Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
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

AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF DEFENDANTS-APPELLEES

Jay Alan Sekulow*, D.C. Bar No. 496335
Stuart J. Roth**
Colby M. May**
American Center for Law & Justice
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
sjr@aclj.org
cmmay@aclj-dc.org

Erik M. Zimmerman**
American Center for Law & Justice
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489
ezimmerman@aclj.org

Carly F. Gammill**
American Center for Law & Justice
188 Front St., Suite 116-19
Franklin, TN 37064
(615) 415-4822
cgammill@aclj.org

**Admission *pro hac vice* pending
**Not admitted in this jurisdiction

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the ACLJ states that it is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

Jay Alan Sekulow
D.C. Bar No. 496335
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

Other Cases

Constitutions, Statutes, and Rules

Other Authorities

INTEREST OF AMICUS

Amicus, the American Center for Law and Justice (ACLJ), is a legal and educational organization committed to ensuring the ongoing viability of constitutional freedoms in accordance with principles of justice. ACLJ attorneys have argued before the Supreme Court of the United States and other federal and state courts in numerous cases involving constitutional issues.[1] The ACLJ is concerned with the proper resolution of this case because it will likely have a significant impact on the recognition of America's religious heritage in public life.

Plaintiffs' strategy to purge all religious observances and references from public life in the Commonwealth of Massachusetts must not be permitted to advance. If successful, it will undoubtedly embolden similar challenges to the Pledge in states across the nation, as well as challenges to other religious expressions in government venues and documents, including the various acknowledgments of God in Massachusetts's own constitution.[2] *Amicus* contends that

---

[1] *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

[2] For example, in the Preamble to the Massachusetts Constitution "the people of Massachusetts" acknowledge "the goodness of the great Legislator of the universe,"

including the words "under God" in the Pledge does not violate the Massachusetts Equal Rights Amendment. These words echo the sentiments found in the Declaration of Independence and recognize America's historical understanding of the concept that freedom derives from an authority higher than the state, a notion also clearly embodied within the Massachusetts Constitution. Because the phrase "under God" is a historical acknowledgment rather than a statement of religious belief or approval, in both purpose and effect it serves as a neutral recognition of the unique heritage of our nation, not as a means of discriminating against persons on the basis of their religious faith.

---

and "His providence," and "devoutly implore[e] His direction" for the Commonwealth. Mass. Const., Preamble. The Constitution declares that it is not only the right but also the "*duty* of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe" *Id.*, pt. I, art. II (emphasis added), and further acknowledges both "the blessing of God" and "the honor of God," *id.* pt. II, ch. V, sec. I, art. I.

ARGUMENT

I. THE PHRASE "UNDER GOD" IN THE PLEDGE ACCURATELY REFLECTS THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

Examining United States history reveals a Nation in which, from its inception, references to God abound. In fact, the Nation's Founders based a national philosophy on a belief in the Deity: "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 213 (1963). The Declaration of Independence attributes the source of inalienable rights to a Creator rather than to government, precisely so the government cannot strip away such rights. In 1782, Thomas Jefferson wrote, "Can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782).

George Washington acknowledged on many occasions the role of Divine Providence in the Nation's affairs. His first inaugural address is replete with references

to God, including thanksgivings and supplications.[3] Washington's Proclamation of a Day of National Thanksgiving stated that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." Jared Sparks, *The Writings of George Washington*, Vol. XII, p. 119 (1833-1837). Washington used the phrase "under God" in several of his orders to the Continental Army. On one occasion he wrote, "The fate of unborn millions will now depend, under God, on the courage and conduct of this army."[4] The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between [the two]." Philip Hamburger, SEPARATION OF CHURCH AND STATE 480 (2002).

The Supreme Court of the United States has long recognized religion's primacy in the Nation's heritage. In *Zorach v. Clauson*, 343 U.S. 306 (1952), the Court stated:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . We sponsor an attitude on the part of government

---

[3] George Washington's First Inaugural Address, *available at* http://www.archives.gov/exhibits/american_originals/inaugura.html.

[4] Diane Ravitch, *To remove 'under God' is to rewrite U.S. history*, N.Y. DAILY NEWS, Mar. 28, 2004, *available at* http://209.157.64.200/focus/f-news/1107238/posts.

> that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe*.

Id. at 313-14 (emphasis added).

In *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), *vacating*, 328 F.3d 466 (9th Cir. 2003), Justice O'Connor noted the historical basis for using religious references: "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." *Id.* at 35-36 (O'Connor, J., concurring).

Thus, the phrase "one Nation under God" in the Pledge describes an indisputable historical fact. As one commentator has observed, the Pledge

> accurately reflects how the founding generation viewed the separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god.

Douglas W. Kmiec, *Symposium on Religion in the Public Square: Forward: Oh God! Can I Say that in Public?*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 312-13 (2003). Moreover, as Chief Justice Rehnquist explained in *Elk Grove*, "[t]he phrase 'under God' in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances." 542 U.S. at 26 (Rehnquist, C.J., concurring). He noted that "[r]eciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one . . . ." *Id.* at 31.

In this case, the trial court rightly recognized this principle when it stated that "[t]he Pledge is a voluntary patriotic exercise, and the inclusion of the phrase 'under God' does not convert the exercise into a prayer." *Doe v. Acton-Boxborough Reg. Sch. Dist.*, No. MICV2010-04261, Mem. of Decision & Order re Cross Motions for Summ. Judg., at 21 (Mass. Super. Ct. June 5, 2012). As the trial court noted, "the phrase ['under God'] serves as an acknowledgment of the Founding Fathers' political philosophy, and the historical and religious traditions of the United States." *Id.* at 21-22. Because "the Pledge is not a religious exercise," the trial court held, "the daily recitation of 'under God' does not constitute an affirmation of a 'religious truth.'" *Id.* at 17.

II. BOTH THE SUPREME COURT AND INDIVIDUAL JUSTICES HAVE REPEATEDLY STATED THAT PATRIOTIC EXERCISES WITH RELIGIOUS REFERENCES ARE CONSISTENT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. There is a Major Difference Between Forbidden Religious Exercises and Permissible Patriotic Exercises.

Beginning with its first school prayer case in *Engel v. Vitale*, 370 U.S. 421 (1962), Supreme Court Justices have distinguished between religious exercises, such as devotional prayer and Bible reading, and patriotic exercises with religious references. In *Engel*, the Court held unconstitutional a New York State law requiring that school officials begin the school day with prayer. *Id.* at 424. Although the Court ruled that the "government . . . should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves," *id.* at 435, the Court distinguished patriotic exercises that contain religious references:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21.

Just one year later, in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Goldberg distinguished mandatory Bible reading in public schools from patriotic exercises with religious references:

> The First Amendment does not prohibit practices, which by any realistic measure, create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Id. at 308 (Goldberg, J., concurring).

Even Justice Brennan, a staunch separationist, expressed the view that patriotic exercises with religious references, such as the Pledge, do not violate the Establishment Clause:

> This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, 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. at 303-04 (Brennan, J., concurring).

In *Lee v. Weisman,* 505 U.S. 577 (1992), a decision built largely on *Engel*, the Court reaffirmed the

distinction between religious exercises, such as state-composed prayers, and patriotic exercises with religious references:

> We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The *prayer exercises* in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit *religious exercise* at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Id. at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice Goldberg's concurrence in *Schempp*, the Court continued:

> Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. *A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.* We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.

Id. at 598-99 (citation omitted) (emphasis added).

In *Lee*, students were led in an inherently religious exercise: prayer. *Lee* does not support a conclusion that the Establishment Clause extends to voluntarily reciting the Pledge simply because it contains the phrase "one Nation under God." Indeed, Chief Justice Rehnquist addressed this in *Elk Grove*, stating:

> I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.

542 U.S. at 31 (Rehnquist, C.J., concurring).

Echoing this sentiment, the Fourth Circuit, in *Meyers v. Loudon County Public Schools,* 418 F.3d 395 (4th Cir. 2005), upheld a Virginia statute requiring daily, voluntary recitation of the Pledge in schools "[b]ecause the Pledge is not a religious exercise and does not threaten an establishment of religion." *Id.* at 397. The court determined that the "[t]he inclusion of ['under God'] does not alter the *nature* of the Pledge as a patriotic activity." *Id.* at 407. Thus, "[e]ven

assuming that the recitation of the Pledge contains a risk of indirect coercion, the indirect coercion is not threatening to establish religion, but patriotism." *Id.* at 408.

> The notion that official acknowledgements of religion and its role in the founding of our nation such as that in the Pledge "pose a real danger of establishment of a state church" is simply "farfetched." The Establishment Clause works to bar "sponsorship, financial support, and active involvement of the sovereign in religious activity." The Pledge, which is not a religious exercise, poses none of these harms and does not amount to an establishment of religion.

Id. (citations omitted). The Fifth Circuit likewise affirmed the Pledge's patriotic nature, stating, "[r]eferences to God in a motto or pledge, for example, have withstood constitutional scrutiny; they constitute permissible 'ceremonial deism' and do not give an impression of government approval." *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006), *vacated on other grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc).

In *Newdow v. Rio Linda Union School District*, the Ninth Circuit held that a California statute requiring school districts to begin the school day with a patriotic exercise (including reciting the Pledge) does not violate the Establishment Clause. 597 F. 3d 1007 (9th Cir. 2010). The court held that the Pledge's "wording as a whole" and our Nation's history demonstrate that the Pledge is a "predominantly

patriotic exercise," and that the phrase "one Nation under God"—a phrase that encompassed the Founders' idea that people derive their rights from God, not government—"does not turn this patriotic exercise into a religious activity."[5] *Id.* at 1014.

Most recently, in *Freedom From Religion Foundation v. Hanover School District*, the First Circuit rejected an Establishment Clause challenge to a New Hampshire statute requiring time to be set aside daily for voluntary recitation of the Pledge in the state's public schools. 626 F.3d 1 (1st Cir. 2010). As the court explained, the statute's "primary effect is not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation." *Id.* at 10. In rejecting the additional argument that the statute violated the endorsement test, the court held that the "premise that children who choose not to recite the Pledge become outsiders based on their beliefs about religion . . . is flawed." *Id.* at 10-11. Because "[t]here are a wide variety of

[5] In *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2003), a divided Ninth Circuit panel held that the Elk Grove Unified School District's policy requiring teachers to lead students in reciting the Pledge violated the Establishment Clause. The Supreme Court reversed on the grounds that the plaintiff lacked standing and, therefore, the panel erred by reaching the merits. *Elk Grove*, 542 U.S. 1. The panel in *Rio Linda Union School District* held that the panel's analysis in *Newdow v. United States Congress* was inconsistent with the Supreme Court's subsequent decisions in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU*, 545 U.S. 844 (2005).

reasons why students may choose not to recite the Pledge, including many reasons that do not rest on either religious or anti-religious belief," the plaintiff children were "not religiously differentiated from their peers merely by virtue of their non-participation in the Pledge." *Id.* at 11.

In the present case, the trial court also correctly recognized the distinction between religious and patriotic exercises:

> the insertion of "under God" into the Pledge has not converted it from a political exercise that is "an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed[,] and into a prayer, which the Supreme Court has defined as "a solemn avowal of divine faith and supplication for the blessings of the Almighty." "In reciting the Pledge, students promise fidelity to our flag and our nation, not to any particular God, faith, or church."

Doe v. Acton-Boxborough Reg. Sch. Dist., Mem. at 16-17 citations omitted).

Furthermore, the Establishment Clause is not so broad as to allow mere offense to religious references in patriotic exercises to convert an exercise from patriotic to religious. In fact, Justice O'Connor dismissed such a broad construction of the Establishment Clause in *Elk Grove*, stating that

> distaste for the reference to "one Nation under God," however sincere, cannot be the yardstick of our Establishment Clause inquiry. . . . It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to

> sever our ties to the traditions developed to honor it.

542 U.S. at 44-45 (O'Connor, J., concurring). Justice O'Connor also stated that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. . . . [N]o robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.* at 44.

Chief Justice Rehnquist further stated in *Elk Grove* that

> [t]he Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they [choose] to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Id. at 33 (Rehnquist, C.J., concurring); *see also Rio Linda Union Sch. Dist.*, 597 F.3d at 1013 (stating that the issue in the case was whether the plaintiff has "the right to prevent teachers from leading other students from [sic] reciting the Pledge of Allegiance . . . because the mention of God in the Pledge offends her as an atheist").

In this case, there is no dispute that recitation of the Pledge is entirely voluntary, as "Plaintiffs are aware that they have the right to refuse participation in the Pledge recitation . . . for a religious reason,

or a non-religious reason, or for no reason." *Doe v. Acton-Boxborough Reg. Sch. Dist.*, Mem. at 5, 22. Given that the Supreme Court has consistently drawn a distinction between religious exercises in public schools, which are often problematic, and patriotic exercises with religious references, which raise no Establishment Clause concerns, any argument that the Pledge creates a distinction on the basis of religion is legally untenable.

B. The Supreme Court Has Consistently Stated that Patriotic Exercises Containing Religious References, such as the Pledge, Are Constitutional Acknowledgements of the Nation's Religious Heritage.

The Supreme Court has made numerous proclamations regarding the Pledge's constitutionality. Almost every time the Court or individual Justices have addressed patriotic exercises with religious references, including the Pledge, they have concluded that those references pose no Establishment Clause problems. To the contrary, recognizing that certain of its precedents may create the impression that some patriotic symbols and exercises would be constitutionally suspect, the Court has taken pains to assure that is not so. Statements from the Court and its members have been so numerous and consistent that ignoring them is not justified.

For example, in *Lynch v. Donnelly*, 465 U.S. 668 (1984), the Court recognized the "unbroken history of

official acknowledgment by all three branches of government of the role of religion in American life." *Id.* at 674. "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Id.* at 675. The Court listed many examples of our "[g]overnment's acknowledgment of our religious heritage," including Congress's addition of the words "under God" to the Pledge in 1954. *Id.* at 676-77.

A year later in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice O'Connor stated that the words "under God" in the Pledge do not violate the Constitution because they "serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" *Id.* at 78 n.5 (O'Connor, J., concurring) (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)).

In *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), the Court stated:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. We need not return to the subject of "ceremonial deism" because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

Id. at 602-03 (citations omitted). The three dissenting Justices in *Allegheny*, Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia, agreed that striking down national traditions such as the Pledge would be a disturbing departure from the Court's precedents upholding the constitutionality of government practices recognizing the Nation's religious heritage. The dissent noted that the Establishment Clause does not "require a relentless extirpation of all contact between government and religion. . . . Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage." *Id.* at 657 (Kennedy, J., concurring in judgment in part, dissenting in part).

More recently, Justice Stevens stated, writing for the court in *Elk Grove*:

> "The very purpose of a national flag is to serve as a symbol of our country." . . . As the history illustrates, the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

542 U.S. at 6 (citations omitted) (quoting *Texas v. Johnson*, 491 U.S. 397, 405 (1989)).

In sum, the Supreme Court has consistently expressed the opinion that the Pledge does not violate the Establishment Clause of the First Amendment, including in cases previously cited with approval by this Court. *See Colo v. Treasurer & Receiver General*,

378 Mass. 550, 560-561 (1979) (acknowledging statements by "[v]arious Justices of the United States Supreme Court" that practices "like the motto 'In God We Trust' on our money or the phrase 'Under God' in the pledge of allegiance" are "permissible under the First Amendment" and holding that "[t]he complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions"). Because Establishment Clause and Equal Protection analysis are virtually indistinguishable in this context, as more fully discussed *infra* Part III, a decision concluding that the Pledge violates equal protection rights is insupportable.

III. PLAINTIFFS' CLAIM UNDER THE MASSACHUSETTS EQUAL RIGHTS AMENDMENT FAILS BECAUSE IT CONSTITUTES NOTHING MORE THAN A REPACKAGING OF CHALLENGES TO THE PLEDGE UNDER THE ESTABLISHMENT CLAUSE THAT HAVE BEEN REPEATEDLY REJECTED.

Plaintiffs' argument that recitation of the Pledge is discriminatory because it stigmatizes them on the basis of religion is merely an effort to dress up a losing Establishment Clause argument in an equal protection suit. This Court should reject such an attempt. Because the analysis under the two provisions is virtually the same, so should be the result.

The clear focus of Establishment Clause analysis is that of religious neutrality, as demonstrated by two

of the primary tests for determining whether the provision has been violated. The *Lemon* test seeks to ensure that a challenged action "neither *advances nor inhibits* religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (emphasis added). The endorsement test asks whether a particular government action "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688 (1984) (O'Connor, J., concurring). In both cases, the inquiry focuses on whether the government has maintained a neutral position that does not favor or disfavor (*i.e.*, discriminate) with regard to religion.

Similarly, equal protection analysis looks to whether the government has treated a particular class of citizens more or less favorably than other similarly situated citizens. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). As the Supreme Court has explained, "[c]entral . . . to our [] Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on *impartial terms* to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996) (emphasis added). In other words, like the Establishment Clause, the principle of equal protection

requires the government to adopt a position of neutrality.[6]

This convergence of the Establishment and Equal Protection Clauses is not a new concept. The Supreme Court, individual justices thereof, and lower federal courts have long recognized the inherent overlap in analysis under the two provisions. In one of the earliest public school cases brought under the Establishment Clause, Justice Goldberg wrote that "[t]he fullest realization of true religious liberty requires that government . . . effect *no favoritism* among sects or between religion and nonreligion . . . ." *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) (emphasis added). Just a few years later, in a case challenging religious property tax exemptions under the Establishment Clause, Justice Harlan expressly connected the two provisions and explained that "[n]eutrality in its application requires an equal protection mode of analysis. . . . [T]he critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought

[6] While these cases specifically address equal protection under the federal Constitution, this Court has consistently held that "[t]he standard for evaluating equal protection challenges under our State Constitution is the same as the standard under the Federal Constitution." *Elroy E. v. Commonwealth*, 459 Mass. 1, 5 (2011) (citing *Blixt v. Blixt*, 437 Mass. 649, 661 n.17, cert. denied, 537 U.S. 1189(2003)(collecting cases)).

to fall within the natural perimeter." *Walz v. Tax Commission of New York*, 397 U.S. 664, 696 (1970)(opinion of Harlan, J.).

Expressing this same understanding in a more recent opinion, Justice O'Connor explained that

> the Religion Clauses -- the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion -- all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits. As I have previously noted, "the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."

Bd. of Educ. v. Grumet, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted); *see also Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993) (quoting Justice Harlan's statement from *Walz* and applying same rationale in assessing neutrality under Free Exercise Clause); *Newdow*, 328 F.3d at 491 (Fernandez, J., dissenting), *rev'd sub nom. Elk Grove Unified Sch. Dist.*, 542 U.S. 1 (explaining that "what the religion clauses of the First Amendment require is neutrality; . . . those clauses are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions"); *McBride v. Shawnee County*, 71 F. Supp. 2d 1098, 1100 (D. Kan. 1999) (holding that the state "may not approve one

religion's conduct and bar the same religious conduct of another religion if both religions are similarly situated. The Establishment and Equal Protection Clauses require state neutrality and prevent a state from passing laws which prefer one religion over another"); *Children's Healthcare Is a Legal Duty, Inc. v. Vladeck*, 938 F. Supp. 1466, 1483 (D. Minn. 1996) ("There can also be little question that this claim is brought under the Establishment Clause, even though it implicates equal protection concerns. The requirement of neutrality in the Establishment Clause, which is squarely at issue here, 'in its application requires an equal protection mode of analysis.'") (citations omitted); *Citizens Concerned for Separation of Church & State v. City & County of Denver*, 481 F. Supp. 522, 531 (D. Colo. 1979) (acknowledging the "principles of neutrality mandated by the establishment and equal protection clauses of the Constitution").

In light of the recognition that the two provisions require substantially similar analysis and seek to ensure the same outcome—*i.e.*, government neutrality—it is entirely logical and indeed unremarkable that courts have repeatedly addressed and decided Establishment Clause and Equal Protection claims in combination. For example, in *Gillette v. United States*, 401 U.S. 437 (1971), the petitioners challenged Section 6(j) of the Military Selective

Service Act of 1967 on the grounds that it "impermissibly discriminate[d] among types of religious belief and affiliation," *id.* at 449, because the provision exempted from military service those with conscientious (including religious) objections to war generally but not those with such objections to a particular war. In addressing the petitioners' Establishment Clause claim, the Court noted their additional assertion that Section 6(j) was "arbitrary and capricious and work[ed] an invidious discrimination in contravention of the 'equal protection' principles encompassed by the Fifth Amendment." *Id.* at 449, n.14. Rather than address this as a separate claim, however, the Court explained that "[t]his is not an independent argument in the context of these cases," and, relying on Justice Harlan's opinion in *Walz*, held that "the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn, and it follows as a more general matter that the line is neither arbitrary nor invidious." *Id.*

Similarly, in a case challenging a Pennsylvania statute authorizing the use of public funds for the transportation of nonpublic school students, in which the plaintiffs brought both Establishment Clause and Equal Protection claims, the court held that the equal protection "argument . . . rests on the same foundation

as the Establishment claim. If the purpose of the Act is permissible and its primary effect is neutral, public school students have little basis for a claim of discrimination." *Bennett v. Kline*, 486 F. Supp. 36, 40 (E.D. Pa. 1980); *see also Freedom From Religion Found.*, 626 F.3d at 11, 14 (citation omitted) (rejecting Establishment Clause and Equal Protection claims on essentially the same basis: the plaintiff children were "not religiously differentiated from their peers merely by virtue of their non-participation in the Pledge" and the statute "applie[d] 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"); *Olsen v. Drug Enforcement Admin.*, 878 F.2d 1458, 1463 (D.C. Cir. 1989) (describing one of the claims as "an establishment clause-equal protection challenge" and explaining, "[w]e do not believe the label consequential" because "in cases of this character, establishment clause and equal protection analyses converge") (citing Justice Harlan's opinion in *Walz*); *Yeshiva Chofetz Chaim Radin, Inc. v. Village of New Hempstead*, 98 F. Supp. 2d 347, 354 (S.D.N.Y. 2000) ("To the extent that the plaintiffs rely on equal protection analysis to argue that the provisions of the zoning law are unconstitutional, they must establish essentially

the same requirements as those that apply to their First Amendment claims.").

In light of the clear "convergence" of Establishment Clause and equal protection analyses in this context, and because the equal protection standards under the Massachusetts and federal Constitutions are the same, *see supra*, n. 7, this Court's holding regarding Plaintiffs-Appellants' Equal Rights Amendment claim should comport with the weight of authority, *see supra* Part II, holding that patriotic exercises including religious references, such as the Pledge's inclusion of the phrase "under God," do not put the government in a position of discriminating for or against any religion or its adherents.[7]

IV. NEITHER THE FEDERAL NOR THE MASSACHUSETTS CONSTITUTION COMPELS THE REDACTION OF ALL REFERENCES TO GOD IN MASSACHUSETTS PUBLIC SCHOOLS THAT WOULD RESULT IF PLAINTIFFS' CLAIMS SUCCEED.

Although the primary issue in this case is whether Massachusetts state law prohibits public schools from leading students in voluntarily reciting the Pledge, much more is really at stake. A decision holding that reciting the Pledge is unconstitutional would render constitutionally suspect a number of other public

[7] Based on this Court's prior acknowledgment that "[w]ith the passage of [the Massachusetts Equal Rights Amendment], our constitutional law has caught up to [G.L. c. 76,] § 5," *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 378 Mass. 342 (1979), it should likewise reject Plaintiffs-Appellants' unlawful discrimination claim.

school practices that traditionally have been considered an important part of American public education.

The first casualty of such a holding would be the practice of requiring students to learn and recite passages from historical documents reflecting the Nation's religious heritage and character. If a public school district violates the Equal Rights Amendment by requiring teachers to lead students in voluntarily reciting the Pledge, it is difficult to see why compelled study of or recitation from the Nation's founding documents would not also violate the Massachusetts Constitution. The Mayflower Compact and the Declaration of Independence contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313; *see also Newdow*, 328 F.3d at 471-82 (O'Scannlain, J., dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a founding document, contains religious language and, historically, has been the subject of required recitations in public schools. President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom—and that Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, *The Gettysburg Address* (Nov.

19, 1863), *available at* http://www.ushistory.org/documents/gettysburg.htm (emphasis added).[8]

Indeed, the references to deity in these historical documents are presumably more problematic than the Pledge because they proclaim not only God's existence but specific dogma about God—He is involved in human affairs, He holds men accountable for their actions, and He is the Author of human liberty. Additionally, while students may be exempted from reciting the Pledge, *see W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), student recitations of passages from historical documents are often treated as a mandatory part of an American history or civics class, not subject to individual exemptions.

Equally disturbing is the likelihood that a decision declaring the Pledge unconstitutional will eventually foreclose the Commonwealth's school districts from teaching students to sing and appreciate the Nation's patriotic music as well as a vast universe of classical music with religious themes. Patriotic anthems, such as "America the Beautiful" and "God Bless America," will become taboo because students cannot realistically learn them unless they are sung. Such musical treasures as Bach's choral arrangements and

[8] Transcriptions of the address, as given, include the phrase "under God," while earlier written drafts omit the phrase. *See* Allan Nevins, *Lincoln and the Gettysburg Address* (1964); William E. Barton & Edward Everett, *Lincoln at Gettysburg* (reprint 1971) (1930).

African-American spirituals will also become constitutionally suspect, at least as a part of public school music curricula. Even with an opt out, if a group of students were to sing "God Bless America," the Equal Rights Amendment would be violated because atheist students might *feel* discriminated against.

Justice O'Connor, addressing the constitutionality (under the federal Establishment Clause) of patriotic songs in *Elk Grove*, stated:

> Given the values that the Establishment Clause was meant to serve . . . I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

542 U.S. at 36-37 (O'Connor, J., concurring) (citation omitted).

It is difficult to discern the outer limits of the unrestrained approach to constitutional decision-making proposed by Plaintiffs-Appellants, as it would also render suspect longstanding practices such as school field trips to government buildings with religious references inscribed on walls, plaques, or statues, and even school displays of the Massachusetts Constitution

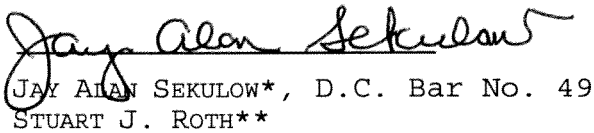
itself, which includes several references to the Creator. *See supra* n. 2. This Court should reject the invitation to view the Pledge of Allegiance and other references to this nation's religious heritage through the lens of "the fevered eye of persons who most fervently would like to drive all tincture of religion out of the public life of our polity." *Newdow*, 328 F.3d at 492 (Fernandez, J., dissenting).

Holding that the Pledge is unconstitutional will threaten a reformation of public school curricula by censoring American history. Neither the federal nor the Massachusetts Constitution warrants such a shift in the treatment of civic references to God.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urges this Court to affirm the decision below.

Respectfully submitted,



JAY ALAN SEKULOW*, D.C. Bar No. 496335
STUART J. ROTH**
COLBY M. MAY**
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org
sjr@aclj.org
cmmay@aclj-dc.org

ERIK M. ZIMMERMAN**
AMERICAN CENTER FOR LAW & JUSTICE
1000 Regent University Dr.
Virginia Beach, VA 23464
(757) 226-2489
ezimmerman@aclj.org

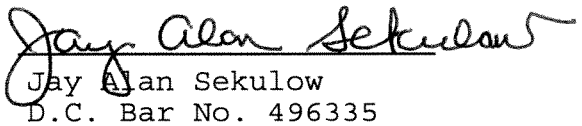
CARLY F. GAMMILL**
AMERICAN CENTER FOR LAW & JUSTICE
188 Front St., Suite 116-19
Franklin, TN 37064
(615) 415-4822
cgammill@aclj-dc.org

*Admission *pro hac vice* pending
**Not admitted in this jurisdiction
Attorneys for Amicus Curiae

April 12, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Massachusetts Rule of Appellate Procedure 16(k), counsel hereby certifies that this brief complies with the rules of this Court pertaining to the filing of briefs, including but not limited to Massachusetts Rules of Appellate Procedure 16 and 20.



Jay Alan Sekulow
D.C. Bar No. 496335
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

CERTIFICATE OF SERVICE

I, Jay Alan Sekulow, hereby certify under penalty of perjury that on April 12, 2013, I caused two true and accurate copies of this brief to be served upon the following counsel of record by first class mail:

David A. Niose
348 Lunenburg St.
Suite 202
Fitchburg, MA 01420

Geoffrey R. Bok
Andrea Lyn Bell
STONEMAN, CHANDLER & MILLER LLP
99 High Street, 16th Floor
Boston, MA 02110

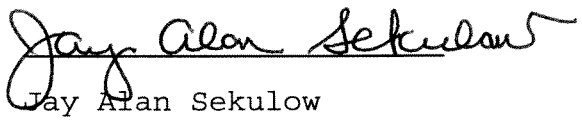
J. Patrick Kennedy
BURKLEY, RICHARDSON & GELINAS, LLP
125 High Street
Oliver Street Tower, 16th Floor
Boston, MA 02110

Eric C. Rassbach
Diana M. Verm
BECKET FUND FOR RELIGIOUS LIBERTY
3000 K St. NW, Suite 220
Washington, DC 20007

Andrew D. Beckwith
MASSACHUSETTS FAMILY INSTITUTE
100 TradeCenter, Suite 625
Woburn, MA 01801

David A. Cortman
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Ste D-1100
Lawrenceville, GA 30043

Jeremy D. Tedesco
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260



Jay Alan Sekulow
D.C. Bar No. 496335
AMERICAN CENTER FOR LAW & JUSTICE
201 Maryland Ave., N.E.
Washington, DC 20002
(202) 546-8890
sekulow@aclj.org

STATUTORY ADDENDUM

Mass. Const., Preamble

The end of the institution, maintenance, and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life: and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people convenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.

We, therefore, the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the great Legislator of the universe, in affording us, in the course of His providence, an opportunity, deliberately and peaceably, without fraud, violence or surprise, of entering into an original, explicit, and solemn compact with each other; and of forming a new constitution of civil government, for ourselves and posterity; and devoutly imploring His direction in so interesting a design, do agree upon, ordain and establish the following *Declaration of Rights, and Frame of Government,* as the Constitution of the Commonwealth of Massachusetts.

Mass. Const., pt. I, art. II

It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate for worshipping God in the manner and season most

agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.

Mass. Const., pt. II, ch. V, sec. I, art. I

Whereas our wise and pious ancestors, so early as the year one thousand six hundred and thirty-six, laid the foundation of Harvard College, in which university many persons of great eminence have, by the blessing of God, have been initiated in those arts and sciences, which qualified them for public employments, both in church and state: and whereas the encouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America -- it is declared, that the President and Fellows of Harvard College, in their corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have or are entitled to have, hold, use, exercise and enjoy: and the same are hereby ratified and confirmed unto them, the said president and fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever.

Mass. Const. amend. art. 106

Article CVI. Article I of Part the First of the Constitution is hereby annulled and the following is adopted:

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.

Mass. Gen. Laws Ch. 71, § 69

The school committee shall provide for each schoolhouse under its control, which is not otherwise supplied, flags of the United States of silk or bunting not less than two feet long, such flags or bunting to be manufactured in the United States, and suitable apparatus for their display as hereinafter provided. A flag shall be displayed, weather permitting, on the school building or grounds on every school day and on every legal holiday or day proclaimed by the governor or the President of the United States for especial observance; provided, that on stormy school days, it shall be displayed inside the building. A flag shall be displayed in each assembly hall or other room in each such schoolhouse where the opening exercises on each school day are held. Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the "Pledge of Allegiance to the Flag". A flag shall be displayed in each classroom in each such schoolhouse. Failure for a period of five consecutive days by the principal or teacher in charge of a school equipped as aforesaid to display the flag as above required, or failure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars. Failure of the committee to equip a school as herein provided shall subject the members thereof to a like penalty.

Mass. Gen. Laws Ch. 76, § 5

Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No school committee is required to enroll a person who does not actually reside in the town unless said enrollment is authorized by law or by the school committee. Any person who violates or assists in the violation of this provision may be required to remit full restitution to the town of the improperly-attended public schools. No person shall be excluded from or discriminated against in admission to a public school

of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, gender identity, religion, national origin or sexual orientation.

4 U.S.C. § 4

The Pledge of Allegiance to the Flag: “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.”, should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.