IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

THE FREEDOM FROM RELIGION FOUNDATION, *et al.* *Plaintiffs,* v. THE CONGRESS OF THE UNITED STATES OF AMERICA, *et al.* *Defendants,* and MURIEL CYRUS, *et al.*, *Defendant-Intervenors.*	)	Civil Action No. 07-356 (SM)

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF PROPOSED DEFENDANT-INTERVENORS MURIEL CYRUS, *et al.*

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INTRODUCTION

Plaintiffs' lawsuit boils down to a single claim: that hearing other schoolchildren voluntarily recite the Pledge of Allegiance constitutes an establishment of religion, even if one is excused from reciting it oneself.[1] Specifically, Plaintiffs claim that hearing others voluntarily recite the Pledge "further[s] (Christian) Monotheistic dogma", Cmplt. ¶ 66, and that hearing others say the Pledge "indoctrinates schoolchildren … with the religious dogmas that (a) there exists a god, and that (b) we are 'one Nation under God,'" Cmplt. ¶ 59. But uttering the word "God" is not inevitably, or even in most cases, a religious act. In fact, the God of the Pledge is not the God of any revealed faith, but rather the Philosophers' God—the prime mover of Aristotle, Seneca, Avicenna and Leibniz, and the "Nature's God" of the Declaration of Independence. This God is not the subject of revelation, but the conclusion of an argument. Because this God is invoked philosophically rather than theologically, the Establishment Clause is not disturbed.

Indeed, because it "should avoid making a constitutional judgment," this Court cannot choose a theological interpretation of the Pledge statute where an interpretation invoking philosophy is available. *Hudson Savings Bank* v. *Austin*, 479 F.3d 102, 106 (1st Cir. 2007) (citing *Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring)).

FACTUAL BACKGROUND

Plaintiff Jan Doe is an atheist; Plaintiff Pat Doe an agnostic. Both object to the use of the words "under God" in the Pledge of Allegiance. Cmplt. ¶¶ 25-26, 36. Plaintiffs Doe have three children (Doechildren-1, -2, and -3, who are also Plaintiffs) attending public schools in Defendant Hanover School District ("HSD"). Cmplt. ¶ 11. These children, too, are allegedly

[1] Since recitation is voluntary, Plaintiffs' claims are based only on the fact that they are required to sit and wait while others recite the Pledge in their presence.

atheists or agnostics who do not wish to say the Pledge with the words "under God." Cmplt. ¶¶ 33, 37. They admit they have never been forced to do so. Cmplt. ¶ 37. Doe Plaintiffs also pay taxes to support in some way Defendants HSD, Dresden School District ("DSD") and Special Administrative Unit # 70 ("SAU 70" and with HSD and DSD, "School Districts").[2] Cmplt. ¶ 52. Plaintiffs claim various harms flowing from the inclusion of the words "under God" in the Pledge and the recitation of the Pledge in the School Districts. Cmplt. ¶¶ 36-51.

Plaintiff Freedom from Religion Foundation ("FFRF") says it has members somewhere in New Hampshire, who allegedly pay taxes somewhere in New Hampshire. Cmplt. ¶ 9. These plaintiffs also object to the Pledge, and claim a variety of harms stemming from the existence of the Pledge and its recitation in public spaces. Cmplt. ¶ 9. FFRF asserts organizational standing on behalf of these members. *Id.*. Except for the Does (who may or may not be members), FFRF does not allege that any of its members pay taxes specifically to support the School Districts. Cmplt. ¶ 9. FFRF also alleges that its members and the Does pay federal and state taxes, and that federal and state tax money is spent on various items related to the Pledge. Cmplt. ¶¶ 9, 52-63.

Intervenors Anna, John, Kathryn, Michael and Margarethe Chobanian, Schuyler, Elijah, Rhys, Austin and Muriel Cyrus, and Minh, Suzu and Daniel Phan are students and parents of students in the School Districts who wish to continue saying the Pledge in its entirety. *See* Motion to Intervene, Exs. A-C.

Intervenor Knights of Columbus is the largest Catholic lay men's organization in the world. As set forth in its Memorandum supporting the Motion to Intervene, it was instrumental in the inclusion of the words "under God" in the Pledge. It has members who have children in

[2] Doe Plaintiffs also claim they pay other state and federal taxes, including a federal sales tax. Cmplt. ¶ 52. Intervenors are unaware of any such federal sales tax.

the School Districts. The Knights of Columbus asserts standing in its own right, as well as organizational standing on behalf of its Hanover members who want their children to continue reciting the Pledge. *See* Motion to Intervene, Ex. D.

STANDARD OF REVIEW

This Court must dismiss Plaintiffs' claims if they "fail[ ] to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). Plaintiffs' facial challenge to 4 U.S.C. § 4 and N.H. REV. STAT. ANN. 194 :15-c may only be sustained if Plaintiffs prove that "no set of circumstances exists under which the [the challenged statutes] would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987).

ARGUMENT

I. Plaintiffs lack standing.

As a threshold matter, the Court must determine whether Plaintiffs have standing to assert their claims. We understand that other parties, in particular the federal Defendants, will brief this point extensively in their own motion to dismiss. Our discussion will therefore be succinct.

"[N]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies," and "Article III standing . . . enforces the Constitution's case-or-controversy requirement." *DaimlerChrysler Corp.* v. *Cuno*, 126 S.Ct. 1854, 1861 (2006) (quoting *Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004)). To establish standing, one must first demonstrate a "concrete and particularized" injury. *Id.* at 1862-64. A "mere interest in an event--no matter how passionate or sincere the interest and no matter how charged with public import the event--will not substitute for an actual injury." *U.S.* v. *AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992). In short, FFRF's vehemence does not give it standing.

FFRF also mistakenly claims organizational standing. In order to establish organizational

standing, however, a party must show, among other things that "[its] individual members would have standing to sue in their own right." *Maine People's Alliance* v. *Mallinckrodt*, 471 F.3d 277, 283 (1st Cir. 2006). FFRF fails that test because it fails to allege that any of its individual members—if indeed, it has any in Hanover—would have individual standing.

A. FFRF's Members Have Suffered No Direct Injury.

FFRF alleges no direct injury on the part of its members. In fact, nowhere does it allege that any of its members even have children or are children attending the Hanover or Dresden public schools. FFRF alleges only that it has members "in this judicial district," *i.e.*, somewhere in New Hampshire. Cmplt. ¶ 9. Merely living in the same state as a Defendant cannot in and of itself establish standing. *See Elk Grove Unified School Dist.* v. *Newdow*, 542 U.S. 1 (2004).[3]

B. FFRF's Members Have No State or Local Taxpayer Standing.

Lacking any direct injury, FFRF turns to taxpayer standing. This, too, is a mistake. In order to establish local taxpayer standing, Plaintiffs must at least allege that they paid taxes that support the school in question. *See Doremus*, 342 U.S. 429, 433 (1952). But once again FFRF alleges no such thing. Instead it claims only that its members pay taxes somewhere in New Hampshire. Cmplt. ¶ 9. This is insufficient.

Moreover, even if FFRF's members did pay taxes to the School Districts, they would still lack taxpayer standing to attack the Pledge. School exercises which are not subject to additional appropriation or do not add any appreciable sum to the costs of running the school cannot be challenged by a taxpayer suit. As the Supreme Court explained in *Doremus:*

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[3] The Complaint suggests, but never actually states, that one or more of the Does might be members of FFRF. *See, e.g.*, Cmplt. ¶ 9. Even if this were the case, FFRF cannot claim standing on this basis. Organizational standing requires that the case "can be adjudicated ***without*** the participation of individual members as named plaintiffs." *Maine People's Alliance*, 471 F.3d at 283 (emphasis added). Where the only members with standing are ***already*** named plaintiffs, organizational standing is superfluous and therefore improper.

> There is no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the cost of conducting the school. No information is given as to what kind of taxes are paid by appellants and there is no averment that the Bible reading increases any tax they do pay or that as taxpayers they are, will, or possibly can be out of pocket because of it.

Doremus v. *Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 433 (1952); *see also Hein* v. *FFRF*, 127 S.Ct. 2553, 2563 (2007) (reaffirming this reasoning). In *Doremus*, the act of reading five Bible verses could not be challenged by taxpayers because it added nothing to their tax burden. *Doremus*, 342 U.S. at 430, 434. If the reading of five verses was too small an expenditure to establish standing in *Doremus*, the inclusion of two words cannot possibly suffice here.

C. Neither FFRF's members nor the Does have federal taxpayer standing.

FFRF fares no better on federal taxpayer standing. As a general rule, "the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable 'personal injury' required for Article III standing." *Hein*, 127 S.Ct. at 2563 (rejecting FFRF standing). In order to establish taxpayer standing, litigants must show that they fit into a "narrow" exception that only "'slightly lower[s]' the bar on taxpayer standing, and that must be applied with 'rigor.'" *Id.* at 2568 (citations omitted). To make this showing, a taxpayer must allege more than an expenditure of tax funds, he or she must show those funds were spent "pursuant to a direct and unambiguous congressional mandate." *Id.* at 2565. Plaintiffs identify no such mandate. They state only that public officials say the Pledge, Cmplt. ¶ 56, that tax funds are used in "Pause for the Pledge of Allegiance" festivities in a completely different state—Maryland, Cmplt. ¶ 62, and that tax money is used to print the U.S. Code and other unnamed publications. Cmplt. ¶ 60.

None of the this involves a direct and unambiguous Congressional mandate. The

unidentified patriotic displays of government officials, if they involve any tax money at all, are exactly the sort of discretionary executive expenditures covered by *Hein*. *See Hein*, 127 S.Ct. at 2570 (litigants may not "enlist the federal courts to superintend, at the behest of any federal taxpayer, the speeches, statements, and myriad daily activities of the President, his staff, and other Executive Branch officials."). And the suggestion that Plaintiffs may challenge a law simply because it is *printed* at government expense makes a mockery of standing doctrine. Every federal law is printed at government expense.

In short, because it has failed to allege even the most basic facts in support of standing, FFRF should be dismissed from this case. And because all Plaintiffs lack federal taxpayer standing, their Complaint against the federal Defendants should be dismissed.

II. Plaintiffs fail to state a claim for relief under the Establishment Clause.

For the reasons set forth below, the recital of the Pledge of Allegiance is a patriotic exercise, not a religious one. It thus does not implicate the Establishment Clause at all and should instead be analyzed—and upheld—under *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

Nonetheless, to the extent it is claimed to involve religious language, recitation of the Pledge is consistent with the Establishment Clause. Government action "does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) the statute does not foster excessive government entanglement with religion." *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000) (citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)). Recitation of the Pledge satisfies each of these elements.[4]

A. The Pledge and its voluntary recitation do not have the primary purpose of advancing or inhibiting religion.

In *McCreary*, the Supreme Court explained that its earlier precedent requiring a

[4] The Plaintiffs' claims under the Equal Protection clauses of the Fifth and Fourteenth Amendments are understood to be subsumed in their challenges under the Establishment and Free Exercise Clauses.

"legitimate secular purpose"[5] meant that the "ostensible and predominant purpose" of a government action must not be to "advance[] religion." *McCreary County* v. *ACLU of Kentucky*, 125 S.Ct. 2722, 2733 (2005). The Court looked to the history and context of McCreary County's actions in placing a Ten Commandments display, and stated that no "objective observer" seeing the County's actions could perceive a legitimate secular purpose for them. *Id.* at 2737.

Here, the relevant governmental purpose is Hanover School District's. And the only "ostensible and predominant purpose" a "reasonable observer" could find that to be is the implementation of N.H. REV. STAT. ANN. § 194:15-c, which states that recitation of the Pledge is "a continuation of the policy of teaching our country's history to the elementary and secondary pupils of this state." *Id.*[6] That is plainly sufficient. *See Elk Grove*, 542 U.S. at 30.

As for the federal statute codifying the Pledge, Plaintiffs do not claim that the Pledge as a whole lacks a secular purpose. Rather, they assert that the 1954 Amendment to the Pledge that added the words "under God" was motivated by an impermissible religious purpose. *See, e.g.*, Cmplt. ¶¶ 46, 64, 70. But as Justice O'Connor concluded, even a cursory examination of the legislative history and context of the 1954 Amendment reveals a secular purpose. *Elk Grove*, 542 U.S. at 41 (O'Connor, J., concurring in the judgment) ("[T]hose legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and the dignity of the human being.'") (quoting H.R. REP. NO. 1693, 83d Cong., 2d Sess., 1.).

In particular, the legislative history reveals that the words "under God" were added to the Pledge at the height of the Cold War, not to promote religious beliefs, but with the purpose of "textually reject[ing] the communis[t]" philosophy "with its attendant subservience of the individual." H.R. REP. NO. 1693, at 2. By adding the words "under God," Congress served the permissible secular purpose of orienting the Pledge within the Framer's political philosophy that

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5 *See Lynch* v. *Donnelly*, 465 U.S. 668, 681 (1984).

6 Even Plaintiffs agree the Pledge is a "patriotic ritual" and its recitation in Hanover schools is a "patriotic exercise." Cmplt. ¶ 47, 67; *see also* Cmplt. ¶ 70 (no objection to the Pledge as a patriotic exercise).

Americans have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. As the House of Representatives Report put it: "Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. REP. NO. 1693, at 1-2. *See also id.* at 3 (noting that "daily recitation of the pledge in school" will "daily impress[] [school-children] with a true understanding of our way of life and its origins," so that "[a]s they grow and advance in their understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us.")

Key to this understanding is the tradition that the God who is the source of our natural rights is a God whose existence may be argued for rationally, not the subject of a revelation such as the Christian, Jewish or Muslim God. He is Aristotle's Unmoved Mover, whose essence is unknown, but whose existence reason leads us to conclude is, in Jefferson's words, "self-evident." He is not a religious entity, but a philosophical one.

Thus, while this political philosophy, wherever expressed, refers to "God," it does so as part of rational argument. It explains that our rights are inalienable precisely because they inhere in a human nature that has been "endowed" with such rights by its "Creator." Recognition and acknowledgment of that premise is hardly an impermissible purpose. If it were, that would lead to the absurd result that publicly acknowledging the traditional grounding of our rights in the dignity of the individual would somehow violate those very rights. Moreover, such a conclusion would be at odds with the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. *See also Boyajian*, 212 F.3d at 5 ("This does not mean that the law's purpose must be unrelated to religion--that would amount to a requirement "that the government show a callous indifference to religious groups.") Discussing and expressing the notion of inherent, fundamental rights is a secular purpose that is not only permissible, but admirable in a free

society. The Pledge does not fail *Lemon*'s purpose prong.

B. Pledge recitation does not have the primary effect of advancing or inhibiting religion.

Lemon's effect prong requires that governmental action have a "principal or primary effect must be one that neither advances nor inhibits religion." *Members of Jamestown School Committee* v. *Schmidt*, 699 F.2d 1, 5 (1st Cir. 1983). Like directing school children to recite the Declaration of Independence or memorize the Gettysburg Address, the primary effect of reciting the Pledge of Allegiance—including the phrase "under God"—is not to indoctrinate religious beliefs or advance religion more generally. To the contrary, as discussed below, the primary effect of reciting the Pledge is to teach and reaffirm our Nation's adherence to the political philosophy that government must respect individual human rights because we are "endowed" with those rights by our "Creator."

1. The Pledge does not have the effect of advancing religion because it reflects our nation's continuing commitment to the universality and inalienability of individual rights.

Plaintiffs attack not only the Pledge of Allegiance, but also the foundational American principle that human rights are universal and inalienable by the State precisely because they exist prior to the State. Affirming this challenge would cause a sea-change in our nation's self-understanding that should not be imposed by judicial order.

a. Inclusion of "under God" in the Pledge echoes and reaffirms a longstanding American philosophical and political tradition.

The phrase "Under God" was not coined by Congress in 1954. Indeed, the first recorded use of the phrase "under God" is in the earliest known compendium of English law, dating from the 13th Century. Bracton states that "[t]he king must not be under man but under God and under the law, because law makes the king." BRACTON, 2 DE LEGIBUS ET CONSUETUDINIBUS ANGLIÆ 33. Since the King embodied the government in his person at that time, this first English legal

writer was already limiting government by declaring it to be "under God and the Law."[7]

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

> With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed* ***sub Deo et Lege***.

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

Blackstone, whom the Supreme Court continues to cite to this day to plumb the Framers' intent,[8] held that the "law of nature" had its source in a "Supreme Being" and that this law was "impressed" into every human being. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, Introduction, Section 2 at 38-39 (1765). Blackstone observed that

> This law of nature, being coeval with mankind and dictated by God Himself, is of

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[7] Of course, even Bracton was not writing on a blank slate. *Compare* Cicero's famous distillation of the *lex naturae*:

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

MARCUS TULLIUS CICERO, DE RE PUBLICA III, xxii.

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

[8] *See, e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 413-14 (2004); *Alden* v. *Maine*, 527 U.S. 706, 715 (1999) (Blackstone's "works constituted the preeminent authority on English law for the founding generation"); *Reid* v. *Covert*, 354 U.S. 1, 26 (1952).

> course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

Id. Blackstone's formulation thus puts human laws "under God," denying their validity if they run contrary to the law of nature. At the same time his understanding of the sources of law gave fodder to the Revolutionaries when they pleaded their case to a "candid world."

Blackstone's understanding of the nature and limits of governmental power suffused the intellectual world of the Founders. In arguing for defiance of British oppression, an 18-year-old Alexander Hamilton wrote in February 1775 that: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power." ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *quoted in* RON CHERNOW, ALEXANDER HAMILTON 60 (2004).

These ideas are, of course, the central argument of the Declaration of Independence. But they did not stop there. When the Revolution had been won, the Continental Congress commissioned James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth to draft an "Address to the States, by the United States in Congress Assembled." The Address, written in Madison's hand, ended with a resounding statement of the idea of that rights inhere in human nature and proceed from an "Author":

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

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

In sum, from the beginning of American history, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. The Pledge, like the Declaration and the Gettysburg Address, like the statements of Framers and legal authorities, is a statement of political philosophy, not of theology. Nevertheless, it is a statement of political philosophy that depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by its "Creator."

This notion is reiterated in the Constitution itself, which states as one of its purposes to "***secure*** the Blessings of Liberty,"--not to ***create*** the blessings of liberty. Echoing this thought, the Ninth Amendment provides that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST., amend. IX. Similarly, the Tenth Amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. CONST., amend. X.

All three of these texts imply a pre-existing body of rights and powers that the Constitution is allocating among the people, the three branches of the federal government, and the state governments. To declare in this context that the Constitution forbids retaining the two words "under God" to the Pledge of Allegiance, or leading public school students in reciting that version of the Pledge, smacks of both historical revisionism and a hostility to religion that cannot be attributed to the "reasonable observer," and should not be adopted by this (or any) Court.

Put another way, no reasonable person would mistake the Declaration of Independence and the Gettysburg Address as prayers (or religious affirmations) simply because they make references to a "Creator" and "God." Rather, it is evident that they are expressions of a political

philosophy premised on the "self-evident" truth that all persons "are endowed by their Creator with certain inalienable rights." THE DECLARATION OF INDEPENDENCE para. 2.

Proceeding from this premise, the Declaration explained to a "candid world" that these God-given rights provided a basis for Americans to reject a tyrannical government and assume the "equal station to which the Laws of Nature and of Nature's God entitle them." *Id*. para. 1.

Lincoln's Gettysburg Address continued and embraced this same political philosophy in proclaiming that "this nation, *under God*, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from this earth." Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *reprinted in* 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 23, 23 (Roy P. Basler ed., 1953) (emphasis added).[9] These works expand upon the conception of God not as a particular personality, but as the force responsible for granting and securing fundamental rights.

Thus, the words "under God" were not a newly minted phrase or idea that Congress added to the Pledge in 1954 to achieve the effect of steering individuals to faith. Instead, they were added as a self-conscious effort to echo and re-affirm the political philosophy that has animated this country throughout its history and that is reflected in seminal documents like the Declaration and Gettysburg Address.[10] This philosophy is not premised upon any claimed religious revelation, but upon the existence of a power known through reason, a power higher than the law. The primary effect of the words "under God" in the Pledge is thus to evoke and

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

[10] *See also Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J. concurring) ("the reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which

conform the Pledge to the quintessential American political philosophy that recognizes the subservience of the State to the God-given inalienable rights of individual citizens.

b. The Executive Branch has consistently affirmed the political philosophy of limited government evoked by the Pledge's use of the phrase "Under God."

That the "primary effect" of including "under God" in the Pledge is to advance and reaffirm a particular political philosophy is also seen by viewing the 1954 Amendment of the Pledge in the context of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. The Executive Branch has led the way in this tradition, most notably in the speeches of our Presidents.

For example, with one exception (Washington's brief, second inaugural in 1793), every single presidential inaugural address includes a reference to God—whether as the source of rights, of blessing to the country, or of wisdom and guidance. *See generally* NEWTON LOTT, THE PRESIDENTS SPEAK: THE INAUGURAL ADDRESSES OF THE AMERICAN PRESIDENTS FROM GEORGE WASHINGTON TO GEORGE WALKER BUSH (M. Hunter & H. Hunter eds. 2002); *see also*:

> "[M]ay that Being who is supreme over all, the Patron of Order, the Fountain of Justice, and the Protector in all ages of the world of virtuous liberty, continue His blessing upon this nation . . . ." John Adams, Inaugural Address (Mar. 4, 1797), *reprinted in* LOTT, *supra*, at 10, 15.
>
> "[T]he same revolutionary beliefs for which our forbears fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state, but from the hand of God." John F. Kennedy, Inaugural Address (Jan. 20, 1961), *reprinted in* LOTT, *supra*, at 306, 306.
>
> "We are a nation under God, and I believe God intended for us to be free." Ronald Reagan, First Inaugural Address (Jan. 20, 1981), *reprinted in* LOTT, *supra*, at 340, 344.
>
> "When our founders boldly declared America's independence to the world and our purpose to the Almighty, they knew that America, to endure, would have to change." William Jefferson Clinton, First Inaugural Address (Jan. 20, 1993), *reprinted in* LOTT, *supra*, at 362, 362.

c. The Legislative Branch has consistently affirmed the political philosophy of limited government evoked by the Pledge's use of the phrase "Under God."

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contains an allusion to the same historical fact.").

In 1789, when the first Congress submitted the Establishment Clause and the rest of the Bill of Rights to the States for ratification, it also established the office of legislative chaplain, *see Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983), and called upon President Washington to "recommend to the People of the United States, a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." ANNALS OF CONGRESS, 90, 92, 949-50, 958-59 (Joseph Gales ed., 1789). The practice begun by the first Congress of acknowledging that the State is not the final guarantor of the inalienable rights of its citizens has continued throughout this country's history. *See, e.g.*, 36 U.S.C. § 302 (making "In God we trust" the national motto); *Elk Grove*, 542 U.S. at 30 (noting Congress' adoption of the Star Spangled Banner as the National Anthem, including the words, "this be our motto In God we trust.") (Rehnquist, C.J., concurring in the judgment).

The Congress that put the words "under God" into the Pledge stood squarely within this tradition. As Congressman Wolverton observed in urging their inclusion in the Pledge:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that every human being has been created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. Thus, the inclusion of God in our pledge of allegiance . . . sets at naught the communistic theory that the State takes precedence over the individual . . . .

100 CONG. REC. 7336 (1954) (statement of Rep. Wolverton).

The proponents of adding the phrase "under God" to the Pledge were conscious not only of that tradition generally, but also of the exigencies of their historical moment. As discussed above, a prime reason the words "under God" were inserted into the Pledge was to distinguish this country from the Soviet Union.[11] But this was not some jingoistic exercise in contrasting good believers with bad atheists. It was a serious reflection on the different visions of human nature—and therefore of human freedom—that underlay the two systems. Representative Louis

[11] The legislative history is replete with references to "times such as these," 100 CONG. REC. 7336 (1954) (statement of Rep. O'Hara); "communism," *id.* at 7332 (statement of Rep. Bolton); "the conflict now facing us," *id.* at 7333 (statement of Rep. Rabaut); "a time in the world," *id.* at 7338 (statement of Rep. Bolton); and "this moment in history," *id.* at 5750 (statement of Rep. Rabaut).

Rabaut, who first proposed the change in the House of Representatives, explained his motivation:

> My reason for introducing this resolution may be very briefly stated. The most fundamental fact of this moment of history is that the principles of democratic government are being put to the test. The theory as to the nature of man which is the keystone in the arch of American Government is under attack by a system whose philosophy is exactly the opposite.
> . . .
> . . . Our political institutions reflect the traditional American conviction of the worthwhileness of the individual human being. That conviction is, in turn, based on our belief that the human person is important because he has been created in the image and likeness of God and that he has been endowed by God with certain inalienable rights which no civil authority may usurp.

100 CONG. REC. 5750 (1954). The House Report likewise echoed that idea:

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

H.R. REP. NO. 83-1693, at 1-2 (1954); *see also* S. REP. NO. 83-1287, at 2 (1954) (describing similar sentiments of Senator Ferguson, author of the Senate proposal); 100 CONG. REC. 7332 (1954) (statement of Rep. Bolton).

In short, the political philosophy through which the Congress viewed the world when it amended the Pledge was traditionally and quintessentially Jeffersonian.[12] It contended simply that people who recognize a higher power than the State live in greater freedom. By adopting the phrase "under God" in the Pledge, Congress achieved the permissible effect of bringing the

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[12] The Declaration of Independence is not the only evidence of Jefferson's consistent argument that God is the source of inalienable rights. For example, shortly before drafting the Declaration of Independence, Jefferson wrote: "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." THOMAS JEFFERSON, *On the Instructions Given to the First Delegation of Virginia to Congress, in August, 1774*, *reprinted in* 1 WRITINGS 181, 211. Later, he questioned: "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?" THOMAS JEFFERSON, *Notes on Virginia*, Query XVIII (1782), *reprinted in* 2 WRITINGS 1, 227.

Pledge within the "natural rights" philosophy of Washington, Hamilton, Jefferson, Madison, and Lincoln, on which the American system is based, and rejecting the Soviet view that rights, such as they are, are conferred at the pleasure of the State.

d. The Judicial Branch has consistently affirmed the political philosophy of limited government evoked by the Pledge's use of the phrase "Under God."

The Supreme Court has joined its co-ordinate branches in reflecting and reinforcing the traditional American political philosophy that the State is subservient to the God-given inalienable rights of its citizens. That is the very real insight in what is too often assumed to be a throw-away line by Justice Douglas: Our "institutions" do indeed "presuppose a Supreme Being," *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952), because they presuppose the existence of a source of rights that is prior to the State.[13] For the same reason, Chief Justice Marshall established the tradition of opening Supreme Court for business with the words "God save the United States and this Honorable Court." *Engel* v. *Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting).

The Supreme Court has also recounted in detail how the Framers did not view references to or invocations of God, such as the foregoing, as an "establishment" of religion. *See, e.g.*, *County of Allegheny* v. *ACLU*, 492 U.S. 573, 671-73 (1989) (opinion of Kennedy, J.); *Lynch*, 465 U.S. at 675-78 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 792 (1983). Quite the contrary, "[t]he institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect." *McGowan* v. *Maryland*, 366 U.S. 420, 562 (1961) (Douglas, J., dissenting).

Plaintiffs' attack on the Pledge is at war with this principle. If voluntarily reciting the Pledge is now suddenly unconstitutional because it refers to a nation "under God," then voluntarily reciting the Declaration of Independence or the Gettysburg Address (as

[13] Since *Zorach*, the Court has repeatedly reaffirmed that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Lynch*, 465 U.S. at 675; *Marsh*, 463 U.S. at 792; *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672 (1970); *Schempp*, 374 U.S. at 213.

schoolchildren have done for generations) must also be unconstitutional since those documents similarly refer to the Creator as the source of our rights. The courts should respect not only our national ethos, but the consistent interpretation of the Establishment Clause reflected in the expression and conduct of both coordinate branches.

2. The Supreme Court has often used the reference to God in the Pledge as a benchmark for what is acceptable under the Establishment Clause.

That the Pledge's use of the phrase "under God" does not advance religion within the meaning of the Establishment Clause is also evident from the fact that the Supreme Court has repeatedly used the Pledge as the standard for evaluating the permissibility of other kinds of government expression that employ religious imagery. For example, in *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Supreme Court described the Pledge and its recitation as one of the many permissible "reference[s] to our religious heritage," both historical and contemporary, that create the context of any Establishment Clause analysis. *Id.* at 676. The Court then used the Pledge and other acknowledgments of religious heritage as a baseline of permissible government expression in the course of rejecting the Establishment Clause challenge at issue in *Lynch*. *See id.* at 686 ("If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of … our religious heritage, are equally offensive to the Constitution.").

Similarly, in *County of Allegheny* v. *ACLU*, 492 U.S. 573 (1989), the Court again used the Pledge as a means for locating the boundary line between constitutional and unconstitutional governmental references to God or religion. In that case, the Court noted that the Pledge was a general "reference[ ] to religion by the government" that the Court had "characteriz[ed] … as consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-03 (citations omitted). Accordingly, the Court used the Pledge to contextualize the practice of displaying a Christmas crèche in a certain way at the County's courthouse as "affiliating the government with [] one specific faith or belief," and therefore impermissible, while allowing other, "more general religious references." *Id.* at 603.

These Supreme Court decisions endorsing the constitutionality of the Pledge are binding on this Court because the discussion of the Pledge in those cases was "necessary" to the result in those cases. *See Seminole Tribe* v. *Florida* 517 U.S. 44, 66-67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). *See also Sherman* v. *Community Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) (rejecting Establishment Clause challenge to Pledge because "[i]f the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously.")

Moreover, the Court's use of the Pledge as the yardstick for measuring the permissibility of other government expression has been echoed by many of the individual Justices in opinions stating that the Pledge does not violate the Establishment Clause. *See Elk Grove*, 542 U.S. at 33 (Rehnquist); *id.* (O'Connor); *id.* at 45 (Thomas); *Lee* v. *Weisman*, 505 U.S. 577, 638-639 (1992) (Scalia, Rehnquist, White and Thomas); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, Rehnquist, White and Scalia); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n. 5 (1985) (O'Connor); *id.* at 88 (Burger); *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 304 (Brennan); *Engel*, 370 U.S. at 449 (Stewart).

3. Voluntary recital of the Pledge does not endorse religion.

Application of the endorsement test also confirms that the Pledge and its voluntary recitation do not advance religion within the meaning of the Establishment Clause. In her concurrence in *Elk Grove*, Justice O'Connor set out two principles that govern application of the endorsement test. First, the "the endorsement test … assumes the viewpoint of a reasonable observer." *Elk Grove*, 542 U.S. at 35 (O'Connor, J. concurring in the judgment) (internal citation omitted). "Second, because the 'reasonable observer' must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape." *Id.* (internal citation omitted).

In applying these principles, the Court should first note that because the Supreme Court and numerous Justices have "characteriz[ed] [the Pledge] as consistent with the proposition that government may not communicate an endorsement of religious belief," the Pledge and the practice of reciting it voluntarily *ipso facto* pass the endorsement test. *See County of Allegheny*, 492 U.S. at 602-03. In other words, the Supreme Court is the "rational observer" *par excellence*, and unlike the typical situation that a lower court faces in applying the endorsement test to a challenged governmental practice, the Supreme Court has already addressed the specific practice in question and observed that the Pledge is "consistent with" the endorsement test. Therefore the Court need only incorporate the Supreme Court's observations into its own examination, and thereby find that the Pledge and its recitation pass the endorsement test.

However, even were the Court to approach the endorsement test *de novo*, no "reasonable observer" could find that the Pledge and its voluntary recitation amount to an endorsement of religion in light of the Pledge's "origins and context" and "its place in our Nation's cultural landscape." *Elk Grove*, 542 U.S. at 35 (O'Connor, J., concurring in the judgment); *see also Van Orden* v. *Perry*, 545 U.S. 677, 700-01 (2005) (Breyer, J., concurring) (government displays may convey a religious message, so long as they convey a secular or historical message as well). As set forth in Section II.B.1 above, the Pledge is a patriotic and political statement rather than a prayer or an affirmation of a religious belief. A reasonable observer would understand the words "under God," taken in the context of both the entirety of the Pledge and its origins and historic uses, to be a statement that the government of the United States is subordinated to the "Laws of Nature and Nature's God." The words are, in essence, a daily mini-declaration of the thoughts expressed in the Declaration of Independence itself.[14]

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[14] The reasonable observer would also be aware that the United States is not unique in using references to God to denote the State's responsibility to recognize fundamental rights. For example, the German Constitution, adopted by West Germany in 1949, begins as follows: "Conscious of their ***responsibility before God and Men***, animated by the resolve to serve world peace as an equal partner in a united Europe, the German people have adopted, by virtue of their constituent power, this Basic Law." GRUNDGESETZ [GG] [Constitution] preamble (F.R.G.) (emphasis added). The framers of the German Constitution included the explicit reference to God specifically because the experience of Nazism had left them with a strong "awareness" of

The Court should also reject Plaintiffs' assertion (Cmplt. ¶ 54) that the word "God" as used in the Pledge is unavoidably a statement of a religious faith. For Plaintiffs, "God" must be the "Christian" God. Cmplt. ¶ 66. Yet philosophers have a long history of referring to God as that which stands at the beginning of reason, the "Unmoved Mover" to which all other movements may be traced. *See* ARISTOTLE, METAPHYSICS at 12.7 (1072b), *reproduced in* INTRODUCTION TO ARISTOTLE 321 (Richard McKeon, ed., 2d. ed. 1973) (using the term "God" to describe his famous "first mover" that, he reasoned, "exists of necessity, and in so far as it exists by necessity, its mode of being is good.").[15] This Philosophers' God is not known as a personality but rather as an explanation and source of our rights. The reasonable observer, cognizant of our nation's political philosophy and its sources, is surely aware of this long and varied history. Thus the term "God" is at least as philosophical a term as are "liberty" and "justice." Just as a deconstructionist could dispute the existence of such things as liberty and justice, an atheist may dispute the existence of the Philosophers' God. And faced with a recitation of the Pledge of Allegiance, each has the same remedy. Under *Barnette*, he or she is excused from having to recite it, but is given no license to silence the speech of others. [16]

The fact that some of the Plaintiffs are children does not change this analysis. The

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the need for a "metaphysical anchoring" (*metaphysische Verankerung*) of the basic rights that the German Constitution was to guarantee. HANS-GEORG ASCHOFF, GOTT IN DER VERFASSUNG. DIE VOLKSINITIATIVE ZUR NOVELLIERUNG DER NIEDERSÄCHSISCHEN VERFASSUNG 21 (1995). Having just seen the atrocities wreaked by a government that acknowledged no authority higher than its *Führer*, the German framers wisely decided to build their new foundation on the recognition of God, rather than the State, as the source of limited government and basic human rights.

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

[16] It bears emphasis that the Plaintiffs in *Barnette* were religious objectors—Jehovah's Witnesses—for whom pledging allegiance to the flag would be false worship to a "graven image." *Barnette*, 319 U.S. at 629.

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

C. Voluntary recital of the Pledge does not entangle government and religion.

The kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by "comprehensive, discriminating, and continuing state surveillance" of religious exercise, *see Lemon*, 403 U.S. at 619, which is simply not present (or alleged) here. The Pledge and its voluntary recitation in public schools do not require pervasive monitoring or other maintenance by public authorities. *See Mueller* v. *Allen*, 463 U.S. 388, 403 (1983) (explaining that such comprehensive surveillance is "necessary [for a challenged action] to run afoul of" *Lemon*'s third prong).

III. Plaintiffs fail to state a claim for relief under RFRA.

The Religious Freedom Restoration Act ("RFRA") prohibits the federal government from substantially burdening a person's religious exercise unless the government can demonstrate that the burden is in furtherance of "a compelling government interest and is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. Because RFRA claims are limited to the federal government, Plaintiffs' RFRA claims fail. They have no standing to sue the government for the mere existence of the Pledge. Moreover, a harm so slight that it is not even a judicially cognizable injury cannot possibly be the basis for a "substantial burden" claim. *See Sherbert* v. *Verner*, 374, U.S. 398, 404 (1963) (describing substantial burdens).

IV. Plaintiffs state no claim for relief under the state and federal Free Exercise Clauses.

Plaintiffs' claim that the inclusion of voluntary recitations of the Pledge in the school

curriculum violates their right to Free Exercise of religion is contrary to the decisions of the Supreme Court in *Barnette* and of multiple courts of appeals.[17] *See*, *e.g.*, *Grove* v. *Mead Sch. Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985) (rejecting Free Exercise claim where school district refused to remove book from public school curriculum despite parents' religious objections); *Fleischfresser* v. *Directors of Sch. Dist. No. 200*, 15 F.3d 680 (7th Cir. 1984) (same). The mere presence of objectionable words in a school curriculum is insufficient to demonstrate a Free Exercise violation. If every piece of material that does not conform to someone's beliefs gave rise to a Free Exercise claim, public schools would be hard-pressed to teach anything.

V. Plaintiffs fail to state a claim that hearing others voluntarily recite the Pledge violates parental rights of privacy and parenthood.

Finally, Plaintiffs claim that recitation of the Pledge in their children's presence violates two New Hampshire statutes. Nonsensically, they claim that recitation of the Pledge violates N.H. REV. STAT. ANN. § 194:15-c, the statute requiring recitation of the Pledge. Even if such a thing were possible, Plaintiffs have failed to allege any facts relevant to a § 194:15-c violation (such as failure to set aside time for the Pledge). They also claim recitation of the Pledge violates N.H. REV. STAT ANN. § 169-D:23. This statute governs religious exercise of "children in need of services" as defined under the New Hampshire Code. N.H. REV. STAT. ANN. § 169-D:1. As Plaintiffs have failed to allege that any of the children here are children in need of services (*e.g.*, habitually truant, runaways, in need of state rehabilitation) they have failed to state a claim under this section. *See* N.H. REV. STAT. ANN. § 169-D:2(II) (defining "children in need of services").

CONCLUSION

Plaintiffs have failed to state a claim upon which relief can be granted. Intervenors therefore respectfully request that their Motion to Dismiss be granted and that the Complaint be dismissed.

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[17] Because N.H. CONST. Pt. 1, Art. 6 is interpreted like its federal counterpart, Plaintiffs' claims under this article fail, too. *See Sanborn* v. *Sanborn*, 465 A.2d 888, 893 (N.H. 1983).

Dated: January 18, 2008

Respectfully submitted,

/s/ Bradford T. Atwood

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of New Hampshire by using the CM/ECF system. The following parties will be electronically served by the CM/ECF system:

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