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

REPLY 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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I. THE STATE-SPONSORED, TEACHER-LED PATRIOTIC EXERCISE REQUIRED BY SECTION 69 FACIALLY DISCRIMINATES BECAUSE IT EXPLICITY AND IMPLICITY DRAWS A LINE BETWEEN GOD-BELIEVERS AND NON-BELIEVERS, CLASSIFYING STUDENTS ON THE BASIS OF CREED.

A. The daily exercise treats similarly situated religious classes differently.

The Commonwealth's practice prescribed by Mass. Gen. L. c. 71, § 69 ("§ 69") promotes and defines patriotism in terms that favor one religious class over another. The daily exercise, required by statute and led by teachers, portrays God-belief as a key element of patriotism, thus stigmatizing atheists such as Plaintiffs and contributing to existing prejudices against them. The exercise denies atheists and Humanists the ability to meaningfully participate in an official patriotic practice that favors similarly situated Christians and other God-believers. As such, Defendants' assertion that Plaintiffs are "not classified (or treated) . . . any differently than other students" is erroneous. Defendants' Brief at 14.[1]

A facial classification occurs when a law or practice treats similarly situated groups differently. *Harlfinger v. Martin*, 435 Mass. 38, 48 (2001). The

[1] Citations to Defendants' Brief are hereafter referred to as "DB" followed by the page number.

state-sponsored practice in question here, instilling patriotism in children each day via a belief that the nation is "under God," treats those who believe in God differently from similarly situated students who do not. The line drawn is based on religion. A state-sponsored practice of affirming that this is a nation "without God," would draw the same classification.

Indeed, an atheist can only gain the same benefits from the practice as a Christian by negating the very trait that defines atheists as a class (disbelief in God). See *Varnum v. Brien*, 763 N.W.2d 862, 884-85 (Iowa 2009)(recognizing that "a gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class-their sexual orientation.") Moreover, the daily validation of the religious views of God-believers resigns atheists to second-class citizens, which also renders the practice facially suspect.[2]

Importantly, a law or practice need not explicitly refer to the trait being discriminated against in order to state a prima facie equal

[2] *In re Senate*, 440 Mass. 1201, 1209 (2004). ("Maintaining a second-class citizen status for same-sex couples . . . is the constitutional infirmity").

protection violation. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 319, 328 (2003)(finding statute classified on basis of "sexual orientation" even though it was silent on whether marriage was limited to a "man and woman" and made no mention of the trait). A facial classification can even arise by negative implication. *Id.* This point is best illustrated by the plethora of cases finding facial classifications on the basis of "sexual orientation" in statutes defining marriage between a "man and a woman" without any mention of sexual orientation.[3]

Significantly, arguments nearly identical to those Defendants assert here denying facial classification were flatly rejected by high courts following *Goodridge.* For instance, in *Varnum*, the government defendants argued that Iowa's statute

[3] See *Windsor v. U.S.*, 699 F.3d 169, 181 (2d Cir. 2012) (DOMA classifies on basis of sexual orientation); *Mass. v. U.S. HHS*, 682 F.3d 1, 15 (1st Cir. 2012) (same); *In re Levenson*, 560 F.3d 1145, 1150 (9th Cir. 2009) (same); *Perry v. Brown*, 671 F.3d 1052, 1094 (9th Cir. 2012) ("Proposition 8 is a classification of gays and lesbians"); *Varnum,* 763 N.W.2d at 884; *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 141 (2008); *In re Marriage Cases*, 183 P.3d 384, 440 (Cal. 2008); *Conaway v. Deane*, 401 Md. 219, 277 (2007); *Hernandez v. Robles*, 7 N.Y.3d 338, 364 (2006)(finding same-sex couples and opposite-sex couples "are not treated alike, since only opposite-sex relationships may gain the status and benefits associated with marriage.").

defining "marriage between a male and a female" was facially neutral because it did "not explicitly refer to 'sexual orientation.'" 763 N.W.2d at 884. Hence, defendants argued the statute "only incidentally impacts disparately upon gay and lesbian people." *Id.* The Iowa Supreme Court disagreed and held that the statute "classifies on the basis of sexual orientation." *Id.* It reasoned:

> It is true the marriage statute does not *expressly* prohibit gay and lesbian persons from marrying. . . [However,] civil marriage with a person of the opposite sex is as *unappealing* to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person under the marriage statute to enter into a civil marriage only with a person of the opposite sex *is no right at all.*

Id. at 885 (emphasis added).

Similarly, for an atheist, reciting the Pledge containing the words "under God" is as unappealing as it would be for a Christian to have to recite that this nation is "without God." The fact that atheists have an equal right to participate in this exercise is therefore *no right at all.* Indeed, contrary to Defendants' assertion, it is well settled both in this Court (*Goodridge*) and in others that the equal application of a discriminatory law or practice does

not shield it from constitutional review.[4]

The Connecticut Supreme Court reached the same conclusion in *Kerrigan*. The state argued that laws defining marriage as between a "man and a woman" do "not discriminate on the basis of sexual orientation," and insisted such laws were "facially neutral." 289 Conn. at 145-46. The court disagreed, finding the statute discriminatory on its face. *Id.* at 150.

The California Supreme Court similarly refused to find a statute limiting marriage to a "man and a woman" as imposing only a "disparate impact" on gay persons. *In re Marriage Cases*, 183 P.3d at 440. In "arguing that the marriage statutes do not discriminate on the basis of sexual orientation," the defendants relied on the fact that the "statutes, on their face, do not refer explicitly to sexual orientation." *Id.* They contended, as Defendants do here, that the statutes "should be viewed as having a 'disparate impact.'" *Id.* The court strongly disagreed:

> the statutory provisions . . . must be viewed as *directly classifying* and prescribing distinct treatment on the basis of sexual orientation. By limiting marriage

[4] *Loving v. Virginia*, 388 U.S. 1, 8 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) ("[j]udicial inquiry under the Equal Protection Clause. . . does not end with a showing of equal application").

> to opposite-sex couples, the marriage statutes, *realistically viewed*, operate clearly and directly to impose different treatment on gay individuals because of their sexual orientation. . . . [I]t is *sophistic to suggest that this conclusion is avoidable* by reason of the circumstance that the marriage statutes permit a gay man or a lesbian to marry someone of the opposite sex, *because making such a choice would require the negation of the person's sexual orientation*.

Id. (emphasis added).

It is equally sophistic for Defendants to argue here that their practice does not discriminate on the basis of religion simply because Plaintiffs have an equal right to participate. This Court rejected such a formalistic approach to equality in *Goodridge*, and reiterated it in *In re Senate*:

> [T]he question the court considered in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by *status discrimination*. . . . Maintaining a second-class citizen status for same-sex couples . . . is the constitutional infirmity at issue.

440 Mass. at 1209.

Hence, the unavoidable discrimination against atheists under the practice required by § 69 constitutes a cognizable harm under the ERA.

The court in *Kerrigan* made a similar point:

> Even though the classifications created under our statutory scheme result in a type of differential treatment that generally may be characterized as symbolic or intangible, . . . such treatment nevertheless "is every bit as restrictive as naked exclusions" because it is no less real than more tangible forms of discrimination, at least when . . . the statute singles out a group that historically has been the object of scorn, intolerance, ridicule or worse.

289 Conn. at 152-53 (internal citation omitted).

Like gays and lesbians, atheists historically have and continue to be the object of scorn and intolerance (A. 116), as reflected by the Pledge practice itself. It is common knowledge that "under God" was added to the Pledge to "deny the atheistic and materialistic concepts of communism." House Report No. 83-1693 (1954).[5] Surveys rank 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).

Because the harm from Defendants' practice is the unequal treatment itself, Plaintiffs need not prove any "personal insult or harassment" as Defendants suggest they do. DB at 7-8. The "right to equal

[5] Congressman Rabaut introduced the bill stating that the addition would strike "at the philosophical roots of communism, atheism, and materialism." 83rd Cong. 1st Sess., *Congressional Record* 99, pt. 10 (1953).

protection recognizes that the act of classification is itself invidious and is thus constitutionally acceptable only where it meets an exacting test." *Finch v. Commonwealth Health Ins. Connector Auth.*, 459 Mass. 655, 676 (2011).

B. The "voluntariness" of the practice does not change the fact that it is a state-sponsored exercise that classifies on the basis of creed.

Defendants assert that because the recitation of the Pledge is "entirely voluntary, the individual students create the classification and not the statute (§ 69) or the School Districts." DB at 16. This argument ignores the fact that the recitation is an official, state-sponsored classroom exercise required by § 69. The exercise takes place on school property, during class time, and is even led by a school official. These facts establish "state action" for ERA purposes. The concept of voluntariness, although central to a free speech analysis, makes little difference in an equal protection scenario, and certainly does not excuse a government-sponsored daily classroom exercise that favors a religious class while stigmatizing another.[6]

[6] Plaintiffs refer to their main brief for a more comprehensive discussion of the voluntariness issue.

C. There is no "discriminatory intent" requirement under the ERA, but even if there were, it would not apply here because the practice required by § 69 facially discriminates.

The Commonwealth's practice of requiring public school teachers to lead a daily classroom recitation affirming that the nation is "under God" draws an explicit classification on the basis of "creed." As such, contrary to Defendants' assertion (DB at 32), Plaintiffs do not need to prove discriminatory intent. This Court recognized as much in *Goodridge,* holding that Massachusetts laws implicitly limited marriage between a "man and woman" and therefore, by implication, classified facially on the basis of "sexual orientation." 440 Mass. 309, 314-15.[7] In declaring this unconstitutional, this Court did not require a showing of intent. Indeed, it was noted: "That our marriage laws, unlike antimiscegenation laws, were not enacted purposely to discriminate in no way neutralizes their present discriminatory character." *Id.* at 346-47 (Greany, J., concurring).

Moreover, although it is a moot point because the practice here facially discriminates, Defendants'

[7] The statutes in *Goodridge,* unlike DOMA, did not contain text limiting marriage to a "man and woman." Thus, the classification was wholly implied.

exclusive reliance on federal law relating to discriminatory intent is suspect, since this Court has never, to Plaintiffs' knowledge, required such a showing under the ERA. See *Moe v. Sec. of Admin. & Finance*, 382 Mass. 629, 664 (1981) (Hennessey, C.J., dissenting) ("This court has not yet fully addressed the question of what, if any, proof of discriminatory intent is required to make out a prima facie showing of discrimination under the Equal Rights Amendment.").[8] *See also, Buchanan v. Director of Div.,* 393 Mass. 329, 334-35 (1984)(disparate impact, even absent intentional discrimination, still raises ERA claim).

This Court has only imposed the requirement of intent, to Plaintiffs' knowledge, in non-ERA cases patently distinguishable from the present case. Most involved claims brought under the Federal Equal Protection Clause, and most raised the unique issue of selective enforcement – a claim that, by definition, challenges a facially neutral law.[9] In fact, neither

[8] The majority in *Moe* held that state restrictions on Medicaid funding of abortions violated the state constitutional due process guarantee even though such restrictions would not violate the U.S. Constitution. 382 Mass. at 651.

[9] See *In re Crossen*, 450 Mass. 533, 572 (2008) (dicta discussing disparate impact test applied under Federal Equal Protection Clause in "selective prosecution"

Defendants, Interveners, nor amici point to any cases brought under the Massachusetts ERA to support the notion of an intent requirement.

The divergence between the Massachusetts Constitution and the Federal Fourteenth Amendment on the issue of intent is illustrated in *Com. v. Bastarache*, 382 Mass. 86, 101-103 (1980) ("As to groups described in art. 1, we would not be concerned with whether the discrimination was intentional because even unintentional discrimination against such a group would raise a [state] constitutional question.") See also *Com. v. Aponte*, 391 Mass. 494, 496 (1984) where, in considering defendants' claim of discriminatory grand jury selection under both state and federal constitutions, this Court held that "art. 12 safeguards defendants against systematic, *albeit unintentional*, discrimination against their protected

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cases); *Com. v. Lora*, 451 Mass. 425, 436 (2008) (evidence of racial profiling could be used to demonstrate "selective enforcement" of traffic laws since challenge raised "discriminatory application of impartial laws"); *McClure v. Sec'y of Commonwealth*, 436 Mass. 614, 625 (2002) (discussing requirement of intent for challenges to gerrymandering under Federal Equal Protection Clause); *New York Times Co. v. Comm'r of Revenue*, 427 Mass. 399, 406 (1998)(explaining discriminatory intent is only one way to demonstrate that a "facially neutral law" violates *Federal* Equal Protection Clause).

class" and therefore refrained from even considering whether the evidence showed "*purposeful* discrimination in violation of the [federal] equal protection clause."[10] *Id* 506 (emphasis added).

Notably, the federal cases Defendants and amici rely upon only make it more apparent that the practice challenged *sub judice* is facially discriminatory. For instance *McCleskey v. Kemp*, 481 U.S. 279 (1987) is inapposite since it was a "selective prosecution" case challenging racial disparities resulting from the exercise of prosecutorial discretion in seeking the death penalty.[11] Importantly, Georgia's death penalty statute, at least in theory, *could* be applied without resulting racial discrimination, for it created no suspect classification (it only classified those "convicted of murder"). *Id.* at 284. McCleskey argued that this race-neutral statute was *applied* unevenly to the detriment of minorities, but the Court rejected the claim, ruling that challenges based on application of facially neutral laws must be supported by proof of

[10] See *Duren v. Missouri*, 439 U.S. 357, 364 (1979).
[11] McCleskey challenged his sentence alleging that Georgia's death penalty scheme violated the U.S. Equal Protection Clause. He based his claim on a study of Georgia murder cases showing that when victims were white, defendants were more likely to be sentenced to death. *Id.* at 287.

purposeful discrimination. *Id* at 287.

In contrast, in the instant case, discriminatory treatment occurs not due to selective enforcement or unfair application of the law, but because § 69 *requires it* by requiring a patriotic exercise that favors one religious class over another. Due to its inherently discriminatory language, *every* application of this law casts atheists as outsiders and second-class citizens.

Arguing that the "under God" assertion does not classify according to creed, Defendants and amici insist that the wording should not be seen as religious. The unavoidable irony here is that this argument is being put forth by overtly religious entities: the Roman Catholic Knights of Columbus, the Alliance Defending Freedom (with its motto "For Faith, For Justice"), the Massachusetts Family Institute (claiming to defend "Judeo-Christian values"), and the Becket Fund for Religious Liberty (which "protects the free expression of all faiths").[12] These religious groups, in what would seem strange to an observer who

[12] The Knights' claim that the "under God" wording "is not a religious statement" (Interveners' brief at 17) is curious in light of its simultaneous statement that granting Plaintiffs relief would amount of "hostility toward religion" (Interveners' Brief at 38).

did not know their motives, ask the Court to ignore the plain meaning of the word "God."

No matter how the Defendants and amici wish to have the Court define the word "God," however, they surely know that few schoolchildren will share this unique interpretation. To ordinary children, the assertion that the nation is "under God" is likely to be understood only as an expression of God-belief, and a rejection of atheism. Of course, it is doubtful that these religious entities truly believe "under God" is so benign. More likely, they know it is a powerful statement that validates their religious beliefs while invalidating atheist beliefs.[13]

II. WHEREAS MASSACHUSETTS PROVIDES CONSTITUTIONAL AND STATUTORY ENUMERATION REQUIRING STRICT SCRUTINY OF RELIGIOUS DISCRIMINATION, FEDERAL JURISPRUDENCE ADDRESSING RELIGIOUS EQUAL PROTECTION IS SCANT AT BEST AND PROVIDES NO USEFUL GUIDANCE FOR APPLICATION OF THE MASSACHUSETTS ERA.

First Amendment religion jurisprudence, under both the Free Exercise Clause and Establishment Clause, is of course abundant in federal courts, but federal equal protection cases focusing on religious discrimination under the Fourteenth Amendment are

[13] This would not be the first court to recognize that the Knights have a history of trying to gain "public backing of their beliefs." *Knights of Columbus v. Town of Lexington*, 272 F.3d 25, 34 (1st Cir. 2001)

almost nonexistent. In fact, although Defendants insist that the Massachusetts ERA (which through enumeration requires strict scrutiny[14]) should be applied using federal standards, Plaintiffs are unaware of any federal appellate case that has ever applied strict scrutiny to a Fourteenth Amendment religious equal protection claim. The few federal cases that mention religious equal protection usually do so as dicta,[15] or in a cursory way within an opinion that is primarily focused on other issues.[16]

Federal jurisprudence is a barren landscape with respect to religious equal protection, yet curiously this is where Defendants wish to direct this Court for guidance. If federal religious equal protection were a highly developed field, rich with case law dissecting the myriad of issues presented, the fruits of that field might prove beneficial to this Court in applying the ERA. In reality, however, such is not the case. Defendants, faced with a State Constitution and

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[14] See *Finch*, 459 Mass. at 662-663.

[15] See *New Orleans v. Dukes*, 427 U.S. 297 (1976), which incidentally mentions that "race, religion or alienage" are "inherently suspect distinctions."

[16] See *Freedom from Religion Found. v. Hanover School Dist.*, 626 F.3d 1 (1st Cir. 2010), where the great weight of the lengthy opinion addresses Establishment Clause issues, while one paragraph is allotted to equal protection.

jurisprudential tradition demanding the highest standards of equality, understandably would prefer that this Court look elsewhere.

Moreover, Defendants greatly exaggerate the extent to which Massachusetts courts are in lockstep with federal courts on equal protection issues. Defendants are simply incorrect, for example, when they claim that strict scrutiny on gender discrimination is the only way in which the Massachusetts Constitution views equal protection differently than the Fourteenth Amendment. Looking no further than *Goodridge,* we can see that Massachusetts courts do not rely on federal courts to define the limits of equality. Other cases, such as *Com v. Aponte, supra*, and *Buchanan v. Director of Div., supra*, reiterate this Court's independence and higher standard of equality as well.

III. A RULING FOR PLAINTIFFS WOULD NOT ALLOW RELIGIOUS MINORITIES TO RESHAPE CURRICULA OR REMOVE ALL VESTIGES OF RELIGION FROM PUBLIC LIFE, BUT WOULD ONLY PROHIBIT SCHOOLS FROM DEFINING AND INSTILLING PATRIOTISM IN A WAY THAT EXALTS ONE RELIGIOUS CLASS OVER ANOTHER.

There is a fundamental difference between a state-sponsored *patriotic exercise* and an ordinary *classroom lesson*. Defendants, ignoring this

distinction, assert with alarmist zeal that a ruling in Plaintiffs' favor would open the floodgates for challenges based on mere disagreement with the content of a lesson plan. DB at 25. Plaintiffs, however, are not challenging the Pledge practice simply because they find it offensive. Rather, they challenge it because it *discriminates, classifies, relegates them to an inferior status, and contributes to prejudice against them*. A classroom lesson discussing evolution, homosexuality, or gender equality does no such thing.

An objective lesson *about* biology, history, the arts, etc., is worlds away from a patriotic practice which contains an affirmation exalting a particular religious class. The *daily* nature of the exercise also distinguishes it from an ordinary classroom lesson. Plaintiffs have even suggested that nondiscriminatory patriotic practices could *include* readings from the Declaration of Independence and other historical documents, in lieu of the current practice.[17]

Parents cannot challenge the practice of teaching

[17] Plaintiffs made this argument in their main brief to illustrate that there are numerous ways to instill patriotism. In fact, in *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 (1943), the Supreme Court seemed to agree that the flag salute might be of questionable utility, calling the exercise "relatively trivial to the welfare of the nation."

about homosexuality or evolution merely because it offends their religious beliefs.[18] The government does not discriminate on the basis of religion by requiring classes that teach factual material. Thus, a ruling in Plaintiffs' favor would not open the door to fundamentalists objecting to lessons about same-sex orientation. As the Supreme Court put it in rejecting a similar argument: "[It is] *exactly backwards* [to say] that enforcing the Constitution's requirement that government remain secular is a prescription of orthodoxy. . . . *[It is] a form of Orwellian newspeak [to] equate[] the constitutional command of secular government with a prescribed orthodoxy.*" *County of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989) (emphasis added). Curriculum that includes historical or scientific facts, omitting contrary religious views, "does not convey a message of governmental approval of secular humanism, neither does it convey a message of government disapproval of theistic religions." *Smith v. Bd. of Sch. Comm'rs*, 827 F.2d 684, 694 (11th Cir.

[18] *Cf. Epperson v. Arkansas*, 393 U.S. 97 (1968) (upholding a statute forbidding the teaching of evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (rejecting a statute requiring the teaching of creationism alongside evolution).

1987).[19]

A ruling in Plaintiffs' favor would simply require that government refrain from instilling and defining patriotism in a manner that exalts one religious class at the expense of another, that government refrain from making a student's religious beliefs relevant to full participation in a daily classroom patriotic exercise.

CONCLUSION

Chapter 71, § 69, is not facially neutral because the exercise mandated by it necessarily favors one religious class while disfavoring and even stigmatizing another. Not only must atheists and other non-believers who wish to participate with their similarly situated classmates in this teacher-led, state-sponsored exercise negate the very belief that defines them as a class, but in doing so they would participate in an exercise that casts a negative light on their own religious class while exalting believers. Those who do not believe in God and those that do are not treated alike, since only believers may gain the

[19] See also *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 225-26 (1963) (rejecting contention that the absence of religion equates to "affirmatively opposing or showing hostility to religion").

status and benefits associated with the State's practice. The preference for God-believers through this daily patriotic exercise results in marginalizing non-believers such as Plaintiffs on the basis of suspect criteria – religion – in violation of the Massachusetts Constitution. It is no defense that everyone can participate and anyone can opt out. This defense ignores the longstanding rule that equal application of a discriminatory practice does not shield it from constitutional review under the ERA.

Respectfully submitted,

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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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February 22, 2013

CERTIFICATE OF SERVICE

I hereby certify under the penalties of perjury that on this date two copies of REPLY 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 Reply 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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