COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. SJC-11317

JANE DOE and JOHN DOE, individually and as parents and next friends of DOECHILD-1, DOECHILD-2, and DOECHILD-3, and THE AMERICAN HUMANIST ASSOCIATION,

Plaintiffs/Appellants

v.

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT, THE TOWN OF ACTON PUBLIC SCHOOLS, and DR. STEPHEN E. MILLS, as Superintendent of Schools,

Defendants/Appellees

and

DANIEL JOYCE and INGRID JOYCE, individually and as parents and next friends of D. Joyce and C. Joyce, and THE KNIGHTS OF COLUMBUS, a Connecticut tax-exempt Corporation,

Defendants-Intervenors/Appellees

ON APPEAL FROM A JUDGMENT
OF THE MIDDLESEX SUPERIOR COURT

BRIEF OF THE PLAINTIFFS/APPELLANTS, JANE DOE and JOHN DOE, individually and as parents and next friends of DOECHILD-1, DOECHILD-2, and DOECHILD-3, and THE AMERICAN HUMANIST ASSOCIATION

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CORPORATE DISCLOSURE STATEMENT

The American Humanist Association ("AHA"), in accordance with Supreme Judicial Court Rule 1:21, discloses that it has no parent corporations and that no publicly held corporation owns any stock in AHA.

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STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in applying "rational basis" review in considering whether a daily patriotic exercise in public schools – utilizing wording strongly favoring one religious class while disfavoring the plaintiffs' religious class – violates the plaintiffs' equal protection rights under the Massachusetts Constitution.

2. Whether the Superior Court erred in issuing a judgment declaring that a daily patriotic exercise in public schools – utilizing wording strongly favoring one religious class while disfavoring the plaintiffs' religious class – does not violate the plaintiffs' equal protection rights under the Massachusetts Constitution.

3. Whether the Superior Court erred in issuing a judgment declaring that a daily patriotic exercise in public schools – utilizing wording strongly favoring one religious class while disfavoring the plaintiffs' religious class – does not violate G.L. c. 76, § 5, which guarantees that no child be discriminated against or denied the advantages and privileges of public schools on account of religion.

STATEMENT OF THE CASE

Plaintiffs commenced this action in the Middlesex Superior Court in November 2010 to enjoin and declare unconstitutional a daily governmental practice that discriminates against them on the basis of their religion. (A. 1).[1] Plaintiffs Jane Doe and John Doe are atheists and Humanists, as are their children, Doechild-1 (age 14), Doechild-2 (age 12), and Doechild-3 (age 10) (collectively "Doechildren"). (A. 156, A. 208, A. 59, ¶ 3). Plaintiff American Humanist Association ("AHA") is a nonprofit organization that advocates for the rights of Humanists. (A. 211). The Doechildren attend public schools administered by the defendants, Acton-Boxborough Regional School District, the Town of Acton Public Schools, and Dr. Stephen E. Mills (collectively "defendants"). (A. 59).

Every day, the public schools attended by Doechildren and administered by defendants conduct a serious patriotic exercise – intended specifically for the purposes of instilling patriotism and loyalty – that exalts and validates one religious view while marginalizing the plaintiffs on the basis of their

[1] References to the plaintiffs' appendix hereafter shall be cited as (A.) followed by the appropriate page number(s) and if relevant, paragraph i.e. (A. 4, ¶ 5).

religious views. This daily patriotic exercise asserts a strong favoritism for one religious creed (and by necessary implication, disapproval of others), creating an environment that stigmatizes plaintiffs and their religious class. (A. 74, ¶ 8; A. 75, ¶¶ 10-11; A. 76, ¶ 8; A. 78, ¶ 8).

Plaintiffs' original complaint sought relief only under the Equal Protection Clause of the Massachusetts Constitution[2] and defendants' nondiscrimination policy. (A. 3). Plaintiffs amended their complaint (A. 15) in January 2011 to add a count under G.L. c. 76, § 5, which provides that no child shall be denied an advantage and privilege of public school attendance on account of religion. (A. 56). Defendants responded to the Amended Complaint with a Motion to Dismiss, which was subsequently denied after hearing (A. 4).

On May 27, 2011, the plaintiffs notified the Attorney General, pursuant to G.L. c. 231A, § 8, of this pending action seeking declaratory relief and raising a question of constitutionality (A. 204).

In October 2011, the Superior Court allowed a Motion to Intervene brought by Daniel and Ingrid Joyce (individually and as parents and next friends of D.

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[2] MASS. CONST. art. 1, as amended by MASS. CONST. amend. art. 106.

Joyce and C. Joyce) and the Knights of Columbus, (A. 4) a nonprofit Roman Catholic fraternal organization. (A. 210-211). (Collectively “intervenors.”)

In January 2012, all of the parties filed motions for summary judgment pursuant to Rule 56 (A. 50; A. 171; A. 175) and the Superior Court heard these motions on February 13, 2012. (A. 5). On June 5, 2012, the court allowed the defendants’ motions for summary judgment and denied plaintiffs’ motion. (A. 208). On June 12, 2012, the court issued a judgment declaring that the daily exercise does not violate the State Equal Protection Clause, the nondiscrimination statute (G.L. c. 76, § 5), or defendants’ nondiscrimination policy. (A. 232).

Plaintiffs subsequently filed a timely Notice of Appeal. (A. 233).

STATEMENT OF FACTS

The plaintiffs, Jane Doe and John Doe, husband and wife, are residents of Acton, Massachusetts, and are parents of the Doechildren. (A. 59, ¶ 3). All are United States citizens. (A. 59, ¶ 3).

The plaintiff AHA is a nonprofit 501 (c)(3) organization incorporated in Illinois with a principal place of business in Washington, District of Columbia.

(A. 7, ¶ 4). AHA is a membership organization, with over 120 chapters and affiliates nationwide (seven of which are in Massachusetts) and over 20,000 members and supporters (over 1,000 in Massachusetts) that promotes Humanism and defends the rights of Humanists and other non-theistic individuals. (A. 211). Among these members and supporters are Massachusetts public school teachers and numerous parents of children who are, or will be, attending defendants' public schools (A. 139) in Acton, Massachusetts. (A. 59, ¶¶ 4-5).

Jane Doe, John Doe and the Doechildren hold and affirm religious views that are Humanist. (A. 210).[3] With regard to the existence of divinities, the Does are atheists, as they do not accept the existence of any type of God or gods. (A. 63, ¶ 1; A. 70, ¶ 1; A. 74, ¶ 5; A. 76, ¶ 5; A. 78, ¶ 5).

Whereas atheism is a religious view that essentially addresses only the specific issue of the existence of a deity, Humanism is a broader religious view that includes an affirmative naturalistic outlook; an acceptance of reason, rational analysis,

[3] The Does are members of the AHA and are involved in the activities of Humanist organizations such as Concord Area Humanists, the Harvard University Humanist Chaplaincy, the Harvard University Secular Society, and Greater Boston Humanists. (A. 64, ¶ 4).

logic, and empiricism as the primary means of attaining truth; an affirmative recognition of ethical duties; and a strong commitment to human rights. (A. 63, ¶ 2; A. 81, ¶¶ 4-5; A. 84, ¶ 10).[4] Humanism, while not aggressively evangelical, encourages a willingness in its adherents to be open about one's Humanism, including the non-theistic aspect of it. (A. 82, ¶ 9; A. 86, ¶ 13).

The Doechildren attend public schools governed by defendants. (A. 60, ¶ 9). The defendant, Dr. Stephen E. Mills, as Superintendent of Schools, is chief executive officer of the Acton-Boxborough Regional School District and the Town of Acton Public Schools, and is responsible for enforcing all provisions of law

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[4] Humanist principles are promoted by formal organizations such as the AHA (which provides a statement of Humanist principles known as "Humanism and Its Aspirations," signed by 21 Nobel laureates and thousands of others), as well as the International Humanist and Ethical Union (which provides a statement of Humanist principles known as "The Amsterdam Declaration"). (A. 63, ¶ 3; A. 81, ¶ 6; A. 85, ¶ 11; A. 211). Humanism also has formal religious structure, with clergy (usually known as "celebrants" who perform weddings, funerals, counseling, and other functions commonly performed by clergy), chaplains (including a full-time Humanist Chaplain at Harvard University), and with formal entities dedicated to the practice of religious Humanism, such as the American Ethical Union and the Society for Humanistic Judaism, among others. (A. 63, ¶ 3; A. 81, ¶ 5; A. 85, ¶ 11; A. 211). Humanism also has a strong history and continuing tradition within the Unitarian Church. (A. 81, ¶ 5).

and all rules and regulations relating to management of the public schools within those school systems. (A. 59, ¶ 6).

General Laws, c. 71, § 69, requires all public school teachers to begin each day with a classroom recitation of the Pledge as part of a ceremony intended to instill values of patriotism and good citizenship. (A. 58; A. 208).[5] In these classes, the following wording is used: "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." (A. 60, ¶ 11) (emphasis added). The Pledge was originally written by a private party – without any reference to "God" – in 1892, and was formally recognized by the federal government – still without any "God" language – in 1942. The words "under God" were added in 1954, at the height of the McCarthy era. (A. 156, ¶ 8). Prior to 1954, the Pledge read: "I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, *one nation*

[5] The statute imposes a monetary fine upon teachers for failure to conduct the flag-salute ceremony. (A. 58).

indivisible, with liberty and justice for all." (A. 156, ¶ 8) (emphasis added).[6]

As atheists and Humanists, plaintiffs do not believe any country is "under God." (A. 65, ¶ 13; A. 71, ¶ 7; A. 74, ¶ 5; A. 76, ¶ 5; A. 78, ¶ 5). Thus, on a daily basis, defendants' public schools declare that in fact the plaintiffs' core religious beliefs are wrong, not only affirming an opposing religious view, but doing so in the context of an exercise that defines patriotism and loyalty for schoolchildren. (A. 65, ¶ 13; A. 71, ¶ 7; A. 74, ¶ 5; A. 76, ¶ 5; A. 78, ¶ 5).

The affirmation that the nation is "under God" is understood by the general public, and public school students in particular, as validating the notion that God-belief is consistent with patriotism and that atheism is not. (See, e.g., A. 140, A. 74, ¶ 8; A. 76, ¶ 8; A. 78, ¶ 8).[7] Used in this patriotic context, the "under God" language suggests that true patriots

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[6] See 4 U.S.C. §4, Historical Revision and Notes.

[7] Indeed, the "under God" wording was recently used to express hostility against an atheist child who challenged governmental religiosity in nearby Cranston, Rhode Island. (A. 140). The child, who had challenged the posting of a prayer in her school, was confronted by her classmates during Pledge recitation, as they turned away from the flag at the appropriate time and shouted "under God!" at her. (A. 140).

believe in God and that open rejection of God-belief is unpatriotic. This view reflects deep-seated prejudice towards atheists and perpetuates the invidious stereotype that those who do not believe in God are less patriotic than those who do. (A. 66, ¶ 17). Atheists, as a class in the United States and in Massachusetts, have, and continue to be, disfavored by the public. (A. 116). Surveys, such as a study by the University of Minnesota published in American Sociological Review in April 2006, have ranked atheists as the most disliked and distrusted minority group in the country, ranking below recent immigrants, Muslims, and gays and lesbians. (A. 64, ¶ 5; A. 72, ¶ 14; A. 116). Practices that maintain a "theistic supremacy," such as the one challenged today, enable society to continue to arbitrarily stereotype and marginalize atheists, even though extensive data indicates that secularity does not correlate to an increase in social or personal ills, and that in fact the reverse is often true. (A. 67, ¶ 20; A. 120).

Jane and John Doe have experienced the public's prejudice against atheists, as they have frequently seen and heard strong public opinions disfavoring atheists and atheism. (A. 64, ¶ 6; A. 72, ¶ 14; A 74,

¶ 7; A. 76, ¶ 7; A. 78, ¶ 7). The Doechildren are also aware of unfavorable public attitudes toward atheism. (A. 74, ¶ 7; A. 76, ¶ 7; A. 78, ¶ 7). As a result, plaintiffs are often hesitant to openly express their religious beliefs. (A. 64, ¶ 6). Although the Does have no desire to evangelize their Humanism and atheism, they strongly desire to be treated equally, not as second-class citizens, by their government and school system. (A. 82, ¶ 9; A. 86, ¶ 13).

Plaintiffs have suffered and continue to suffer actual harm as a direct and proximate result of the defendants' actions. The daily classroom exercise, by publicly rejecting plaintiffs' religious beliefs and calling into question their patriotism, marginalizes and stigmatizes plaintiffs, denying them the equal classroom standing that they deserve. (A. 67, ¶ 19; A. 72, ¶ 13; A. 74, ¶ 8; A. 76, ¶ 8; A. 78, ¶ 8). The daily affirmation recited in Massachusetts public schools reinforces the public prejudice against plaintiffs' religious class, as it necessarily classifies them as outsiders and defines them as second-class citizens. (A. 66, ¶ 17; A. 72, ¶ 11).

While plaintiffs recognize that all children have the right to refuse participation in the daily

exercise, the Doechildren do not wish to be excluded from it, nor do they want their public schools conducting a daily exercise that portrays them and their religious class negatively. As their schools define patriotism and instill loyalty each day, they want to stand and participate with their schoolmates as equals. (A. 66, ¶ 18; A. 72, ¶ 12; A. 75, ¶ 9; A. 75, ¶ 10; A. 76, ¶¶ 9-10; A. 78, ¶¶ 9-10).

SUMMARY OF THE ARGUMENT

If public schools in Massachusetts conduct a daily classroom exercise to instill patriotism and loyalty in students, any recitation accompanying that exercise must not violate the prohibitions against discrimination set forth in the state Constitution's Equal Rights Amendment ("ERA")[8] and State nondiscrimination statute.[9] Because the daily exercise conducted pursuant to G.L. c. 71, § 69, discriminates on the basis of religion, the practice violates both the constitutional and statutory equality protections. (Pgs. 15-20; 41-42).

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[8] MASS. CONST. art. 1, as amended by MASS. CONST. amend. art. 106.

[9] G.L. c. 76, § 5 (providing that no child shall be denied the advantages and privileges of public school on account of religion).

The patriotic exercise in question, which includes a daily classroom affirmation that the nation is in fact "under God," strongly favors theistic students (especially monotheistic students), portraying their religious class as the quintessential patriots, while necessarily disfavoring non-theistic students such as the plaintiffs by implying they are less patriotic or even unpatriotic. (Pgs. 20-22). Indeed, the daily public school patriotic exercise asserts a sort of *theistic supremacy*, directly disaffirming plaintiffs' religious beliefs. (Pgs. 29-34).

Because the classroom practice discriminates on the basis of religion and creed – an enumerated "suspect" classification under the ERA – strict scrutiny applies. In fact, classifications expressly enumerated in the ERA are *always* subject strict scrutiny. This rule is unambiguous. (Pgs. 16-19).

Nevertheless, the Superior Court erroneously applied only rational basis review, justifying doing so on an apparent assumption that a governmental practice is immune from strict scrutiny if its predominant purpose is patriotic and not religious. (Pgs. 19-23). Ironically, by excusing the religious

discrimination because it is occurring in a patriotic context, the Superior Court overlooks the most egregious aspect of the classroom affirmation: schools are instilling patriotism and loyalty each day via an exercise that defines those concepts in *religious* terms, to the detriment of plaintiffs and their religious class. (Pgs. 22-28).

The Superior Court seemed to place much weight on the fact that the patriotic exercise in question is voluntary, but voluntariness is irrelevant. Regardless of whether plaintiffs participate, their public school is discriminating against them by conducting an exercise that defines patriotism with theistic religious language that marginalizes them, a practice that stigmatizes and contributes to existing prejudices against atheists. It is little consolation that they have the option of sitting silently to watch, or perhaps even leaving the room, as teachers and classmates recite in unison a patriotic pledge that casts them as outsiders. (Pgs. 29-34).

The Superior Court's analysis was based largely on federal case law, primarily Establishment Clause case law that is inapplicable and irrelevant to the State ERA issues presented in this case. (Pgs. 21-23).

Plaintiffs are not challenging any federal statute or raising any federal claims of any kind. This is strictly a *state* case challenging — under the *state* Constitution and *state* statute - a *state* law that requires schools to instill patriotism and loyalty via theistic language. (Pgs. 38-41).

Had the Superior Court applied strict scrutiny, it would have found that the daily classroom patriotic exercise is not narrowly tailored to further a compelling governmental interest. In fact, patriotism and loyalty can be instilled in numerous ways that do not involve a daily discriminatory recitation. (Pgs. 34-38).

STANDARD OF REVIEW

In reviewing a grant of summary judgment, the appellate court proceeds de novo, *Miller v. Colter*, 448 Mass. 671, 676 (2007), which may include "an independent compilation of the relevant facts." *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 123 n.1 (1997). See *Maffei v. Roman Catholic Archbishop of Boston*, 449 Mass. 235, 243 (2007); *Miller*, 448 Mass. at 676 (reversing summary judgment, stating that appellate courts review grant of summary judgment de novo, construing facts in favor of

nonmoving party); *District Attorney for Northern Dist. v. School Committee of Wayland*, 455 Mass. 561, 566 (2009). An "order granting summary judgment will be upheld only if it relies on undisputed material facts and the moving party is entitled to judgment as a matter of law." *Coombes v. Florio*, 450 Mass. 182, 186 (2007).

ARGUMENT

I. THE SUPERIOR COURT ERRED IN APPLYING RATIONAL BASIS REVIEW TO A DAILY PATRIOTIC EXERCISE FAVORING ONE RELIGIOUS CLASS OVER THE PLAINTIFFS' RELIGIOUS CLASS, BECAUSE THE PRACTICE DISCRIMINATES ON THE BASIS OF RELIGION – A SUSPECT CLASSIFICATION – TRIGGERING STRICT SCRUTINY UNDER THE MASSACHUSETTS EQUAL RIGHTS AMENDMENT.

A. Strict scrutiny applies to the challenged practice because religion is a suspect classification under the Massachusetts Equal Rights Amendment.

Where, as here, a State practice discriminates on the basis of a suspect classification, the practice is subject to strict scrutiny pursuant to the equal protection provision of the Massachusetts Constitution. *Finch v. Commonwealth Health Ins. Connector Authority,* 459 Mass. 655, 662 (2011).

Equal protection under the Massachusetts Constitution is found in Article 1, as amendment by Article 106, also known as the Equal Rights Amendment ("ERA"), which reads:

> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, *creed* or national origin.[10]

Significantly, no classification expressly enumerated in Article 106 is subject to mere rational basis review. On the contrary, "[t]he classifications set forth in art. 106 [sex, race, color, creed, or national origin] . . . are subject to the *strictest* judicial scrutiny." *Finch,* 459 Mass. at 662 (quoting *Commonwealth v. King,* 374 Mass. 5, 21 (1977))(emphasis added). In fact, the primary purpose of adopting Article 106 was to guarantee that Massachusetts courts would apply strict scrutiny to discriminatory governmental action against the enumerated classes. *Opinion of the Justices*, 373 Mass. 883, 887-888 (1977); *Opinion of Justices to House of Representatives*, 374 Mass. 836, 840 (1977).[11] Thus, in

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[10] MASS. CONST. art. 1, as amended by MASS. CONST. amend. art. 106 (emphasis added). Article 106 was ratified by the people on Nov 2, 1976. *Finch,* 459 Mass., at 665-66.

[11] The amendment would also "ensure stronger and broader protections than antidiscrimination

considering the daily school practice of reciting language strongly favoring one religious view over another (particularly as part of an exercise designed to instill patriotism and loyalty), the Superior Court erred as a matter of law in applying only rational basis review. (A. 227).

If the constitutional mandate against discrimination on the basis of creed means anything, it is that the State cannot exalt one religious view while stigmatizing other citizens because of their religious beliefs. When such discrimination occurs, the court must scrutinize the practice in the most exacting way. *Id.* at 840 ("[t]o use a standard in applying the Commonwealth's equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.").

Although this is a case of first impression (because religious discrimination under the ERA has never been adjudicated by this Court), Massachusetts courts have consistently maintained that religion (or

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legislation." *Finch*, 459 Mass. at 695 n.8 (Duffly, J., concurring and dissenting) (citations omitted).

"creed")[12] is a "suspect" classification triggering strict scrutiny. See, *Animal Legal Defense Fund, Inc., v. Fisheries and Wildlife Board,* 416 Mass. 635, 640 (1993) ("Classifications based on sex, race, color, creed or national origin are considered suspect.").[13] Despite these cases, the Superior Court erroneously applied only rational basis in considering the challenged practice. (A. 227).

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[12] Although there are no cases defining "creed" as used in Article 106, other courts have defined it as a "system of religious beliefs." See, *Augustine v. Anti-Defamation League,* 75 Wis.2d 207, 213-215 (1977); *Riste v. E. Wash. Bible Camp,* 25 Wn. App. 299, 302 (Wash. Ct. App. 1980). Atheism and Humanism are both systems of religious beliefs. (A. 210-11). Defendants do not dispute this issue, (A. 157, ¶ 10), nor did the Superior Court. (A. 210-211). See also, *Torcaso v. Watkins,* 367 U.S. 488, 495-495, n.11 (1961); *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989); *U.S. v. Seeger*, 380 U.S. 163, 176 (1965); *Kaufman v. McCaughtry,* 419 F.3d 678, 683-84 (7th. Cir. 2005) ("Atheism is Kaufman's religion . . . even though it expressly rejects a belief in a supreme being").

[13] See also, *Powers v. Wilkinson,* 399 Mass. 650, 657 n.11 (1987) (noting that "suspect classifications are only those of 'sex, race, color, creed or national origin.'"); *Care & Protection of Rebecca,* 419 Mass. 67, 81 n.12 (1994) (implying State Constitution would protect "classification based on race, alienage, national origin, or religion"); *Lacava v. Lucander,* 58 Mass. App. Ct. 527, 532 (2003) ("Suspect classes for equal protection purposes include classifications based on race, religion, alienage, national origin, and ancestry."); *Cote-Whitacre v. Dept. of Public Health,* 446 Mass. 350, 366 (2006) (Spina, J., concurring) ("In this Commonwealth, suspect classifications are currently those of sex, race, color, creed, or national origin").

By affirming that the nation is in fact "under God," the exercise in question asserts a sort of *theistic supremacy* that favors a preferred class of citizens – theists – to the detriment of non-theistic citizens. The exercise discriminates on the basis of plaintiffs' religion, for it portrays the ideal patriot as a believer in God and implies that nonbelievers are second-class citizens at best. With such daily pronouncements being made by the government to children, it is little wonder that atheists, as a class, remain unfairly stigmatized. (A. 116).

Significantly, the Superior Court did not dispute that the religious language, as recited pursuant to G.L. c. 71, § 69, draws a classification. (A. 225; A. 227). The court cited *Paro v. Longwood Hospital*, 373 Mass. 645, 649 (1977) for the notion that "[c]lassification is an integral part of the legislative task." (A. 225). The court then went on to explain that strict scrutiny applies "whenever a legislative discrimination" is "'drawn upon inherently suspect distinctions.'" (A. 226) (Citing *Paro,* 373 Mass. at 649). Yet puzzlingly, while acknowledging that the practice here draws a line separating theistic believers from nonbelievers, the court

concluded that such classification is not "suspect" simply because the patriotic ceremony as a whole does not amount to a "prayer." (A. 226-27). As discussed in more detail below, this analysis was erroneous.

B. The Superior Court incorrectly assumed that a governmental practice must be almost exclusively religious or akin to a prayer to violate the ERA's Creed Clause.

Contrary to the Superior Court's ruling (A. 224-226), there is no requirement that a governmental practice be exclusively religious or akin to a prayer to violate the ERA's Creed Clause. Yet the Superior Court seemed to assume that the critical question here is whether the recitation in question is essentially a patriotic exercise or a religious exercise. (A. 216; 223-24). Deciding that the recitation is a patriotic exercise, not a prayer, the court concluded that "the rational basis test rather than strict scrutiny is the applicable standard." (A. 227). What the court ignored, however, is that the recitation is *both* patriotic and religious, which only makes the religious discrimination more objectionable.

Strict scrutiny applies whenever a government practice discriminates on the basis of religion, and there is no exception for practices that occur in the context of a predominantly patriotic exercise. This is

not a judgment call for the court, but instead is an automatic application of strict scrutiny. See, *Finch,* 459 Mass. at 662-663. Effectively, "art. 106 removes the first step - determination whether a classification is suspect - from equal protection analysis and mandates strict scrutiny of the enumerated classifications." *Id.* Because "art. 106 acts to channel the discretion of the courts with respect to the enumerated classes, the policy considerations that ordinarily illuminate equal protection analysis are not relevant to interpretation of art. 106." *Id.*

The Superior Court opinion emphasized that the "under God" wording did not convert the recitation into a prayer (A. 216, 223-224), but this is not a school-prayer case. This is a *discrimination* case, and unlawful discrimination is afoot because public schools define patriotism on a daily basis in a way that esteems one religious class while strongly disfavoring plaintiffs' class. Just as a law requiring a daily patriotic recitation in public schools that this is one nation "under Jesus" would discriminate against the Commonwealth's Buddhists, Hindus, Jews, and Muslims (and atheists and Humanists), the

challenged practice, which declares our nation to be "under God," violates Article 106's mandate against religious discrimination.[14] This is true regardless of whether the practice is cast as a "prayer" or not. It is the State's alignment of theistic belief with loyalty to country that is relevant, not the question of whether the overall exercise is itself predominantly religious.

Only by adding the uncomfortable detail – that this discrimination results from the well-known Pledge of Allegiance – is this case made to seem more difficult than it really is. Discomfort, however, is hardly a reason for denying religious minorities in this Commonwealth fundamental constitutional rights. Indeed, discrimination against African Americans, women, the disabled, and same-sex orientation once had deep, institutional roots in American politics and culture, and each of those minority groups relied upon dauntless courts to redress the injustices that are now universally recognized.

[14] Indeed, any kind of discrimination in a daily patriotic school exercise against an enumerated class of Article 106, religious or otherwise, would be problematic. Few would argue, for example, that a daily patriotic pledge exalting only "great white men" would pass constitutional muster.

The Superior Court's opinion suggests that it failed to understand the critical differences between the interests protected by the Federal Establishment Clause and the Massachusetts ERA.[15] (A. 213, n.10). Equal Protection occupies a niche separate and distinct from the Establishment Clause, as the former directly targets discrimination, while the latter protects, *inter alia,* freedom of conscience – independent of discrimination.[16] Indeed, Article 106 specifically prevents the government from stigmatizing citizens on prohibited grounds such as religion. *King,* 374 Mass. at 21 ("Article 106 incorporates into our State Constitution an express prohibition of discrimination").

The Superior Court's erroneous reliance on the Establishment Clause stemmed from its incorrect belief that the plaintiffs' arguments are identical to those in *Freedom from Religion Found. v. Hanover Sch. Dist.,* 626 F.3d 1, 6 (1st Cir. 2010) (*"FFRF")* and *Newdow v.*

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[15]Compare U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion") with MASS. CONST. amend. art. 106. ("Equality under the law shall not be denied or abridged because of . . . creed.").

[16] See *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (the First Amendment guarantees "fundamental constitutional rights regarding matters of conscience").

Rio Linda Union Sch. Dist., 597 F.3d 1007, 1013 (9th Cir. 2010). (A. 213, n.10). Referring to these cases (neither of which challenged any Massachusetts statute or sought relief under the Massachusetts Constitution), the court below surmised that the question raised here is whether G.L. c. 71, § 69, with the insertion of "under God" into the Pledge, "does 'relate to religion' in such as way as to violate the Doechildren's rights." (A. 215-16). By characterizing the question this way, the court made two fundamental errors: 1) it seemed to assume that the plaintiffs are challenging Congress' insertion of "under God" in the Federal Pledge statute, and 2) it seemed to assume that the analysis under the ERA's Creed Clause is the same as the analysis under the Federal Establishment Clause. Neither assumption is correct.

Because the Massachusetts ERA protects interests that are distinct from the Establishment Clause, it is simply irrelevant in this case that "under God" was upheld under the Federal Establishment Clause.[17] The rights of religious minorities in the Commonwealth are not defined by the limits of the First Amendment, or for that matter the Federal Constitution. The

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[17] *Newdow,* 597 F.3d at 1013; *FFRF,* 626 F.3d at 6-7.

Massachusetts Constitution not only provides broader protection of individual liberty and equality than the Federal Constitution, *infra*, but it also expressly forbids religious discrimination.

Importantly, the analysis under each clause is significantly different. The Establishment Clause requires inquiry into whether a state practice is predominantly "religious" or "secular" pursuant to the well-known *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).[18] In contrast, the ERA considers whether, *inter alia*, a practice discriminates on the basis of suspect criteria, such as creed, and if so, whether the state can justify it under the appropriate standard of review – in this case, strict scrutiny.

In *Newdow*, the Ninth Circuit's Establishment Clause analysis, applying the "predominant purpose" prong of *Lemon*, found that the Pledge was not intended to advance religion. *Newdow,* 597 F.3d at 1033. That finding (albeit puzzling in light of the legislative history[19]) has no bearing on the outcome of the instant

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[18] The Superior Court seemingly applied some variant of the *Lemon* test to the practice challenged here.

[19] The legislative history makes clear that the words "under God" were added to indoctrinate schoolchildren in the belief that God exists. 100 Cong. Rec. 5915, 6919 (1954). The Senate sponsor, Senator Ferguson, felt it necessary to "remind the Boy Scouts, the Girl

Equal Protection case, for a practice need not *advance religion* at all to be violative of the Massachusetts ERA's Creed Clause – the question is only whether the practice discriminates against citizens on the basis of religion.

Similarly, the *FFRF* case, being both a Federal decision and an Establishment Clause decision (and not a case seeking relief under Massachusetts law, or even challenging a Massachusetts statute), carries no weight in the instant case. Of the approximately 73 paragraphs in the decision, almost all analyze

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Scouts, and the other young people of America, who take the pledge of allegiance to the flag more often than do adults, that it is not only a pledge of words, *but also of belief*." 100 Cong. Rec. 6348 (1954) (emphasis added). Another Senator concurred: "What better training for our youngsters could there be than to have them, each time they pledge allegiance to Old Glory, reassert their *belief . . .* in the all-present, all-knowing, all-seeing, all-powerful Creator." *Id.* at 5915 (statement of Sen. Wiley) (emphasis added). The House Report stated that "[t]he inclusion of God in our pledge . . . would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator." H.R. REP. No. 83-1693 at 1-2 (1954), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2340. The words "under God" were intended to strike "at the philosophical roots of communism, atheism, and materialism." 83rd Cong. 1st Sess., Cong. Rec. 99, pt. 10 (1953)(statement of Rep. Rabaut). See also, 87th Cong. 2nd Sess., *U.S. Government Printing Office,* 1, 42 (1962)("the amendment" was "significant [i]n an age in which our principal concern is with the spread of atheistic communism.").

Establishment Clause issues, with only one paragraph briefly addressing Equal Protection in a cursory way.[20] And even this reference is to *Federal* Equal Protection, thereby making it inapplicable here.

The Massachusetts ERA, unlike the Federal Constitution, *expressly* forbids discrimination on the basis of creed and unquestionably requires strict scrutiny of such discrimination.[21] In this regard, the ERA is more explicitly protective of religious equality than the Federal Equal Protection Clause. The Supreme Judicial Court has long recognized that "[a]bsolute equality before the law is a fundamental principle of *our own* Constitution." *Bogni v. Perotti,* 224 Mass. 152, 156 (1916) (emphasis added); *Opinion of*

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[20] Though inapplicable here, the *FFRF* court's brief discussion of Federal Equal Protection was flawed. Dismissively, the court said: "[the Pledge] applies equally to those who believe in God, and those who do not, . . . giving adherents of all persuasions the right to participate." 626 F.3d at 14. Thus, the court ignored the clear rule from *Loving v. Virginia,* 388 U.S. 1, 9 (1967) and *Brown v. Board of Educ.,* 347 U.S. 483, 495 (1954): equal application does not excuse a practice when it discriminates on the basis of suspect criteria such as race or religion. This rule is discussed in greater detail below.

[21] There is almost no Federal Equal Protection case law adjudicating religious discrimination (including the appropriate level of scrutiny) because almost all federal religion cases are brought under the First Amendment. Nevertheless, the question of what level of scrutiny applies is settled in Massachusetts, as the ERA requires strict scrutiny. *Finch,* 459 Mass. at 662.

the Justices, 211 Mass. 618, 619 (1912). See also, *Lowell v. Kowalski*, 380 Mass. 663, 665-666 (1980) ("the requirements of [Art. 106] to the Massachusetts Constitution are more stringent than the Fourteenth Amendment equal protection requirements."). Recently, in the groundbreaking *Goodridge* decision, the Court reiterated that "[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights." *Goodridge v. Dept. of Public Health,* 440 Mass. 309, 312-13 (2003)(holding that same-sex couples have right to marry under Massachusetts Constitution).[22]

The instant case provides no justification for a sudden divergence from the absolute rule that strict scrutiny applies to discrimination against an enumerated class under the ERA. Accordingly, the Superior Court erred as a matter of law in applying mere rational basis review.

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[22] *Cf. Rasheed v. Comm'r of Corr.*, 446 Mass. 463, 465 (2006) ("the Massachusetts Constitution [is] more protective of the religious freedoms of prisoners than the United States Constitution, and that the proper standard of review to be applied to the infringement of such freedoms is consequently more demanding.")

C. The practice discriminates against plaintiffs on account of their religion even if they refrain from participation, and therefore the "voluntariness" of the daily exercise is constitutionally irrelevant.

The State's daily exercise promoting patriotism through language maintaining a theistic supremacy stigmatizes non-theistic students on account of their religious beliefs and contributes to existing prejudices against atheists. (A. 67, ¶ 19). Such stigmatization occurs regardless of whether the student participates or not.[23] It is therefore irrelevant, for Equal Protection purposes, that the practice is "voluntary."

The daily classroom practice affirming that our nation is "under God" perpetuates the invidious stereotype that atheists are "un-American."[24] The right to nonparticipation is hardly a consolation when a child's classmates and teachers are defining

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[23] According to the schoolchildren "sitting out . . . would not change anything, because the classroom would still be saying the Pledge and reinforcing the idea that Humanists, atheists, and others who don't believe in God are not as good or patriotic as everyone else." (A. 75, ¶ 11; A. 77, ¶ 11; A. 79, ¶ 11).

[24] Former President George Bush said, "I don't know that atheists should be considered citizens, nor should they be considered patriots. This is one nation under God." Jennifer Gresock, *No Freedom From Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 Margins 569 (2001).

patriotism each day in a way that exalts theism while denigrating the child's religious class.[25]

Stigmatization alone can constitute an Equal Protection violation under both the federal and State constitutions. See, *Allen v. Wright,* 468 U.S. 737, 755 (1984) ("[t]here can be no doubt that this sort of noneconomic injury [stigmatization] is one of the most serious consequences of discriminatory government action..."); *Heckler v. Mathews,* 465 U.S. 728, 739-40 (1984) ("we have repeatedly emphasized, discrimination itself . . . by stigmatizing members of the disfavored group as 'innately inferior' and therefore as less worthy participants in the political community," causes "serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (citations omitted).

In *In Re Senate,* 440 Mass. 1201, 1204 (2004) the Court was called upon to determine the constitutionality of a bill, proposed after the *Goodridge* decision had legalized same-sex marriage,

[25] Additionally, the practice denies some students the fair opportunity to fully participate because of their religious beliefs. The Doechildren want to participate, and often do, but not fully, as they often remain silent when it comes to "under God." (A. 75, ¶ 10; A. 76, ¶ 10; A. 78, ¶ 10).

that would have eliminated same-sex marriage and instead substituted civil unions with all of the same benefits, protections, rights, and responsibilities of marriage, while retaining the word "marriage" for only opposite-sex partners. Finding the proposal plainly unconstitutional, the Court reasoned that the "bill would have the effect of maintaining and fostering a *stigma* of exclusion that the Constitution prohibits. It would deny to same-sex 'spouses' only a status that is specially recognized in society." *Id.* at 1208. (emphasis added). The Court concluded that "[t]he Massachusetts Constitution . . . does not permit such invidious discrimination." *Id.*

In *Loving v. Virginia,* 388 U.S. 1 (1967), the Supreme Court famously struck down a statute that made interracial marriage a crime. While the statute purported to apply equally to whites and nonwhites, the Court found that it was intended to favor one race and disfavor all others. *Id.* at 9. Specifically, it was "designed to maintain White Supremacy." *Id.* at 11. Virginia unsuccessfully advanced an almost identical argument to the one set forth by the defendants here: that *equal application* of a discriminatory law triggers only rational basis review. *Id.* at 9. In

rejecting this argument, the Supreme Court declared: "the fact of equal application does not immunize the statute from the very heavy burden of justification . . . required of state statutes drawn according to race." *Id.*

Similar to the anti-miscegenation statute in *Loving*, the Massachusetts practice of requiring daily classroom affirmation that our nation is "under God," maintains a theistic supremacy that is hostile to atheists. (A. 79, ¶ 11). The issue in this case is not that the theistic language results in the establishment of a religion – as the First Amendment prohibits – but instead, that it creates a group of second-class citizens – as the ERA prohibits. See, *Goodridge,* 440 Mass. at 312 ("[t]he Massachusetts Constitution . . . forbids the creation of second-class citizens."). With all classrooms regularly reciting that our nation is "under God," true believers can rest assured that they meet the definition of patriotism. In contrast, nonbelievers receive a daily reminder that they don't quite measure up to their classmates.

Hence, it is inconsequential under the ERA that atheists have an "equal" right to *participate* in the daily exercise that discriminates against them.[26]

In the seminal case of *Brown v. Board of Education,* 347 U.S. 483, 495 (1954), the Supreme Court found that a principal consequence of school segregation was stigmatization. Although the plaintiffs acknowledge that the degree of discrimination here is less egregious than the centuries of horrific racism that were an undercurrent in *Brown*, they point out that the Supreme Judicial Court recently rejected the argument that "*degree"* is relevant under the ERA. The Court explained:

> The point of the equal protection guarantee is not to ensure that . . . in singling out disadvantaged classes, the State subjects them to only mild inequality. Rather the right to equal protection recognizes that the act of classification is itself invidious and is thus constitutionally acceptable only where it meets an exacting test. Whether § 31 results in a sharp reduction in benefits to some or all members of the plaintiff class therefore is irrelevant to the standard of review that is applicable.

[26] Even the dissent in *Goodridge* acknowledged: "Of course, a statute that on its face treats protected groups equally may still harm, stigmatize, or advantage one over the other." 440 Mass. at 376 (Cordy, J., dissenting).

Finch, 459 Mass. at 676. Thus, even if the lower court regarded the treatment towards plaintiffs, members of a suspect class, as only mildly discriminatory, strict scrutiny still should have applied.

That said, a finding of only "mild" discrimination in this case would be seriously mistaken. With atheism carrying a significant stigma in American society, (A. 64, ¶¶ 5-7; A. 116), there is nothing "mild" about reinforcing such prejudice via a patriotic practice that by law must occur every single day of a child's public school career.[27]

II. THE DAILY EXERCISE REQUIRED BY G. L. CHAPTER 71, § 69, UTILIZING THEISTIC LANGUAGE TO INSTILL PATRIOTISM AND LOYALTY, IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST.

Under strict scrutiny, a challenged practice will be upheld only if it is "narrowly tailored to further a legitimate and compelling governmental interest." *Aime v. Commonwealth,* 414 Mass. 667, 673 (1993); *Blixt v. Blixt*, 437 Mass. 649, 655-656 (2002); *Lowell v. Kowalski*, 380 Mass. 663, 667-669 (1980). Not surprisingly, defendants have failed to advance a single argument that patriotism and loyalty can be

[27] Over the course of a child's 13-year public school education (kindergarten through grade 12), his or her classes will conduct this exercise over 2,300 times.

instilled only via a daily classroom exercise that exalts theism and disfavors atheists and Humanists.

The daily exercise in question is intended to "instill attitudes of patriotism and loyalty" in students. *Opinions of the Justices to the Governor,* 372 Mass. 874, 879 (1977). The Superior Court found that the Pledge was "clearly designed to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the constitutions of the State and nation." (A. 221) (quoting *Nicholls v. Mayor and School Committee of Lynn,* 297 Mass. 65, 69 (1937)).

The government's interest in maintaining a loyal and patriotic citizenry is not at issue.[28] (A. 115). The focus is instead on the government's achieving these goals by means of a daily recitation that validates one religious class and invalidates another. Assuming, therefore, that the government has a compelling interest in instilling attitudes of

[28] While plaintiffs do not dispute that the government has an interest in maintaining a loyal and patriotic citizenry, they also point out that there is no evidence to suggest that rote recitation of a daily pledge furthers that goal. The Court could, however, reasonably assume that classroom recitation of a *discriminatory* pledge might actually *diminish* patriotism among those who are the target of the discrimination.

"patriotism and loyalty," the means chosen to achieve those ends – specifically, a daily exercise affirming a central religious belief that favors some students over others – is not narrowly tailored to avoid discrimination in achieving such ends.

Patriotism and loyalty can be instilled in numerous ways that do not involve the daily recitation of theistic language. As just one of innumerable examples, classes could begin each day with a brief lesson about an important American hero, or with alternating readings from important historical documents. Ideally, a wide variety of information could be covered over the course of a school year, conveying the pluralistic nature of the country and the complexity of its history and institutions. References to religion and even theistic language could of course be included from time to time, but not on a daily basis in a ceremonial manner that conditions children to see one religious view as superior and another as presumptively unpatriotic. Such religious references could be contrasted with the voluminous material reflecting the secular nature of American government, such as the God-free U.S. Constitution and the language of the Treaty of Peace

and Friendship (Tripoli), unanimously approved by the Senate and signed by President John Adams in 1797, which states: "[T]he government of the United States is not in any sense founded on the Christian Religion."[29] Given the wide array of historically significant works, this approach would allow students to gain a comprehensive understanding of their nation, and, in turn, a greater sense of patriotism and loyalty, without instilling anti-atheist prejudice.

It follows that the government has no interest, compelling or otherwise, in continuing a patriotic practice that utilizes religious language. To the contrary, unnecessary prejudice towards atheists has lived on by virtue of the continued use of discriminatory language in daily exercises such as the one challenged here. (A. 75, ¶ 11; A. 77, ¶ 11; A. 79, ¶ 11). The prejudice might once have been understandable (though still not justified) in light of the Cold War, but certainly by now, with the Cold War having ended over two decades ago, it is time to put this prejudice behind us. The stereotype of the atheist as "un-American" is both hurtful and

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[29] Treaty of Peace & Friendship, U.S.-Tripoli, art. XI, Nov. 4, 1796, available at http://avalon.law.yale.edu/18th_century/bar1796t.asp.

completely wrong. (A. 120) Extensive data indicates that atheism and Humanism do not correlate to an increase in social or personal ills, and in fact the reverse is often true. (A. 67; A. 120). By mandating daily recitation of theistic language, Massachusetts has chosen to perpetuate, rather than terminate, invidious stereotypes of atheists.

Accordingly, the means chosen do not closely fit the ends of achieving patriotism and loyalty, and therefore the practice cannot satisfy strict scrutiny.

III. FEDERAL LAW DOES NOT DICTATE HOW OR EVEN WHETHER MASSACHUSETTS SHOULD INSTILL PATRIOTISM IN STUDENTS, AND THUS, THIS IS ENTIRELY A STATE LAW ISSUE WHICH SHOULD BE GOVERNED BY THE STATE EQUAL PROTECTION CLAUSE.

The relationship between federal and state law is important here. Plaintiffs are not challenging the federal statute adding “under God” to the Pledge. 4 U.S.C.A. § 4. Indeed, plaintiffs make no federal claims of any kind: no Establishment Clause claims, no Fourteenth Amendment claims, and no claims based on any federal constitutional or statutory authority. Plaintiffs rely solely on the equal protection guarantees of the Commonwealth’s Constitution and the nondiscrimination protections of G.L. c. 76, § 5 to challenge a *state* practice.

The Federal Pledge statute does not relate to public education or refer to it in any way. Congress has not even mandated, via 4 U.S.C.A. § 4 or any other law, that states incorporate the Pledge into public school curricula. Consequently, there is no Supremacy Clause issue here. U.S. CONST. art. VI, cl. 2.

The constitutionality of the Massachusetts exercise required by G.L. c. 71 § 69 is therefore entirely a state law issue. In *Finch,* the Supreme Judicial Court explained that "[t]he command of art. 106 is inapplicable only if, pursuant to the supremacy clause, Federal law permits the State no alternative but to adopt policies that classify individuals on the basis of [suspect criteria]." 459 Mass. at 678. There is no federal law requiring Massachusetts to adopt a practice utilizing language that stigmatizes students on the basis of religion, and thus, Article 106 is not rendered inapplicable. While 4 U.S.C.A. § 4 provides a ready-made recitation that might be wrongly assumed to be appropriate for daily classroom use, schools in the Commonwealth would be prohibited from utilizing it if doing so violates the ERA.[30]

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[30] See *Finch,* 459 Mass., at 678 ("the fact that the Federal government (on national origin grounds) is unwilling to shoulder a portion of the financial load

Indeed, Massachusetts courts have the right and duty to determine whether the daily recitation of theistic language in the Commonwealth's schools is appropriate, in light of *State* constitutional and statutory guarantees of religious equality. Since the practice unnecessarily and invidiously discriminates against the plaintiffs on the basis of their religion, the outcome of such an analysis is clear: it violates the ERA.

Fundamental principles of equality and humanity were at the heart of the Supreme Judicial Court's opinion in *Goodridge,* and language from that case is especially pertinent here:

> The plaintiffs are members of our community, our neighbors, our coworkers, our friends. . . The plaintiffs volunteer in our schools . . . and have children who play with our children. . . . We share a common humanity and participate together in the social contract that is the foundation of our Commonwealth. Simple principles of decency dictate that we extend to the plaintiffs . . . full acceptance, tolerance, and respect. We should do so because it is the right thing to do.

440 Mass. at 349-350. (Greany, J., concurring). A fair application of those principles here leads to the

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. . . does not render the Commonwealth obligated to classify eligibility on the basis of national origin – it merely makes such a classification economically attractive.").

conclusion that the current practice must be enjoined in order to allow atheists and Humanists the respect and dignity they deserve as citizens.

IV. THE DAILY PATRIOTIC EXERCISE VIOLATES G.L. C. 76, § 5 BECAUSE IT DENIES PUBLIC SCHOOL STUDENTS AN ADVANTAGE AND PRIVILEGE OF PUBLIC SCHOOL ON ACCOUNT OF RELIGION.

The nondiscrimination language of Chapter 76, § 5 assures that Massachusetts children will not be denied the advantages and privileges of public school attendance based on "race, color, sex, religion, national origin, or sexual orientation." G.L. c. 76, § 5 (2012); (A. 56). Participation in a daily patriotic exercise is an "advantage" and "privilege" of public school education. By forcing atheist students to choose between participating in an activity that denigrates their religious beliefs or becoming an outsider to the ceremony, the challenged practice denies these students a "privilege" and "advantage" of public school on account of religion, in violation of the statute.

The Supreme Judicial Court has assumed that G.L. c. 76, § 5 equates with the protections in Article 106 of the Constitution. *Attorney Gen. v. Massachusetts Interscholastic Athletic Asso.,* 378 Mass. 342, 344 n.5 (1979). The Court explained, "[w]ith the passage of

ERA, our constitutional law has caught up to s 5." *Id.* Because the daily exercise violates Article 106, *supra,* it also violates G.L. c. 76, § 5.

The invidious nature of the daily religious discrimination faced by the plaintiffs is undeniable, and the Superior Court erred in its judgment to the contrary. (A. 230).

CONCLUSION

Where, as here, the State discriminates on the basis of religion through a practice expressly validating one religious view and invalidating another – particularly when doing so in the process of trying to instill patriotism in children – there is no question that strict scrutiny must apply. By employing rational basis to uphold the practice, the Superior Court erred as a matter of law. As highlighted in much more detail above, a practice need not be exclusively religious or akin to a prayer to discriminate on the basis of religion.

Because strict scrutiny applies, the practice is presumed to be unconstitutional. The government can only overcome this presumption by meeting the very heavy burden of establishing a compelling state interest and demonstrating that the means used to

achieve that interest are narrowly tailored. The government cannot meet its burden here because there are numerous ways to instill patriotism and loyalty that do not involve the affirmation of theistic beliefs and implied denigration of atheism. Indeed, there is no evidence to suggest that daily recitation of the same words has any value. It is fair to assume, moreover, that the daily recitation of discriminatory language is actually counterproductive as it could *diminish* patriotism among those who are the target of the discrimination. As such, it would be difficult to uphold the practice in question under even rational basis review. Accordingly, the Massachusetts practice violates the State ERA, and similarly violates the State nondiscrimination statute, G.L. c. 76, § 5.

WHEREFORE, plaintiffs respectfully request that the Court *reverse* the judgment of the Superior Court in its entirety and declare unconstitutional the practice of discriminating on the basis of religion or creed in a daily classroom patriotic exercise in Massachusetts public schools.

Respectfully submitted,
Jane Doe and John Doe,
individually and as parents and
next friends of Doechild-1,
Doechild-2, and Doechild-3, and
the American Humanist Association,

By their Attorney,

____

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November 12, 2012

CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that on this date two copies of BRIEF OF THE PLAINTIFFS/APPELLANTS, JANE DOE and JOHN DOE, individually and as parents and next friends of DOECHILD-1, DOECHILD-2, and DOECHILD-3, and THE AMERICAN HUMANIST ASSOCIATION were served by first-class mail upon the following counsel of record:

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CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. A. P. 16 (K)

I, David A. Niose, Counsel for the plaintiffs, hereby certify that the Plaintiff's Brief complies with the rules of Court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(a) (6), Mass. R. A. P. 16(e), Mass. R. A. P. 16(f), Mass. R. A. P. 16(h), Mass. R. A. P. 18, and Mass. R. A. P. 20.

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