UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Docket No. 09-2473

THE FREEDOM FROM RELIGION FOUNDATION; PAT DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3; JAN DOE, Parent and Next Friend of Doechild-1, Doechild-2 and Doechild-3

Plaintiffs - Appellants

v.

UNITED STATES; THE STATE OF NEW HAMPSHIRE; MURIEL CYRUS; A.C., Minor; J.C., Minor; K.C., Minor; S.C., Minor; E.C., Minor, R.C., Minor; A.C., Minor; D.P., Minor; MICHAEL CHOBANIAN; MARGARETHE CHOBANIAN; MINH PHAN; SUZU PHAN; KNIGHTS OF COLUMBUS

Defendants - Appellees

DRESDEN SCHOOL DISTRICT; HANOVER SCHOOL DISTRICT

Defendants

United States District Court for the District of New Hampshire

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BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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JURISDICTIONAL STATEMENT

The State of New Hampshire (hereinafter "State") does not contest the jurisdictional statement by Plaintiffs-Appellants, the Freedom From Religion Foundation; Pat and Jan Doe, Doechild-1, Doechild-2 and Doechild-3 (hereinafter collectively referred to as "FFRA" and/or "Does").

STATEMENT OF ISSUES

Did the trial court correctly determine that RSA 194:15-c, the New Hampshire School Patriot Act, which requires that each public elementary and secondary school in the State, as a continuation of the policy of teaching our country's history, authorize a period of time during the school day for voluntary recitation of the Pledge of Allegiance as codified in 4 U.S.C. § 4, is constitutional?

STATEMENT OF CASE

Apart from the legal arguments concerning the nature of the case contained in the first two paragraphs, the State does not dispute the procedural history of the case stated by the FFRA, except to add the following clarifications and additional facts.

In addition to the reply to the objection to the initial Motion to Dismiss filed by the State, which is correctly cited by the FFRA (*see* Dx 41[1]), the other intervenors, the United States of America (hereinafter "United States") and Muriel Cyrus A.C., Minor; J.C., Minor; K.C., Minor; S.C., Minor; E.C., Minor, R.C., Minor; A.C., Minor; D.P., Minor; Michael Chobanian; Margarethe Chobanian; Minh Phan; Suzu Phan; Knights Of Columbus (hereinafter "Cyrus"), also filed replies. *See* Dx 42 and 43.

The initial motion to dismiss by the United States Congress and the United States as defendants was granted. *See* Dx 44, p. 19. However, the United States remained in the case as an intervenor to defend the constitutionality of the Pledge of Allegiance, 4 U.S.C. § 4 (hereinafter "Pledge"). The intervenors' motions to dismiss were otherwise denied without prejudice because the school districts, the only remaining actual defendants, had not joined the motions to dismiss. *See* Dx

[1] The term "Dx" herein refers to the Document number of the pleading or order in the USDC electronic docket for this case, attached as part of Appellants' Addendum, which will be referred to as "ADD." References to Appellants' Appendix will be to "App."

44, p. 20-22. The court stated "[A]ccordingly, the State of New Hampshire's motion to dismiss is denied, but with the understanding that argument presented in that motion relating to the constitutionality of RSA 194:15-c will be taken into account at such time as that issue is joined by the remaining parties in interest." *Id.* at 21.

On September 17, 2008 the school district defendants filed a motion to dismiss, stating that for purposes obtaining resolution of these issues, it adopted the arguments set forth in the United States and State motions to dismiss, Dx 16 and 14. *See* Dx 46. The FFRA subsequently amended the complaint. Dx 52. The State then supplemented its earlier motion to dismiss and the United States and Cyrus filed renewed motions to dismiss incorporating their initial motions. *See* Dx 53, 55 and 56. The FFRA objected. Dx 57. The United States and Cyrus filed replies. Dx 58 and 59.

The order granting the motions to dismiss identified the motions granted as Dx 46, 55 and 56. The State sought clarification that its motion to dismiss had likewise been granted, particularly as the school districts had incorporated it in their motion to dismiss. Dx 65. The motion to clarify was denied, however, the court stated, "To the extent the state, as intervenor, supported the motion to dismiss that was granted, the state's position prevailed."

FFRA appealed only the order of September 30, 2009.

STATEMENT OF FACTS

I. Complaint Factual Allegations

The plaintiff-appellants in this action are Jan Doe and Pat Doe and their three children. At the time the complaint was filed, the eldest Doe child attended a middle school jointly administered by the Hanover and Dresden school districts. The two younger Doe children were enrolled in a public elementary school operated by the Hanover district. Jan and Pat Doe describe themselves as atheist and agnostic, respectively. Both are members of the Freedom from Religion Foundation, which is also a plaintiff.[2] Each of the Doe children is said to be either an atheist or an agnostic, and each is said to either deny or doubt the existence of God. First Am. Complt. Dx 48, ¶ 5-10, 37-41.

The Pledge of Allegiance ("Pledge") is routinely recited in the Doe childrens' classrooms, under the leadership of their teachers. First Am. Complt. Dx 48, ¶ 43. As provided by Congress, the Pledge reads: I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all. 4 U.S.C. § 4. While the statute prescribes the text of the Pledge, and describes the preferred

[2] The intervenors raised the issue of the standing of the FFRA to be a plaintiff in this suit. The issue was never decided below, as the court ruled that the intervenors had standing only to address the issues of the constitutionality of 4 U.S.C. § 4 and RSA 194:15-c. *See* Dx 44. As these issues are dispositive, the State does not address standing in this brief. However, as argued below, the State contends that the FFRA does not have standing.

formalities attendant to its recitation, the statute includes no other mandate. That is, the statute does not compel recitation of the Pledge under any circumstances or by any person.

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

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

RSA 194:15-c.

Appellants concede that no Doe child has been compelled to recite the Pledge or its included phrase, "under God." Complt. Dx 1, ¶ 37. The Doe parents asked the principals of their childrens' schools to provide assurances that the Pledge would not be recited in their childrens' classes, but have received no such assurance. First Am. Complt. Dx 48, ¶ 46.

II. State and Federal Constitutional and Legislative History Background

A. New Hampshire

New Hampshire history establishes the secular, patriotic purpose of the statutes and practices related to the national flag and the Pledge. Shortly after the revision to the Pledge by Congress in 1954, the New Hampshire legislature voted to commemorate Flag Day on June 14, 1955, noting that at a time when the nation was in a cold war that threatened the continuance of our principles of freedom and democracy, it "is most appropriate that we vigorously reaffirm our continued and everlasting belief in those ideals and institutions for which our great banner stands . . ." N.H. Senate Journal, 1955, Resolution re Flag Day, p. 911, S. Appx 109. [3]

The legislative history of the New Hampshire School Patriot Act, RSA 194:15-c, adopted in 2002, and its predecessor statute, RSA 194:15-a, adopted in 1975, make clear that the purpose of adopting these statutes, that first encouraged and then in 2002 required, that school children be allowed to recite the Pledge had nothing to do with monotheistic religion and everything to do with fostering patriotism and respect for our nation and flag.

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[3] The New Hampshire historical documents and legislative history cited herein are published as indicated. However, as some of these publications are obscure and may not be readily available, the State has provided an Appendix to this Brief containing the significant historical documents cited. The State's Appendix will be referred to herein as "S. Appx."

HB 639, introduced in 1973, sought to permit, but did not mandate, that school districts to set aside a time for voluntary participation in reciting the Pledge of Allegiance as "an affirmation of our many freedoms." N.H. House Journal, 1973, re HB 639, pp. 1089-91, 1114, S. Appx 120. The bill also provided that school districts could set aside time for the Lord's Prayer. When this bill was sent to the Senate, the provisions regarding the Lord's Prayer generated considerable debate and resulted in referral to the New Hampshire Supreme Court for advice on whether the bill would be constitutional as proposed or under a proposed Senate amendment. N.H. Senate Journal, 1973, re HB 639, pp. 2046-47, S. Appx 126. Although the New Hampshire Supreme Court was critical of the proposal regarding the Lord's Prayer, as to the Pledge, it opined;

> In our opinion neither the encouragement nor authorization of voluntary silent meditation nor a voluntary pledge of allegiance to the flag violates the first amendment to the Constitution of the United States as interpreted by the Supreme Court of the United States. *Opinion of the Justices,* 108 N.H. 97, 228 A.2d 161 (1967). . . . In the event the proposed senate amendment should be enacted, it should explicitly provide for a voluntary pledge of allegiance as well as voluntary silent meditation in order to avoid the possibility of conflict with the Constitution of the United States. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), it was held that a school child may not be compelled to pledge allegiance to the flag.

Opinion of the Justices, 113 N.H. 297, 301-02 (1973).

The 1973 Legislature did not agree on a version of HB 639, so the bill failed. N.H. House Journal, 1973, re HB 639, pp. 2089-90, S. Appx 120; N.H. Senate Journal, 1973, re HB 639, pp. 2504-06, S. Appx 126. However, the identical proposal returned in 1975 as HB 915 and was adopted in N.H. Laws 1975, ch. 225. The House adopted HB 915 over a committee recommendation that it be referred to interim study. N.H. House Journal, 1975, re HB 915, p. 669, S. Appx 136. In the Senate, there was a great deal of discussion again about the part of the bill that allowed the Lord's Prayer as a voluntary practice and an attempt to amend that section to refer to voluntary meditation failed. N.H. Senate Journal, 1975, re HB 915, pp. 515-521, S. Appx 137-42. Regarding the section authorizing recitation of the Pledge, there was little specific discussion, except for Senator Sanborn's concern that Pledge would still be at the option of the school districts, as he was gravely concerned that there was a trend of increased lack of respect for our country as school children no longer heard the Pledge except when they came to the state house. *Id.* at S. Appx 141. As adopted in 1975, RSA 194:15-a provided that, as a continuation of the policy of teaching our country's history and as an affirmation of freedom of religion in this country, a school district may authorize voluntary participation in the recitation of the Lord's Prayer and the Pledge of Allegiance to the flag by elementary students. RSA 194:15-a (1975), S. Appx 144.

In 2002 the New Hampshire School Patriot Act was introduced in HB 1446, which deleted the Pledge from the existing RSA 194:15-a and created a separate section containing the requirement that school districts authorize time in elementary and secondary schools for the voluntary recitation of the Pledge. As originally proposed and adopted in the House, the bill stated that pupils were to be reminded that the Pledge is an affirmation of the freedoms we enjoy and is recited in remembrance of those who have sacrificed their lives in defense of our country and in the service of freedom. It also proposed that, although recitation would be voluntary, any student not choosing to participate be required to stand in respect for the flag. *See* HB 1446, As Introduced, App. 30. The House rejected the committee recommendation that the bill was inexpedient to legislate and adopted the bill. N.H. House Journal, 2002, re HB 1446, pp. 544-52, S. Appx 146. An amendment was proposed and adopted in the Senate that allowed pupils not participating to either stand silently or to remain seated.[4] N.H. Senate Journal, 2002, re HB 1446, pp. 945-68, S. Appx 155. There was considerable debate on the bill and several proposed amendments. *Id*. During that debate, Senator O'Hearn made the following comments:

[4] The Senate also deleted the sentence stating that the purpose was in remembrance of those who have sacrificed their lives. Senate testimony indicated that some objected to this purpose statement as being too narrow. N.H. Senate Journal, 2002, re HB 1446, p. 946, S. Appx 156.

> I am going to take just a couple of minutes and see if I can give a bit of a history lesson trying to get to the root of the Pledge of Allegiance and "In God we Trust." The pledge tracks Lincoln's Gettysburg Address which ends with a wish "that this nation, under God, shall have a new birth of freedom and that the government of the people by the people, for the people shall not perish from the earth." Justice Brennan of the Supreme Court wrote, "we have simply interwoven the motto 'In God we Trust' so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the first amendment prohibits. . ." The reference to divinity in the revised Pledge for example, may merely recognize the historical fact that our nation was believed to have been founded under God. Thus reciting the Pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg address which contains an allusion to the same historical fact.

Id. S. Appx 167-68. It is also apparent from the available legislative history that no New Hampshire legislator saw the enactment of a statute requiring school districts to authorize time for voluntary recitation of the Pledge to be an affirmation of any religion. *Id.* S. Appx 155-78. HB 1466 was ultimately adopted as N.H. Laws 2002, ch. 277. Shortly thereafter in 2002, Senate Resolution 2, supporting retention of the phrase "under God" in the Pledge, was also adopted by unanimous vote and sent to Washington. N.H. Senate Journal, 2002, re Senate Resolution 2, p. 1365, S. Appx 179.

As Senator O'Hearn noted when RSA 194:15-cwas being debated, references to the political philosophy underlying the freedoms our nation and state were founded on are firmly entrenched in New Hampshire history as well. The State therefore provides the following history related to the New Hampshire

constitution related to the separation of church and state and education. While some of the practices that the earliest settlers and state constitutional founders during the first century of statehood viewed as consistent with the inalienable rights of humanity have since properly been abandoned, the historical context is important to demonstrating the founders' intent and political philosophy.

From the earliest colonial times, New Hampshire, at that time part of the Massachusetts Bay Colony, viewed "the free fruition of such liberties Immunities and priveledges as humanitie, Civilitie and Christiantie call for as due to every man . . ." as flowing from their Christian heritage and essential to stable government. Massachusetts Bay Colony, Body of Liberties 1641, Laws of New Hampshire, Vol. 1, Provinical Period, 1679-1702, Appx. D, pp. 748-65, S. Appx 1-9. The Liberties contained a number of provisions regarding the relationship between religion and government, for example, that silence on conscientious grounds was allowed. *Id*. Liberty 65 further defined the relation between church and civil authority, providing for equal rights for all sects. *Id*.

In protecting these precious liberties against tyranny by the British crown, the New Hampshire colonists clearly realized they were laying their lives on the line. In 1776, in anticipation of the Declaration of Independence by the Continental Congress, the New Hampshire General Congress required that every adult white male in New Hampshire be asked to sign a declaration to "show our

Determination in joining our American Brethern in defending the Lives, Liberties and Properties . . .” that stated that they would “to the utmost of our Power, at the Risque of our Lives and Fortunes . . .” oppose the British. The declaration was signed and returned by 8,199 of the 8,972 eligible male citizens of New Hampshire. Returns of the Association Test, 1776, New Hampshire Papers, Journal of the House, Vol. 8, pp. 204-206, S. Appx 10-12. Further, the members of the state legislature, convened to govern during the revolution, took an oath renouncing any allegiance to the crown of Great Britain. Oath of Allegiance, Third NH legislature 1777, New Hampshire Papers, Journal of the House, Vol. 8, pp. 714-15, S. Appx 13-15.

The New Hampshire Constitution adopted in 1792[5] provided that among the “natural” unalienable rights is the right of conscience. N. H. CONST. pt. 1, art. IV (1792), S. Appx. 20. The natural rights further included the right to worship God according to the dictates of the individual’s own conscience. N. H. CONST. pt. 1, art. V (1792), S. Appx 20. However, consistent with the practice in many other states at the time, it also provided that all members of the House of Representatives, Senate and Governor must be landowners and of the “protestant religion.” N.H. CONST. pt. 2, House of Rep., Senate, Executive Power, Governor

[5] There was a prior Constitution, adopted in 1784, which was only in effect for 8 years.

(1792), S. Appx 28, 30, 33.[6] The Oaths and Subscription provision provided for oaths to be made ending in "So help me God," unless the person be a Quaker or conscientiously object to swearing. N.H. CONST. pt. 2, Oaths and Subscription, *et al*. (1792), S. Appx 40.

The 1792 New Hampshire Constitution also had a version of the current day Part 1, Article 6 that set out the founders' belief that "morality and piety, rightly grounded on evangelical principles" was essential to government and that encouraged and allowed the legislature to authorize towns and parishes to support "publick Protestant teachers of piety, religion and morality." N.H. CONST. pt. 1, art. VI (1792), S. Appx 21. The New Hampshire legislature promptly gave the towns and parishes such authority. N.H. Laws 1791, ch. 41, Laws of New Hampshire, Vol. 5, First Const. Period, 1784-1792, S. Appx 18-19. Part 2 of the 1792 New Hampshire Constitution also contained the forbearer of current day N.H. CONST. pt. 2, art. 83, enshrining in the state constitution the obligation for the "Encouragement of Literature" in all "seminaries and publick schools; to encourage private and public institutions . . ." for the promotion of agriculture, arts, sciences . . . and natural history of the country." N.H. CONST. pt. 2, Encouragement of Literature (1792), S. Appx 39-40.

[6] The Part Second of the 1792 Constitution did not have section numbers.

New Hampshire adopted a position of encouraging education, including private and public religious education early on. One of the most prestigious education institutions of the state, Dartmouth College, was founded in 1769 by Reverend Eleazar Wheelock, a Congregational minister, by royal charter for the express purpose of spreading Christian knowledge.[7] One of the first acts of New Hampshire legislators after the revolutionary war was to provide a tract of land to "that useful Seminary." N.H. Laws 1789, ch. 46, Laws of New Hampshire, Vol. 5, First Const. Period, 1784-1792, p. 396, S. Appx 16.[8]

In one of the earliest cases of the newly constituted State of New Hampshire, the court upheld Part 1, Article VI and explained the meaning of various constitutional provisions regarding religion, including N.H. CONST. pt. 1, art. VI (1792). *See Muzzy v. Wilkins, Smith*, (N.H.) 1 (1803), S. Appx 44-82. The parish of Amherst had contracted with a Congregational minister, Mr. Barnard as the public teacher for the district, and Mr. Muzzy, a Presbyterian, objected to the tax levied for Barnard's support. In the lengthy opinion, after emphasizing the centrality of the constitutional provisions protecting individual rights of conscience, the importance of government abstaining from dictating belief, and the equality of all sects, Justice Smith summarized the provisions of Part I, Art. VI. *Id.*

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[7] *See* Dartmouth College Charter, http://.dartmouth.edu/~govdocs/charter.htm.

[8] It is interesting to note that a large part of the town of Hanover, in which the school district giving rise to this lawsuit is located, was within the land grant to "that useful seminary" Dartmouth College.

at 11. Commenting on the clause that exempts members of other sects from support of such public teachers the court stated:

> And here it may be useful to observe that, if this clause had been omitted altogether, there would have been neither any violation of the rights of conscience, nor any proper religious establishment in the State.
> A religious establishment is where the State prescribes a formulary of faith and worship for the rule and government of all subjects. (Citation omitted). Here the State did neither.
> . . . .
> The Constitution, viewing religion in some form or other as useful if not indispensably necessary to make good subjects; not being able to decide between contending sects as to which is most agreeable to the Word of God, the infallible standard, but viewing them all as equally good for the purposes of civil society, because they inculcate the principles of benevolence, philanthropy, and the moral virtues (citation omitted) considering, too, that public instruction in the general principles of religion and morality can only be maintained by enabling corporate bodies to support and maintain it . . .confers the powers in question.
> . . . .
> Public instruction in religion and morality, within the meaning of our Constitution and laws, is to every purpose a civil, not a spiritual institution.

Id. at 12-14, S. Appx 56-58.

In 1853 the New Hampshire Senate and House passed a resolution calling upon the next constitutional convention to revise the constitutional requirement that state legislators and the governor be Protestant. N.H. Laws 1853, ch. 1322, p. 1246, S. Appx 83. The "religious test" for state office was removed from the Constitution in 1877. N.H. CONST. pt. II (1877), S. Appx 84-106. However in

the 1877 amendments, Part I, Article 6 remained unchanged. Part II, Article 82[9] added the sentence "Provided nevertheless, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination." N.H. CONST. pt. II, art. 82 (1877), S. Appx 84-106.

It was not until 1968 that Part I, Article 6 was amended to its current form which provides:

> As morality and piety, rightly grounded on high principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection; and as the knowledge of these is most likely to be propagated through a society, therefore, the several parishes, bodies, corporate, or religious societies shall at all times have the right of electing their own teachers, and of contracting with them for their support or maintenance, or both. But no person shall ever be compelled to pay towards the support of the schools of any sect or denomination. And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.

N.H. CONST. pt. I, art. 6 (1968), S. Appx 112.

Although New Hampshire's constitutional provisions that allow for frequent constitutional conventions have resulted in frequent revisiting of the state constitution,[10] the delegates have taken their task most seriously and have reiterated the relationship between the limited form of government and personal freedoms that we enjoy and a higher source for that "organic law." "There can be

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[9] In subsequent revisions renumbered as Article 83.

[10] Prior to 1968 see N.H. CONST. pt. II, art. 98, subsequently see N.H. CONST. pt. II, art. 100.

no higher duty come to citizens of a state than to be charged by its people with examination and revision of its organic law – that instrument that has unified government and the elements of prosperity; that has voiced the stern integrity, reverence of Deity, and crowding energy that from feeble beginnings have developed a prosperous commonwealth." Journal of the Constitutional Convention of 1902, Kent, December 2, 1902, p. 3, S. Appx 107. Respect for the nation's flag has been an integral part of the state constitutional conventions. Indeed, the Convention of 1964 made a point of selecting a delegate each day to lead the Convention in the salute to the flag. Journal of the Constitutional Convention of 1964, May 13, 1964, p. 27, S. Appx 110.

B. United States

Although the Pledge of Allegiance was first authored in 1892, it was not part of any law until 1942. In 1942, as part of an overall 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. H.R. Rep. No. 2047, 77th Cong., 2d Sess. 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess. 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, ch. 435, § 7, 56 Stat. 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, ch. 297, § 7, 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 amendment "is not an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 1693, 83d Cong., 2d Sess. 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. 1287, 83d Cong., 2d Sess. 2 (1954).

In 2002, Congress considered again the words "under God" in the Pledge. The 2002 legislation made extensive findings about the historic role of religion in the political development of the Nation, reaffirmed the text of the Pledge as it has "appeared . . . for decades," and repeated Congress's judgment that the legislation 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, §§ 1-16, 116 Stat. 2057-60.

SUMMARY OF ARGUMENT

RSA 194:15-c, the New Hampshire School Patriot Act, which requires that each public elementary and secondary school in the State, as a continuation of the policy of teaching our country's history, authorize a period of time during the school day for voluntary recitation of the Pledge of Allegiance as codified in 4 U.S.C. § 4, is constitutional.

The trial court correctly focused its analysis on the New Hampshire Pledge statute, RSA 194:15-c, finding that it has a clear, undisputed secular legislative purpose. It was enacted to enhance instruction in the Nation's history and to foster a sense of patriotism. It is consistent with New Hampshire history emphasizing the concept that government is limited by the inalienable rights of humanity, which derive from a source greater than any government. The primary effect neither advances nor inhibits religion. Appellants concede that there is no basis to argue that it fosters excessive government involvement with religion. In other words, RSA 194:15-c satisfies all three prongs of the *Lemon* test. *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

Likewise, RSA 194:15-c passes the endorsement and coercion tests. The New Hampshire Patriot Act does not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion, or any particular religious belief, is favored or preferred. The brief,

historical reference to "under God" in the Pledge does not transform the patriotic activity of honoring the flag into a prayer nor does it require belief any particular concept of God or any religion. The trial court correctly characterized the words "under God" in the Pledge as meaning; "[T]oday, the words remain religious words, but plainly fall comfortably within the category of historic artifacts – reflecting a benign or ceremonial civic deism that presents no threat to the fundamental values protected by the Establishment Clause."

If the focus is the Pledge statute, 4 U.S.C. § 4, the court should still find that there is no Establishment clause violation for all of the reasons previously stated. As with the New Hampshire statute, the purpose of the Pledge is a patriotic affirmation of allegiance to the values that the nation is founded upon. Precisely because today the concept of limited government and personal rights may be so firmly embedded in our culture that we take them for granted, the words serve an important purpose in reminding us that it was not always so. The Founders risked their lives to establish the inalienable rights imbedded in the constitution, believing that those rights derive from an organic, higher source. They had to identify a source that a future government could not just legislate out of existence to convince the colonists they were worth fighting for. As the New Hampshire history presented herein demonstrates, over 90% of the male inhabitants pledged

their lives and fortunes to do exactly that. Returns of the Association Test, 1776, New Hampshire Papers, Journal of the House, Vol. 8, pp. 204-06, S. Appx 10-12.

The Pledge must be considered as a whole. The trial court properly rejected FFRA's argument that the only words that should be considered are the two words "under God," while ignoring the context in which they are set. The Pledge and the New Hampshire Patriot Act do not require that anyone pledge allegiance "to God." The allegiance being asked for is to the flag and to the Untied States.

Likewise, the court should be able to rely on the statements by the Supreme Court that the Pledge can be considered a baseline of what is acceptable in public acknowledgment of the role of religion in the establishment of our nation and its value to society. The Supreme Court's analysis of the Pledge in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) 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," that the Pledge of Allegiance, and similar references in pubic laws and ceremonies, are constitutional.

The Appellants' Free Exercise claim fares no better. Analysis consistent with this court's recent decision in *Parker v. Hurley*, 514 F.3d 87 (1st Cir. 2008) demonstrates that answering the question of "whether the plaintiff's free exercise is interfered with at all" shows no constitutionally significant burden on Appellants' rights. RSA 194:15-c and the Pledge do not interfere the Doe parents or children's right to believe and profess whatever religious doctrine they desire.

The equal protection argument also fails. As the trial court found, RSA 194:15-c does not require different treatment of any class of people because of their religious beliefs, nor does it give preferential treatment to any particular religion. It gives the same right to participate, or not, for or any reason or for no reason at all to everyone. Any disparate treatment claim has been waived as no argument in support of such a claim is made in Appellants' brief.

Therefore, the trial court correctly determined that RSA 194:15-c, the New Hampshire School Patriot Act, is constitutional.

ARGUMENT

I. Standard of Review

The State agrees with the Appellants' statement of the standard or review.

II. The Trial Court Correctly Found RSA 194:15-c Constitutional Under Any Of The Possible First Amendment Establishment Clause Tests

As the trial court noted, although the *Lemon* test has frequently been criticized, the First Circuit has, within the last decade, endorsed its continued application. *Boyajian v. Gatzunis*, 212 F. 3d 1, 4 (1st Cir. 2000) (citing *Lemon v. Kurtzman*, 403 U.S. at 612-13). Additionally, the Ninth Circuit, within the last month, issued its decision in *Newdow v. Rio Linda School District*, __ F.3d __, 2010 WL 816986 (March 11, 2010), which applied the *Lemon* test to uphold a similar California statute requiring the Pledge in California schools.[11] Therefore the State starts the analysis below with the *Lemon* test and then turns to addressing the two alternative tests that courts have utilized in establishment clause cases, the "endorsement test" and the "coercion test." *Newdow*, 2010 WL 816986 at *6. To

[11] This decision expressly rejects the proposition that the earlier Ninth Circuit decision in *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2002) (referred to as *Newdow III*) remained good law for any purpose. 2010 WL 816986 at 25-26. Therefore, the FFRA's arguments touting *Newdow III* as the only "principled" decision which should be controlling here should be disregarded. FFRA Brief p. 35. Likewise, the trial court here (ADD 24) would no longer need to choose between the approaches in *Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005) and *Sherman v. Community Consol. School Dist.*, 980 F.2d 437 (7th Cir. 1992) and *Newdow III*, as all of the appellate courts that have addressed the issue now agree that state statutes providing for voluntary recitation of the Pledge in schools are constitutional.

the extent that FFRA argues that there are separate tests referred to as the "neutrality" or "imprimatur, the outsider and divisiveness" tests, these are not separate tests that have been adopted by any court, rather they are factors mentioned in describing the other tests and will be addressed therein.

A. The Lemon Test

The trial court correctly determined that RSA 194:15-c passes the *Lemon* test. The *Lemon* test is a three-pronged test. "First, the legislature must have adopted the law with a secular purpose. Second, the statute's principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not result in an excessive entanglement with religion." *Lemon*, 403 U.S. at 612-13; *see also Van Orden v. Perry*, 545 U.S. 677, 686, n.6 (2005); *Edwards v. Aquillard*, 482 U.S. 578, 583 (1987).

1. Secular Purpose

As to RSA 194:15-c, FFRA offers no argument that the New Hampshire law was adopted with anything other than a secular purpose. "Plaintiffs have stipulated that the New Hampshire legislators had a secular purpose in enacting RSA 194:15-c." FFRA Brief, p. 21. The legislative history that the State provided previously herein is not disputed. The purpose of the New Hampshire statute is unquestionably to promote civic and patriotic awareness.

It is the state purpose in enacting RSA 194:15-c that is relevant, not the United States Congress purpose in regard to the 1954 Amendment of the Pledge as FFRA argues. The trial court held that "the constitutionality of 4 U.S.C. § 4 'as applied' is not at issue." ADD 7. Rather, "determining the constitutionality of the teachers' actions turns on the constitutionality of RSA 194:15-c. *Id.*

FFRA has presented no argument regarding why the trial court's focus on the constitutionality of RSA 194:15-c is incorrect. Therefore, as the Appellants have conceded the secular purpose of RSA 194:15-c, the decision below should be affirmed.

Additionally, given that RSA 194:15-c requires that the Pledge be used, if the purpose of 4 U.S.C. § 4 is the relevant inquiry, RSA 194:15-c is still constitutional. FFRA incorrectly focuses on the individual motivations of private citizens and legislators in connection to the 1954 Congressional amendment, dismissing as irrelevant the 2002 Congressional enactment spelling out the secular purpose of Congress and reaffirming the word of the Pledge. This circuit has rejected that approach. "Our task is to consider the validity of the statute before us, not the one enacted fifty years ago. *See generally Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 688 n. 8 (1970) ('the only governmental purposes germane to the present inquiry . . . are those that now exist.')." *Boyajian*, 212 F.3d at 7.

Likewise, the Ninth Circuit in addressing essentially identical issues in the most recent *Newdow* decision held that, when considering 4 U.S.C. § 4 the relevant inquiry is the 2002 Congressional actions. *Newdow*, 2010 WL 816986 at *7-8. "The primary flaw in the dissent's reasoning is that, because the secular reasons given directly in the statute do not lead to the dissent's desired result, the dissent ignores those reasons and instead focuses on the statements of individual legislators . . . The Supreme Court has been very clear that we are not to do this." *Id*. at 3895.

As to the federal pledge statute, FFRA seems to acknowledge that the Pledge, even after the 1954 amendment had, and continues to have, a primary patriotic purpose. Am. Complt. ¶85, p. 17, Dx 48. The flag continues to be the symbol of our nation, not that of any religious sect or denomination. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 6 (2004). Invalidation under the purpose prong is only appropriate when the legislation's predominant motive was to promote or advance religion and the secular purpose is found to be nothing more than a sham. *McCreary County v. ACLU*, 545 U.S. 844, 864-865 (2005) (legislature's stated reason to be given deference as long as it is not a sham); *Wallace v. Jaffery*, 472 U.S. 38, 56 (1985) (statute must be invalidated if it is entirely motivated by purpose to advance religion); *Lynch v. Donnelly*, 465 U.S. at 680 (statute or activity was motivated wholly by religious considerations).

Appellants demand that the court focus solely on the two words that they object to, "under God" and ignore the context in which those words are set. The framing of the issue in FFRA's brief does not even acknowledge that the words are in the Pledge of Allegiance to the flag of the United States. This is not the approach required.

> The Supreme Court has specifically rejected such a limited analysis: "[the dissenting Justices] would cut context out of the enquiry, to the point of ignoring history, no matter what bearing it actually had on the significance of current circumstances. There is no precedent for [their] arguments, or reason supporting them." *McCreary County*, 545 U.S. at 864. Further, "[t]he eyes that look to purpose belong to an 'objective observer' . . . one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id*. at 864-66 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

Newdow, 2010 WL 816986 at *7.

In rejecting the notion that the words "under God" transform the Pledge into a prayer to a monotheistic God, the trial court agreed with the "ceremonial deism" approach adopted by the Seventh Circuit in *Sherman v. Community Consol. School Dist*., 980 F.2d 437 (7th Cir. 1992), and to a lesser extent the Forth Circuit in *Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005). ADD 24. "Today, the words remain religious words, but plainly fall comfortably within the category of historic artifacts – reflecting a benign or ceremonial civic deism that presents no threat to the fundamental values protected by the Establishment Clause." ADD 25.

If, as the trial court correctly found, the words "under God" are historical artifacts, why are they important at all? As in New Hampshire, the nations 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: "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." Declaration of Independence 1 U.S.C. at XLIII.

The Ninth Circuit captured the essence of the centrality and import of this view in shaping our nation in its most recent decision upholding the Pledge. *Newdow*, 2010 WL 816986 at *15-17. In contrast to the monarchies of Europe, or the oppressive dictatorships proliferating in the mid 1900's in which the government had all of the power and people had only such rights as the government chose to give them, the Framers believed that people had inalienable natural rights. *Id.* The importance of that concept to the development of this nation cannot be understated. "Long before this nation could be founded, the Framers had to convince the people in the American colonies that their individual rights were important enough to start a war. Important enough to die for. Important enough to send their sons to die for. We must remember the Framers

urged a rationale for committing treason against Great Britain." *Id.* at 17. As the New Hampshire history presented herein demonstrates, over 90% of the male inhabitants pledged their lives and fortunes to do exactly that. Returns of the Association Test, 1776, New Hampshire Papers, Journal of the House, Vol. 8, pp. 204-206, S. Appx 10-12. The Framers had to explain to a skeptical world what justified their concept of a limited government at a time when such a concept was rare. They had to identify a source for the inalienable rights that they were asking the colonists to defend. *Newdow*, 2010 WL 816986 at *16. They had to identify a source that a future government could not just legislate out of existence.

This view of society was not new or derived necessarily from a Christian monotheistic God. Blackstone, whom the Supreme Court continues to cite to this day to plumb the Framers' intent, held that the "law of nature" had its source in a "Supreme Being" and that this law was "impressed" into every human being. William Blackstone, Commentaries On The Law Of England, Introduction, Section 2 at 38-39 (1765). Blackstone observed that "This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original." *Id*. When Jefferson wrote in the Declaration of the "equal

station to which the Laws of Nature and of Nature's God entitle[d]" Americans, he was expressly alluding not only to Blackstone's formulation, but also to Cicero's famous distillation of the *lex naturae*.[12] Notably, Cicero's concept of "God" was neither Christian nor monotheistic. *Id*.

The distinction between limited government vs. unlimited government remains relevant and an important concept in today's world.

> This fundamental debate—whether government has only limited rights given to it by the people, or whether the people have only limited rights given to them by the government—remains one of the crucial debates around the world to this day. Whether government is limited or unlimited has a profound impact on people's day-to-day lives. For instance, if the police arrest an individual, in many countries, the only question is whether there is a law forbidding the arrest. If there is no such law, the arrest is legal because the government is all powerful and not to be questioned. In America, the question is what law allows the police to arrest the person. If there is no such law, then the arrest is unlawful and the person can petition the courts to be released because the government has only such power as the people have chosen to give it through their elected representatives.

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

Newdow, 2010 WL 816986 at *16.

The State anticipates that the United States will thoroughly brief the arguments concerning the role of religious faith in the founding of our nation. It has also been the subject of lengthy narratives in court decisions, not to mention the 2002 Congressional enactment listing 16 separate factors. *See* 4 U.S.C. § 4 (2002); *Elk Grove*, 542, U.S. 6-7, 25-29; *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984); *Newdow*, 2010 WL 816986 at *12-15; *Myers*, 418 F.3d 403-04; *Sherman*, 980 F.3d 445-46. 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. The State adopts these historical accounts without repeating them *in toto* here and contends that they firmly establish the permissible secular purpose of the inclusion of the words "under God" in the Pledge.

The trial court agreed that the purpose prong of the *Lemon* test requires consideration of the words in the context of the Pledge as a whole. ADD 13-14. The touchstone of the purpose test is neutrality; it is not a separate test. *McCreary County* 545 U.S. at 860. Invalidation under the purpose prong is only appropriate when the legislation's exclusive motive was to promote or advance religion and the secular purpose is found to be nothing more than a sham. *Id.* at 864-65

(legislature's stated reason to be given deference as long as it is not a sham); *Wallace v. Jaffery*, 472 U.S. at 56 (statute must be invalidated if it is entirely motivated by purpose to advance religion); *Lynch v. Donnelly*, 465 U.S. at 680 (statute or activity was motivated wholly by religious considerations). Likewise, the "outsider test" FFRA posits is also part and parcel of the purpose test. "By showing a purpose to favor religion, the government 'sends the . . . message to . . . nonadherents 'that they are outsiders, . . .'" *McCreary County*, 545 U.S. at 860 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309-10 (2000). As demonstrated above, RSA 194:15-c passes the purpose prong of the Lemon test, as does 4 U.S.C. § 4.

2. Primary Effect

The second prong of the Lemon test requires that the statute's principal or primary effect must be one that neither advances nor inhibits religion. *Lemon*, 403 U.S. at 612-13. RSA 194:15-c and the Pledge also pass the effect prong, as they do not have the "principal or primary" effect of advancing religion. FFRA argues passionately that inclusion of the phrase "under God" transforms the Pledge into a religious activity equivalent to prayer demanding belief in a monotheistic Protestant God based on statements by former President Bush and the chaplain's opening prayer at the Senate the day after the decision in *Newdow III* (now reversed) was issued. FFRA Brief p. 27-28. It does not. "[A]n understanding of

official objective emerges from readily discoverable fact, without [need of] any judicial psychoanalysis of a drafter's heart of hearts." *McCreay County*, 545 U.S. at 862. The inquiry looks to the "plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history [and] the historical context of the statute, . . . and the specific sequence of events leading to its passage." *Edwards v. Aguillard*, 482 U.S. at 594-95. While the comments by President Bush and the chaplain are possibly interesting, they were not even drafters of the legislation. As the trial court noted, individual legislators' statements about their personal intent "probably had far more to do with politics than religion – more to do with currying favor with the electorate than with an Almighty." ADD 25.

The Pledge requires allegiance to the flag, which represents our nation, not to any particular concept of God. As noted by Justice O'Connor, no reasonable observer could conclude that reciting the Pledge is worship or akin to prayer. *Elk Grove*, 542 U.S. at 49 (O'Connor, J., concurring). The Merriam-Webster Online Dictionary defines prayer as "an address (as a petition) to God or a god in word or thought." The Pledge does not have as its purpose placing the speaker or the listener in a penitent state of mind, nor does it attempt spiritual communion or request divine aid. *Id.*; s*ee also Myers*, 418 F.3d at 407-08 (A prayer by contrast is

"a solemn and humble approach to Divinity in word or thought."). The Pledge is not addressed to God, it is addressed to the flag of this country.

While the State does not dispute that the founding fathers of this state and the nation had a Christian God in mind, as is demonstrated by the history provided herein, this does not equate to all references in public life having an effect of promoting any particular religion or even Christianity in general. Appellants' argument that the phrase "under God" is necessarily equivalent to phrases such as "under Jesus" and to endorsement of monotheistic Protestant religion in particular, simply assumes too much. The Merriam Webster Online Dictionary definitions of the noun "God" are expansive enough to include non-traditional religious views that do not include a divine being.[13]

Nothing in the Pledge defines the concept of God. Regardless of the Founders belief in a Protestant God, every individual, adult and child alike, is free to apply the concept of God that his or her conscience supplies, regardless of

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[13] **1:** the supreme or ultimate reality: as **a:** the Being perfect in power, wisdom, and goodness who is worshipped as creator and ruler of the universe **b:** *Christian Science* the incorporeal divine Principle ruling over all as eternal Spirit**:** infinite Mind.
2: a being or object believed to have more than natural attributes and powers and to require human worship; *specifically***:** one controlling a particular aspect or part of reality.
3: a person or thing of supreme value
4: a powerful ruler.

whether that concept is founded on any Christian religion or not.[14] Atheists, as any other group, are free interpret the term God in the Pledge consistent with their own worldview, or to abstain. As the trial court pointed out, this case is distinguishable from *Lee v. Weisman*, 505 U.S. 577, 598 (1992), as there is a permissible purpose to the Pledge, honoring our flag and country which is purely patriotic, as opposed to a prayer, however non-sectarian. Likewise, the statute is expressly voluntary and a student who exercises the option guaranteed by RSA 194:15-c to opt out of any portion of the Pledge does not forgo one of life's most important events, high school graduation. ADD 19.

FFRA seeks to strike down the Pledge because it is not *exclusively* secular, but contains the words "under God." The second prong of the *Lemon* test, however, asks whether a challenged statute or governmental action has an effect that is *predominantly* religious or secular, and does not require that it be exclusively secular. *McCreary County*, 545 U.S. at 867-68. This formulation makes sense because oftentimes what one person considers secular, another considers religious. For instance, even FFRA thinks the 1942 version of the Pledge was entirely secular, FFRA Brief p. 6, yet that was the version challenged in *Barnette*, 319 U.S. at 626, 629 (1943). To the Jehovah's Witnesses in *Barnette*,

[14] Atheism is not excluded from being part of a "religion." Indeed, Plaintiffs' counsel, Micheal Newdow, has been an ordained minister in the Universal Life Church since 1977 and started his own church in 1997 the First Atheists Church of True Science. *See* Micheal Newdow website, http://www.restorethepledge.com/.

even the version of the Pledge that did not contain the words "under God" violated their religious freedom by causing them to pledge allegiance to something other than God. *Id*. Therefore, because the New Hampshire Pledge statute does not coerce students to support or participate in a religious exercise, it does not run afoul of the second prong of the *Lemon* test.

3. Excessive Entanglement

The third prong of the Lemon test requires that the statute in question must not result in an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. The Appellants concede that there is no excessive entanglement; therefore this prong is met. ADD 21.

B. The Endorsement Test

The endorsement test,[15] as most recently articulated and promoted by Justice O'Connor in *Elk Grove*, provides that "government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message that religion or a particular religious belief is favored or preferred." *Elk Grove*, 542 U.S. at 34 (O'Conner, J., concurring). FFRA and Does

[15] Plaintiffs also refer to an "Imprimatuer, Outsider and Divisiveness" test. FFRA Brief p. 34. As mentioned previously, the term "outsider" is also discussed in relation to the purpose prong of the *Lemon* test. However, these factors are really just a restatement of the *Lemon* or Endorsement tests, as the cases cited by Appellants make clear. *Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002); *Santa Fe Independent Sch. Dist.*, 530 U.S. at 308; *McCollum v. Board of Education*, 333 U.S. 203, 231 (1948). Therefore these tests will not be dealt with separately.

claim that application of the endorsement test as stated in the *Lynch*, 465 U.S. at 688, would compel a conclusion in their favor, yet concedes that the tests' author herself wrote in *Elk Grove* that the "under God" words in the Pledge were permissible. FFRA Brief, p. 32.

In *Lynch v. Donnelly*, the Supreme 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 crèche 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 crèche 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, and concluded that the display of the crèche by itself was unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms." *Id*. at 598, 603.

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." *Elk Grove Unified School District v. Newdow*, 542 U.S. 1, 6 (2004). Moreover, three concurring Justices wrote separately to explain, in more detailed terms, why they would find that recitation of the Pledge by willing students in public schools 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 act 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").[16]

Two additional "crucial and related principles" are that the test must assume the viewpoint of a "reasonable observer" who must not evaluate the practice in isolation from its origins and context, and who must understand the history of the conduct and its place in our Nation's cultural landscape. *Id*. at 34-35; s*ee also Skoros v. City of New York*, 437 F.3d 1, 24 (2d Cir. 2006). This court should decline to "employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Newdow*, 2010 WL 816986 at *23 (citing *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 119 (2001)).

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[16] 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 v. Weisman*, 505 U.S. 577, 638-39 (1992) (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); *Abbington School District v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

Official acknowledgments of the Nation's religious history and enduring religious character do not violate the Establishment Clause. 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 v. Clauson*, 343 U.S. at 313. "[T]he 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 v. ACLU*, 492 U.S. at 623 (O'Connor, J., concurring), or to compel official disregard 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 v. Chambers*, 463 U.S. 783, 792 (1983); *Walz v. Tax Comm'n*, 397 U.S. 664, 672 (1970); *Abington Sch. Dist.*, 374 U.S. at 213; *Zorach*, 343 U.S. at 313. The Establishment Clause does not deny government actors the ability to acknowledge officially both the religious character of the people of the United States and the pivotal role that religion has played in developing the Nation's governmental institutions.

Although *County of Allegheny* and *Lynch* did not involve direct challenges to the Pledge, they should be viewed as 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, Seventh and Ninth Circuits have held, the lower courts cannot ignore those consistent and emphatic statements. *See Myers v. Loudon County Public Schools*, 418 F.3d at 395 (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 v. Community Consol. School Dist.*, 980 F.2d at 448 (7th Cir. 1992) ("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.").[17] *Newdow*, 2010 WL 816986 at *26 (subsequent cases after *Newdow III* instrumental in showing us that majority in *Newdow III* erred by using incomplete analysis when focusing solely on the two words "under God").

C. The Coercion Test

Appellants rely on *Lee v. Weisman* for the coercion test. FFRA Brief p. 29. However, *Lee* declined to jettison the *Lemon* test and simply stated that due to the "formal religious observance" involved in prayer and the importance of graduation ceremonies, the activity was inherently a religious act creating a state sponsored religious exercise that was pervasive. Although expressing concern regarding coercion, it was not the coercion or imprimatur that the Court found objectionable, but the overt and explicitly religious nature of prayer in the context of an event of singular importance in a student's life, graduation. *Lee*, 505 U.S at 598; *see also Elk Grove*, 542 U.S. at 31 (Rehnquist, J., concurring) (whatever the virtues and vices of *Lee*, the court was concerned only with "formal religious exercises, which the Pledge is not.").

[17] 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").

The Fourth, Seventh and Ninth Circuits have likewise found that the brief reference to "under God" in the Pledge does not change the essential patriotic nature of the Pledge or convert it into an inherently religious exercise. Therefore the coercion concern raised by *Lee* does not apply. *Myers*, 418 F.3d at 407-08; *Sherman*, 980 F.2d at 445-47; *Newdow*, 2010 WL 816986 at *25.

The trial court correctly determined that the inclusion of the words "under God" in the Pledge do not transform it into a religious exercise. ADD 20. The Court has drawn an explicit distinction between patriotic mentions of God on the one hand, and prayer, an "unquestioned religious exercise," on the other. *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Therefore, RSA 194:15-c providing for the voluntary recitation of the Pledge in New Hampshire schools does not violate the *Lee* coercion test.

III. The Trial Court Correctly Found That RSA 194:15-c Is Constitutional Under the First Amendment Free Exercise Clause

The Appellants do not articulate any standard related to their free exercise claim. However, the trial court correctly found *Parker v. Hurley*, 514 F.3d 87, controlling in disposing of the free exercise claim in this case. In *Parker*, two sets of parents objected on Free Exercise grounds to their very young children (kindergarten, first and second grade) being presented with or being required to listen to the reading of books that portray homosexuality and same sex marriage in

a positive light by their school district. After discussing at length various standards that prior cases have utilized, the Court stated that it need not enter the fray regarding the various standards, as answering the threshold question "whether the plaintiff's free exercise is interfered with at all" showed no constitutionally significant burden on plaintiffs rights. *Id.* at 99.

The *Parker* Court stated, "free exercise means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Id.* at 103 (citing *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990)). As a result, a government is barred from: 1) compelling affirmation of religious beliefs; 2) punishing expression of religious doctrine it believes false; 3) imposing special disabilities on particular religious beliefs or status; or 4) lending it's power to one side or the other in controversies over religious authorities or dogma. *Id.* It also noted that in recent funding cases there was no burden on free exercise rights where the government has imposed no criminal or civil sanction and did not require students to choose between their religious belief and receiving a government benefit. *Id.* (citing *Locke v. Davey*, 540 U.S. 712, 720-21 (2004)).

Within this context, the *Parker* Court found that nothing about the exposure to materials that were presumed to be sincerely objectionable on religious grounds prevented the parents from raising their children in their own religious views. *Parker*, 514 F.3d at 105-06 (citing *Elk Grove v. Newdow*, 542 U.S. at 16, noting

school's requirement that Newdow's daughter recite the Pledge every day did not impair his right to instruct her in his religious views). Turning to the children's rights, the Court held that even the child that was required to be present during the reading of a book that affirmatively endorsed gay marriage had not suffered coercion of free exercise rights. Significantly, the Court stated that public schools are not obliged to shield individual students from ideas which are potentially religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas. *Id.* at 106. It was further noted that in *Barnette*, 319 U.S. at 624, it was the **mandatory** nature of the recital of the Pledge, backed by suspension, that violated the free exercise clause, not the attempt to inculcate values by instruction. *Id.* at 105.

Here, the Doe children are not required to participate in the recitation of the Pledge. RSA 194:15-c specifically allows them to stay seated or stand silently. There is also nothing that requires them to say all of the pledge. If they wish to affirm their patriotism, but not say the words "under God," there is absolutely nothing preventing them from doing so. The trial court found: "Here, as in *Parker*, the objection is to mere exposure; there are no allegations of required affirmation or participation. And so, like the students in *Parker*, the Doe children have failed to state a claim under the Free Exercise Clause." This conclusion is correct and should be upheld.

Likewise the court correctly held that *Parker* is dispositive of the Doe parents' free exercise claims. In addressing the parents' claims the *Parker* court cited with approval *Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058 (6th Cir. 1987). The *Mozert* court emphasized that "the evil prohibited by the Free Exercise Clause" is "governmental compulsion either to do or refrain from doing an act forbidden or required by one's religion, or to affirm or disavow a belief forbidden or required by one's religion." *Mozert*, 827 F.2d at 1066. *Parker* found that reading or even discussing the books did not compel such action or affirmation. *Parker*, 514 F.3d at 105.

The trial court determined that the Doe children have not been compelled to perform or to refrain from performing any act, and they have not been compelled to affirm or disavow any belief. Thus, the rights of their parents under the Free Exercise Clause have not been violated, relying on *Parker*.

> [T]he mere fact that a child is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently. A parent whose "child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials." *C.N. [v. Ridgewood Bd. of Educ.]*, 430 F.3d [159,] 185 [(3d Cir. 2005)]; see also *Newdow*, 542 U.S. at 16 (noting that the school's requirement that Newdow's daughter recite the pledge of allegiance every day did not "impair[ ] Newdow's right to instruct his daughter in his religious views").

Parker, 514 F.3d at 105-06 (parallel citations omitted).

Like the parents in *Parker*, the Doe parents have suffered no impairment in their ability to instruct their children in their views on religion. Accordingly, the trial court correctly found that they have failed to state a claim under the Free Exercise Clause.

IV. The Trial Court Correctly Found That RSA 194:15-c Is Constitutional Under the Fourth or Fourteenth Amendment Equal Protection Provisions

Appellants' Equal Protection argument provides no analysis for why they have a valid equal protection claim and does little more than say that, because they have sincere beliefs, there must be an equal protection violation. The attempt to liken the Pledge to a sign that prohibits a person of color from using a bathroom marked "whites only" (FFRA Brief at 62) is far-fetched. A sign prohibiting usage of a bathroom based on race is an absolute prohibition. In contrast, RSA 194:15-c expressly allows children to opt out of participation. They can choose to not say the Pledge at all, or if they wish to express their patriotic feelings they can simply not repeat the words they find objectionable.

"The Equal Protection Clause of the Fourteenth Amendment guarantees that those who are similarly situated will be treated alike." *In re Subpoena to Witzel*, 531 F.3d 113, 116 (1st Cir. 2008) (citing *City of City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)). In Equal Protection analysis, legislative enactments like RSA 194:15-c should only be invalidated when the law

is a "creates different rules for distinct groups of individuals based on a suspect classification." *Wirzburger v. Galvin*, 412 F.3d 271, 283 (1st Cir. 2005) (citing *Strauder v. West Virginia*, 100 U.S. 303 (1879)). As the trial court found, RSA 194:15-c "do[es] not require different treatment of any class of people because of their religious beliefs," *Wirzburger*, 412 F.3d at 283, nor does it "give preferential treatment to any particular religion," ADD 31. "Rather, it applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the pledge, for any or no reason." *Id*.

In regard to the fact that objectors may have to listen to classmates recite the Pledge, the court correctly determined that, because the Pledge is not a prayer or religious exercise, the Does' rights are not violated by recitation of the Pledge in the presence of the Doe children.

For completeness, the trial court also analyzed the Equal Protection claims under a disparate treatment standard. ADD 32 – 33. However, Appellants' brief makes no disparate treatment argument at all and incorrectly characterizes the court's analysis as "discriminatory intent" rather than "discriminatory treatment." FFRA Brief, p 62. Where a brief contains no support for a claim, the claim is waived. This circuit has explained on many occasions, "'[i]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation,

are deemed waived.'" *United States v. Rivera Calderon*, 578 F.3d 78, 94 n.4 (1st Cir. 2009) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

CONCLUSION

For the reasons stated herein the State respectfully submits that the trial court decision finding that RSA 194:15-c is constitutional should be affirmed. Senior Assistant Attorney General Nancy J. Smith will present the oral argument for the State.

Respectfully submitted,

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CERTIFICATION

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Certificate of Service

April 7, 2010

I hereby certify that the State of New Hampshire's Brief has been served on all counsel by use of the Court's CM/ECF system this day. Please note that on November 23, 2009, Attorney David Bradley, counsel for the School District Defendants requested that the court and all parties remove his name from the service list and the Court issued an order on January 22, 2010.

/Nancy J. Smith
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