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

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

MEMORANDUM IN SUPPORT OF THE
FEDERAL DEFENDANTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

The Supreme Court has spoken repeatedly on the central issue in this case: whether the voluntary recitation of the Pledge of Allegiance by willing students violates the Establishment Clause. Each time, the Court has said, without equivocation, that it does not. Two Supreme Court decisions have unqualifiedly stated that the Pledge is consistent with the Establishment Clause, and have used the Pledge as a baseline for weighing the constitutionality of other forms of government action. See Lynch v. Donnelly, 465 U.S. 668, 675-77 (1984); County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989). Those decisions are binding here, and this Court need not look beyond them to resolve this case.

What is more, in a line of cases stretching from Engel v. Vitale, 370 U.S. 421 (1968), to, most recently, Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), the Supreme Court and many individual Justices have repeatedly reaffirmed that patriotic and ceremonial references to God — including the Pledge's reference to a "Nation under God" — do not offend the Establishment Clause. Indeed, no Justice of the Supreme Court has ever concluded otherwise. This is because the Pledge's brief reference to a generic God does not convert its recitation from a patriotic exercise into a religious one. Regardless of the doctrinal test employed, the Pledge cannot reasonably be viewed as threatening to establish a state religion or anything of the sort.

History confirms why this understanding of the Establishment Clause must be so. Similar references to God are replete in our Nation's heritage, from the founding documents to the motto stamped on our currency ("In God we trust"). The Founders' firm belief that the unalienable rights of man were God-given laid the groundwork for the concept of individual rights enshrined in the Declaration of Independence ("all men are . . . endowed by their Creator with certain unalienable Rights"). These religious roots survive today, embedded in such practices as Presidential inaugural

speeches and legislative prayer, and in common rituals like public oaths ("So help me God") and formal court cries ("God save the United States and this Honorable Court"). Our Nation's history is uniquely and indelibly etched by religious influences, and the Establishment Clause does not forbid the government from officially acknowledging that heritage. That is all the Pledge does.

In this case, Plaintiffs challenge the constitutionality of 4 U.S.C. § 4, which codifies the wording of the Pledge of Allegiance, and three New Hampshire public school districts' Pledge-recitation practices. This is but the latest iteration in a series of lawsuits targeting the Pledge. In 1998, Plaintiffs' attorney, Rev. Dr. Michael A. Newdow ("Newdow"), filed an analogous federal lawsuit in the Southern District of Florida challenging the constitutionality of a public school district's Pledge practices. That action was rejected on standing grounds. Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), aff'd, No. 99-4136 (11th Cir. Jan. 4, 2000). In 2000, Newdow filed a second Pledge challenge in the Eastern District of California. That case was ultimately dismissed by the Supreme Court on standing grounds, although the three Justices who would have reached the merits all expressed the view that the Pledge is constitutional. Elk Grove, 542 U.S. 1 (2004). In an effort to cure his standing defect, Newdow added as co-plaintiffs three minor children and their parents and, in 2005, filed a third lawsuit, again in the Eastern District of California. The district court denied in part the defendants' motions to dismiss and their appeals are now pending before the Ninth Circuit. Newdow v. U.S. Congress, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), appeal pending, Nos. 05-17257, 05-17344, 06-15093 (9th Cir.) (argued Dec. 4, 2007).

In the present case, Newdow represents three minor children, DoeChild-1, DoeChild-2, and DoeChild-3; their parents, Jan and Pat Doe; and the Freedom From Religion Foundation. The United States of America ("United States") and the United States Congress ("Congress") are named as defendants (collectively "Federal Defendants"), as are three local school districts: the Hanover

School District, the Dresden School District, and School Administrative Unit 70.

Plaintiffs' claims against the Federal Defendants all relate to their contention that 4 U.S.C. § 4 ("Pledge statute") is unconstitutional on its face. Although, as noted earlier, these claims are foreclosed by Supreme Court precedent, this Court need not reach the merits of that question, for the claims founder on two jurisdictional grounds. First, Plaintiffs lack standing. The Pledge statute does not compel anyone to recite (or lead others in reciting) the Pledge, and Plaintiffs thus cannot show that the statute has injured them. Second, Congress is shielded from Plaintiffs' claims by the Constitution's Speech or Debate Clause, and Plaintiffs' claims against all the Federal Defendants are barred by the doctrine of sovereign immunity.

Plaintiffs' claims against the school districts all relate to their contention that the school districts' Pledge-recitation practices are unconstitutional.[1] These claims should also be dismissed. First, Plaintiffs lack standing to challenge the Pledge practices of the Dresden School District and School Administrative Unit 70. Because no Plaintiff attends a school operated by either district, Plaintiffs cannot establish that they are injured by those districts' Pledge practices. For those Plaintiffs with standing to sue the Hanover School District, the Pledge's underlying constitutionality does not change when it is said by willing students in a public school classroom. The Pledge's reference to a "Nation under God" permissibly acknowledges the role that faith in God has played in the formation, political foundation, and continuing development of the Republic. Children may be taught about that heritage in their History classes, and acknowledging the same in the Pledge is equally permissible. For all of these reasons, Plaintiffs' claims should be dismissed.

[1] Because these claims technically lie against only the school districts, simultaneously with this brief the United States is filing an assented-to motion to intervene to defend the constitutionality of 4 U.S.C. § 4 as applied by the school districts' Pledge-recitation practices. The arguments in Part IV of this memorandum support the constitutionality of those practices.

BACKGROUND

A. Statutory Background

1. The federal Pledge statute

In 1942, as part of an effort "to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America," Congress enacted a Pledge of Allegiance to the United States flag. S. Rep. No. 77-1477, at 1 (1942); see H.R. Rep. No. 77-2047, at 1 (1942). It read: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. Accordingly, the Pledge of Allegiance, set forth at 4 U.S.C. § 4, now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4. Both the Senate and House Reports expressed the view that, under Supreme Court case law, the 1954 amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3 (1954) (citing Zorach v. Clauson, 343 U.S. 306 (1952)), reprinted in 1954 U.S.C.C.A.N. 2339, 2341; see also S. Rep. No. 83-1287, at 2 (1954).

In 2002, Congress enacted legislation that (i) made extensive findings about the historic role of religion in the political development of the Nation, (ii) reaffirmed the text of the Pledge as it "has appeared . . . for decades," and (iii) repeated Congress's judgment that the Pledge statute is constitutional both facially and as applied by school districts whose teachers lead willing students in its recitation. See Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057.

2. The New Hampshire Pledge-recitation statute

As part of a "policy of teaching our country's history" to elementary and secondary school students, New Hampshire law requires that each school district in the State "authorize a period of time during the school day for the recitation of the pledge of allegiance." N.H. Rev. Stat. Ann. § 194:15-c (2007). Plaintiffs allege that, in furtherance of this requirement, the defendant school districts have their teachers lead classes attended by the Doe children in reciting the Pledge. See Compl. ¶¶ 28, 34, 45, 55, 67. Actual recitation of the Pledge is voluntary. N.H. Rev. Stat. Ann. § 194:15-c ("Pupil participation in the recitation of the pledge of allegiance shall be voluntary."); see Compl. ¶ 37 ("stipulat[ing]" that "none of [the Plaintiffs] are or have been actually compelled to say the words, 'under God,' in the Pledge").

B. Prior Pledge Litigation

1. Newdow's first district court challenge

In 1998, Newdow filed an action similar to this one in the Southern District of Florida, raising a First Amendment challenge to a public school district's Pledge practices. The district court held that Newdow lacked standing, in part because his daughter was not enrolled in the defendant school district. Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), slip op. at 3-4 & n.3 (attached). It held in the alternative that Newdow's challenge was foreclosed by Supreme Court precedent suggesting that the Pledge is consistent with the First Amendment. Id. at 4. The Eleventh Circuit affirmed, addressing only the question of standing. Newdow v. United States, No. 99-4136 (11th Cir. Jan. 4, 2000), slip op. at 3 (attached).

2. Newdow's second district court challenge

In March 2000, Newdow filed a second Pledge challenge, this time in the Eastern District of California. Acting on his own behalf and as "next friend" of his minor daughter, Newdow raised

Establishment Clause challenges to 4 U.S.C. § 4; a California statute requiring patriotic exercises, such as the Pledge, to be conducted daily in public elementary schools; and the voluntary Pledge-recitation policies of two public school districts, Elk Grove and Sacramento City Unified. The district court rejected those challenges and dismissed Newdow's complaint.

A divided panel of the Ninth Circuit reversed. In its initial opinion, the court held that Newdow had standing as a parent to challenge Elk Grove's Pledge-recitation practices and that Newdow himself had standing to challenge 4 U.S.C. § 4. See Newdow v. U.S. Congress, 292 F.3d 597, 602-05 (9th Cir. 2002) ("Newdow I"). However, it concluded that Newdow did not have standing to sue Sacramento City Unified because his daughter was "not currently a student" there. Id. at 603. The court also ruled that Newdow's claims against Congress were barred by the Speech or Debate Clause. Id. at 601-02. On the merits, it held that both 4 U.S.C. § 4 and Elk Grove's Pledge practices violate the Establishment Clause. See id. at 605-12.

After the panel's original decision, the mother of Newdow's daughter intervened to contest Newdow's standing because she had sole legal custody over their child. The panel nevertheless reaffirmed Newdow's standing to challenge Elk Grove's Pledge practices as a "noncustodial parent." Newdow v. U.S. Congress, 313 F.3d 500, 502-05 (9th Cir. 2002) ("Newdow II").

After various defendants sought rehearing, the panel issued a third order, which denied panel rehearing and amended the opinion in Newdow I. Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002) ("Newdow III"). The amended opinion once again held that Elk Grove's Pledge-recitation practices violate the Establishment Clause, but it deleted Newdow I's further holding that 4 U.S.C. § 4 violates the Establishment Clause on its face. See id. at 485-90. Nine judges dissented from the denial of rehearing en banc. See id. at 471-82.

The Supreme Court reversed. Elk Grove, 542 U.S. at 17-18. The Court reasoned that Newdow lacked prudential standing because his custody arrangement with his daughter's mother gave the mother final decision-making authority in the event of a disagreement between the parents. See id. at 14-15 & n.6. As a result, it had been "improper for the federal courts to entertain" Newdow's claim. Id. at 17.[2]

Three concurring Justices would have upheld the challenged Pledge-recitation policy on the merits. Chief Justice Rehnquist, after demonstrating that "[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," id. at 26 (opinion concurring in the judgment), concluded that "our national culture allows public recognition of our Nation's religious history and character," id. at 30. He further reasoned that the phrase "under God" in the Pledge "is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: 'From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.'" Id. at 31. And because reciting the Pledge "is a patriotic exercise, not a religious one," the Chief Justice concluded, its use "of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it." See id. at 31-32.

Justice O'Connor concluded that the challenged Pledge policy was constitutional because a reasonable observer would not view it as a governmental endorsement of religion. She reasoned that

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[2] Newdow filed a petition for certiorari seeking review of the Ninth Circuit's determination that Congress was immune from suit under the Speech or Debate Clause. See Petition for Writ of Certiorari, Newdow v. U.S. Congress, No. 03-7 (June 26, 2003), 2003 WL 22428407, at *18-20. That petition also sought review of the Ninth Circuit's judgment to the extent it declined to find the United States liable. See id. (disputing the United States's argument that no federal statute waives its sovereign immunity from a suit for declaratory or injunctive relief under the First Amendment). Newdow's petition was denied. Newdow v. U.S. Congress, 540 U.S. 962 (2003).

"some references to religion in public life and government are the inevitable consequences of our Nation's origins," which a reasonable observer would not perceive as "signifying a government endorsement of any specific religion, or even of religion over nonreligion." Id. at 35-36 (opinion concurring in the judgment). She stressed that the Pledge for decades could "fairly be called ubiquitous" in American public life; that reciting the Pledge is not an act of worship or prayer; that the Pledge does not refer to any particular religion; and that the Pledge contains only "minimal religious content." Id. at 37-44.

Justice Thomas concluded that the challenged Pledge policy was constitutional because it "has not created or maintained any religious establishment," has not "granted government authority to an existing religion," and "does not expose anyone to the legal coercion associated with an established religion." Id. at 53 (opinion concurring in the judgment).

The Elk Grove majority did not definitively decide the constitutionality of the challenged Pledge practices. Nonetheless, it began by noting that "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes," and that its "recitation is a patriotic exercise designed to foster national unity and pride in those principles." Id. at 6.

3. Newdow's third district court challenge

After the Supreme Court's ruling in Elk Grove, Newdow filed a third action, again in the Eastern District of California, on his own behalf and as counsel for three minor children and their parents. As in Elk Grove, Newdow raised Establishment Clause challenges to 4 U.S.C. § 4; the California "patriotic exercises" statute; and the Pledge-recitation practices of certain California school districts. See Newdow v. U.S. Congress, 383 F. Supp. 2d 1229, 1231-33 (E.D. Cal. 2005).

The district court dismissed Newdow's claims for lack of standing, id. at 1237-39, and dismissed the facial challenges to 4 U.S.C. § 4 on mootness grounds, see id. at 1242. However, the

court declined to dismiss the challenges of the other parents to the Pledge practices at their children's schools, considering itself bound by the Ninth Circuit's (reversed) judgment in Newdow III. See id. at 1239-42. The defendants' appeals are now pending before the Ninth Circuit. Nos. 05-17257, 05-17344, 06-15093 (9th Cir.) (argued Dec. 4, 2007).

4. Other Pledge litigation

Two federal Courts of Appeals have rejected Establishment Clause challenges to state statutes providing for the voluntary recitation of the Pledge by public school students. See Myers v. Loudoun County Pub. Schs., 418 F.3d 395 (4th Cir. 2005) (upholding Virginia statute); Sherman v. Cmty Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) (upholding Illinois statute), cert. denied, 508 U.S. 950 (1993).

C. Factual Background

This case, like Elk Grove, implicates the constitutionality of 4 U.S.C. § 4; a state Pledge-recitation statute; and several public school districts' practices of leading willing students in the voluntary recitation of the Pledge. To establish standing, Plaintiffs allege that each of the Doe children is "currently" enrolled in an elementary school in the Hanover School District. See Compl. ¶¶ 11, 14, 27, 32. They further allege that, after completing elementary school, the Doe children will "subsequently" attend a school run by the Dresden School District or School Administrative Unit 70, which operate the public middle and high schools in Hanover. See id. ¶¶ 11, 15, 29. According to the Complaint, the Pledge is recited in the Doe children's current classrooms, id. ¶ 28, 45, and in the schools run by the Dresden School District and School Administrative Unit 70, id. ¶ 30. Each of the Doe children is an atheist or agnostic who denies or doubts the existence of God. Id. ¶ 33. Though Plaintiffs stipulate that the Doe children have never been forced to recite the Pledge, they claim that the children are unconstitutionally "coerced" and made to feel like political "outsiders"

by the districts' Pledge practices. See id. ¶¶ 37-38.

Jan and Pat Doe are the parents of the Doe children and have "full legal custody" of them. Compl. ¶ 10. Jan is an atheist who denies the existence of God; Pat is an agnostic who doubts the existence of God. Id. ¶ 25-26. Plaintiffs allege that the Doe parents live in and own property in Hanover, and pay property taxes that fund the defendant school districts. Id. ¶¶ 10, 52. They further allege that the Doe parents pay federal income tax, federal sales tax, New Hampshire state income tax, and New Hampshire state sales tax. Id. ¶ 52. Plaintiffs allege that the Doe parents' federal tax dollars are used to fund a variety of expenses associated with the Pledge, such as paying teachers for the time spent reciting the Pledge, printing copies of the U.S. Code that contain 4 U.S.C. § 4, distributing pamphlets that bear the text of the Pledge, and supporting an annual "Pause for the Pledge of Allegiance" event in the state of Maryland. See id. ¶¶ 53-56, 60, 62.

The Freedom from Religion Foundation ("FFRF") is an association of atheists and agnostics based in Madison, Wisconsin. See Compl. ¶ 9. According to the Complaint, about 60 of its roughly 11,000 members are "from" New Hampshire. Id. An unspecified number of these 60 "live in, pay taxes in, and have children (or are children) who attend public schools" in New Hampshire. Id. These FFRF members allegedly "suffer the same or similar harms" as the Doe plaintiffs. Id.

On the merits, Plaintiffs challenge 4 U.S.C. § 4 and the school districts' Pledge practices on several grounds. Plaintiffs' principal claim is that the Pledge statute and the school districts' Pledge practices violate the Establishment Clause. See Compl. ¶¶ 37, 38, 64. Plaintiffs also contend that 4 U.S.C. § 4 violates the Free Exercise Clause, the Equal Protection component of the Fifth Amendment, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. Id. ¶¶ 37, 46, 65, II. They further allege that the school districts' Pledge practices violate the Free Exercise Clause, the Equal Protection Clause, RFRA, and analogous provisions of the New

Hampshire Constitution. Id. ¶¶ 37, 39, 46, 65, 67, III. Finally, Plaintiffs submit that the school districts' Pledge practices violate a New Hampshire statute that protects the religious preferences of troubled children placed by the State in foster homes, see id. ¶¶ 68, III (citing N.H. Rev. Stat. Ann. § 169-D:23), as well as the New Hampshire Pledge-recitation statute itself, see id. ¶¶ 67, III.

Plaintiffs seek several forms of relief. With respect to the Federal Defendants, they seek (i) a declaration that "Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses"; (ii) a declaration that the inclusion of the words "under God" in the Pledge violates the Establishment and Free Exercise Clauses, the Equal Protection component of the Fifth Amendment, and RFRA; (iii) an injunction requiring Congress to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4"; and (iv) an injunction requiring the United States to "use its power to remove the words 'under God' from the United States Code as now written in 4 U.S.C. § 4." Compl. ¶¶ I, II, IV, V.

With respect to the defendant school districts, Plaintiffs seek (i) a declaration that the districts' Pledge practices violate the Establishment and Free Exercise Clauses, the Fourteenth Amendment's Equal Protection Clause, Article 6 of Part I of the New Hampshire Constitution, RFRA, and New Hampshire Revised Statutes §§ 169-D:23 and 194:15-c; and (ii) an injunction requiring the districts to "cease and desist" from reciting the Pledge in their schools. Id. ¶¶ III, VI.

ARGUMENT

Our argument proceeds in four parts. Part I demonstrates that all Plaintiffs lack standing to challenge the Pledge statute and that certain Plaintiffs also lack standing to challenge the school districts' Pledge practices. Part II shows that Plaintiffs' claims against the Federal Defendants are barred by the Speech or Debate Clause and/or sovereign immunity. Part III establishes that 4 U.S.C. § 4 is constitutional. Part IV shows that the school districts' Pledge practices are constitutional.

I. PLAINTIFFS LACK STANDING

Standing doctrine imposes both constitutional and prudential restraints on the exercise of federal judicial power. See Elk Grove, 542 U.S. at 11; Osediacz v. City of Cranston, 414 F.3d 136, 139 (1st Cir. 2005). To satisfy the constitutional requirements, a plaintiff must establish: (1) an "actual or imminent" injury; (2) that is "fairly . . . trace[able] to the challenged action of the defendant"; and (3) that would "likely . . . be redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted; alterations in original). As the parties invoking the Court's jurisdiction, Plaintiffs bear the burden "clearly to allege facts demonstrating" each of these three elements. Warth v. Seldin, 422 U.S. 490, 518 (1975); United States v. AVX Corp., 962 F.2d 108, 114 (1st Cir. 1992). In ruling on a motion to dismiss, the Court must accept as true all material allegations in the Complaint; however, it need not credit conclusory statements or generalized averments. See AVX, 962 F.2d at 114-15. Indeed, "where standing is at issue, heightened specificity is obligatory at the pleading stage." Id. at 115.

"[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." Allen v. Wright, 468 U.S. 737, 752 (1984). As explained below, all Plaintiffs lack standing to challenge 4 U.S.C. § 4 on its face. In addition, all Plaintiffs lack standing to challenge the Pledge practices of the Dresden School District and School Administrative Unit 70. Moreover, FFRF lacks standing to raise any claim on behalf of its members. The Federal Defendants do not at this time contest the standing of the Doe plaintiffs to challenge the Pledge practices of the Hanover School District based upon Plaintiffs' allegations that (i) Jan and Pat Doe are the parents, with full legal custody, of the Doe children; and (ii) the Doe children attend an elementary school run by the

Hanover School District in which the Pledge is recited. See Compl. ¶¶ 10, 28.[3]

A. All Plaintiffs Lack Standing to Challenge the Federal Pledge Statute on Its Face

Causation. With respect to their facial challenge to 4 U.S.C. § 4, see Compl. ¶¶ 64-66, 70, I-II, Plaintiffs cannot point to an injury that is caused by the challenged statute. The principal injury asserted in the Complaint is that the Doe children are unconstitutionally "coerced" and made to feel like political "outsiders" by the practice of teacher-led Pledge recitation in their classrooms. See id. ¶¶ 27-39, 45, 47-50, 59, 65. This injury is not caused by the Pledge statute, which does not compel anyone to do anything.

In 1954, Congress amended 4 U.S.C. § 4 by adding the words "under God" after the word "Nation," so that the Pledge now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." The statute itself does not injure Plaintiffs, for it does not compel the State of New Hampshire, the State's school districts, or anyone else to recite (or lead others in reciting) the Pledge. It merely sets forth the wording of the Pledge and provides the manner of addressing the Flag when the Pledge is recited.[4]

Indeed, it is New Hampshire law — not federal law — that since 2002 has required each school district in the State to "authorize a period of time during the school day for the recitation of the pledge of allegiance." N.H. Rev. Stat. Ann. § 194:15-c (2002). Prior to 2002, New Hampshire

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[3] As set forth below, however, the Federal Defendants contest any claim of Doe taxpayer standing. See Compl. ¶¶ 52-63.

[4] The statute also provides, as it has since 1942, that the Pledge "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 U.S.C. § 4. These provisions are not at issue in this case.

law permitted, but did not require, school districts to authorize recitation of the Pledge in elementary (but not secondary) schools. See N.H. Rev. Stat. Ann. § 194:15-a (1975). And before 1975, New Hampshire law contained no Pledge-recitation requirement. Thus, to the extent Plaintiffs are injured, it is not by Congress's 1954 modification of the Pledge statute, but by later developments in New Hampshire law and the school districts' efforts to comply with that law. See Council of Ins. Agents v. Juarbe-Jimenez, 443 F.3d 103, 108 (1st Cir. 2006) ("[T]he injury must be fairly traceable to the defendant's challenged action rather than to some third party's independent action."). It is perhaps for this reason that in Myers and Sherman, the plaintiffs did not challenge the federal Pledge statute; rather, they challenged (and the courts upheld) the application of state statutes requiring recitation of the Pledge. See Myers, 418 F.3d at 398-99 & n.4; Sherman, 980 F.2d at 439-40.

Cognizable Injury. Plaintiffs also appear to suggest they are injured by the mere fact that the Pledge is codified in its current form. See Compl. ¶¶ 64, I, II. But this objection, standing alone, is not the sort of individualized, direct, and concrete injury required to support Article III standing. Even in the Establishment Clause context, the Supreme Court has consistently "rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 482-83 (1982) (citation and internal quotation marks omitted); see also Allen, 468 U.S. at 754-55 (same). Moreover, "the psychological consequence presumably produced by observation of conduct with which one disagrees" is likewise insufficient to confer Article III standing, "even though the disagreement is phrased in constitutional terms." Valley Forge, 454 U.S. at 485-86. Plaintiffs plainly believe that the inclusion of the words "under God" in the Pledge renders 4 U.S.C. § 4 unconstitutional. Absent injury to some concrete interest, however, their disagreement with the law cannot create standing. See id.

Plaintiffs further contend that they have federal taxpayer standing to challenge the Pledge statute. See Compl. ¶¶ 52-63. This is meritless. As a general rule, a federal taxpayer cannot rely on an interest in ensuring that the government spends tax revenues lawfully as a basis for standing to challenge federal action. See Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923). This rule is subject to a "narrow exception," first recognized in Flast v. Cohen, 392 U.S. 83 (1968), in certain types of Establishment Clause cases. See Bowen v. Kendrick, 487 U.S. 589, 618 (1988). To establish federal taxpayer standing under Flast, a plaintiff must show: (i) that the challenged action is an "exercise[] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution"; and (ii) that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." Flast, 392 U.S. at 102-03; see also Valley Forge, 454 U.S. at 481 (Flast's two-part test is applied with "rigor").

The Flast exception has no application here because 4 U.S.C. § 4 was not enacted under Congress's taxing and spending powers — in fact, it authorizes no expenditures whatsoever. The Taxing and Spending Clause provides constitutional authority for "taxing and spending programs," Flast, 392 U.S. at 101; that is, programs that promote the "general welfare" through the "expenditure of public moneys for public purposes," South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citation and internal quotation marks omitted).[5] The Pledge statute indisputably does not establish a federal

[5] The Supreme Court has consistently rejected claims of federal taxpayer standing where the plaintiff did not challenge an exercise of Congress's taxing and spending powers. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no standing where plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status"); United States v. Richardson, 418 U.S. 166, 175 (1974) (no standing where plaintiffs' challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA"); Valley Forge, 454 U.S. at 480 (no standing where the challenged government action "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8").

"taxing and spending program." It does not require, authorize, or even mention the expenditure of federal funds; it merely codifies the text of the Pledge of Allegiance. Because 4 U.S.C. § 4 neither mandates nor authorizes the use of public moneys, there is no "logical link" between Plaintiffs' legal challenge and their alleged status as federal taxpayers and, thus, no federal taxpayer standing. See Flast, 392 U.S. at 102-103.[6]

Redressability. Finally, Plaintiffs' claims against the Federal Defendants are not redressable. A court has never, to our knowledge, attempted to redress an injury caused by an allegedly unconstitutional statute by purporting to order Congress to repeal or amend the challenged law. See Compl. ¶ IV (seeking this relief). Indeed, as the Supreme Court has stated: "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation." Bowsher v. Synar, 478 U.S. 714, 733-34 (1986); see also Mississippi v. Johnson, 71 U.S. 475, 500 (1867) ("Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in

[6] Plaintiffs also assert taxpayer injury arising from the alleged use of federal funds to pay "governmental agents who lead . . . students" in reciting the Pledge, Compl. ¶ 55; to pay federal employees who recite the Pledge during working hours, see id. ¶ 56-57; to print and distribute "the United States Code (including 4 U.S.C. § 4) as well as pamphlets, etc., that contain the Pledge," id. ¶ 60; and to "support the 'Pause for the Pledge of Allegiance' (Pub. L. 99 Stat. 97) annual festivities," id. ¶ 62. However, the Supreme Court has explicitly rejected the view that the Flast exception covers "any expenditure of government funds [allegedly] in violation of the Establishment Clause." Hein v. Freedom from Religion Found., 127 S. Ct. 2553, 2565 (2007) (plurality opinion) (emphasis added; internal quotation marks omitted). Rather, to be considered an exercise of Congress's taxing and spending powers under Flast, a challenged expenditure must be "made pursuant to an express congressional mandate and a specific congressional appropriation." Id.; Hinrichs v. Speaker of the Indiana House of Reps., 506 F.3d 584, 598 (7th Cir. 2007). As explained in the text, the Pledge statute authorizes no expenditures whatsoever, and Plaintiffs identify no "specific congressional appropriations" that fund the incidental expenditures they allege in ¶¶ 53-63 of the Complaint. Thus, these allegations, too, fail to establish federal taxpayer standing.

proper cases, subject to its cognizance."); Franklin v. Massachusetts, 505 U.S. 788, 829 (1992) (Scalia, J., concurring) ("[W]e cannot direct . . . Congress to perform particular legislative duties.").

Plaintiffs' claims against the United States pose further redressability problems. Plaintiffs seek an injunction requiring the United States to "use its power to remove the words 'under God' from the United States Code as now written in 4 U.S.C. § 4." Compl. ¶ V. Even if the Court were to order the United States to "remove" "under God" from the United States Code, the Statutes at Large would still contain those words and the current Pledge would thus remain the law. See Five Flags Pipe Line Co. v. Dep't of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) ("[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls."); see also United States v. Welden, 377 U.S. 95, 98 n.4 (1964). Thus, unless Congress were to ratify the removal of the words "under God" from the Code by affirmatively enacting this change into positive law, the Pledge itself would remain unchanged, see Five Flags, 854 F.2d at 1440, and any "injury" Plaintiffs suffer by the inclusion of the words "under God" in the Pledge would be left unremedied. For all of these reasons, Plaintiffs lack standing to challenge 4 U.S.C. § 4 on its face.

B. All Plaintiffs Lack Standing to Sue the Dresden School District and School Administrative Unit 70

Actual or imminent injury. Plaintiffs lack standing to sue the Dresden School District and School Administrative Unit 70 because no Plaintiff attends a school operated by either district and, therefore, Plaintiffs are not "injured" by those districts' Pledge practices. It is Plaintiffs' burden to establish an "injury in fact" that is "actual or imminent." Lujan, 504 U.S. at 560. The Complaint alleges that the Doe children are "currently" enrolled in an elementary school in the Hanover School District, see Compl. ¶¶ 11, 14, 27, 32, and that, "after completing elementary school," they will

"subsequently" attend a school run by the Dresden School District or School Administrative Unit 70, which operate the public middle and high schools in Hanover, see id. ¶¶ 11, 15, 29. Hence, any alleged injury from the latter districts' Pledge practices is surely not "actual." Neither is there any "assurance that the asserted injury is 'imminent' — that it is 'certainly impending.'" Daimler Chrysler Corp. v. Cuno, 126 S. Ct. 1854, 1863 (2006) (citation omitted). The Complaint is silent as to the Doe childrens' ages or grade levels, and there is no basis to conclude that there is anything "impending" or "certain" about their eventual plans to enroll in a school run by either the Dresden School District or School Administrative Unit 70. See id.; AVX, 962 F.2d at 115 ("facts necessary to support standing must clearly appear in the record and cannot be inferred argumentatively from averments in the pleadings") (citation and internal quotation marks omitted). Accordingly, Plaintiffs are not "injured" by those districts' Pledge practices and lack standing to challenge them. See also Newdow III, 328 F.3d at 485, rev'd on other grounds, 542 U.S. 1 (2004).

Cognizable injury. Moreover, Plaintiffs lack state taxpayer standing for the same reasons they lack federal taxpayer standing. See Compl. ¶¶ 52, 56-59. "The . . . rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers." Cuno, 126 S. Ct. at 1863. Accordingly, state taxpayers generally cannot challenge state action "simply by virtue of their status as taxpayers," id. at 1864, and to invoke the Flast exception must demonstrate that the challenged expenditure is "made pursuant to an express [legislative] mandate and a specific [legislative] appropriation." See Hein, 127 S. Ct. at 2565; Hinrichs, 506 F.3d at 598 (denying state taxpayer standing because "plaintiffs have not pointed to any specific appropriation of funds by the legislature to implement the [challenged] program"). Furthermore, the challenge must target a "measurable appropriation or loss of revenue" that results in a "direct dollars-and-cents injury" to the plaintiffs. See Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 639 (1st Cir.

1990) (quoting Doremus v. Board of Education, 342 U.S. 429, 434 (1952)). "[I]ncidental expenses" incurred by the government in administering a challenged activity are insufficient. See id.

Plaintiffs cannot establish state taxpayer standing here. First, the New Hampshire Pledge-recitation statute, N.H. Rev. Stat. Ann. § 194:15-c, like the federal Pledge statute, neither requires, authorizes, or even mentions an expenditure of state funds, and Plaintiffs point to no specific legislative appropriation that implements the state statute. That alone dooms Plaintiffs' claim of state taxpayer standing. See Hein, 127 S. Ct. at 2565; Hinrichs, 506 F.3d at 598. In addition, Plaintiffs fail to establish the requisite "dollars-and-cents" injury because they identify no "measurable appropriation or disbursement of school-district funds occasioned solely by the [Pledge] activities complained of." See Doremus, 342 U.S. at 434 (rejecting state taxpayer standing in Establishment Clause challenge to state statute requiring daily Bible reading) (emphasis added). Indeed, any costs associated with the school districts' Pledge practices are, at best, indirect and incidental: existing buildings are used and no additional employees are hired, see Schneider, 917 F.2d at 639, and expenses for teachers' salaries for the sliver of the school day devoted to Pledge exercises would be incurred whether or not the Pledge were recited, see Doremus, 342 U.S. at 431 (quoting the state court's judgment that plaintiffs failed to show that "the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day's work"). See also Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794 (9th Cir. 1999) (en banc) ("This case is legally indistinguishable from Doremus, in which the school's expenditures for teachers' salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing despite their indirect support

of the Bible reading."). For these reasons, Plaintiffs lack state taxpayer standing.[7]

C. FFRF Lacks Standing to Raise Any Claim in This Case

Finally, FFRF lacks standing to raise any claim in this lawsuit. FFRF asserts no injury to itself as an organization; rather, its standing is premised on injuries allegedly suffered by its members. See Compl. ¶¶ 9, 24. Its allegations, however, are inadequate to establish associational standing to sue on its members' behalf.

"An association has standing to sue on behalf of its members when three requisites have been fulfilled: (1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals." AVX, 962 F.2d at 116. This Court need look no further than the First Circuit's opinion in AVX to conclude that FFRF's assertion of associational standing fails the first of these prongs, because FFRF fails to allege a particularized injury to "any one" of its members that is "sufficient to meet the requirements of Article III." See id. Indeed, FFRF makes "only the most nebulous allegations regarding its members' identities" and a "generalized allegation of individual harm." See id. at 117. Of FFRF's roughly 11,000 members nationwide, about 60 are "from" New Hampshire. Compl. ¶ 9. Of those 60, an unspecified number "live in, pay taxes in, and

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[7] Doremus likewise defeats any claim of municipal taxpayer standing to the extent one is asserted. See Compl. ¶ 52. Although municipal taxpayer standing rests on a different conceptual footing than federal and state taxpayer standing and, thus, may be subject to less stringent restrictions, see Frothingham, 262 U.S. at 486-87; Donnelly v. Lynch, 691 F.2d 1029, 1031-32 (1st Cir. 1982), rev'd on other grounds, 465 U.S. 668 (1984), a municipal taxpayer must nevertheless meet Doremus's pocketbook injury requirement, see Doremus, 342 U.S. at 433-34 (rejecting state and municipal taxpayer allegations); Elk Grove, 542 U.S. at 18 n.8 (weighing under Doremus whether taxes paid to local school district suffice for taxpayer standing); ACLU-NJ ex rel. Miller v. Twp. of Wall, 246 F.3d 258, 262 (3d Cir. 2001) (applying Doremus to municipal taxpayer standing; collecting like cases from the Second, Fifth, Seventh, Ninth, and D.C. Circuits).

have children (or are children) who attend public schools" in "this judicial district" — a district that, of course, spans the entire state. Id. The Complaint says nothing more about these FFRF members. None is named. None is said to live in or around Hanover. None is alleged to attend a school operated by the defendant school districts. See AVX, 962 F.2d at 117 ("The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of affected resources is left open to surmise."). Further, in terms of actual injury, FFRF alleges nothing more than that these members suffer "the same or similar harms" as the Doe plaintiffs. Compl. ¶ 9. Under AVX, such meager allegations are plainly insufficient to demonstrate the particularized injury required for associational standing.

II. THE FEDERAL DEFENDANTS ARE IMMUNE FROM PLAINTIFFS' CLAIMS

A. Plaintiffs' Claims Against Congress Are Barred by the Speech or Debate Clause

Plaintiffs seek three specific forms of relief against Congress. They seek: (i) a declaration that "Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses"; (ii) a declaration that the inclusion of the words "under God" in the Pledge violates the Establishment and Free Exercise Clauses, the Equal Protection component of the Fifth Amendment, and RFRA; and (iii) an injunction requiring Congress to "immediately act to remove the words 'under God' from the Pledge . . . as now written in 4 U.S.C. § 4." Compl. ¶¶ I, II, IV. Plaintiffs also suggest that they seek mandamus relief under 28 U.S.C. § 1361. See id. ¶ 4. All of these claims are barred by the Constitution's Speech or Debate Clause.

The Speech or Debate Clause precludes courts from exercising jurisdiction over Congress, or any of its Members, for claims arising from the enactment or amendment of legislation. It provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1. The Clause "reinforc[es] the

separation of powers," United States v. Johnson, 383 U.S. 169, 178 (1966), and is "modeled to ensure that the Legislative Branch will be able to perform without undue interference the whole of the legislative function ceded to it by the Framers," Nat'l Ass'n of Soc. Workers v. Harwood, 69 F.3d 622, 629-30 (1st Cir. 1995).

The Speech or Debate Clause "protects not only speech and debate per se." Id. at 630. The Supreme Court has read the Speech or Debate Clause "broadly to effectuate its purposes," such that any conduct falling within the "sphere of legitimate legislative activity" is absolutely immune from scrutiny by the courts. See Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975); see also Harwood, 69 F.3d at 630 (the Clause "extends to any act generally done in a session of the House by one of its members in relation to the business before it.") (citation and internal quotation marks omitted). The passage of legislation is quintessential legislative activity. See Gravel v. United States, 408 U.S. 606, 624 (1972) (voting by Members protected); Eastland, 421 U.S. at 504 (the Clause protects activities "integral" to the "consideration and passage or rejection of proposed legislation") (citation and internal quotation marks omitted); Harwood, 69 F.3d at 635 (the Clause protects the "core legislative activities" of "debating, voting, [and] passing legislation"). Thus, Plaintiffs' claims for relief against Congress for its passage of the 1954 Act amending the Pledge statute — including their request that Congress partially repeal or amend 4 U.S.C. § 4 by removing the words "under God" — are squarely barred by the Speech or Debate Clause. See also Newdow III, 328 F.3d at 484 ("[I]n light of the Speech and Debate Clause . . . , the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.").[8]

[8] Plaintiffs also seek an injunction requiring the United States to "use its power to remove the words 'under God' from the United States Code as now written in 4 U.S.C. § 4" — the same relief they seek against Congress. Compare Compl. ¶ IV with id. ¶ V. For the reasons explained supra at pages 16-17, and consonant with separation-of-powers principles, such an act can be

B. Plaintiffs' Constitutional Claims Against the Federal Defendants Are Barred by Sovereign Immunity

Plaintiffs' constitutional claims against all the Federal Defendants are barred by sovereign immunity. A body of the sovereign "is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980) (citation and internal quotation marks omitted; alteration in original); see also Muirhead v. Mecham, 427 F.3d 14, 17 (1st Cir. 2005). Such consent "cannot be implied" and must be "unequivocally expressed" by Congress. Mitchell, 445 U.S. at 538; see also Lane v. Pena, 518 U.S. 187, 192 (1996). Absent an applicable waiver, a court lacks jurisdiction to entertain a claim against the sovereign, whether the named defendant is the United States, one of its agencies, or Congress. See FDIC v. Meyer, 510 U.S. 471, 475 (1994) (sovereign immunity "shields the Federal Government and its agencies from suit"); Keener v. U.S. Congress, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (Congress is "protected from suit by sovereign immunity"); Rockefeller v. Bingaman, 234 Fed. Appx. 852, 855 (10th Cir.) (sovereign immunity "forecloses [plaintiff's] claims against the House of Representatives and Senate"), cert. denied, 128 S. Ct. 619 (2007). Plaintiffs bear the burden of establishing an unambiguous textual waiver of immunity. See Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987).

Here, although Plaintiffs invoke the Court's jurisdiction under a variety of statutes, see Compl. ¶¶ 1-5, they identify no statute waiving the sovereign immunity of Congress or the United

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performed only by Congress. See also Newdow III, 380 F.3d at 484 ("[T]he President has no authority to amend a statute or declare a law unconstitutional, those functions being reserved to Congress and the federal judiciary respectively.")

States from their constitutional claims for declaratory and injunctive relief.[9] See, e.g., Powelson v. United States, 150 F.3d 1103, 1104 (9th Cir. 1998) ("[A] statute that purports to create jurisdiction alone does not necessarily eliminate sovereign immunity.").[10] Accordingly, the Federal Defendants are immune from those claims, and the Court lacks jurisdiction to consider them.[11] See Muirhead, 427 F.3d at 17; Baker, 817 F.2d at 562.

III. 4 U.S.C. § 4 IS CONSTITUTIONAL

If the Court determines to reach the merits of Plaintiffs' facial challenge to 4 U.S.C. § 4, it should reject that challenge. Plaintiffs ask the Court "to judge the constitutionality of an Act of Congress — the gravest and most delicate duty that [a court] is called upon to perform." Rostker

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[9] Although we do not concede that the relief Plaintiffs seek constitutes "appropriate relief" as contemplated by RFRA's waiver of sovereign immunity, see 42 U.S.C. § 2000bb-1(c), the Court need not address that issue, for Plaintiffs' RFRA claim is barred as against Congress by the Speech or Debate Clause, see supra Part II.A, and fails on the merits as discussed infra at note 16.

[10] Claims challenging federal statutory or regulatory provisions typically are raised against an Executive Branch agency or official who, in administering or enforcing the challenged provision, has taken some action that "injures" the plaintiff, and the waiver of immunity typically is supplied by the Administrative Procedure Act ("APA"). See 5 U.S.C. § 702. Plaintiffs do not invoke the APA here. Indeed, Plaintiffs have not sued any federal agency or official, presumably because 4 U.S.C. § 4 merely sets forth the words of the Pledge, and neither requires nor authorizes any federal agency or official to do anything; thus, no federal agency or official has "injured" Plaintiffs. Moreover, the only substantive mention of the United States in the Complaint is the allegation that the "United States of America has . . . permit[ted] the Congress to further (Christian) monotheistic dogma." Compl. ¶ 66. The APA's waiver of sovereign immunity, however, is limited to claims stated against "an agency or an officer or employee" of the United States. 5 U.S.C. § 702; Puerto Rico v. United States, 490 F.3d 50, 57-58 (1st Cir. 2007) (waiver applies to actions for relief "against a Federal agency or officer acting in an official capacity"); Muirhead, 427 F.3d at 18 (same). In addition, Congress is not an "agency" as defined by the APA. 5 U.S.C. § 701(b)(1)(A). Accordingly, the APA supplies no waiver of sovereign immunity in this case.

[11] Plaintiffs' invocation of the mandamus statute, see Compl. ¶ 4 (citing 28 U.S.C. § 1361), is similarly unavailing. The mandamus statute "applies only to officers and employees of the United States, rather than to the United States itself," and its provisions therefore "do not waive the sovereign immunity of the United States." Muirhead, 427 F.3d at 18. Nor is Congress subject to the mandamus statute. See Liberation News Serv. v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970).

v. Goldberg, 453 U.S. 57, 64 (1981) (citation omitted). It is well established that Acts of Congress are presumptively constitutional. See United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963). In fact, Congress has expressly reaffirmed its view that 4 U.S.C. § 4 is constitutional. See Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057. Moreover, because Plaintiffs challenge the Pledge statute on its face, see Compl. ¶¶ 64-66, 70, I-II, to prevail they must show that "no set of circumstances exists under which the [statute] would be valid," United States v. Salerno, 481 U.S. 739, 745 (1987).

Plaintiffs cannot meet this test. As explained below, their contention that the Pledge of Allegiance violates the Establishment Clause is squarely foreclosed by Supreme Court precedent. Two Supreme Court decisions have said without qualification that the Pledge is consistent with the Establishment Clause, and have used the Pledge as a baseline for weighing the constitutionality of other forms of government action. See Lynch, 465 U.S. at 675-77; County of Allegheny, 492 U.S. at 602-03. Those decisions are binding here, and the Court need not look further to resolve this case. Moreover, in many other cases, the Supreme Court and individual Justices have repeatedly reaffirmed that patriotic and ceremonial references to God such as the one in the Pledge do not offend the Establishment Clause. Viewed in the context of our unique history, these opinions make clear that the Establishment Clause does not forbid the federal government from officially acknowledging the religious heritage, foundation, and character of the Nation. That is precisely what the Pledge of Allegiance does.

A. Supreme Court Precedent Forecloses Plaintiffs' Establishment Clause Claims

In two cases, the Supreme Court has unreservedly described the Pledge of Allegiance as consistent with the Establishment Clause and used it as a benchmark to measure the constitutionality of other government action. In Lynch, the Court held that the Establishment Clause permits a city

to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," 465 U.S. at 680, and noted that similar "examples of reference to our religious heritage are found," among other places, "in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag," which the Court said "is recited by many thousands of public school children — and adults — every year." Id. at 676. The words "under God" in the Pledge, the Court explained, are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers," which are "replete" in our Nation's history. Id. at 675, 677.

Likewise, in County of Allegheny, the Supreme Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed Lynch's approval of the reference to God in the Pledge, noting that all of the Justices in Lynch viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." 492 U.S. at 602-03 (citations omitted). The Court then used the Pledge and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, id., and concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." Id. at 598; see id. at 603.

Although County of Allegheny and Lynch did not involve direct challenges to the Pledge, they are controlling precedent on the Pledge's constitutionality. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996); see also Rossiter v. Potter, 357 F.3d 26, 31 (1st Cir. 2004). The Supreme Court's analysis of the Pledge in Lynch and

County of Allegheny was an integral part of the rationale of each decision. Specifically, that analysis provided the constitutional baseline for permissible official acknowledgments of religion, against which the practices at issue in Lynch and County of Allegheny were then measured. For decades, the Court and individual Justices "have grounded [their] decisions in the oft-repeated understanding," Seminole Tribe, 517 U.S. at 67, that the Pledge of Allegiance, and similar references, are constitutional. As the Fourth and Seventh Circuits have held, the lower courts cannot ignore those consistent and emphatic statements. See Myers, 418 F.3d at 405 (the Supreme Court has "made clear that the Establishment Clause, regardless of the test to be used, does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school"); Sherman, 980 F.2d at 448 ("If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."); see also Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), slip op. at 4 (attached).[12]

Moreover, in many other cases, the Supreme Court and individual Justices have repeatedly reaffirmed that patriotic and ceremonial references to God such as the one in the Pledge do not offend the Establishment Clause. In Engel, for example, in the course of invalidating an official school prayer, the Court contrasted that "unquestioned religious exercise" with the permissible "patriotic or ceremonial" references to God contained in the Declaration of Independence and our "officially espoused" national anthems. 370 U.S. at 435 n.21. The next term, stalwart separationist Justice Brennan wrote that the revised Pledge "may be no more of a religious exercise than the

[12] Even if the Court's reasoning in County of Allegheny and Lynch were to be considered dicta — which it is not — such "carefully considered statements of the Supreme Court . . . must be accorded great weight and should be treated as authoritative." Crowe v. Bolduc, 365 F.3d 86, 92 (1st Cir. 2004); see also McCoy v. MIT, 950 F.2d 13, 19 (1st Cir. 1991) (lower federal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings").

reading aloud of Lincoln's Gettysburg Address, which contains an allusion to" the "historical fact that our Nation was believed to have been founded 'under God.'" Abington Sch. Dist. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); see Sherman, 980 F.2d at 447. Most recently, in Elk Grove, while the Court resolved the case on standing grounds, it described recitation of the Pledge as "a patriotic exercise designed to foster national unity and pride." 542 U.S. at 6. Three concurring Justices wrote separately to explain, in more detailed terms, why recitation of the Pledge by willing students does not contravene any conceivably applicable Establishment Clause standards. See id. at 26-32 (Rehnquist, C.J., concurring in the judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," and the Pledge is "a simple recognition of the fact . . . [that] 'our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God'") (citation omitted); id. at 40 (O'Connor, J., concurring in the judgment) ("[A]n observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive . . . ."); id. at 54 (Thomas, J., concurring in the judgment) (voluntary recitation of Pledge "does not expose anyone to the legal coercion associated with an established religion").[13]

As these decisions illustrate, the reference to God in the Pledge is not reasonably understood as endorsing, or coercing individuals into silent assent to, any particular religious doctrine. Rather,

[13] In other cases as well, various individual Justices have specifically and repeatedly stated that the Pledge is consistent with the Establishment Clause. See, e.g., Lee, 505 U.S. at 638-39 (Scalia, J., dissenting); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring); id. at 88 (Burger, C.J., dissenting); Engel, 370 U.S. at 449 (Stewart, J., dissenting).

the Pledge is "consistent with the proposition that government may not communicate an endorsement of a religious belief," County of Allegheny, 492 U.S. at 602-603, because its reference to God acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation continues as a matter of demographic and cultural fact to be "a religious people whose institutions presuppose a Supreme Being." Zorach, 343 U.S. at 313. Indeed, in an area of law that is often mired in uncertainty, the Justices have been remarkably unanimous on one point: "[T]he Pledge is not implicated by the Court's interpretation of the Establishment Clause." Myers, 418 F.3d at 405.

This Court need not proceed further in order to conclude that the Pledge of Allegiance is fully consistent with the Establishment Clause. Even still, if the Supreme Court's repeated and express assurances on this point are unsatisfying, a review of our Nation's history and traditions confirms this inescapable conclusion.

B. The Establishment Clause Permits Official Acknowledgments of the Nation's Religious Heritage and Character such as the Pledge's Reference to God

1. Religious beliefs inspired settlement of the colonies and influenced the formation of the government.

"[R]eligion has been closely identified with our history and government." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212 (1963). Many of the Country's earliest settlers came to these shores seeking a haven from religious persecution and a home where their faith could flourish. In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact in which they announced that their voyage was undertaken "for the Glory of God." Mayflower Compact, Nov. 11, 1620, reproduced in 1 B. Schwartz, The Roots of the Bill of Rights 2 (1980). Settlers established many of the original thirteen colonies, including Massachusetts, Rhode Island, Connecticut,

Pennsylvania, Delaware, and Maryland, for the specific purpose of securing religious liberty for their inhabitants. The Constitutions or Declarations of Rights of almost all of the original States expressly guaranteed the free exercise of religion. See 5 The Founders' Constitution 70-71, 75, 77, 81, 84-85 (P. Kurland & R. Lerner eds., 1987). It thus is no surprise that among the very first rights enshrined in the Bill of Rights are the free exercise of religion and protection against federal laws respecting an establishment of religion. U.S. Const. amend. I.

The Framers' deep-seated faith also laid the philosophical groundwork for the unique governmental structure they adopted. In the Framers' view, government was instituted by individuals for the purpose of protecting and cultivating the exercise of their fundamental rights. Central to that political order was the Framers' conception of the individual as the source (rather than the object) of governmental power. That view of the political sovereignty of the individual, in turn, was a direct outgrowth of their conviction that each individual was entitled to certain fundamental rights, a conviction most famously expressed in the Declaration of Independence: "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." 1 U.S.C. at XLIII (2000). Thus, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Schempp, 374 U.S. at 213.

2. The Framers considered official acknowledgments of religion's role in the formation of the Nation to be appropriate.

Many Framers attributed the survival and success of the new Nation to the providential hand of God. The Continental Congress itself announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by direct imposition of Providence, that

not to feel and acknowledge his protection would be the height of impious ingratitude." 11 Journals of the Continental Congress 477 (W. Ford ed., 1908). Likewise, in his first inaugural address, President Washington proclaimed that "[n]o people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States," because "[e]very step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency." Inaugural Addresses of the Presidents of the United States, S. Doc. No. 101-10, at 2 (1989).

Against that backdrop, from the Nation's earliest days, the Framers considered references to God in official documents and official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of religious autonomy embodied in the First Amendment. Indeed, two documents to which the Supreme Court has often looked in its Establishment Clause cases — James Madison's Memorial and Remonstrance Against Religious Assessments (1785) and Thomas Jefferson's Bill for Establishing Religious Freedom (1779) — repeatedly acknowledge the Creator. See 5 The Founders' Constitution, supra, at 77, 82. Moreover, the Constitution itself refers to the "Year of our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. U.S. Const. art. I, § 7; id. art. VII.

The First Congress — the same Congress that drafted the Establishment Clause — adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See Marsh v. Chambers, 463 U.S. 783, 787 (1983). That same Congress, one day after the Establishment Clause was proposed, also urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." Lynch, 465 U.S. at 675 n.2 (citation omitted). President Washington responded by proclaiming November 26, 1789, a day of thanksgiving to "offer[] our prayers and supplications

to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." Id. (citation omitted). President Washington also included a reference to God in his first inaugural address: "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the council of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." S. Doc. No. 101-10, at 2.

Later generations have followed suit. Since the time of Chief Justice Marshall, the Supreme Court has opened its sessions with "God save the United States and this Honorable Court." See Engel, 370 U.S. at 446 (Stewart, J., dissenting). President Abraham Lincoln referred to a "Nation[] under God" in the historic Gettysburg Address (1863): "[T]hat 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." Every President who has delivered an inaugural address has referred to God or a Higher Power,[14] and every President, except Thomas Jefferson, has declared a Thanksgiving Day holiday.[15] In 1865, Congress authorized the inscription of "In God we trust" on United States coins. Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 517, 518. In 1931, Congress adopted as the national anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land

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[14] See Inaugural Addresses of the Presidents of the United States, supra; First Inaugural Address of William J. Clinton, 29 Weekly Comp. Pres. Doc. 77 (Jan. 20, 1993); Second Inaugural Address of William J. Clinton, 33 Weekly Comp. Pres. Doc. 63 (Jan. 20, 1997); First Inaugural Address of George W. Bush, 37 Weekly Comp. Pres. Doc. 209 (Jan. 20, 2001).

[15] See S. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2113 & nn. 174-182 (1996) (listing Thanksgiving proclamations).

Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause is just, And this be our motto 'In God is our Trust.'" See Engel, 370 U.S. at 449 (Stewart, J., dissenting). In 1956, Congress passed legislation to make "In God we trust" the National Motto, and provided that it be inscribed on all United States currency, above the main door of the Senate, and behind the Chair of the Speaker of the House of Representatives. See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. There thus "is an unbroken history of official acknowledgment by all three branches of government," as well as by the States, "of the role of religion in American life from at least 1789." Lynch, 465 U.S. at 674.

3. The Pledge of Allegiance's reference to God is a permissible acknowledgment of religion's role in the formation of the Nation.

That uninterrupted pattern of official acknowledgment of the role that religion has played in the foundation of the Country, the formation of its governmental institutions, and the cultural heritage of its people, counsels strongly against construing the Establishment Clause to forbid such practices. "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). In the Establishment Clause context in particular, the Supreme Court has recognized that actions of the First Congress are "'contemporaneous and weighty evidence'" of the Constitution's "'true meaning,'" Marsh, 463 U.S. at 790 (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)), and that "an unbroken practice . . . is not something to be lightly cast aside," Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970). See also The Pocket Veto Case, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . . ."); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936) (construction "placed upon the Constitution . . . by the men who were contemporary with its

formation" is "almost conclusive") (citation omitted).

In light of these principles, the Supreme Court has stated time and again that official acknowledgments of the Nation's religious history and enduring religious character do not violate the Establishment Clause. For example, the Court has long refused to construe the Establishment Clause so as to "press the concept of separation of Church and State to . . . extremes" by invalidating "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies." Zorach, 343 U.S. at 313. That is because "the purpose" of the Establishment Clause was not to "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens," County of Allegheny, 492 U.S. at 623 (O'Connor, J., concurring), or to compel official disregard of or stilted indifference to the Nation's religious heritage and enduring religious character. "It is far too late in the day to impose [that] crabbed reading of the Clause on the country." Lynch, 465 U.S. at 687. Indeed, the Supreme Court has "asserted pointedly" on five different occasions 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, 397 U.S. at 672; Schempp, 374 U.S. at 213; Zorach, 343 U.S. at 313. The Establishment Clause thus does not deny government actors the ability to acknowledge officially the pivotal role that religion has played in the founding and development of the Nation's governmental institutions.

Nor does it compel government actors to ignore that tradition. In Marsh v. Chambers, the Supreme Court upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. In so doing, the Court discussed numerous other examples of constitutionally permissible religious references in official life "that form 'part of the fabric of our society,'" id., such as "God save the United States and this Honorable Court," id. at 786. Similarly, in Schempp, the Court explained, in the course of

invalidating laws requiring Bible reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending with "So help me God." 374 U.S. at 213; see Lynch, 465 U.S. at 676 (referring favorably to the National Motto, "In God we trust").

Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678. Indeed, "[a]ny notion" that such measures "pose a real danger of establishment of a state church" would be "farfetched." Id. at 686. Instead, such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," id., simply takes note of the historical facts that "religion permeates our history," Edwards v. Aguillard, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of this Nation and in the founding of its government.

Accordingly, our Nation's history and traditions confirm what the Supreme Court and its individual Justices have repeatedly made explicit: the Pledge of Allegiance's reference to a "Nation under God" does not offend the Establishment Clause.

C. Plaintiffs' Other Challenges to 4 U.S.C. § 4 Are Meritless

Finally, Plaintiffs' claim that the Pledge statute violates the Free Exercise Clause is easily dismissed. The Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion." Bowen v. Roy, 476 U.S. 693, 700 (1986) (emphasis added); see also Engel, 370 U.S. at 430 (Free Exercise Clause violation "depend[s] upon [a] showing of direct governmental compulsion"); Tarsney v. O'Keefe, 225 F.3d 929, 935 (8th Cir. 2000) (same), cert. denied, 532 U.S. 924 (2001); Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058, 1066 (6th Cir. 1987) ("It is clear that governmental compulsion . . . is the evil prohibited by the Free Exercise

Clause."), cert. denied, 484 U.S. 1066 (1988). There is no compulsion here. The Pledge statute does not, on its face or otherwise, compel anyone to act or to refrain from acting; it merely sets forth the text of the Pledge. Plaintiffs do not contend otherwise — in fact, they concede that none of them "ha[s] been actually compelled to say the words, 'under God,' in the Pledge." Compl. ¶ 37. Accordingly, 4 U.S.C. § 4 does not implicate the Free Exercise Clause.[16] See Mozert, 827 F.2d at 1066 (mere "exposure" to classmates participating in challenged activity insufficient to establish compulsion absent proof that plaintiff-children were "required" to participate). For all of these reasons, Plaintiffs' facial challenge to 4 U.S.C. § 4 should be dismissed.[17]

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[16] Plaintiffs' RFRA claim fails for the same reason. RFRA prohibits the federal government from substantially burdening a person's exercise of religion — even if the burden results from a rule of general applicability — unless the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1(a)-(b). RFRA does not define "substantial burden," but the legislative history indicates that Congress "expect[ed] that the courts will look to free exercise cases . . . for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 103-111, at 8-9 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898. Accordingly, as in the Free Exercise Clause context, the hallmark of a "substantial burden" under RFRA is compulsion — which, as we have explained, is absent here. See Gary S. v. Manchester Sch. Dist., 374 F.3d 15, 21-22 (1st Cir. 2004) (where there is "no cognizable burden on religion" under the Free Exercise Clause, there is "no occasion to apply RFRA").

That Plaintiffs' RFRA claim must fail is further illustrated by the fact that the typical remedy for a RFRA violation — an exemption from an otherwise generally applicable law — makes utterly no sense here: the Pledge statute does not regulate Plaintiffs' conduct, so an exception would be meaningless. (Indeed, even if RFRA were enforceable against the school districts — which it is not, see City of Boerne v. Flores, 521 U.S. 507 (1997); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 35 n.4 (1st Cir. 2007) — the state Pledge-recitation statute has a built-in exception: student participation in Pledge exercises is voluntary, see N.H. Rev. Stat. Ann. § 194:15-c.)

[17] Plaintiffs' brief suggestion that the Pledge statute violates equal protection because its supposed "endors[ment] of the religious notion that God exists . . . creates a social environment where prejudice against Atheists . . . is perpetuated," Compl. ¶ 46, is an evident repackaging of their unsuccessful First Amendment claims that should be summarily rejected. As an initial matter, the existence of an objectionable "social environment," without specific harm to a concrete interest, is not a cognizable injury for Article III purposes. See Valley Forge, 454 U.S. at 485-86. Moreover, the Pledge statute is insusceptible to traditional equal protection analysis. First, it makes no classifications or distinctions whatsoever. See Wirzburger v. Galvin, 412 F.3d 271, 283 (1st Cir.

IV. THE PLEDGE OF ALLEGIANCE MAY BE RECITED IN PUBLIC SCHOOL CLASSROOMS

In addition to challenging 4 U.S.C. § 4 on its face, Plaintiffs contend that the Pledge statute is unconstitutional as applied to the voluntary recitation of the Pledge by public school students in the defendant school districts. In determining whether recitation of the Pledge in public school classrooms violates the Establishment Clause, the question is "whether government acted with the purpose of advancing or inhibiting religion" and whether reciting the Pledge has the "'effect' of advancing or inhibiting religion." Agostini v. Felton, 521 U.S. 203, 222-23 (1997); see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-08 (2000); cf. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) (there is "no single mechanical formula that can accurately draw the constitutional line in every case"). Voluntary recitation of the Pledge in public schools has no such impermissible purpose or effect.

A. The Purpose of Reciting the Pledge is to Promote Patriotism and National Unity

A practice violates the Establishment Clause's purpose inquiry if it is "entirely motivated by a purpose to advance religion." Wallace, 472 U.S. at 56; see Lynch, 465 U.S. at 680 (law invalid if "there [is] no question" that it is "motivated wholly by religious considerations"); cf. McCreary County v. ACLU of Ky., 545 U.S. 844, 863 (2005) (law invalid if it has a "predominant purpose of advancing religion"); Van Orden, 545 U.S. at 701 (2005) (Breyer, J., concurring in the judgment).

2005) ("[T]his is not the classic violation of equal protection in which a law creates different rules for distinct groups of individuals based on a suspect classification."); Sturm v. Clark, 835 F.2d 1009, 1016 (3d Cir. 1989) ("Government action cannot violate the equal protection clause if it does not create classifications among, or discriminate between, those affected."). Second, neither religion nor irreligion has ever been held to be a suspect classification. See Wirzburger, 412 F.3d at 285 & 283 n.6. Accordingly, even if the Court were to engage in equal protection analysis, it should find that the Pledge statute bears a rational relationship to the legitimate goals of fostering national unity and patriotism. See id. at 282-83, 285 (applying rationality review to First Amendment claims recast under the rubric of equal protection); infra at pages 37-40 (discussing legitimate goals of Pledge).

The schools districts' Pledge practices easily satisfy these Establishment Clause standards. As Plaintiffs recognize, see Compl. ¶¶ 22, 34, 67, the districts' Pledge practices implement a state statute requiring public school districts to "authorize a period of time during the school day for the [voluntary] recitation of the pledge of allegiance." N.H. Rev. Stat. Ann. § 194:15-c. The Supreme Court in Elk Grove made clear that reciting the Pledge is a "patriotic exercise" that is "designed to foster national unity and pride in those principles" symbolized by our flag. 542 U.S. at 6. More generally, the Court also has held that the promotion of patriotism and the instillation of shared values in children attending public schools is a "clearly secular purpose." Wallace, 472 U.S. at 56; see also Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 681, 683 (1986) ("[P]ublic education must prepare pupils for citizenship in the Republic" and must teach "the shared values of a civilized social order."). Indeed, Plaintiffs acknowledge these secular goals, observing that the Pledge's "purpose" is "to provide a means of demonstrating patriotism and engendering national unity." Compl. ¶ 71.

Plaintiffs suggest, however, that Congress inserted the phrase "under God" into the Pledge with the "purely religious" intent to "further (Christian) Monotheistic dogma." See, e.g., Compl. ¶¶ 35, 66. But the 1954 amendment of 4 U.S.C. § 4 hardly had any such single-minded purpose. The Committee Reports indicate that Congress viewed the amendment as a permissible acknowledgment that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954); see S. Rep. No. 83-1287, at 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. . . . Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports trace the numerous references to God in historical documents central to the founding and preservation of the

United States, from the Mayflower Compact to the Declaration of Independence to the Gettysburg Address. H.R. Rep. No. 83-1693, at 2; S. Rep. No. 83-1287, at 2.

The Reports further identify a political purpose for the amendment — to highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being," and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 83-1693, at 1-2; see S. Rep. No. 83-1287, at 2. Congress thus added "under God" to highlight the Framers' political philosophy concerning the sovereignty of the individual — a philosophy with roots in 1954, as in 1787, in religious belief — to serve the political end of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 83-1693, at 2; see S. Rep. No. 83-1287, at 2.

No doubt some Members of Congress may have been motivated, in part, to amend the Pledge because of their religious beliefs. Such intentions would not undermine the constitutionality of the Pledge, however, because "those 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 dignity of the human being.'" Elk Grove, 542 U.S. at 41 (O'Connor, J., concurring in the judgment) (citation omitted). Moreover, "[w]hatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context." Id. And, more broadly, the Establishment Clause focuses on "the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law." Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (emphasis added); see McGowan v. Maryland, 366 U.S. 420, 469 (1961)

(opinion of Frankfurter, J.). That is because, among other reasons, "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384 (1968).

Moreover, because this suit challenges contemporary Pledge recitation practices, the purpose inquiry must focus on the school districts' current reasons for leading willing students in voluntarily reciting the Pledge. In McGowan, the Supreme Court acknowledged that Sunday closing laws originally "were motivated by religious forces," 366 U.S. at 431, but nevertheless sustained those laws against Establishment Clause challenge because modern-day retention of the laws advanced secular purposes, id. at 434. The Court reasoned that, to proscribe laws that advance valid secular goals solely because they "had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state." Id. at 445; see also Freethought Soc'y v. Chester County, 334 F.3d 247, 261-262 (3d Cir. 2003). As we have shown, the modern-day purposes of the school districts' Pledge practices are secular. The New Hampshire Pledge-recitation statute, passed in 2002, expressly affirms the state legislature's view that daily, voluntary Pledge exercises reinforce the State's "policy of teaching our country's history" to elementary and secondary school students. N.H. Rev. Stat. Ann. § 194:15-c. Moreover, as Congress made clear in the course of reenacting the Pledge statute in 2002, the federal government's contemporary purpose for retaining the Pledge, including its reference to God, advances the legitimate, secular purpose of "acknowledgment of the religious heritage of the United States." H.R. Rep. No. 107-659, at 4 (2002), reprinted in 2002 U.S.C.C.A.N. 1304.

B. The Pledge Has the Secular Effects of Promoting Patriotism and National Unity

The schools' Pledge practices have the permissible secular effects of promoting national unity, patriotism, and an appreciation for the values that define the Nation. Plaintiffs acknowledge,

as they must, that a public school "certainly" has the "right to foster patriotism." Compl. ¶ 70. "National unity as an end which officials may foster by persuasion and example is not in question." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943); see Sherman, 980 F.2d at 444 ("Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that justify its survival. Public schools help to transmit those virtues and values.").

Recitation of the Pledge does not constitute an "endorsement" of religion or prayer to the kind of "objective observer" described in some of the Court's cases, see Santa Fe, 530 U.S. at 308; Good News Club v. Milford Cent. Sch., 533 U.S. 98, 118-19 (2001). There is no reasonable basis for perceiving such religious endorsement in the Pledge.[18] Taken as a whole, the Pledge is not a profession of religious belief, but a statement of allegiance to the Republic itself. See Van Orden, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment) (text of Ten Commandments on challenged monument, when viewed in context, "conveys a predominantly secular message").

1. The Pledge must be considered as a whole.

In Lynch, the Supreme Court emphasized that Establishment Clause analysis looks at religious symbols and references in their overall setting, rather than "focusing almost exclusively on the" religious symbol alone. 465 U.S. at 680. The Court in Lynch thus did not ask whether the government's display of a creche — a clearly sectarian symbol — was permissible. Instead, it analyzed whether an overall display that included both religious and other secular symbols of the winter holiday season conveyed a message of endorsement, and held that it did not. Id. at 680-86.

Likewise, in County of Allegheny, the Supreme Court analyzed and upheld the "combined

[18] By common understanding, a "pledge" of "allegiance" is a "promise or agreement" of "devotion or loyalty" "owed by a subject or citizen to his sovereign or government." Webster's 3d New Int'l Dictionary 55, 1739 (1993); see American Heritage Dictionary of the English Language 47, 1390 (3d ed. 1992).

display" during the winter holiday season of a Christmas tree, Liberty sign, and Menorah. 492 U.S. at 616. The Court looked at the content of the display as a whole, rather than focusing on the presence of the Menorah and the religious message that it would convey in isolation. Id. at 616-20. The fact that Congress added the phrase "under God" to a preexisting Pledge does not change this analysis. The city government in County of Allegheny had likewise added the Menorah, after the fact, to a preexisting holiday display. See id. at 581-82. Yet the Court focused its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. See id. at 616-20 & n.64.[19]

Read as a whole, the Pledge is not an endorsement of religion. Congress did not enact a pledge to a religious symbol or a pledge to God. Individuals pledge allegiance to "the Flag of the United States of America," and to "the Republic for which it stands." 4 U.S.C. § 4. The remainder of the Pledge is descriptive — delineating the culture and character of that Republic as a unified Country, composed of individual States yet indivisible as a Nation, established for the purposes of promoting liberty and justice for all, and founded by individuals whose belief in God gave rise to the governmental institutions and political order they adopted, which continue to inspire the quest for "liberty and justice" for each individual. See J. Bay, The Pledge of Allegiance: A Centennial History; 1892-1992, at 48-49 (1992) (discussing the "national doctrines or ideals" that inspired the text of the Pledge). The Pledge's reference to a "Nation under God," in short, is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the

[19] See also Zelman v. Simmons-Harris, 536 U.S. 639, 656-57 (2002) (Establishment Clause inquiry must consider all relevant programs, not just the specific program challenged); Wallace, 472 U.S. at 78 n.5 (O'Connor, J., concurring) (later addition of "under God" to the Pledge does not offend the Establishment Clause because it is an "acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future'").

individual, and its continuing demographic character — a statement that itself is simply one component of a larger, more comprehensive patriotic message. See Elk Grove, 542 U.S. at 31 (Rehnquist, C.J., concurring in the judgment) (the Pledge is a "promise [of] fidelity to our flag and our nation, not to any particular God, faith, or church"); Myers, 418 F.3d at 407.

2. Reciting the Pledge is not a religious exercise.

The Supreme Court repeatedly has made clear that not every reference to God amounts to an impermissible government-endorsed religious exercise. As explained above, it repeatedly has cited the Pledge as a quintessential example of a permissible reference to God. And it repeatedly has distinguished descriptive or ceremonial references to God, like that contained in the Pledge, from formal religious exercises like prayer and Bible reading. In Engel, for example, the Supreme Court struck down the New York public school system's practice of reciting a nondenominational Regents prayer because that formal "invocation of God's blessings" was a religious activity — "a solemn avowal of divine faith and supplication for the blessings of the Almighty." 370 U.S. at 424. The Court contrasted the Regents prayer with the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity," concluding that "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored." Id. at 435 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York's practice of preceding the prayer with recitation of the Pledge. See id. at 440 n.5 (Douglas, J., concurring).

Likewise, in striking down school prayer in Schempp, the Court noted, without a hint of disapproval, that the students also recited the Pledge of Allegiance immediately after the invalidated prayer. Schempp, 374 U.S. at 207. That is because, as Justice Brennan explained in his extended concurrence, "daily recitation of the Pledge of Allegiance . . . serve[s] the solely secular purposes

of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." Id. at 281 (Brennan, J., concurring). "The reference to divinity in the revised pledge of allegiance," he continued, "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'" Id. at 304; see Lee, 505 U.S. at 583 (striking down graduation prayer without suggesting that the Pledge, which preceded the prayer, was at all constitutionally questionable).

As those cases recognize, describing the Republic as a "Nation under God" is not the functional equivalent of prayer, or any other performative religious act. No communication with or call upon the Divine is attempted. The phrase is not addressed to God or a call for His presence, guidance, or intervention. Nor can it plausibly be argued that reciting the Pledge is comparable to reading a sacred text, like the Bible, or engaging in an act of religious worship. The phrase "Nation under God" has no such established religious usage as a matter of history, culture, or practice.

It is true that the Pledge is a "declar[ation] [of] a belief," Barnette, 319 U.S. at 631, but the belief declared is not monotheism; it is a belief in allegiance and loyalty to the United States Flag and the Republic that it represents. That is a politically performative statement, not a religious one. A reasonable observer, reading the text of the Pledge as a whole, cognizant of its purpose, and familiar with (even if not personally subscribing to) the Nation's religious heritage, would understand that the reference to God is not an approbation of monotheism, but a patriotic and unifying acknowledgment of the role of religious faith in forming and defining the unique political and social character of the Nation. See Elk Grove, 542 U.S. at 42 (O'Connor, J., concurring in the judgment) (the Pledge does not prefer one religion over another, "but instead acknowledges religion in a general way: a simple reference to a generic 'God'").

As Justice O'Connor further observed in Elk Grove, "one would be hard pressed to imagine

a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation." 542 U.S. at 42. Thus, ceremonial references to a generic "God" do not violate the Establishment Clause even though "some religions — Buddhism, for instance — are not based upon a belief in a Supreme Being." Id. Thus, "[t]he phrase 'under God,' conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system." Id.

Beyond that, it is impossible to distinguish the Pledge from other permissible acknowledgments of religion in public life. Even with respect to school children, for example, there is no coherent or discernible difference between inviting them to say the Pledge, rather than to sing The Star-Spangled Banner ("And this be our motto 'In God is our Trust.'"), or to memorize and recite the Gettysburg Address ("this nation, under God, shall have a new birth of freedom"), the National Motto ("In God we trust"), or the Declaration of Independence ("all men . . . are endowed by their Creator with certain unalienable Rights").

Moreover, a reasonable observer might well view the compelled omission of the familiar words "under God" from the Pledge, at this point in our Nation's history, as reflecting hostility toward religion — which itself is constitutionally impermissible. See, e.g., County of Allegheny, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment) (the Court "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion"); Lynch, 465 U.S. at 673 ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."); Schempp, 374 U.S. at 225 ("[T]he State may not establish a

'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'") (citation omitted).

3. The school districts' Pledge practices are not unconstitutionally coercive.

Plaintiffs acknowledge that the Pledge practices at issue do not involve the level of compulsion that would render them unconstitutional under West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). See Compl. ¶ 37. Although Plaintiffs claim that the Pledge practices nevertheless are unlawfully "coercive" under Lee v. Weisman, 505 U.S. 577 (1992), it is Barnette, not Lee, that establishes the relevant standard for analyzing whether a school's Pledge practice safeguards the "opt-out" rights of students.

Barnette involved a challenge by Jehovah's Witnesses to a policy that compelled public school students to salute the flag and recite the pre-1954 version of the Pledge. See 319 U.S. at 629 ("[f]ailure to conform is 'insubordination' dealt with by expulsion"). The Jehovah's Witnesses claimed the Pledge ceremony violated their religious beliefs by forcing them to salute a "graven image." Id. The Court agreed, and held that the Jehovah's Witnesses could not be compelled to salute the flag and recite the Pledge: "[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." Id. at 642.

Barnette thus makes perfectly clear, with specific reference to the Pledge, that it is only compelled recitation without the possibility of opting out — the coerced "confess[ion] by word or act," id. — that transgresses constitutional bounds. Mere exposure to classmates reciting the Pledge does not rise to the level of unconstitutional coercion. The Elk Grove majority recognized this point: "The Elk Grove Unified School District has implemented the state law by requiring that '[e]ach elementary school class recite the pledge of allegiance to the flag once each day.' Consistent with

our case law, the School District permits students who object on religious grounds to abstain from the recitation." 542 U.S. at 7-8 (citing Barnette). Barnette thus forecloses Plaintiffs' claim of unconstitutional coercion.[20]

The coercion principles applied in Lee "have no relevance here, because the Pledge is a patriotic utterance, not a religious one." Habecker v. Town of Estes Park, 452 F. Supp. 2d 1113, 1124 (D. Colo. 2006) (rejecting Establishment Clause challenge). In Lee, the Supreme Court held that the Establishment Clause proscribes prayer at public secondary school graduation ceremonies. See 505 U.S. at 599. What made those prayers unconstitutionally coercive, however, was their character as a pure "religious exercise" and the government's "pervasive" involvement in institutionalizing the prayer, to the point of making it a "state-sponsored and state-directed religious exercise." Id. at 587. Coercion thus arose because (i) the exercise was so profoundly religious that even quiet acquiescence in the practice would exact a toll on conscience, id. at 588 ("the student had no real alternative which would have allowed her to avoid the fact or appearance of participation"); and (ii) the force with which the government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well, id. at 592-94.

Those concerns have little relevance here. As the Supreme Court made clear in Elk Grove, reciting the Pledge "is a patriotic exercise designed to foster national unity and pride" in the principles the flag symbolizes. 542 U.S. at 6. It is not a religious exercise at all, let along a core

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[20] Although the claim in Barnette was discussed in free speech terms, the Jehovah's Witnesses objected to reciting the Pledge based on their religious views. See Barnette, 319 U.S. at 629, 633 & n.13. Thus, while Plaintiffs here raise Establishment Clause claims, Barnette provides the controlling standard. See Elk Grove, 542 U.S. at 8 (citing Barnette). Indeed, the government would have no greater right to coerce political orthodoxy (the issue in Barnette) than it would to coerce religious orthodoxy (the issue here). See Barnette, 319 U.S. at 642 ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.") (emphasis added).

component of worship like prayer. See id. at 31 & n.4 (Rehnquist, C.J., concurring in the judgment) (phrase "under God" in the Pledge does not "convert[] its recital into a 'religious exercise' of the sort described in Lee"); id. at 44 (O'Connor, J., concurring in the judgment) ("Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as reciting or listening to the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.").

Plaintiffs allege that "opting out" of the Pledge recital would make students feel like political "outsiders." See Compl. ¶ 38. But the government does not make "religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Whatever "incidental" benefit might befall religion from the government's acknowledgment of the Nation's religious heritage does not implicate the Establishment Clause. 515 U.S. at 768 (opinion of Scalia, J.). Put another way, the Establishment Clause is not violated just because a governmental practice "happens to coincide or harmonize with the tenets of some or all religions." McGowan, 366 U.S. at 442; see also Lynch, 465 U.S. at 683.

Second, any analysis of the alleged coercive effect of voluntary recital of the Pledge must take into account the Supreme Court's repeated assurances that the "many manifestations in our public life of belief in God," Engel, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," Marsh, 463 U.S. at 792, including in public school classrooms. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, "has become embedded" in the American consciousness and "become part of our national culture." Dickerson v. United States, 530 U.S. 428, 443 (2000). Public familiarity with the Pledge's use as a patriotic exercise and a solemnizing ceremony for public events ensures both that

the reasonable observer, familiar with the context and historic use of the Pledge, will not perceive governmental endorsement of religion at the mere utterance of the phrase "under God," and that voluntary recitation of the Pledge has no more coercive effect than does use of currency that bears the National Motto "In God we trust." See Elk Grove, 542 U.S. at 38 (O'Connor, J., concurring in the judgment) (in the 50 years since Congress added the words "under God" to the Pledge, "the Pledge has become, alongside the singing of The Star-Spangled Banner, our most routine ceremonial act of patriotism"); Van Orden, 545 U.S. at 702-03 (Breyer, J., concurring in the judgment) (passage of 40 years without legal challenge "suggest[s] more strongly than can any set of formulaic tests that few individuals . . . are likely to have understood the [Ten Commandments] monument as . . . a government effort . . . primarily to promote religion over nonreligion").

Finally, the Pledge's brief reference to God represents a historical fact: that our Nation was founded on the principle that individuals have inalienable rights given by God that no government may take away. This Nation's history has uniquely religious roots, and it is wholly proper to teach that history and recognize its import through the Pledge. "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203, 235 (1948).

Thus, public schools may teach not just that the Pilgrims came to this country, but also why they came. They may teach not just that the Framers conceived of a governmental system in which power and inalienable rights resided in the individual, but also why they thought that way. They may teach not just that abolitionists opposed slavery, but also why they did. See Edwards, 482 U.S. at 606-07 (Powell, J., concurring) ("I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."). The reference to a "Nation under God" in the

Pledge of Allegiance is an official and patriotic acknowledgment of what all students — Christian, Jewish, Muslim, Hindu, Buddhist, or atheist — may properly be taught in the public schools. Voluntary recitation of the Pledge by willing students thus fully comports with the Establishment Clause.[21]

CONCLUSION

For all the foregoing reasons, the Federal Defendants' motion to dismiss should be granted.

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Respectfully submitted,

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[21] Plaintiffs' claims that the school districts' Pledge practices violate the Free Exercise Clause, RFRA, and the Equal Protection Clause fail for the reasons discussed supra at pages 35-36 and notes 16-17.

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Michael A. Newdow and Rosanna T. Fox, counsel for the Plaintiffs, and David Bradley, counsel for the School District Defendants.

I further certify that on January 18, 2008, a true and correct copy of the foregoing document was sent via e-mail to Nancy Smith, counsel for proposed intervenor-defendant the State of New Hampshire, at Nancy.Smith@doj.nh.gov.

/s/ *Eric B. Beckenhauer*
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