COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11317

JANE DOE AND JOHN DOE, INDIVIDUALLY AND AS PARENTS AND NEXT FRIENDS OF DOECHILD-1, DOECHILD-2, AND DOECHILD-3, AND THE AMERICAN HUMANIST ASSOCIATION,

Plaintiffs/Appellants,

v.

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT, ET AL.,

Defendants/Appellees.

and

DANIEL JOYCE AND INGRID JOYCE, AND THE KNIGHTS OF COLUMBUS,
Defendants/Interveners-Appellees.

On Direct Appeal from the Middlesex Superior Court

BRIEF FOR AMICI CURIAE CONGRESSMAN STEVEN PALAZZO, CONGRESSMAN MIKE MCINTYRE, AND OTHER MEMBERS OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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INTEREST OF AMICI

The Preamble of the United States Constitution establishes the ends of the national government and declares an ultimate aim of "form[ing] a more perfect union." To that end, Congress has seen fit to define national symbols that reflect our nation's heritage and affirm constitutional principles. The national Pledge of Allegiance is one of America's most treasured national symbols, and it serves an invaluable unifying purpose. The Pledge of Allegiance's power as a symbol of our more perfect union would crumble if individual states or school districts could each tinker with the congressionally enacted language of the national Pledge.

Amici are Congressman Steven Palazzo, Congressman Mike McIntyre, and other members of the United States House of Representatives currently serving in the One Hundred Thirteenth Congress.[1] They include members of the House's Education & Workforce Committee and its Early Childhood, Elementary, and Secondary Education Subcommittee. While the Members who join this brief have diverse views on a variety of subjects, all agree that the opportunity for students to voluntarily recite the universal language of the national Pledge of Allegiance in school is an important

[1] A complete list of the Members of Congress who join this brief as Amici appears in the Appendix.

expression of patriotism and unity. Like the Interveners, the Members believe that our national unity will be diminished if a single, national Pledge of Allegiance is not utilized as part of the daily patriotic exercise that commonly begins each school day across the country.

Amici further agree the First Amendment affords atheists and humanists the absolute freedom to abstain from the recitation of the Pledge, but they do not agree that the exercise of voluntarily reciting the national Pledge intrudes on any individual's freedoms or that the Massachusetts Pledge Act deprives any student of the equal protection of the laws. Because the phrase "under God" in the Pledge continues to act not as a "religious service or prayer, but [as] a statement of historical beliefs," H. R. Rep. No. 107-659, at 5 (2002), it does not classify an individual on the basis of religion. Amici urge this Court to uphold Mass. Gen. Laws ch. 71, § 69.

STATEMENT OF THE ISSUES

I. Whether the Superior Court correctly held that Mass. Gen. Laws ch. 71, § 69 does not violate the Equal Rights Amendment to the Massachusetts Constitution by providing for the voluntary recitation of the Pledge of Allegiance at school even though some students disapprove of the Pledge's reference to "God."

II. Whether the Superior Court correctly held that the voluntary recitation of the Pledge of Allegiance at school does not violate Mass. Gen. Laws ch. 76, § 5 because it does not discriminate against non-participants who disapprove of the words of the Pledge.

STATEMENT OF THE CASE

Every day, teachers in schools around the country lead their classes in a brief civics exercise that reflects the philosophical foundations of this nation. Massachusetts, like so many other states in the Union, has come to the conclusion that this lesson is an important one. But consistent with First Amendment guarantees, Massachusetts recognizes that some students or parents may disagree, and it therefore grants every student the unquestionable right to refrain from participating, for whatever reason.

Those who choose to participate recite familiar words: "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 Pledge, like the public school curriculum in general, is meant to lay the foundation for an educated and informed citizenry. It is the modern embodiment of this country's original political

maxim, that Americans "are endowed by their Creator with certain unalienable rights." Declaration of Independence (US 1776).

The plaintiffs here object to some of the Pledge's words—which are set by federal law—on religious grounds. They find fault with the words "under God," viewing that phrase as a daily affirmation that their atheistic beliefs are wrong. It is an argument that has been made many times before, usually based on alleged violations of the First or Fourteenth Amendments to the federal Constitution. Historical First Amendment challenges related to the Pledge of Allegiance were grounded in mandatory participation, but courts have long concluded that there is no constitutional infringement when participation is completely voluntary, as it is here. This Court came to a similar conclusion, opining in 1977 that recitation of the Pledge would be constitutional so long as it was voluntary.

The plaintiffs seek to change this settled understanding by requiring the Commonwealth to abandon the voluntary recitation of the Pledge or to reformulate the words used in its classrooms so that the Massachusetts exercise no longer conforms to the federal Pledge defined by Congress and recited throughout the rest of the country.

They have challenged the Massachusetts Pledge Act because it supposedly "asserts a strong favoritism for one religious creed (and by necessary implication, disapproval of others)." Pls.' Br. at 3. Despite the plainly establishment-oriented basis of their challenge, the plaintiffs have attempted to artfully plead their claim in a futile effort to avoid implicating federal law or the portions of the Massachusetts Constitution that directly concern religious establishments. Instead, they have attempted to gerrymander a challenge based on the Massachusetts Constitution's Equal Rights Amendment (the "Equal Rights Amendment" or "ERA") and the Commonwealth's statutory ban on discrimination. These provisions provide no basis to challenge the Pledge of Allegiance for a simple reason: the Massachusetts Pledge Act does not classify the plaintiffs or anyone else. And without a state classification, there can be no discriminatory state action. The Superior Court's decision must be affirmed.

STATEMENT OF THE FACTS

The plaintiffs are students in the Acton-Boxborough Regional School District, their parents, and the American Humanist Association. They are self-proclaimed atheists and Humanists. Humanism is "a worldview which says that reason and science are the best ways to understand the

world around us, and that dignity and compassion should be the basis for how you act toward someone else." Am. Humanist Ass'n, *Frequently Asked Questions*, About the AHA (2013), http://www.americanhumanist.org/AHA/Frequently_Asked_Questions. Humanists are "nontheistic," which does not mean a belief in no God, but "that there is no proof for the existence of God, any gods, the supernatural or an afterlife." *Id.* For this reason, the plaintiffs object to the daily recitation of the Pledge of Allegiance, which includes the phrase "under God."

The defendants are the Acton-Boxborough Regional School District, the Town of Acton Public Schools, and Dr. Stephen Mills, as superintendent of schools (together, "the school district"). The school district complies with Mass. Gen. Laws ch. 71, § 69 and has its teachers begin each day by leading the national Pledge of Allegiance.

The Superior Court granted the motion of Daniel and Ingrid Joyce, on behalf of their children, and the Knights of Columbus to intervene.

In January 2011, the plaintiffs filed an amended complaint in Superior Court challenging the school district's daily recitation of the Pledge as a violation of their right to the equal protection of the laws under the

Massachusetts Constitution and Massachusetts Gen. Laws ch. 76, §5, the Commonwealth's statutory ban on discrimination.

The Superior Court issued its opinion in June 2012, holding the daily recitation of the Pledge does not violate either the plaintiffs' equal-protection rights under the Massachusetts Constitution or Gen. Laws ch. 76, § 5.

In November 2012, the plaintiffs filed a motion of direct appeal to the Supreme Judicial Court, which was granted. On February 11, 2013, the Justices solicited amicus briefs.

Summary of the Argument

The plaintiffs claim that the voluntary recitation of the Pledge of Allegiance in their school violates the Commonwealth's constitutional and statutory equality protections. This is so, they argue, because the recitation of the federal Pledge marginalizes them on the basis of their religion, making them outsiders in the classroom. This novel theory—for which the plaintiffs admit they can find no support in either the Massachusetts Reporter or decisions of the federal Supreme Court or Courts of Appeals—is an overt attempt to artfully plead an Establishment Clause claim as an equal protection claim. No doubt the plaintiffs take this step because it is well-settled that the voluntary recitation of the Pledge does

not violate the federal First Amendment or corresponding state-law rights. The plaintiffs' transparent attempt to evade controlling case law must fail: the Pledge Act does not violate the Equal Rights Amendment to the Massachusetts Constitution for the simple reason that it creates no classification.

To state the obvious, a law cannot create an unlawful classification under the Equal Rights Amendment if it contains no classification in the first place. Classifications arise when the Commonwealth grants benefits or imposes burdens based upon some characteristic. The Equal Rights Amendment ensures that these benefits or burdens are not imposed unequally on similarly-situated people. But the Pledge Act does not draw distinctions based on religion or anything else, and there is no benefit granted or burden imposed by the Pledge of Allegiance. First, the Pledge Act does not treat anyone differently on the basis of religion; its function is to "instill values of patriotism and good citizenship." Pls.' Br. at 7. Second, any student can decline to participate in the Pledge for any reason or no reason whatsoever, and therefore there is no burden based upon religion. Because any student's reason for not participating is not obvious, the daily recitation simply cannot create an environment

that stigmatizes the plaintiffs and their religious beliefs. At bottom, having a teacher lead an entirely voluntary, no-questions-asked recitation of the Pledge provides no benefit to and imposes no burden on any group or individual, regardless of the plaintiffs' subjective impressions. This conclusion, which flows from a straightforward application of equal-protection principles, is consistent with the overwhelming body of law developed at the federal level and throughout the states, including Massachusetts.

Even if this Court were to hold that a teacher's leading a voluntary recitation of the Pledge classifies students, the plaintiffs' suit would still fail because there is a rational basis for the law. This deferential standard of review, rather than strict scrutiny, is a consequence of the plaintiffs' knowing decision not to plead a claim under the religious liberty provisions of the Massachusetts Constitution. Instead, in an effort to evade adverse precedent, the plaintiffs styled their claim of religious discrimination as arising under the Equal Rights Amendment and the statutory ban on discrimination. In such circumstances, however, the plaintiffs must allege an establishment of religion or free-exercise violation for strict scrutiny to apply. Without that allegation, any

claim under the ERA must be reviewed for a rational basis. This Court has a longstanding practice of following federal law when deciding equal protection claims, and there is no reason to depart from that practice here. The plaintiffs have failed to prove that there is no rational basis for the recitation of the Pledge.

Even if the Massachusetts Pledge Act were subjected to strict scrutiny review, the law would still survive. As the plaintiffs acknowledge, the Pledge is crafted to serve the federal Constitution's compelling objective of forming a more perfect union of the American people. The Pledge Act reflects the Commonwealth's agreement with that goal. The Act is narrowly-tailored because the same purpose cannot be met by redrafting the national Pledge for Massachusetts students. Perhaps the greatest strength of the Pledge is its unifying function, ensuring that citizens throughout the country all make the same pledge to the same flag. Congress has the principal responsibility to define national symbols like the Flag and the Pledge. If a state were to change the words of the Pledge used within its borders, citizens would no longer be united through a common pledge, thwarting Congress's purpose in setting forth a national Pledge. It would be as if Massachusetts chose to fly an American flag with only 49 stars or 12

stripes. 4 U.S.C. §§ 1–2. The Massachusetts Pledge Act, a procedural statute which incorporates the content of the federal Pledge, is narrowly tailored to prevent that type of factionalism.

Lastly, the plaintiffs invite this Court to create a new framework of equal-protection law based solely on subjective interpretations of harm. The Court should decline to do so. The effect of the plaintiffs' theory would be to expose every government action to a barrage of equal-rights litigation. In a state as diverse as Massachusetts, any government action might somehow offend someone's sensibilities. Allowing suits based on the plaintiffs' kind of perceived injury would grant each citizen a heckler's veto and would make the task of governing virtually impossible. Children or parents could use the plaintiffs' proposed rule to challenge all manner of curricular choices in public schools, and citizens could attack the application of laws of general applicability to conduct they consider to be religiously important.

Argument

I. The Plaintiffs Have Failed to State a Claim Under the Equal Rights Amendment to the Massachusetts Constitution Because the Massachusetts Pledge Act Does Not Create a Classification

The plaintiffs have failed to state any claim under the Equal Rights Amendment because neither the national Pledge nor the Massachusetts Pledge Act classifies them or anyone else on the basis of religion. *See DuPont v. Comm'r of Corr.*, 448 Mass. 389, 399–400 (2007) (classification must be proven to establish an equal protection claim).[2] First, the Pledge Act does not group people for different treatment. Second, the Pledge Act does not create a classification by its apportionment of benefits and burdens.

A. The Massachusetts Pledge Act Does Not Classify Anyone

Classifications arise when "a law creates different rules for distinct groups of individuals." *Wirzburger v. Galvin*, 412 F.3d 271, 283 (1st Cir. 2005). Put another way, a classification occurs when a government "us[es] standards, qualifications, or criteria to control the scope and applicability" of government action. *Mahone v. Addicks*

[2] The plaintiffs likewise have failed to state a claim under Mass. Gen. Laws ch. 76, § 5 because this Court "equates" the legal standard for § 5 with that of the ERA. *Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc.*, 378 Mass. 342, 344 n.5 (1979).

Util. Dist. of Harris Cnty., 836 F.2d 921, 932 (5th Cir. 1988); *see also Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 344–45 (2003) (Greaney, J., concurring) (classifications "withhold[]" or "restrict" or "vitiate" a privilege or right). The government draws distinctions on the basis of religion when it "require[s] different treatment of any class of people because of their religious beliefs." *Wirzburger*, 412 F.3d at 283; *see also Opinion of the Justices to the Senate*, 373 Mass. 883, 886 (1977). It does so impermissibly when the benefits or burdens are more than incidental. *See Taunton E. Little League v. City of Taunton*, 389 Mass. 719, 725 (1983) (incidental benefit not unconstitutional); *Attorney Gen. v. Bailey*, 386 Mass. 367, 377 (1982) (incidental burden on religion not unconstitutional, especially in light of "the importance of education in our society").

Despite the plaintiffs' attempts, the facts here cannot be forced to fit into this analytical framework. Irrespective of one's religious beliefs, or lack thereof, the Massachusetts Pledge Act regards all students in the same way; it does not "require different treatment" of any student because of those beliefs. *See Wirzburger*, 412 F.3d at 283. Far from creating different rules for similarly-situated students, the Pledge Act treats every student the

same by giving each student the same choice of whether or not to recite the Pledge, for any reason or no reason. What motivates certain pupils to not recite the Pledge is not obvious and might not rest on either religious or anti-religious beliefs. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 11 (1st Cir. 2010). Thus, the plaintiffs "are not *religiously* differentiated from their peers merely by virtue of their non-participation in the Pledge." *Id.*

Furthermore, despite the plaintiffs' assertion that the voluntary recitation of the Pledge makes them feel like second-class citizens, there can be no classification for equal protection purposes if the law does not affect some objective, non-incidental benefit or burden on some students and not others. *See Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011) (no Equal Protection claim where "burden on religion is incidental"), *cert. denied*, 132 S. Ct. 1743 (2012); *see also Freedom from Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (subjective harms "differ from legal injury"); *accord Parker v. Hurley*, 514 F.3d 87, 99 (1st Cir. 2008) ("While we accept as true plaintiffs' assertion that their sincerely held religious beliefs were deeply offended, we

find that they have not described a constitutional burden on their rights, or on those of their children.")

B. The Massachusetts Pledge Act Does Not Benefit Any Individual on the Basis of His or Her Religion

The government speech challenged by the plaintiffs does not provide any benefit to any student.[3] To see why, one must analyze not only the complete text of the Pledge, *Commonwealth v. Scott*, 464 Mass. 355, 358 (2013) (meaning of a word or phrase necessarily depends on the surrounding context), but "how the text *is used*." *Van Orden v. Perry*, 545 U.S. 677, 701 (2005) (Breyer, J., concurring).

The text of the Pledge is familiar. Its focus is the Flag. The words at issue here, "under God," appear toward the end of the Pledge as an adjectival phrase. Courts have generally seen these words as "a recognition of the historical principles of governance." *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1021 (9th Cir. 2010).

This understanding of the meaning of the phrase is underscored by viewing the Pledge in its proper historical context. The Pledge is a way to connect every new

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[3] Because the teacher is required by law to lead the Pledge in the course of employment, the teacher's statement is properly regarded as government speech. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966–67 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1807 (2012); *see also Evans-Marshall v. Bd. of Educ.*, 624 F.3d 332, 340 (6th Cir. 2010); *Mayer v. Monroe Cnty. Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007).

generation of Americans with the founding era. *See id.* at 1012. That is why the Pledge is recited not only in schools, but in naturalization classes as well. *See* U.S. Citizenship and Immigration Services, *Lesson Plan: American Symbols and Celebrations* at 2 (Jan. 17, 2013), *available at* http://www.uscis.gov/USCIS/files/Symbols_Celebrations_lesson_plan.pdf. The Pledge, like other aspects of civic education, contains important lessons that contribute to an informed populace capable of effective self-government. That the Pledge is recited frequently should therefore come as no surprise, since it concisely encapsulates the theories behind this country's vision of popular governance, and the whole point of public education is to "prepare [students] to participate as free citizens of a free State to meet the needs and interests of a republican government." *McDuffy v. Sec'y of Exec. Office of Educ.*, 415 Mass. 545, 606 (1993). But the value of the Pledge does not end there.

This is not a country of one race, religion or creed. "What makes us American," President Obama remarked in his Second Inaugural Address, "is our allegiance to an idea articulated in a declaration made more than two centuries ago." President Barack H. Obama, Inaugural Address (Jan. 21, 2013) (transcript available at http://www.whitehouse.

gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama). Perhaps out of design, the Pledge recalls the words of that declaration.

The Declaration of Independence established the political belief that "all men are created equal" and that each person has the right to "life, liberty, and the pursuit of happiness." That philosophy is reflected today in the Pledge's acknowledgment that this nation believes in "liberty and justice for all." The two declarations both refer as well to a kind of Providence, unclaimed by any sect. The Declaration speaks of "Nature's God" and to man's "Creator." Today, in terms less poetic but equally allegorical, the Pledge uses "God."

There can be little dispute that today in this country a simple mention of "God" can be understood as a term that transcends religious differences. *See Commonwealth v. Callahan*, 401 Mass. 627, 638 (1988) (holding that the words "in the year of our Lord" and "so help me God" are "simply two examples of many permissible, secular 'references to the Almighty that run through our laws, our public rituals, [and] our ceremonies.'") (quoting *Colo. v. Treasurer & Receiver Gen.*, 378 Mass. 550, 561 (1979)); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 42 (2004) (O'Connor, J., concurring); *see also* Pew Forum

on Religion & Pub. Life, *"Nones" on the Rise: One in Five Adults Have No Religious Affiliation* at 48 (Oct. 9, 2012) (noting that fourteen percent of self-identified atheists believe in a higher power such as "God"). With the idea of the divine being so widely accepted, the reference to "God" in the Pledge cannot be seen as impermissibly benefitting any sect or creed. It does not, as the plaintiffs allege, "assert[] a strong favoritism for one religious creed," Pls.' Br. at 3, "exalt one religious view," Pls.' Br. at 17, or "validate[] one religious class." *Id.* at 35.[4] In

[4] The plaintiffs' arguments underscore their effort to artfully plead around an unsustainable Establishment Clause challenge. They claim that reciting the Pledge "asserts a strong favoritism for one religious creed," Pls.' Br. at 3. That is an Establishment Clause claim, not an equal protection claim. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989) ("'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.'") (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). That conclusion cannot be avoided by the plaintiffs' attempt to re-label their claim as arising under the ERA. *See id.* at 593–94 (explaining that regardless of whether the "key word," "favoritism," "promotion," or "endorsement" is used, each implicates Establishment Clause principles). Nor can the plaintiffs remove their claim from the ambit of the Establishment Clause by arguing that the Pledge "reinforces the public prejudice against plaintiffs' religious class, as it necessarily classifies them as outsiders and defines them as second-class citizens," Pls.' Br. at 10. As the Supreme Court has explained, it is the Establishment Clause that prohibits the State from telling "nonadherents 'that they are outsiders, not full members of the political community . . . .'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984)). While the Establishment Clause is the true home

fact, the plaintiffs' view that the word "God" in the context of the broader Pledge endorses religion at all has been explicitly rejected. "Taken in the context of the words of the whole Pledge, the phrase 'under God' does not convey a message of endorsement." *Hanover*, 626 F.3d at 11.

Moreover, accepting the plaintiffs' argument would not only directly contradict a long line of state and federal cases concerning the Pledge, it would also be inconsistent with decisions regarding the religious references in numerous laws. The Supreme Court, when confronted with government recognition of our nation's religious heritage, has never hinted that such acknowledgments would rise to the level of conferring a benefit that would implicate constitutional guarantees of equality. Simply put, the plaintiffs' alleged benefits to certain religions have already been determined to be, at most, constitutionally incidental.

The Supreme Court's jurisprudence with respect to holiday celebrations is instructive. The Court has explained that, within the bounds of the First Amendment, the "government may celebrate Christmas." *Cnty. of*

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of the plaintiffs' claims, they have expressly abandoned any reliance on it. *See* Pls.' Br. at 14 ("Plaintiffs are not . . . raising any federal claims of any kind."). And, in any event, the Establishment Clause would not entitle them to any relief. *Rio Linda*, 597 F.3d at 1042; *Hanover*, 626 F.3d at 10, 12, 14.

Allegheny, 492 U.S. at 601. The government may do so even though those celebrations will "inevitably recall the religious nature of the Holiday." *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984). The government may celebrate Thanksgiving as well, even though the holiday "has not lost its theme of expressing thanks for Divine aid any more than has Christmas lost its religious significance." *Id.* 675. Just last Thanksgiving, President Obama reminded all of us to "spend this day by lifting up those we love, mindful of the grace bestowed upon us by God and by all who have made our lives richer with their presence." Presidential Proclamation 8908 (Nov. 20, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2013-title3-vol1/pdf/CFR-2013-title3-vol1-proc8908.pdf. The fact "that Government has long recognized—indeed it has subsidized—holidays with religious significance" has never been thought to be constitutionally troublesome. *Lynch*, 465 U.S. at 676. Yet, under the plaintiffs' theory, each of these observances would be in violation of the Massachusetts Constitution's guarantee of equal rights.

The federal circuit courts are similarly consistent in recognizing that these types of laws do not unconstitutionally benefit certain religions. Public schools may designate Good Friday and the Monday after

Easter as holidays, despite their obviously Christian roots. *Koenick v. Felton*, 190 F.3d 259, 267 (4th Cir. 1999). This is so even though the holidays make it easier for Christian students to practice their faith compared to students of other religions. That benefit has been recognized as merely incidental. *Koenick*, 190 F.3d at 267. County and state courthouses may close on Good Friday, even though closing the courthouses was "convenient for persons of a particular faith." *Granzeier v. Middleton*, 173 F.3d 568, 576 (6th Cir. 1999). And the Ninth Circuit rejected a challenge to Hawaii's declaration of Good Friday as a state holiday, holding it to be of "no constitutional moment that Hawaii selected a day of traditional Christian worship, rather than a neutral date, for its spring holiday." *Cammack v. Waihee*, 932 F.2d 765, 776 (9th Cir. 1991). The court observed that other religions were not treated equally, but that fact gave the court no pause. *Id.*

Given the practically universal treatment by federal courts regarding these matters, it should be no surprise that state courts reach similar conclusions. "The fact that many religious days having significance to adherents of various faiths have not been designated as legal holidays does not . . . deny to those adherents the equal protection of the laws or effect a discrimination because

of religious principles." *Epstein v. State*, 311 N.J. Super. 350, 358 (App. Div. 1998).

These cases establish that the government does not violate constitutional guarantees of equality by incidentally benefiting the holidays of one creed as against other creeds. If the government does not confer any constitutionally-significant benefit on Christians by declaring as a government holiday Christmas, Easter, and Good Friday, surely the Commonwealth does not unconstitutionally benefit any religion when it simply recognizes this country's undisputed philosophical foundation by including "under God" as part of an educational and patriotic statement. *See N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)(Holmes, J.) (remarking that "a page of history is worth a volume of logic").

C. The Pledge Does Not Burden the Plaintiffs

Unable to prove that the government has conferred any benefit on anyone, the plaintiffs must show that they are burdened by the speech in order to prevail. *See Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 510 (5th Cir. 2001). The plaintiffs cannot.

The plaintiffs' primary claim is that they are burdened in a comparative sense. They are burdened *because* others are benefitted. Pls.' Br. at 3 (arguing that the

Pledge "asserts a strong favoritism for one religious creed (and by necessary implication, disapproval of others).").
But as just explained, the Pledge provides no benefit to theistic beliefs. It follows that the Pledge does not undermine atheistic or humanist beliefs.

In circumstances similar to those in this case, federal courts have consistently held that the type of psychic injury alleged here is insufficient. For instance, the Ninth Circuit recently rejected an atheist's argument that the ubiquity of the national motto ("In God We Trust"), "turns Atheists into political outsiders and inflicts a stigmatic injury upon them." *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010). The court held that the plaintiff's claim was insufficient because it was nothing more than "an abstract stigmatic injury." *Id.* (internal quotation marks omitted). So too here.

When pressed for specific harm based on their specific circumstances, the most the plaintiffs allege is that they "receive a daily reminder that they don't quite measure up to their classmates." Pls.' Br. at 32. Even if this were true, this type of perceived burden is insufficient to state a claim under Massachusetts law. *See Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 243 (2006) (holding that "[t]he standard for equal protection analysis

under our Declaration of Rights is the same as under the Federal Constitution."); *see also Hanover*, 626 F.3d at 11 ("the constitutionality of a state statute does not turn on the subjective feelings of plaintiffs as to whether a religious endorsement has occurred"); c*f. Rasheed v. Comm'r of Corr.*, 446 Mass. 463, 473 (2006) (perceived burden on religious freedoms insufficient). As courts around this country have consistently recognized, "a feeling of alienation cannot suffice as injury in fact." *Obama*, 641 F.3d at 808; *see also In re Navy Chaplaincy*, 534 F.3d 756, 764–65 (D.C. Cir. 2008) (holding there to be an insufficient injury "[w]hen plaintiffs are not themselves affected by a government *action* except through their abstract offense at the *message* allegedly conveyed by that action."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982). That this case involves children does not change that conclusion. *See Curtis v. Sch. Comm. of Falmouth*, 420 Mass. 749, 763 (1995) ("peer pressure in secondary schools . . . simply does not rise to the level of constitutional infringement").

These holdings are based, at least in part, on the fact that "when the State is the speaker, it may make content-based choices." *Rosenberger v. Rector & Visitors*

of Univ. of Va., 515 U.S. 819, 833 (1995); *see also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) ("To govern, government has to say something."). It is not surprising that sometimes people disagree with what the government chooses to say. Not only is it not surprising, "[i]t is inevitable." *Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000). From time to time, if not every day, the "government will adopt and pursue programs and policies" that "are contrary to the profound beliefs and sincere convictions of some of its citizens." *Id.* Yet these perceived burdens are not enough to establish a constitutional violation because, within the bounds of the First Amendment, the government may "select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

This discretion is not limited to trivial matters. Even when these content-based statements could be seen as intruding on deeply-held beliefs that are based more in faith than fact, that has not proven to be enough. The government did not "unconstitutionally discriminate[]," the Supreme Court observed, when it "established a National Endowment for Democracy to encourage other countries to adopt democratic principles" but did not "encourage

competing lines of political philosophy such as communism and fascism." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991). Claims of unequal treatment that may result cannot be constitutionally cognizable injuries given that "[i]t is the very business of government to favor and disfavor points of view." *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring). Indeed, "it is not easy to imagine how government could function if it lacked this freedom." *Pleasant Grove City*, 555 U.S. at 468.

Given how intertwined the government—whether federal, state, or local—is in all aspects of our lives, every government action will be considered by some individual as "incompatible with their own search for spiritual fulfillment and with the tenets of their religion." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452 (1988). Mindful of the Pandora's box that could be opened were one of these challenges to allegedly unequal government speech to succeed, courts turn them away with a simple observation: "welcome to the crowd." *Freedom from Religion Found., Inc. v. City of Warren,* 707 F.3d 686 (6th Cir. 2013). It is therefore just a fact of life that "courts cannot . . . offer to reconcile the various competing demands on government, many of them rooted in

sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislatures and other institutions." *Lyng*, 485 U.S. at 452.

Even when the challenged speech involves the curriculum in public schools, courts respond the same way. They steadfastly refuse to allow upset teachers, parents or students to "transform run-of-the-mine curricular disputes into constitutional stalemates." *Evans-Marshall*, 624 F.3d at 341–42; *see also Lanner v. Wimmer*, 662 F.2d 1349, 1354 (10th Cir. 1981) ("Courts have rarely entered the thicket of trying to supervise the manner in which public schools teach traditional subjects which may conflict with or offend the religious sensibilities of some students."). As the First Circuit noted, "[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 (emphasis added). That is why a person "has no constitutional right to require others to submit to her views and to forego a portion of their education they would otherwise be entitled

to enjoy." *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979).

At bottom, the plaintiffs' alleged injuries simply are not cognizable under Massachusetts law. As a result of their failure to demonstrate that they are burdened by the Pledge Act, their equal protection claim must fail.

*D. **Goodridge** and its Progeny Do Not Aid the Plaintiffs' Claims*

The plaintiffs try to distract the Court from the overwhelming body of law that undercuts each of their arguments by attempting to analogize this case to *Goodridge*. Their attempts to slide this case under the *Goodridge* framework fail because that case involved an actual government classification: the Commonwealth used a specific criterion to restrict marriage and withhold its benefits.[5] *Goodridge*, 440 Mass. at 315. Nothing of the

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[5] In an effort to twist the facts of this case to fit *Goodridge*, the plaintiffs appear at times to confuse the difference between an explicit (or facial) classification and one that is implicit. *See* Pls.' Reply Br. at 1 ("Section 69 Facially Discriminates Because it Explicitly and Implicitly Draws a Line Between God-believers and Non-Believers"). As a general matter, something cannot be implicit while at the same time being explicit. *The American Heritage Dictionary of the English Language* (4th ed. 2000) ("Implicit: 1. Not explicit"). As a legal matter, an explicit classification is one "that . . . exists on the face of the law" while an implicit classification is proven by "demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose." Erwin Chemerinsky, Constitutional Law 671 (3d ed. 2006). So in the constitutional sense the

sort is present here.

As this Court explained, the Massachusetts marriage law at the time permitted a man to marry only a woman, and vice versa. *Id.* at 319-20. Two men could not marry each other, nor could two women. Thus, when presented with a marriage certificate between two adults, before granting the license the Commonwealth would first determine the sex of the couple. In this way, the Commonwealth classified because it "us[ed] standards, qualifications, or criteria to control the scope and applicability" of the marriage law. *See Mahone*, 836 F.2d at 932. The criterion was

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terms are mutually exclusive as well. Yet the plaintiffs' lengthy discussion regarding implicit classifications only serves to distract from their actual argument. They allege that "§ 69 facially discriminates" because it "draws an explicit classification on the basis of 'creed.'" Pls.' Reply Br. at 9. Indeed, in their Amended Complaint, the plaintiffs make clear that it is the "wording of the Pledge" with the language "under God" that is the lynchpin of their equal protection claim. Amended Compl. ¶ 21. *E.g.*, *id.* at ¶¶ 23, 40, 41. That the plaintiffs allege only facial discrimination is further evident in each count of the Amended Complaint where the plaintiffs assert that it is the inclusion of the words "under God" that is discriminatory and concede that the practice of a Flag-salute ceremony would be appropriate and not discriminatory if such words were excluded. Moreover, nowhere in the plaintiffs' Amended Complaint do they allege that the Act has a discriminatory impact that can only be explained by a discriminatory purpose, which is required to demonstrate an implicit classification. *See Fedele v. Sch. Comm. of Westwood*, 412 Mass. 110 (1992); *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 256 (1979). As a result, all of the plaintiffs' discussion about implicit classifications is tangential and inapplicable.

"opposite sex." *Goodridge*, 440 Mass. at 320 n.11 (characterizing the classification as between "'same sex' and 'opposite sex'" because it was "more accurate in this context than the terms 'homosexual' or 'heterosexual'"). Thus, the Commonwealth identified and classified people by limiting marriage to opposite-sex couples. *Id.* at 315.

Indeed, the clerk had to determine the sexual characteristics of a couple to effectively execute the law. Here, the Commonwealth does not seek to know the identity or religious affiliation of any student. The teacher can lead the Pledge without knowing anything about the religion of the students. This total lack of classification is why the plaintiffs may proceed with this suit anonymously. They are indistinguishable from all the other students who choose not to participate for whatever reason. The Commonwealth does not know who the plaintiffs are, nor does it care.

Moreover, this Court emphasized in *Goodridge* that the essence of a classification is in the prevention or prohibition of certain groups from taking a particular action or availing themselves of a certain privilege or right. *Id.* at 323; *see also id.* at 345–56 (Greaney, J., concurring). By limiting marriage to opposite-sex couples, the Commonwealth was necessarily controlling who could

receive the benefits of marriage. This Court described "[t]he benefits accessible only by way of a marriage license" as "enormous" and "touching nearly every aspect of life and death." *Id.* at 323. There were, at a minimum, "hundreds of statutes" that provided benefits to married individuals. There are simply no parallels to this in the present case.

Like *Goodridge*, this Court's opinion in *In re Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004), does not provide the answer the plaintiffs seek. There, this Court opined that a proposed law limiting "marriage" to the union between a man and a woman while permitting same-sex couples to enter into "civil unions" would be unconstitutional for two reasons: the distinction was irrational and it was based on impermissible discriminatory intent. *See id.* at 1208. Here, the plaintiffs do not challenge that the Massachusetts Pledge Act has a rational basis and they do not contend that the Massachusetts Pledge Act was enacted with any discriminatory intent. Accordingly, *In re Senate* provides the plaintiffs with no comfort.

Because the government speech that is challenged here does not classify any individual or group on any basis, the

plaintiffs have failed to set forth a claim under the Equal Rights Amendment to the Massachusetts Constitution.

II. Any Viable Claim Should be Analyzed Under Rational Basis Scrutiny Because the Plaintiffs Have Not Properly Alleged a Claim of Religious Discrimination Under Massachusetts Law

Even if the Court were to determine that the Pledge Act creates a classification—which it does not—the end result would still be the same: affirmance of the Superior Court because the plaintiffs have failed to carry their burden.

This Court has explained repeatedly that, "[f]or the purpose of equal protection analysis, our standard of review under . . . the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment to the Federal Constitution." *Tobin's Case*, 424 Mass. 250, 252 (1997) (quoting *Dickerson v. Attorney Gen.*, 396 Mass. 740, 743 (1986)).[6]

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[6] The plaintiffs, in an effort to evade controlling authority on the matter, argue that the differences between the federal and Massachusetts equal-protection standards require the court to use strict scrutiny. Their argument fails to appreciate where the differences actually lie. The constitutions differ because Massachusetts subjects more classifications to strict scrutiny. *See Soares v. Gotham Ink of New England, Inc.*, 32 Mass. App. Ct. 921, 923 (1992) (noting that plaintiffs' equal protection claims are analyzed the same under both the federal and state constitutions, but that Massachusetts also recognizes classifications based on gender as suspect). But this case concerns an equal protection challenge based on an alleged religious classification, and both the federal and state

Under the federal Constitution, courts take a two-step approach when analyzing whether a state has violated the guarantee of equal protection by discriminating on a religious basis. *See Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004). First, the court determines whether the state's conduct violated the First Amendment's guarantees of religious freedom. *See id.* In this way, the First Amendment is the apparatus for evaluating whether state action offends religious liberties. *See Wells v. City and Cnty. of Denver*, 257 F.3d 1132, 1153 (10th Cir. 2001) (First Amendment claim is a prerequisite to an equal protection claim). If the conduct does not run afoul of the First Amendment, courts then "apply rational-basis scrutiny to [the plaintiff's] equal protection claim[]." *Locke*, 540 U.S. at 720 n.3; *see Eulitt ex rel. Eulitt v. Me. Dept. of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004); *Nordyke v. King*, 681 F.3d 1041, 1043 n.2 (9th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 840 (2013); *Wirzburger*, 412 F.3d at 282–83.

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constitutions treat those types of challenges similarly. *Compare City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (classification based on religion as suspect), *with LaCava v. Lucander*, 58 Mass. App. Ct. 527, 531–32 (2003) (religion as suspect class and analyzed the same as a claim under the federal Equal Protection Clause). There is no difference between the Massachusetts and federal levels of scrutiny applied to claims of this type.

The plaintiffs attempt to construct out of whole-cloth a different mode of analysis. Pls.' Br. at 23-24 ("Equal Protection occupies a niche separate and distinct from the Establishment Clause [with respect to religious discrimination]."). Their approach is not supportable, however, because "the Supreme Court clearly rejected . . . effort[s] to erect a separate and distinct framework for analyzing claims of religious discrimination under the Equal Protection Clause." *Eulitt*, 386 F.3d at 354. Thus it is clear that, for strict scrutiny to apply, the Massachusetts Constitution—just like the federal Constitution—requires a plaintiff to assert a claim under the First Amendment or cognate provisions of the Massachusetts Constitution when the allegation is premised on religious discrimination.

The plaintiffs do not even attempt to meet that requirement. Purposefully, they have chosen not to argue that the Massachusetts Pledge Act somehow violates the relevant religious provisions of the Massachusetts or federal constitutions.[7] They insist on the limited nature

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[7] One reason the plaintiffs do not make such a claim is because they know it would be meritless. The Pledge passes all three of the tests that federal courts use to determine whether government conduct complies with the Establishment Clause of the First Amendment. *See Rio Linda*, 597 F.3d at 1042 (Pledge complies with the *Lemon* test, Endorsement test, and Coercion test); *Hanover*, 626 F.3d at 10, 12, 14

of their argument. *See* Pls.' Br. at 38 ("[P]laintiffs make no federal claims of any kind . . . . Plaintiffs rely solely on the equal protection guarantees of the Commonwealth's Constitution and the nondiscrimination protections of G.L. c. 76, § 5").

Their failure to plead a violation of the First Amendment to the federal Constitution, Article 2 of the Massachusetts Declaration of Rights or Article 46 of the Amendments to the Massachusetts Constitution would lead most federal courts to review the challenged law only to see if it has a rational basis. *See e.g., Eulitt*, 386 F.3d at 353–54.[8] A federal court would then uphold the statute

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(same). While those tests were developed at the federal level, this Court has consistently explained that they are "'equally appropriate'" to judge "'claims brought under cognate provisions of the Massachusetts Constitution.'" *Doe v. Sex Offender Registry Bd.*, 459 Mass. 603, 623–24 (2011) (quoting *Opinions of the Justices*, 387 Mass. 1201, 1202 (1982)). Therefore, although this Court has not directly addressed the matter, under Massachusetts law the result would be the same. The Pledge does not violate the religious-freedom protections afforded by the Massachusetts Constitution.

[8] Other federal courts would simply dismiss the suit without even reaching the equal protection claim. *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005) (concluding that, because the court found no merit in the plaintiff's First Amendment claim, the corresponding equal protection challenge "must be rejected"); *see also Atheists of Florida, Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1342 (M.D. Fla. 2011), *aff'd*, No. 12-11613 (11th Cir. Mar. 26, 2013) (dismissing an equal-protection challenge to legislative prayer because "[t]he proper analytical device in [government speech

due to the plaintiffs' failure to "negate every plausible basis that conceivably might support [the law]." *Boivin v. Black*, 225 F.3d 36, 44 (1st Cir. 2000). Because "the equal protection analysis is the same under both the Federal and State Constitutions," *Smith v. Sex Offender Registry Bd.*, 65 Mass. App. Ct. 803, 814 (2006), the plaintiffs' failure to plead properly dooms their claim in this Court as well.[9]

III. This Court Should Acknowledge Massachusetts' Compelling Interest in Having its Students Recite the Same Pledge as Other Students Throughout the Country

Even if this Court were to accept the plaintiffs' argument that the Pledge classifies citizens under the Equal Rights Amendment and determines that strict scrutiny is the appropriate standard of review, the Pledge Act would still survive because Massachusetts has a compelling interest in having its students recite the Pledge daily and the statute is narrowly tailored to achieve that interest. *See Blixt v. Blixt*, 437 Mass. 649, 661 (2002) (holding classification is permissible if it "furthers a

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cases] is the Establishment Clause, and not the Equal Protection or Free Speech clauses.").

[9] Given that all claims of unequal religious treatment must be filtered through the First Amendment or corresponding provisions of the Massachusetts Constitution, it is no surprise that the plaintiffs could not locate any case in this Court's history in which it has entertained a claim of religious discrimination brought under the ERA, Pls.' Br. at 17, or "any federal appellate case that has ever applied strict scrutiny to a Fourteenth Amendment religious equal protection claim." Pls.' Reply Br. at 15.

demonstrably compelling interest of the State and limits its impact as narrowly as possible consistent with the purpose of the classification.") (quotation marks and citation omitted).

Courts have long recognized that the recitation of the Pledge of Allegiance "is a patriotic exercise designed to foster national unity and pride . . . ." *Elk Grove*, 542 U.S. at 6. This Court specifically recognized the recitation of the Pledge as an important patriotic exercise designed "to instill attitudes of patriotism and loyalty in those students." *Opinions of the Justices to the Governor*, 372 Mass. 874, 879 (1977).[10] Currently, 42 of the 50 states in the country provide for the daily recitation of the Pledge in schools.[11] Massachusetts' interest in

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[10] The plaintiffs' contention that the Declaration of Independence, for example, is an adequate substitution for the Pledge fails because if Massachusetts' students alone refrain from reciting the Pledge and instead recite the Declaration, it essentially distinguishes Massachusetts' students from other students throughout the country, defeating the purpose of the unifying civics exercise. While it is true the Declaration of Independence is a historical document, it does not fulfill the same unifying purpose, and therefore it is an insufficient substitute for the Pledge.

[11] *See* Ala. Code §16-43-5; Alaska Stat. §14.03.; Ariz. Rev. Stat. §15-506; Ark. Code §6-16-122; Cal. Educ. Code §52720; Colo. Rev. Stat. §22-1-106; Conn. Gen. Stat. §10-230(c); Del. Code tit. 14, §4105; Fla. Stat. §1003.44(1), *invalidated in part by Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008)(compuslory standing provision unconstitutional); Ga. Code §20-2-310(c)(1); Idaho Code §33-1602(4); 105 Ill. Comp. Stat. 5/27-3; Ind. Code §20-30-

instilling “attitudes of patriotism and loyalty” by reciting the Pledge must include the requirement that its citizens recite the same Pledge as other students throughout the country.[12]

Furthermore, this Court should recognize that the Pledge Act is narrowly tailored to further this compelling interest and therefore does not offend the Equal Rights Amendment. It is important to recognize what the Pledge Act does not do: (1) it does not require any student to recite the Pledge and (2) it does not punish any student for choosing to abstain from reciting the Pledge. Because the statute neither compels any behavior, nor punishes any person in order to compel specific behavior, it is narrowly tailored to accomplish the purpose of “foster[ing] national unity and pride . . . .” *Elk Grove*, 542 U.S. at 6.

5-.05; Kan. Stat. §72-5308; Ky. Rev. Stat. §158.175(2); La. Rev. Stat. §17:2115(B); Md. Code Educ. §7-105(c); Mass. Gen. Laws ch.71, § 69; Minn. Stat. §121A.11; Miss. Code §37-13-7(1); Mo. Stat. §171.021(2); Mont. Code §20-7-133; Nev. Rev. Stat. §389.040; N.H. Rev. Stat. §194:15-c; N.J. Stat. §18A:36-3(c); N.M. Stat. §22-5-4.5; N.Y. Educ. Law §802(1); N.C. Gen. Stat. §115C-47(29a) (amended 2013); N.D. Cent. Code §15.1-19-03.1(4); Ohio Rev. Code §3313.602(A); Okla. Stat. tit. 70, §24-106; Or. Rev. Stat. §339.875; R.I. Gen. Laws §16-22-11; S.C. Code §59-1-455; S.D. Codified Laws §13-24-17.2; Tenn. Code §49-6-1001(c)(1); Tex. Educ. Code §25.082 (amended 2013); Utah Code §53A-13-101.6; Va. Code §22.1-202(C); Wash. Rev. Code §28A.230.140; W. Va. Code §18-5-15b; Wis. Stat. §118.06.

[12] Although not every state requires the daily recitation of the Pledge by statute, every state recognizes the national Pledge without modification.

If this Court were to accept the plaintiffs' argument, it would be rejecting the rationale provided to the Governor over forty years ago. Nothing has changed in the intervening years to undermine the necessity to encourage patriotism and loyalty in students. This Court should continue to recognize Massachusetts' ongoing compelling interest in having its students recite the national Pledge and reject the plaintiffs' challenge.

IV. Accepting the Plaintiffs' Argument Would Set a Dangerous Precedent to Invite Future Litigation Based on a Heckler's Veto

While the plaintiffs present their argument as a limited challenge to the Pledge Act that will not "open the floodgates for challenges based on mere disagreement with the content of a lesson plan," Pls.' Reply Br. at 17, this characterization is incorrect. Indeed, this Court would be welcoming the "heckler's veto" warned of in *Elk Grove*, 542 U.S. at 33 (Rehnquist, C.J., concurring in judgment) ("The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of 'heckler's veto' over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase 'under God,' is an unwarranted extension of the Establishment Clause."). For

if this Court finds that the phrase "under God" in the national Pledge classifies citizens based on their creed, it must be prepared to recognize that most state action similarly classifies individuals, as any state action has the potential to make an individual feel marginalized based on his or her beliefs. *See Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 444 (7th Cir. 1992) ("The diversity of religious tenets in the United States ensures that *anything* a school teaches will offend the scruples and contradict the principles of some if not many persons."). Moreover, if this Court begins to entertain these types of challenges to state action for strict scrutiny under the Equal Rights Amendment it must be prepared to revisit many difficult and decided issues addressing school curriculum. The following are just a few examples of controversies that will become subject to equal protection challenges if the Court accepts the plaintiffs' theory in this case.

Sexual Education. The Massachusetts' curriculum includes sex education, which discusses such topics as contraception and homosexuality. Mass. Gen. Laws ch. 69, §1E; Mass. Dep't of Educ., *Massachusetts Comprehensive Health Curriculum Framework*, (October 1999), *available at* http://www.doe.mass.edu/frameworks/health/1999/1099.pdf. Many individuals of diverse religious backgrounds sincerely

disagree with and disapprove of these lessons on moral grounds. For example, some school districts advocate condom use as the "safe" way to have sex.[13] But, for many religions, premarital sex or sex with the use of contraception is immoral, directly contrary to their church's teachings, and not safe at all. Thus, Massachusetts public schools "declare that in fact [some students'] core religious beliefs are wrong." *Cf.* Pls.' Br. at 8. Massachusetts has attempted to accommodate these beliefs by enacting Mass. Gen. Laws ch. 71, § 32A, which requires parental notification of such lessons and permitting student to withdraw from participation without consequences. The legislature determined that making participation voluntary would reduce First Amendment challenges to the law based on religious beliefs. But, if accommodating such religious objections by making participation voluntary is no longer sufficient to insulate legislative decisions, this type of law with respect to school curriculum will certainly be litigated in due

[13] In 2012, for instance, the Springfield School Committee decided to make condoms available to students in public middle schools and high schools through school nurses or health clinics in order to reduce the amount of unintended teen pregnancies and the transmittal of sexual diseases. Sexuality Info. and Educ. Council of the U.S., *Springfield, Massachusetts to Make Condoms Available in Schools*, http://www.siecus.org/index.cfm?fuseaction=Feature.showFeature (last visited Aug. 11, 2013).

course. There can be no doubt that some students do not want their public schools conducting classes that portray them and their religious class negatively. *Cf.* Pls.' Br. at 11. This curriculum choice surely makes some students feel as though they are being marginalized based on their religious views while other students who agree with the curriculum regarding contraception and homosexuality are being "exalt[ed]" and validate[d]."[14] *Cf. id.* at 2.

Evolution versus Creationism. The same issue arises with respect to the inclusion of evolution in the Commonwealth's curriculum as opposed to any creationism

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[14] The plaintiffs assert that a ruling in their favor would not result in such challenges because "[p]arents cannot challenge the practice of teaching *about* homosexuality or evolution merely because it offends their religious beliefs." Pls.' Reply Br. at 17-18 (emphasis in original). The plaintiffs assert that these curriculum decisions requiring "objective lesson[s] about biology, history, the arts, etc." cannot discriminate on the basis of religion because they teach "factual material." *Id.* at 18. But the plaintiffs endorse that view only when discussing topics with which they agree, conveniently ignoring that the religious history of our nation underpinning the "under God" reference in the Pledge is equally a matter of historical fact. *See* Pledge of Allegiance Bill, Pub. L. No. 107-293, 116 Stat. 2057. The plaintiffs' argument is nothing more than a bald attempt to privilege their own viewpoint on controversial topics over those of other families. For example, the plaintiffs may view an educational lesson on the use of contraceptives as merely "factual material," but many religious believers have deeply held moral and religious views about contraceptives. This Court is clear that the Commonwealth may not interfere with "deep-seated religious, moral, and ethical convictions" as "these matters of belief and conviction are properly outside the reach of judicial review or government interference." *In re Senate*, 440 Mass. at 1207.

theory. Mass. Gen. Laws ch. 69, §1E; Mass. Dep't of Educ., *Massachusetts Science and Technology/Engineering Curriculum Framework* (October 2006), *available at* http://www.doe.mass.edu/frameworks/scitech/1006.pdf. Currently, decisions with respect to curriculum are left to the discretion of the school board and educators, and under that authority, the decision to teach only the evolutionary theory of the species, rather than a religious theory of creationism, has escaped judicial challenge in Massachusetts.[15] But there is no question that there are dissenters from the theory of evolution, and they are not limited to Christians. For example, within Hinduism there are a variety of creation stories, including that the universe formed from the God Vishnu's breath. *See* B.A. Robinson, *Beliefs of World Religions about Origins*, Religious Tolerance, http://www.religioustolerance.org/ev_denom2.htm (last updated Sept. 15, 2005). Muslims allow for a belief in biological evolution that is guided by God. *Id.* Judaism mirrors Christianity in that different sects subscribe to different beliefs: Orthodox Jews generally reject evolution while Conservative and

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[15] This is not merely a hypothetical issue as the decision whether to teach evolution or creationism remains a current debate throughout the country. *See* Am. Geosciences Inst., *Political Challenges to the Teaching of Evolution*, Geoscience Policy, http://www.agiweb.org/gap/evolution/index.html (last updated May 8, 2012).

Reform Jews generally reject creationism. *Id.* Finally, Sikhs believe God created the universe. *Id.*

A challenge to the curricular choice to teach only evolution without a discussion of other beliefs could surely be brought under the plaintiffs' theory, as believers in other doctrines would feel they were being marginalized or treated as outsiders based on their religious creed.[16] The decision not to teach these other beliefs alongside the theory of evolution asserts a strong disapproval for certain religions. *Cf.* Pls.' Br. at 3. Indeed, this classroom teaching could be viewed as "directly disaffirming" some students' religious beliefs. *Cf. id.* at 12. While current challenges to school decisions to teach evolution are decided under the First

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[16] The plaintiffs assert there is a "fundamental difference between a state-sponsored *patriotic exercise* and an ordinary *classroom lesson*." Pls.' Reply Br. at 16 (emphasis in original). The plaintiffs attempt to distinguish the situations by claiming the Pledge's daily recitation containing "an affirmation exalting a particular religious class" is what "*discriminates, classifies, relegates them to an inferior status, and contributes to prejudice against them*." *Id.* at 17 (emphasis in original). But the plaintiffs' argument ignores the impact of these classroom lessons on a person's religious creed. It is difficult to imagine that the subjective effects on students' beliefs from required lessons is less than those of a patriotic exercise in the case where a student's decision to ignore the curriculum and answer test questions in conformity with his or her own religious beliefs would result in a failing grade on a test, a significant burden on any student.

Amendment to insulate school administrative decisions,[17] the plaintiffs' novel approach to the Equal Rights Amendment would open such "classifications" to litigation.

Sexual-Identity Issues. Many individuals of Christian faiths believe that homosexual behavior is morally wrong and believe that they have a moral obligation not to condone such behavior. Nevertheless, schools allow individuals in same-sex relationships to attend official school functions, such as dances. *Fricke v. Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (holding a policy excluding same-sex couples from proms or school dances violates the First Amendment); *see generally*, Mass. Dep't of Elementary & Secondary Educ., *Gay/Straight Alliances: A Student Guide Other Activities*, Nutrition, Health and Safety, http://www.doe.mass.edu/cnp/GSA/OutAbout.html (last updated July 15, 1995). Some students may feel morally obligated to decline attendance at these events because of their creed. In doing so, they are denied "full participation" in school activities because they are forced to choose

[17] *See, e.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987) (holding Louisiana's law requiring that creation science be taught in conjunction with evolution was unconstitutional under the First Amendment); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) (holding the school district did not violate a teacher's First Amendment rights by requiring the teaching of evolution); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (holding a teacher does not have a First Amendment right to teach creation science in public school).

between participating in an activity that condones behavior contrary to their religious beliefs or becoming an outsider to the event. Under the plaintiffs' theory, the school's decision to recognize same-sex relationships, thereby sending a message of approval, may leave those students who disagree feeling disapproved of and marginalized. *Cf.* Pls.' br. at 3.

Holidays. School calendars incorporate the recognition of many historically Christian holidays with vacation days, such as a winter break around Christmas and a spring break around Easter. Students of non-Christian faiths could feel this type of schedule discriminates against them on the basis of religion because their religious holidays are "second-rate." This type of litigation has already occurred in other parts of the country and surely would increase in Massachusetts under the plaintiffs' novel theory.

Texts Used in the Curriculum. The Massachusetts legislature sets out statewide academic standards which form the curriculum but do not provide for the particular texts teachers must use. Mass. Gen. Laws ch. 69, § 1E; *see also* Mass. Dep't of Educ., *Massachusetts Curriculum Framework for English Language Arts and Literacy* at 6 (March 2011), *available at* http://www.doe.mass.edu/

frameworks/ela/0311.pdf ("The standards define what all students are expected to know and be able to do, not how teachers should teach. . . .Furthermore, while the standards make references to some particular forms of content, . . . they do not—indeed, cannot—enumerate all or even most of the content that students should learn."). It is this necessary—indeed, unavoidable—ambiguity with respect to the texts used in the curriculum that involves value judgments which could be challenged by members of different religions who view the judgment made as disapproving of a belief that they hold. For example, history textbooks often include as required reading jingoistic texts that glorify war. For religious pacifists and Quakers, who advocate against war as part of their belief system, this choice of literature could lead them to feel marginalized based on their creed. The plaintiffs' novel theory on the Equal Rights Amendment would allow individual curriculum decisions to be susceptible to challenge in many instances where they currently are not. *See Evans-Marshall*, 624 F.3d at 341 (finding that placing responsibility over the curriculum with elected officials allows for public accountability because the community retains control over the board's membership).

Further Challenges to the Pledge. Were the

plaintiffs to prevail in this case and have the phrase "under God" removed from the recitation of the Pledge in Massachusetts, it would not end challenges to the recitation of the Pledge. Instead, it would open the door to new litigation by, for example, Jehovah's Witnesses. Jehovah's Witnesses object to reciting the Pledge as their religion forbids them from saluting or pledging to symbols because it is seen to them as idol worship. Although this objection has been accommodated by making the recitation of the Pledge voluntary, voluntariness is no longer sufficient under the plaintiffs' theory. Rather, a Jehovah's Witness could successfully challenge the statement within the Pledge that the speaker "pledge[s] allegiance to the Flag" because, just as many atheists believe there is no God, Jehovah's Witnesses believe they owe "allegiance to God rather than to a nation." *United States v. Corliss*, 280 F.2d 808, 813 (2d Cir. 1960) (internal quotation marks omitted). Similarly, members of the Aryan Nation could successfully argue that they are denied the equal protection of the laws by the pronouncement that this nation believes in "liberty and justice for all," as they do not. *See Murphy v. Mo. Dep't of Corr.*, 814 F.2d 1252, 1254 n.2 (8th Cir. 1987). Both groups can claim the language of the Pledge classifies them as non-believers

versus believers, and their failure to recite the Pledge makes them less patriotic. Before long, there would be no Pledge. Constitutional guarantees of equality do not extend this far.

These examples do not represent a complete, or even a near complete, list of the issues the Commonwealth faces in their decision-making. Every decision could result in a group of individuals feeling as if its beliefs are disfavored and marginalized, "portray[ing] them and their religious class negatively." *See* Pls.' Br. at 11. The inevitable result of the plaintiffs' theory is that each of these policies draws a classification favoring a class of students, while leaving other students feeling like second-class citizens by their school system. *Cf. id*. at 10. This Court has historically allowed school administrators to make decisions with respect to the administration of schools as long as behavior is not compelled. The Court should continue its practice of rejecting the "heckler's veto" to duly-enacted legislative decisions and reject the plaintiffs' argument that the Pledge of Allegiance violates the Equal Rights Amendment.

CONCLUSION

The plaintiffs' attempt to use the Equal Rights Amendment in a manner not contemplated—to challenge a

voluntary patriotic exercise—should not be sanctioned. The inclusion of the phrase "under God" in this voluntary civics exercise does nothing to classify individuals as believers or non-believers. And for the reasons discussed, without this type of classification, there is no remedy to grant the plaintiffs.

For the foregoing reasons, *Amici Curiae* respectfully urge this Court to affirm the lower court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), I certify the following:

This brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to Massachusetts Rules of Appellate Procedure 16 (a)(6), 16(e), 16(f), 16(h), 18, and 20.

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Dated: August 23, 2013

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I hereby certify under penalty of perjury that on August 23, 2013, I caused to be served, by first class mail, postage prepaid, two copies of this brief upon the following counsel of record:

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Addendum

Mass. Const. amend. art. 106

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

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

Mass. Gen. Laws ch. 71 § 69

§ 69. Display of national flags; pledge of allegiance; penalty for violation

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

Mass. Gen. Laws ch. 76 § 5

§ 5. Place of attendance; violations; discrimination

Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.

Text effective until July 1, 2012

Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, national origin or sexual orientation.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

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

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

Chap.		Sec.
1.	**The Flag**	**1**
2.	**The Seal**	**41**
3.	**Seat of the Government**	**71**
4.	**The States**	**101**
5.	**Official Territorial Papers**	**141**

AMENDMENTS

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

POSITIVE LAW; CITATION

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

REPEALS

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

TABLE SHOWING DISPOSITION OF ALL SECTIONS OF FORMER TITLE 4

Title 4 Former Sections	*Revised Statutes Statutes at Large*	*Title 4 New Sections*
1	R.S. §§1791, 1792	1
2	R.S. §1792	2
3	Feb. 8, 1917, ch. 34, 39 Stat. 900	3
4	R.S. §1793	41
5	R.S. §§203 (first clause), 1794	42
6	R.S. §1795	71
7	R.S. §1796	72
8	R.S. §4798	73
9	R.S. §1836	101
10	R.S. §1837	102
11	R.S. §1838	103
12	June 16, 1936, ch. 582, §10, 49 Stat. 1521 Oct. 9, 1940, ch. 787, §7, 54 Stat. 1060.	104
13	Oct. 9, 1940, ch. 787, §1, 54 Stat. 1059	105
14	Oct. 9, 1940, ch. 787, §2, 54 Stat. 1060	106
15	Oct. 9, 1940, ch. 787, §3, 54 Stat. 1060	107
16	Oct. 9, 1940, ch. 787, §4, 54 Stat. 1060	108
17	Oct. 9, 1940, ch. 787, §5, 54 Stat. 1060	109
18	Oct. 9, 1940, ch. 787, §6, 54 Stat. 1060	110

CHAPTER 1—THE FLAG

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

AMENDMENTS

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

§1. Flag; stripes and stars on

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

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

SHORT TITLE OF 2009 AMENDMENT

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

SHORT TITLE OF 2007 AMENDMENT

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

SHORT TITLE OF 2000 AMENDMENT

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

EXECUTIVE ORDER NO. 10798

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

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

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

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

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

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

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

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

PART I—DESIGN OF THE FLAG

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

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

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

PART II—REGULATIONS GOVERNING EXECUTIVE AGENCIES

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

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

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

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

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

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

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

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

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

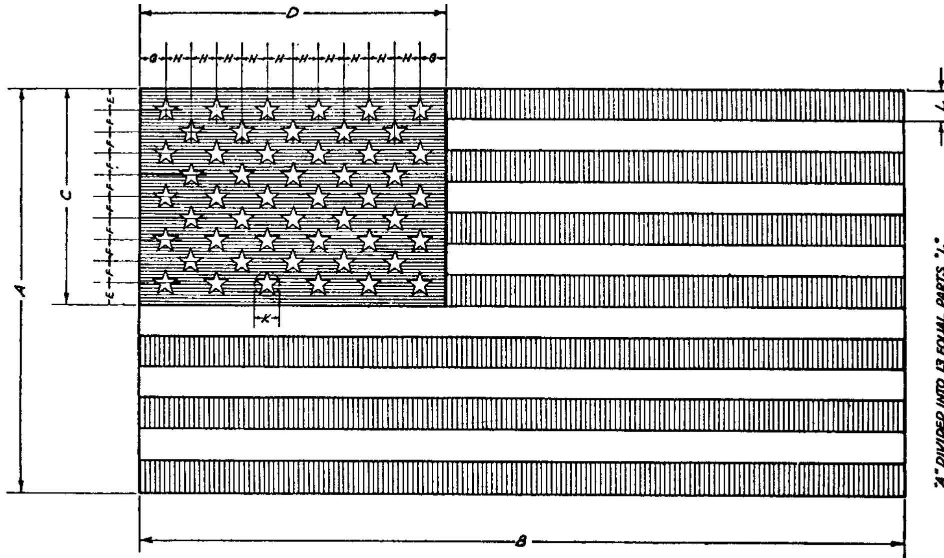
PART III—GENERAL PROVISIONS

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

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

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

DWIGHT D. EISENHOWER.



Standard proportions

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

§2. Same; additional stars

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

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

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

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

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

AMENDMENTS

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

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

The Pledge of Allegiance to the Flag: ''I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left

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

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

HISTORICAL AND REVISION NOTES

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

CODIFICATION

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

AMENDMENTS

2002—Pub. L. 107–293 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows: ''The Pledge of Allegiance to the Flag, 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove their headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.''

FINDINGS

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

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

''(2) On July 4, 1776, America's Founding Fathers, after appealing to the 'Laws of Nature, and of Nature's God' to justify their separation from Great Britain, then declared: 'We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness'.

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

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

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

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

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

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

''(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.'

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

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

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

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

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

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

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

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

REAFFIRMATION OF LANGUAGE

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

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

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

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

HISTORICAL AND REVISION NOTES

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

REFERENCES IN TEXT

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

FREEDOM TO DISPLAY THE AMERICAN FLAG

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

''SECTION 1. SHORT TITLE.

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

''SEC. 2. DEFINITIONS.

''For purposes of this Act—

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

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

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

''(4) the term 'member'—

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

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

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

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

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

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

Public Law 107–293
107th Congress

An Act

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

Nov. 13, 2002
[S. 2690]

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

SECTION 1. FINDINGS.

4 USC 4 note.

Congress finds the following:

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

(2) On July 4, 1776, America's Founding Fathers, after appealing to the "Laws of Nature, and of Nature's God" to justify their separation from Great Britain, then declared: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness".

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

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

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

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to proclaim a National Day of Thanksgiving for the people of the United States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.".

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

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

(9) On June 15, 1954, Congress passed and President Eisenhower signed into law a statute that was clearly consistent with the text and intent of the Constitution of the United States, that amended the Pledge of Allegiance to read: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.".

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

(11) On June 17, 1963, in the decision of the Supreme Court of the United States in Abington School District v. Schempp, 374 U.S. 203 (1963), in which compulsory school prayer was held unconstitutional, Justices Goldberg and

Harlan, concurring in the decision, stated: “But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.”.

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

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

(14) On November 20, 1992, the United States Court of Appeals for the 7th Circuit, in Sherman v. Community Consolidated School District 21, 980 F.2d 437 (7th Cir. 1992), held

that a school district's policy for voluntary recitation of the Pledge of Allegiance including the words "under God" was constitutional.

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

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

SEC. 2. ONE NATION UNDER GOD.

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

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

"The Pledge of Allegiance to the Flag: 'I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.', should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.".

4 USC 4 note.

(b) CODIFICATION.—In codifying this subsection, the Office of the Law Revision Counsel shall show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades.

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

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

"§ 302. National motto

"'In God we trust' is the national motto.".

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

Approved November 13, 2002.

LEGISLATIVE HISTORY—S. 2690:

HOUSE REPORTS: No. 107–659 (Comm. on the Judiciary).
CONGRESSIONAL RECORD, Vol. 148 (2002):
June 27, considered and passed Senate.
Oct. 7, 8, considered and passed House, amended.
Oct. 17, Senate concurred in House amendment.