishment Clause permits official acknowledgments of the nation's religious heritage and character; (2) the Pledge of Allegiance is a permissible acknowledgment of the nation's religious heritage and character; and (3) the purpose of the New Hampshire Pledge statute is to promote

patriotism and respect for the flag.[28] Plaintiffs disagree, categorically.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I. "The [Establishment] Clause[ ] appl[ies] to the States by incorporation into the Fourteenth Amendment." Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 8 n.4 (2004) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)); see also Parker v. Hurley, 514 F.3d 87, 103 (1st Cir. 2008) (citation omitted).

Plaintiffs are distressed, primarily, that the phrase "under God" is included in the Pledge's text. They contend that inclusion of "under God" in the Pledge renders the New Hampshire Pledge statute unconstitutional under six different legal tests that have been employed in assessing Establishment Clause claims: (1) the "touchstone test" of neutrality found in McCreary County v. ACLU of Kentucky, 545 U.S. 844, 860 (2005); (2) the "endorsement test" posited by Justice O'Conner in Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); (3) the first two prongs of the familiar Lemon test, see Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); (4) the "outsider test" described in Santa Fe Independent School District v. Doe, 530 U.S. 290, 309 (2000); (5) the "imprimatur test" articulated by

[28] As subsidiary matters, defendants further argue that the Pledge must be considered as a whole, and that Lee, 505 U.S. 577, is not controlling in this case because reciting the Pledge does not constitute an inherently religious practice.

Justice Blackmun in Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring); and (6) the "coercion test" noted in Engel v. Vitale, 370 U.S. 421 (1962), and refined in Lee, 505 U.S. at 593.

The three federal appellate opinions addressing the constitutionality of public-school Pledge recitation all take slightly different analytical approaches. See Myers v. Loudoun County Pub. Schs., 418 F.3d 395, 402 (4th Cir. 2005) (upholding the Virginia Pledge statute against an Establishment Clause challenge based upon "[t]he history of our nation" and "repeated dicta from the [Supreme] Court respecting the constitutionality of the Pledge"); Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (striking down school district's Pledge policy on Establishment Clause grounds based upon the coercion test found in Lee, 505 U.S. 577); Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) (upholding the Illinois Pledge statute by taking a "more direct" approach than the trial court, which "trudged through the three elements identified by the Court in Lemon [v. Kurtzman, 403 U.S. 602 (1971)]"). The Sherman court's own "more direct" approach achieved directness by starting from the premise that the words "under God" in the Pledge constitute a "ceremonial reference[ ] in civic life to a deity" of a sort that the nation's founders would not have considered the establishment of religion. Id. at 445.

A. Applying the Lemon Test

The Lemon test has its share of detractors. See, e.g., Sherman, 980 F.2d 445. Nevertheless, within the last decade, in a case involving an Establishment Clause challenge to a state law limiting local regulation of land use for religious purposes with respect to land owned by a religious denomination, the court of appeals for this circuit endorsed continued application of the Lemon test ("[a]s a practical framework for analysis in cases such as this, the Supreme Court has adopted the three-part test articulated in Lemon v. Kurtzman"). Boyajian v. Gatzunis, 212 F.3d 1, 4 (1st Cir. 2000) (citing Lemon, 403 U.S. at 612-13). It is appropriate, then, to begin by applying the Lemon test.

The United States Supreme Court recently described the Lemon test:

> Lemon stated a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."

Cutter v. Wilkinson, 544 U.S. 709, 718 n.6 (2005) (quoting Lemon, 403 U.S. at 612-13); see also Boyajian, 212 F.3d at 4 ("a law does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive government

entanglement with religion") (citing Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335-39 (1987); Rojas v. Fitch, 127 F.3d 184, 187 (1st Cir. 1997)).

1. Purpose

The "first step in evaluating [the New Hampshire Pledge statute's] constitutionality is to ascertain whether it serves a 'secular legislative purpose.' " Boyajian, 212 F.3d at 5 (citation omitted). "The touchstone for [an] analysis [of legislative purpose] is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.' " McCreary County, 545 U.S. at 860 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)) (other citations omitted). Accordingly, "[w]hen the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides." McCreary County, 545 U.S. at 860 (citations omitted) (emphasis added). "Manifesting a purpose to favor one faith over another, or adherence to religion generally, clashes with the 'understanding, reached . . . after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens . . . .' " Id. (quoting Zelman v. Simmons-Harris, 536 U.S. 639, 718 (2002) (Breyer, J., dissenting)). "By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents "that they are

outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .” ’ ” McCreary County, 545 U.S. at 860 (quoting Santa Fe Indep. Sch. Dist., 530 U.S. at 309-310).

Defendants argue that the New Hampshire Pledge statute serves the secular legislative purposes of fostering an appreciation of history, and promoting patriotism and respect for the American flag. Plaintiffs counter by focusing on the legislative purpose of the act of Congress that inserted the phrase “under God” into the Pledge in 1954. Plaintiffs see this case as a direct challenge to the constitutionality of including “under God” in the Pledge statute, while defendants see the case as one primarily challenging a patriotic civic custom, in which the Pledge must be considered as a whole.

Defendants rely on Lynch v. Donnelly, 465 U.S. 668, 685 (1984), for the proposition that when conducting an Establishment Clause analysis, the focus must be not on religious symbols alone, but on their overall setting, echoing the court of appeals’ observation that “the context of a religious display is crucial in determining its constitutionality.” Knights of Columbus v. Town of Lexington, 272 F.3d 25, 33 (1st Cir. 2001) (comparing County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) with Lynch, 465 U.S. at 685). That principle, reasonably extended to the facts of this case, emphasizes that the context in which religious words or symbols are employed is critical to any Establishment Clause analysis. Here, the context in which the disputed words appear is

provided by the thirty-one words that make up the Pledge.

The New Hampshire Pledge statute plainly has a secular legislative purpose. Here, "an understanding of official objective emerges from readily discoverable fact, without [need of] any judicial psychoanalysis of a drafter's heart of hearts." McCreary County, 545 U.S. at 862 (citation omitted). The New Hampshire Pledge statute is titled "New Hampshire School Patriot Act." RSA 194:15-c. The statute's own words describe its purpose as continuing "the policy of teaching our country's history to the elementary and secondary pupils of this state." RSA 194:15-c, I. That is a secular purpose.

Moreover, the legislative history contains a far-reaching discussion of patriotism, see N.H.S. JOUR. 945-67 (2002), and places enactment of the statute in the context of a response to the attacks of September 11, 2001, see id. at 948, 953. That context supports the conclusion that patriotism, rather than support of theism over atheism or agnosticism, was the guiding force behind the enactment of the New Hampshire Pledge statute.

With regard to the phrase "under God" in the Pledge, Senator O'Hearn stated, on the floor of the New Hampshire Senate:

> Justice Brennan of the Supreme Court wrote, "we have simply interwoven the motto 'In God we Trust' so deeply into the

> fabric of our civil polity that its present use may well not present that type of involvement [with religion] which the first amendment prohibits. . . The reference to divinity in the revised Pledge of Allegiance for example, 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."

N.H.S. JOUR. 958, supra (quoting Sch. Dist. v. Schempp, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring)). Senator Wheeler added: "We are not touching the words in the Pledge of Allegiance. It still says 'one nation under God'. That has not been removed. We are not expressing anything at the state level about God, one way or the other, so just forget about that." N.H.S. JOUR. 958, supra. Like the legislative discussions of patriotism, the legislators' disclaimers of religious motivation buttress the conclusion that the New Hampshire Pledge statute was enacted for patriotic, not religious, purposes.

Finally, the legislative history supports defendants' position in another way. Before the New Hampshire School Patriot Act (i.e., the New Hampshire Pledge statute) was enacted in 2002, RSA chapter 194 included a section titled "Lord's Prayer and Pledge of Allegiance in Public Elementary

Schools," RSA 194:15-a (1989), which provided that "a school district may authorize the recitation of the traditional Lord's prayer and the pledge of allegiance to the flag in public elementary schools," *id.* The New Hampshire School Patriot Act separated the Pledge of Allegiance from the Lord's prayer, leaving the prayer provision in RSA 195:14-a and creating a new section for the Pledge. Leaving aside the potential constitutional infirmities of the Lord's prayer statute, which were in fact discussed by the legislature when it enacted the new separate Pledge statute, see N.H.S. JOUR. 956-61, supra, the placement of the Pledge in a separate provision, apart from the Lord's prayer provision, certainly underscores the secular purpose of the New Hampshire Pledge statute.

2. Effect

"The second basic Establishment Clause concern is that of avoiding the effective promotion or advancement of particular religions or of religion in general by the government." Rojas, 127 F.3d at 189, abrogated on other grounds by Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998). Under the Lemon effects test, "[i]t is beyond dispute that . . . government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.' " Lee, 505 U.S. at 587 (quoting Lynch, 465 U.S. at 678) (other citations omitted). Moreover, "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary

public schools," Lee, 505 U.S. at 592 (citations omitted), and "prayer exercises in public schools carry a particular risk of indirect coercion." *Id.*

The New Hampshire Pledge statute, as implemented by the school districts, does not have the effect of coercing the Doe children to support or participate in religion or its exercise. First, the sort of coercion at issue in Lee is not present in this case. The Supreme Court described the coercion in Lee this way:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the

> act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position.

Id. at 593 (emphasis supplied).

Here, by contrast, objectors are not placed in a religious dilemma. The dilemma in Lee was that a student who objected to prayer was confronted, while seated at her graduation ceremony, with a prayer (a religious exercise) delivered by a rabbi. She, and all the other attendees were effectively rendered involuntary congregants, being led in prayer by a religious officiant. The student's choices were these:

involuntary participation, silent acquiescence that bore all the hallmarks of participation, or active protest. And, the onus was placed on her to determine how to deal with her objection to the religious exercise being imposed. The New Hampshire Pledge statute sets up no such dilemma.

The statute directs schools to authorize a "period of time during the school day for the recitation of the pledge of allegiance" but provides that "[p]upil participation shall be voluntary." RSA 194:15-c, II. Thus, rather than leaving students to conclude that participation is required and that nonparticipation is, necessarily, an "objection," Lee, 505 U.S. at 590, a "dissent," id. at 592, 593, or a "protest," id. at 593, the New Hampshire Pledge statute expressly endorses nonparticipation. That recognition somewhat distinguishes voluntary participation in the Pledge recital from the claim of voluntary participation in graduation ceremonies that the Court found unpersuasive in Lee, 505 U.S. at 594-95. And, as noted in Lee, to avoid being made an unwilling congregant, a student would have had to forego "one of life's most significant occasions." Id. at 595. Here, the Doe children forfeit no significant experience or occasion to avoid reciting the Pledge, or that portion of it to which they object. While I recognize that peer or social pressure probably does push students toward participation, by sheer dint of the number of students opting in rather than out, opting out of a Pledge recitation involves little more than exercising the right to demur.

But statutorily prescribed voluntariness is not the main point. The critical and dispositive difference is this: the Pledge of Allegiance is not a religious prayer, nor is it a "nonsectarian prayer" of the sort at issue in Lee, 505 U.S. at 589, and its recitation in schools does not constitute a "religious exercise." The Pledge does not thank God. It does not ask God for a blessing, or for guidance. It does not address God in any way. See Myers, 418 F.3d at 407-08 (describing prayer as an "approach to Divinity in word or thought" or a "communication between an individual and his deity"). Rather, the Pledge, in content and function, is a civic patriotic statement — an affirmation of adherence to the principles for which the Nation stands.[29] Inclusion of the words "under God," in context, does not convert the Pledge into a prayer or religious exercise, as discussed in greater detail later. Peer or social pressure to participate in a school exercise not of a religious character does not implicate the Establishment Clause, and as a civic or patriotic exercise, the statute is clear in making participation completely voluntary.

Because the New Hampshire Pledge statute does not coerce students to support or participate in

[29] In Elk Grove, the Supreme Court described recitation of the Pledge as "a patriotic exercise designed to foster national unity and pride" in the "ideals that our flag symbolizes," specifically, the "proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations.' " 542 U.S. at 6 (quoting Texas v. Johnson, 491 U.S. 397, 437 (1989) (Stevens, J., dissenting)).

a religious exercise, it does not run afoul of the second prong of the Lemon test.

3. Entanglement

The third prong of the Lemon test requires that a statute not foster excessive government entanglement with religion.[30] Plaintiffs do not argue that the New Hampshire Pledge statute encourages government entanglement with religion. Accordingly, defendants prevail on the third prong of the Lemon test.

4. Lemon Summary

The New Hampshire Pledge statute has a secular legislative purpose. It was enacted to enhance instruction in the Nation's history, and foster a sense of patriotism. Its primary effect neither advances nor inhibits religion. It does not foster excessive government involvement with religion. In

[30] While Lee was decided on the second prong of the Lemon test, the facts of that case provide a textbook example of impermissible government entanglement with religion. "A school official, the principal, decided that an invocation and a benediction should be given." Lee, 505 U.S. at 587. That same official selected the clergyman who led the prayers. Id. Beyond that, "the principal directed and controlled the content of the prayers." Id. at 588. A government official who chooses to include a prayer in a student activity, who selects the clergyman who delivers it, and who controls the content of the prayer entangles government and religion to a substantial degree.

other words, RSA 194:15-c satisfies all three prongs of the Lemon test. Accordingly, defendants are entitled to dismissal of Count I.

B. Applying the Approach of the Fourth and Seventh Circuits

As noted, plaintiffs direct their challenge not at the Pledge as a whole, but at the two words, "under God," added in 1954. While application of the Lemon test is determinative of the Establishment Clause issue raised in Count I, the court turns, briefly, to different approaches taken by the Fourth and Seventh Circuits in characterizing the effect of the words "under God" in the Pledge.

In Myers, the court concluded that the Pledge does not constitute a prayer, reasoning as follows:

> Undoubtedly, the Pledge contains a religious phrase, and it is demeaning to persons of any faith to assert that the words "under God" contain no religious significance. See Van Orden [v. Perry], [545 U.S. 677, 695] (2005) (Thomas, J., concurring) ("words such as 'God' have religious significance"). The inclusion of those two words, however, does not alter the nature of the Pledge as a patriotic activity. The Pledge is a statement of loyalty to the flag of the United States and the Republic for which it stands; it is performed while standing at attention,

> facing the flag, with right hand held over heart. See also West Virginia v. Barnette, 319 U.S. 624, 641 (1943) (referring to the Pledge as a "patriotic ceremony"). A prayer, by contrast, is "a solemn and humble approach to Divinity in word or thought." Webster's Third New Int'l Dictionary 1782 (1986). It is a personal communication between an individual and his deity, "with bowed head, on bended knee." Newdow, 328 F.3d at 478 (O'Scannlain, J., dissenting from denial of rehearing en banc).

418 F.3d at 407-08 (parallel citations omitted). That reasoning is persuasive.

In Sherman, Judge Easterbrook posed the rhetorical question: "Does 'under God' make the Pledge a prayer, whose recitation violates the establishment clause of the first amendment?" Sherman, 980 F.2d at 445. His response began with a description of the phrase "under God" as a "ceremonial reference[ ] in civic life to a deity." Id. He continued by describing the history of such ceremonial references in significant historical documents,[31] noting that "[w]hen it decided Engel v.

[31] The Sherman opinion cites, among others, the Declaration of Independence, the declarations in support of separation between church and state by James Madison and Thomas Jefferson, and Abraham Lincoln's Gettysburg Address and second inaugural address. Sherman, 980 F.2d at 446. Of Lincoln's second inaugural address, the court said: "Pupils who study this address with care will find 14 references to God among its 699 words." Id.

Vitale, [370 U.S. 421 (1962),] the first of the school-prayer cases, the [Supreme] Court recognized this tradition and distinguished ceremonial references to God from supplications for divine assistance." Id. at 446. Judge Easterbrook went on to invoke Justice Brennan's conclusion "that 'the reference to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of ceremonial deism protected from Establishment Clause scrutiny chiefly because it has lost through rote repetition any significant religious content.' " Id. at 447 (quoting Lynch, 465 U.S. at 716 (Brennan, J., dissenting)) (internal quotation marks and brackets omitted).

While the Fourth Circuit did not go so far as to adopt the Seventh Circuit's "ceremonial deism" view, both courts have persuasively concluded that the phrase "under God" does not transform the Pledge into a prayer, or its recitation into a religious exercise.

Of course, the Fourth and Seventh Circuits are not the only federal appellate courts to have addressed the issue. In Newdow v. United States Congress, the Ninth Circuit reached a different conclusion, deciding that, "[i]n the context of the Pledge, the statement that the United States is a nation 'under God' is a profession of a religious belief, namely a belief in monotheism," Newdow, 328 F.3d at 487, and recitation of the Pledge in a classroom, even with the opt-out required by Barnette, "places students in the untenable position of choosing

between participating in an exercise with religious content or protesting," id. at 488.

I am of the view that the Fourth and Seventh Circuits got it right. The words "under God" undeniably come from the vocabulary of religion, or, at the least, reflect a theistic orientation, but no more so than the benign deism reflected in the national trust in God declared on our currency, or in ceremonial intercessions to "save this Honorable Court" at the commencement of many court proceedings. It may well be that some, perhaps many, people required to employ U.S. currency, or socially pressured to stand during civic ceremonies, feel offended by what seems to them an imposition of theistic doctrine. But the Constitution prohibits the government from establishing a religion, or coercing one to support or participate in religion, a religious exercise, or prayer. It does not mandate that government refrain from all civic, cultural, and historic references to a God. The line is often difficult to draw, of course, and in some senses the drawn line yet has some mobility.

When Congress added the words "under God," to the Pledge in 1954, its actual intent probably had far more to do with politics than religion — more to do with currying favor with the electorate than with an Almighty. (God, if God exists, is probably not so easily fooled.) In the intervening half century since the words were added, rote repetition has, as Justice Brennan observed, removed any significant religious content embodied in the words, if there ever was significant religious (as opposed to political) content

embodied in those words. Today, the words remain religious words, but plainly fall comfortably within the category of historic artifacts — reflecting a benign or ceremonial civic deism that presents no threat to the fundamental values protected by the Establishment Clause.

Counts II and III

In Counts II and III, plaintiffs claim that defendants violated the rights of the Doe children and their parents under the Free Exercise Clause of the federal Constitution by leading the Doe children's classes in reciting the Pledge of Allegiance. Defendants argue that they are entitled to dismissal of plaintiffs' free-exercise claims because plaintiffs do not allege that the Doe Children have been subject to compulsion of any sort. Plaintiffs disagree, but do not develop an argument.

The First Amendment to the United States Constitution bars Congress from making any law prohibiting the free exercise of religion. U.S. CONST. amend. I. That bar applies to the states. See Elk Grove, 542 U.S. at 8 n.4; Parker, 514 F.3d at 103. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." Employment Div. v. Smith, 494 U.S. 872, 877 (1990)). Under the Free Exercise Clause, the government may not, for example, (1) compel affirmation of religious beliefs; (2) punish the expression of religious doctrines it believes to be false; (3) impose special disabilities on

the basis of religious views or religious status; or (4) lend its power to one side or the other in controversies over religious authorities or dogma. Parker, 514 F.3d at 103 (citing Smith, 494 U.S. at 877).

The free-exercise claim appears to be that exposure to classroom recitation of the Pledge places an unconstitutional burden on a student's ability to freely believe or practice atheism or agnosticism (or polytheism). That claim fails for two reasons.

To begin, as explained above, the Pledge, taken as a whole, is a civic patriotic affirmation, not a religious exercise, and inclusion of the words "under God" constitutes, at the most, a form of ceremonial or benign deism. The benign nature of the words, in context, preclude a finding that listening to others recite the Pledge "compels affirmation of religious beliefs," or "lends [government] power to one side or the other in controversies over religious . . . dogma." Second, as the court of appeals explained in a case involving a substantially analogous free-exercise objection to curricular materials:

> Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them. See Fleischfresser [v. Directors of Sch. Dist. 200], 15 F.3d [680,] 690 [(7th Cir. 1994)]; Mozert [v.

> Hawkins County Bd. of Educ.], 827 F.2d 1058,] 1063-65, 1070 [(6th Cir. 1987)]; see also Bauchman [ex rel. Bauchman v. West High Sch.], 132 F.3d [542,] 558 [(10th Cir. 1997)] ("[P]ublic schools are not required to delete from the curriculum all materials that may offend any religious sensibility." (quoting Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980)) (internal quotation marks omitted)). The reading of King and King [the book to which the school children in Parker objected on religious grounds] was not instruction in religion or religious beliefs. Cf. Barnette, 319 U.S. at 631 (distinguishing between compelling students to declare a belief through mandatory recital of the pledge of allegiance, which violates free exercise, and "merely . . . acquaint[ing students] with the flag salute so that they may be informed as to what it is or even what it means").

Parker, 514 F.3d at 106 (footnote, parallel citation omitted) (emphasis added). Here, as in Parker, the objection is to mere exposure; there are no allegations of required affirmation or participation. And so, like the students in Parker, the Doe children have failed to state a claim under the Free Exercise Clause. Parker is also dispositive of the Doe parents' free-exercise claim. In Parker, the court of appeals cited with approval the Sixth Circuit's determination that "exposure to ideas through the required reading of books did not constitute a constitutionally

significant burden on the plaintiffs' free exercise of religion." Parker, 514 F.3d at 105 (citing Mozert, 827 F.2d at 1065). The Parker court continued:

> [T]he [Mozert] court emphasized that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion," and reading or even discussing the books did not compel such action or affirmation.

Parker, 514 F.3d at 105 (quoting Mozert, 827 F.2d at 1066, 1069). Here, the court has determined that the Doe children have not been compelled to perform or to refrain from performing any act, and they have not been compelled to affirm or disavow any belief. Thus, the rights of their parents under the Free Exercise Clause have not been violated. As the court of appeals explained in Parker:

> the mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." C.N. [v. Ridgewood Bd. Of

> Educ.], 430 F.3d [159,] 185 [(3d Cir. 2005)]; see also Newdow, 542 U.S. at 16 (noting that the school's requirement that Newdow's daughter recite the pledge of allegiance every day did not "impair[ ] Newdow's right to instruct his daughter in his religious views").

Parker, 514 F.3d at 105-06 (parallel citations omitted). Like the parents in Parker, the Doe parents have suffered no impairment in their ability to instruct their children in their views on religion. Accordingly, they have failed to state a claim under the Free Exercise Clause.

Because neither the Doe children nor the Doe parents have stated a claim under the Free Exercise Clause, defendants are entitled to dismissal of Counts II and III.

Count IV

In Count IV, plaintiffs claim that defendants violated their rights under the Due Process[32] and

[32] The phrase "due process" appears in the last sentence of Count IV, but plaintiffs do not otherwise develop a due-process claim. Defendants do not address due process in their motion to dismiss, nor do plaintiffs mention due process in their objection. As explained below, to the extent that plaintiffs have made a due-process claim at all, it is discussed along with Count V, in tandem with plaintiffs' "right-of-parenthood" claim. See Parker, 514

Equal Protection Clauses of the United States Constitution by leading the Doe children's classes in reciting the Pledge. More specifically, they assert that defendants: (1) have a duty to show equal respect to their beliefs, i.e., atheism or agnosticism; (2) breached that duty by leading public school students in affirming that God exists; and (3) created a social environment that perpetuates prejudice against atheists. Defendants argue that government action that makes no classification is not amenable to an equal-protection challenge. They further argue that because religion is not a suspect classification, their actions are subject to rational basis review, a standard the New Hampshire Pledge statute easily meets. Plaintiffs disagree.

"The Equal Protection Clause of the Fourteenth Amendment guarantees that those who are similarly situated will be treated alike." In re Subpoena to Witzel, 531 F.3d 113, 116 (1st Cir. 2008) (citing City of City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

With regard to legislative enactments like the New Hampshire Pledge statute, "the classic violation of equal protection [is] a law [that] creates different rules for distinct groups of individuals based on a suspect classification." Wirzburger v. Galvin, 412 F.3d 271, 283 (1st Cir. 2005) (citing Strauder v. West Virginia, 100 U.S. 303 (1879)). The New Hampshire Pledge statute "do[es] not require different treatment of any class of people because of their religious

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F.3d at 102 (discussing "[t]he due process right of parental autonomy").

beliefs," Wirzburger, 412 F.3d at 283, nor does it "give preferential treatment to any particular religion," id. Rather, 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.[33] Moreover, to the extent the New Hampshire Pledge statute may be construed as compelling agnostics and atheists to listen to their classmates recite the Pledge, the court has ruled that the Pledge is not a prayer or religious exercise, and, even if it were, plaintiffs' constitutional rights are not violated by recitation of the Pledge in the presence of the Doe children.

Given plaintiffs' claim that defendants violated the Doe children's equal-protection rights by leading public-school students in reciting the Pledge, Count IV may, perhaps, be better understood as a claim of discriminatory treatment, as opposed to a facial challenge to the Pledge statute. Such a claim, however, is unavailing. "A requirement for stating a valid disparate treatment claim under the Fourteenth Amendment is that the plaintiff make a

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[33] The Wirzburger court also noted that the Supreme Court has "sometimes struck down facially neutral laws, which it recognized were crafted to avoid facial discrimination." 412 F.3d at 283 (citing Hunter v. Erickson, 393 U.S. 385, 387-91 (1969); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982). The New Hampshire Pledge statute gives no indication in its terms or legislative history that it was enacted with a hidden purpose to discriminate against atheists or agnostics.

plausible showing that he or she was treated differently from others similarly situated." Estate of Bennett v. Wainwright, 548 F.3d 155, 166 (1st Cir. 2008) (citing Clark v. Boscher, 514 F.3d 107, 114 (1st Cir. 2008); Witzel, 531 F.3d at 118)). Moreover:

> To succeed on a claim of discriminatory treatment, a plaintiff must show that the defendant acted with discriminatory intent or purpose. Washington v. Davis, 426 U.S. 229, 239-40 (1976). That is, the plaintiff must establish that the defendant intentionally treated the plaintiff differently from others who were similarly situated. Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). A discriminatory intent or purpose means that the defendants "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." Wayte v. United States, 470 U.S. 598, 610 (1985) (internal quotation marks omitted).

Witzel, 531 F.3d at 118-19 (parallel citations omitted). Here, plaintiffs have not alleged that the Doe children's teachers acted with a discriminatory intent.

Because the New Hampshire Pledge statute does not create rules for agnostics and atheists different from rules applicable to monotheists or polytheists, and because there are no allegations that the Doe children's teachers acted with a

discriminatory intent, defendants are entitled to dismissal of the equal-protection claim stated in Count IV.

Count V

In Count V plaintiffs, claim that defendants violated the Doe parents' federal constitutional rights of parenthood (and their children's concomitant rights) by leading the children's classes in reciting the Pledge of Allegiance. Defendants counter that plaintiffs' parental-rights claim is foreclosed by the court of appeals' decision in Parker v. Hurley.

Plaintiffs base Count V on a "federal constitutional right of parenthood, which includes the right to instill the religious beliefs chosen by the parents, free of governmental interference." (First Am. Compl. ¶ 68.) But, they do not identify any specific constitutional provision guaranteeing such a right. Wisconsin v. Yoder, 406 U.S. 205 (1972), upon which plaintiffs rest Count V, is a free-exercise case. See Yoder, 406 U.S. at 213. In Parker, the court of appeals for this circuit explained its view that in Yoder, "the Court did not analyze separately the due process and free exercise interests of the parent-plaintiffs, but rather considered the two claims interdependently, given that those two sets of interests inform one [an]other." Parker, 514 F.3d at 98 (citing Yoder, 406 U.S. at 213-14). The court then followed the model it identified in Yoder, and analyzed jointly the "plaintiffs' complementary due

process and free exercise claims." Parker, 514 F.3d at 101.

Following the analytical model established in Yoder and Parker, dismissal of plaintiffs' free-exercise claim compels dismissal of their due-process/parental-rights claim. The court can discern nothing of the latter that remains after dismissal of the former.

Count IX

In Count IX, plaintiffs ask the court to rule, without any colorable basis in law, that "the use of a Pledge of Allegiance containing the words 'under God' is void as against public policy" (First Am. Compl. ¶ 84), because if fosters divisiveness. Count IX is summarily dismissed for failure to state a claim on which relief can be granted.

Counts VI-VIII

Counts VI through VIII state claims under Part I, Article 6 of the New Hampshire Constitution (Count VI), RSA 169-D:23 (Count VII), and the common law of New Hampshire, as expressed in Sanborn v. Sanborn, 123 N.H. 740 (1983) (Count VIII). Because all of plaintiffs' federal claims have been dismissed, it is appropriate to reassess the court's exercise of jurisdiction over plaintiffs' remaining state claims. Camelio v. Am. Fed'n, 137 F.3d 666, 672 (1st Cir. 1998) (citing Roche v. John

Hancock Mut. Life Ins. Co., 81 F.3d 249, 256-57 (1st Cir. 1996)). Factors to consider include "fairness, judicial economy, convenience, and comity," Camelio, 137 F.3d at 672 (citation omitted), with a particular emphasis on comity, see id. (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)). Here, principles of comity counsel in favor of not exercising supplemental jurisdiction over plaintiffs' state-law claims. Accordingly, Counts VI through VIII are dismissed, without prejudice to refiling in a state court of competent jurisdiction.

Conclusion

For the reasons given, all three pending motions to dismiss (documents 46, 55, and 56) are granted. The Clerk of the Court shall enter judgment in accordance with this order and close the case.

SO ORDERED.

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Steven J. McAuliffe
Chief Judge

September 30, 2009

Appendix D

Court of Appeals' Denial of Rehearing
December 28, 2010

No. 09-2473

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, ET AL.,

Plaintiffs - Appellants,

v.

UNITED STATES, ET AL.,

Defendants - Appellees.

HANOVER SCHOOL DISTRICT, ET AL.,

Defendants

Before

Lynch, Chief Judge,
Toruella, Boudin, Lipez,
Howard and Thompson,
Circuit Judges.

ORDER OF THE COURT

Entered: December 28, 2010

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk

Appendix E

Constitutional Provisions and Statutes Involved in the Case

This case involves the First Amendment's Religion Clauses ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"), as well as on the Fourteenth Amendment's Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is contended that these constitutional provisions are violated by 4 U.S.C. § 4, which states (in pertinent part):

> 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."

in conjunction with the N.H. Rev. Stat. Ann. ("RSA") § 194:15-c:

I. As a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state, this section shall be known as the New Hampshire School Patriot Act.

II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.

III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate. If this paragraph shall be declared to be unconstitutional or otherwise invalid, the remaining paragraphs in this section shall not be affected, and shall continue in full force and effect.

Appendix F

State Constitutional Provisions Depriving Atheists of Equal Rights

Ark. Const., art. XIX, § 1:

> No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.

Md. Const., art. XXXVII:

> That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.

Miss. Const., art. XIV, § 265:

> No person who denies the existence of a Supreme Being shall hold any office in this state.

N.C. Const., art. VI, § 8:

> The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God.

Pa. Const., art I, § 4:

> No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.

S.C. Const., art. XVII, § 4:

> No person who denies the existence of a Supreme Being shall hold any office under this Constitution.

Tenn. Const., art. IX, § 2:

> No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state.

Tex. Const., art. I, § 4:

> No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.