No. 09-2473

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellants

v.

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

Defendants-Appellees

On Appeal from the United States District Court
for the District of New Hampshire

BRIEF FOR APPELLEE-INTERVENOR THE UNITED STATES

TONY WEST
Assistant Attorney General
THOMAS P. COLANTUANO
United States Attorney
ROBERT M. LOEB
(202) 514-4332
LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Appellate Staff
Civil Division, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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Statement of Jurisdiction

The amended complaint asserts claims under the First, Fifth, and Fourteenth Amendments to the United States Constitution, *inter alia*. The amended complaint invoked the district court's jurisdiction under 28 U.S.C. 1331.

On September 30, 2009, the district court issued an order granting the defendants' motion to dismiss the amended complaint, *see* Addendum to Appellants' Opening Brief ("ADD") at 1. The court also issued a final judgment on the same day. *See* ADD37. That judgment resolves the claims of all the parties in this case, and is a final order for purposes of appeal.

On October 24, 2009, plaintiffs filed a notice of appeal from the district court's September 20, 2009 order. This court has jurisdiction over the appeal pursuant to 28 U.S.C. 1291.

Statement of the Issue

Whether a 2002 New Hampshire statute that requires New Hampshire public schools to provide a time during the school day for voluntary recitation of the Pledge of Allegiance is consistent with the Establishment Clause, the Free Exercise Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

Statement of the Case

Plaintiffs filed this case to challenge the constitutionality of the federal statute that sets out the Pledge of Allegiance, 4 U.S.C. 4, and a New Hampshire law that requires public schools to provide a time during the school day for voluntary recitation of the Pledge. *See* RSA 194:15-c. Plaintiffs later abandoned their challenge to the federal statute, and the district court dismissed their amended complaint, holding that the New Hampshire statute is consistent with the Establishment Clause, the Free Exercise Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Plaintiffs appeal that ruling.

Statutory Background

1. The Federal Pledge Statute

a. Original Enactment

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

b. 1954 Amendment

In 1954, Congress amended the Pledge of Allegiance by adding the words "under God" after the word "Nation." Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. As a result, the Pledge of Allegiance now reads: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. 4.

Both the Senate and House Reports regarding the 1954 amendment noted that Congress did not view the addition of "under God" to the Pledge as "an act establishing a religion or one interfering with the 'free exercise' of religion." H.R. Rep. No. 83-1693, at 3 (1954) (citing *Zorach* v. *Clauson*, 343 U.S. 306 (1952)), *reprinted in* 1954 U.S.C.C.A.N. 2339, 2341; *see also* S. Rep. No. 83-1287, at 2 (1954). Rather, Congress viewed the 1954 amendment as a permissible acknowledgment that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954); *see* S. Rep. No. 83-1287, at 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. . . . Throughout our history, the statements of our great national leaders have been filled with reference to God."). Both Reports trace the numerous references to God in historical documents central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to the Gettysburg Address. H.R. Rep. No. 83-1693, at 2; S. Rep. No. 83-1287, at 2.

The Reports also identify a political purpose for the amendment — to highlight a foundational difference between the United States and Communist nations: "Our American Government is founded on the concept of the individuality and the dignity of the human being," and "[u]nderlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp." H.R. Rep. No. 83-1693, at 1-2; *see* S. Rep. No. 83-1287, at 2.

The House and Senate Reports show that Congress added "under God" to the Pledge to highlight the Framers' *political* philosophy concerning the sovereignty of the individual — a philosophy with roots in 1954, as in 1787, in religious belief — to serve the *political* end of textually rejecting the "communis[t]" philosophy "with its attendant subservience of the individual." H.R. Rep. No. 83-1693, at 2; *see* S. Rep. No. 83-1287, at 2.

c. 2002 Reaffirmation

In 2002, Congress reenacted the exact language that has appeared in the Pledge for decades. Act of Nov. 13, 2002, Pub. L. No. 107-293, § 2(b), 116 Stat. 2057, *codified at* 4 U.S.C. 4 note. This 2002 statute explained that the statement that "one Nation under God" in the Pledge is a "reference to our religious heritage." *Id.* § 1, ¶ (8) (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 676 (1984)). The statute also included extensive findings regarding the historic role of religion in the foundation of the Nation. *Id.* § 1. For example, the statute noted that "[o]n July 4, 1776, America's Founding Fathers, after appealing to the 'Laws of Nature, and of Nature's God' to justify their separation from Great Britain, then declared: 'We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness'." *Id.* § 1, ¶ (2).

2. The New Hampshire Pledge-recitation statute

In 2002, the New Hampshire legislature enacted the New Hampshire School Patriot Act. *See* N.H. Rev. Stat. Ann. § 194:15-c (2007). The Act provides as follows:

I. As a continuation of the policy of teaching our country's history to the elementary and secondary school students of this state, this section shall be known as the New Hampshire School Patriot Act.

II. A school district shall authorize a period of time during the school day for the recitation of the pledge of allegiance. Pupil participation in the recitation of the pledge of allegiance shall be voluntary.

III. Pupils not participating in the recitation of the pledge of allegiance may silently stand or remain seated but shall be required to respect the rights of those pupils electing to participate.

As the district court observed, the "guiding force" behind this statute, which was proposed and enacted in the wake of the events of September 11, 2001, was patriotism and an effort to provide for the instruction of public school students into this important aspect of our country's history. *See* Opinion at 14 (ADD 14). In light of the above facts, plaintiffs have stipulated that the 2002 New Hampshire Act has a valid secular purpose. *See* Appellant's Opening Brief (p. 21).

Statement of Facts

1. Original Complaint

On October 31, 2007, plaintiffs The Freedom From Religion Foundation, Jan and Pat Doe, and DoeChildren 1-3 filed a complaint against the Congress of the United States; the United States; the Hanover and Dresden School Districts; and School Administrative Unit 70. *See* District Court Docket No. 1. The complaint alleged that 4 U.S.C. 4 violates the Free Exercise, Establishment, and Equal Protection Clauses of the United States Constitution and the Religious Freedom Restoration Act, 42 U.S.C. 2000bb. The complaint also alleged that the school districts' policy requiring public school teachers to lead willing students in the recitation of the Pledge of Allegiance violates the same provisions, as well as Article 6 of the New Hampshire Constitution. *See id.* at 19.

The United States moved to intervene to defend the constitutionality of 4 U.S.C. 4. *See* D. Ct. Docket No. 15. Motions to intervene also were filed by the State of New Hampshire, *see* D. Ct. Docket No. 12, and by a group including eight students in the Hanover School District, parents of five of those students, and the Knights of Columbus (who will be referred to as Muriel Cyrus, *et al.*). *See* D. Ct. Docket No. 21. The district court granted all of the motions to intervene. *See* D. Ct. Docket Nos. 12, 13, 15.

2. Order on Motion to Dismiss

Each of the Intervenor-Defendants filed a motion to dismiss the complaint. *See* D. Ct. Docket Nos. 14 (New Hampshire); 16 (United States and United States Congress); 22 (Muriel Cyrus, *et al.*). By order of August 7, 2008, the district court ordered that the U.S. Congress be dismissed from the case because "'the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.'" District Court Opinion, Docket No. 44, at 11 (citation omitted). In the same order, the district court dismissed plaintiffs' claims against the United States to the extent they are based on taxpayer standing. *See id.* at 18.[1] The court declined to consider whether the remainder of plaintiffs' claims should be dismissed, however, concluding that a ruling on those issues should await a filing by the school districts and School Administrative Unit 70. *See id.* at 22.

3. School Districts' Motion to Dismiss

After the district court entered the above-described order, the School Districts and School Administrative Unit 70 (hereinafter collectively referred to as the "School Districts") moved to dismiss the claims against them. *See* D. Ct. Docket No. 46. The motion requested that the claims against the school districts be dismissed for the reasons set forth (1) in the Federal Government's Memorandum In Support of the Federal Defendants' Motion to Dismiss, with respect to the constitutionality of 4 U.S.C. 4, and (2) in the State of New Hampshire's Memorandum of Law in Support of its Motion to Dismiss, with respect to the constitutionality of RSA 194.15-c. *See id.* at 1-2.

[1] Plaintiffs' notice of appeal does not mention the district court's order of August 7, 2008, or seek to appeal the court's dismissal of plaintiffs' claims against the United States Congress or against the United States with respect to taxpayer standing. *See* Notice of Appeal, D. Ct. Docket No. 62.

4. First Amended Complaint

On November 17, 2008, plaintiffs filed a First Amended Complaint. *See* Appendix (hereinafter "App") 01. The First Amended Complaint abandoned plaintiffs' facial challenge to 4 U.S.C. 4, but continued to press their challenge to the New Hampshire Pledge-recitation statute. The First Amended Complaint also abandoned plaintiffs' claims against the United States Congress and against the defendants based on taxpayer standing, both of which claims the district court had dismissed in its earlier order. *See* p. 8, *supra*. In addition, the First Amended Complaint added an express count alleging that the school districts' Pledge-recitation practices infringe upon the Doe parents' "federal constitutional right of parenthood, which includes the right to instill the religious beliefs chosen by the parents." App 16 (para. 68). Otherwise, the First Amended Complaint is substantively indistinguishable from plaintiffs' original complaint.

The First Amended Complaint seeks three forms of relief: (1) a declaration that the defendant school districts are violating the First, Fifth, and Fourteenth Amendments to the United States Constitution and Article 6 of the New Hampshire Constitution by "having their agents leading Plaintiffs and their peers in reciting the Pledge of Allegiance;" (2) a declaration that RSA 194.15-c is void as against public policy; and (3) an injunction preventing the School Districts "from using the now-sectarian Pledge of Allegiance in the public schools within its jurisdictions." First Amended Complaint, p. 18 (App 20).

5. Dismissal of the First Amended Complaint

The State of New Hampshire thereafter filed a supplemental memorandum supporting its earlier motion to dismiss, which addressed the additional claims in the First Amended Complaint. *See* D. Ct. Docket No. 53. The United States and Muriel Cyrus, *et al.*, likewise filed renewed motions to dismiss that (1) incorporated by reference arguments made in their original motions to dismiss plaintiffs' claims, and (2) separately addressed plaintiffs' new claims. *See* D. Ct. Docket Nos. 55 (Muriel Cyrus, *et al.*), 56 (United States). The School Districts did not file any new pleading addressing the First Amended Complaint. The district court construed the renewed pleadings of the other defendants as also having been advanced by the School Districts, because that was the understanding of all the parties, and because the School Districts had previously expressed the intent to join the United States' and the State of New Hampshire's motions to dismiss. *See* District Court Opinion of February 1, 2010, at 6 (ADD 06).

Preliminarily, the district court noted that the constitutionality of 4 U.S.C. 4 is no longer directly at issue, because the First Amended Complaint does not challenge that statute, and because plaintiffs' challenge to the School Districts' Pledge-recitation policy cannot fairly be described as an "as-applied" challenge to 4 U.S.C. 4. *See* Opinion at 6 (ADD 06). Thus, as the district court observed, the only issue that remains in this case is plaintiffs' challenge to the New Hampshire Pledge-recitation statute. *See id.* at 5-7 (ADD 05-07).[2]

The district court rejected each of the grounds on which plaintiffs challenge the New Hampshire statute. With respect to the Establishment Clause, the court held that Congress's addition of the words "under God" to the Pledge is consistent with all of the analytical approaches the Supreme Court has followed in various Establishment Clause cases. For example, with respect to the *Lemon* v. *Kurtzman* test, the district court held that those words have the permissible secular purpose of "fostering an appreciation of history, and promoting patriotism and respect for the American flag." Opinion at 13 (ADD 13) . The court also held that RSA 194:15-c has the permissible secular effect of "teaching our country's history to the elementary and secondary pupils of this state." Opinion at 14 (ADD 14).

The court then held that the New Hampshire Pledge statute, as implemented by the School Districts, "does not have the effect of coercing the Doe children to support or participate in religion or its exercise." Opinion at 17 (ADD 17). The court

[2] The district court recognized, however, that the United States has a sufficient interest in that issue to justify its participation in this case as an intervenor. *See* Opinion at 1 (ADD 01).

observed that the New Hampshire statute expressly provides that pupil participation in the recitation of the Pledge in public schools "shall be voluntary." *Id.* at 19 (ADD 19) (citation omitted). In addition, the court noted, "the Pledge of Allegiance is not a religious prayer, nor is it 'nonsectarian prayer'" of the sort the Supreme Court has held school officials may not initiate and lead in the public school setting. *Id.* at 19-20 (ADD 19-20).

The court also pointed out that the Fourth and Seventh Circuits have upheld voluntary recitation of the Pledge of Allegiance in schools. *See* Opinion at 22-25 (ADD 22-25). The district court expressed its agreement with the reasoning in those decisions, and observed in particular that the inclusion of "under God" to the Pledge "'does not alter the nature of the Pledge as a patriotic activity.'" Opinion at 22 (ADD 22) (citation omitted). In addition, the court noted, the Pledge is similar to numerous other ceremonial references to God that the Supreme Court has recognized are permissible under the Establishment Clause, such as those in the Declaration of Independence, the Gettysburg Address, and the use of "God save this Honorable Court." *Id.* at 23-24 (ADD 23-24) (citations omitted).

With respect to the Free Exercise Clause, the court held that the mere exposure of the DoeChildren to the Pledge in school does not place any unconstitutional burden on their ability to freely believe or practice atheism. *See* Opinion at 27 (ADD

27). The court pointed out that "the Pledge, taken as a whole, is a civic patriotic affirmation, not a religious exercise," *ibid.*, and that "[p]ublic schools are not obligated to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas . . .." *Ibid.* (citing *Parker* v. *Hurley*, 514 F.3d 87, 106 (1st Cir. 2008). The court rejected plaintiffs' claim based on the "fundamental right of parenthood" for similar reasons, *see id.* at 34 (ADD 34), and denied plaintiffs' Equal Protection Clause claim because the Pledge is not a prayer or religious exercise, and because the New Hampshire's statute "applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the Pledge, for any or no reason." Opinion at 31 (ADD 31).

Finally, the district court summarily dismissed plaintiff's claim that the New Hampshire statute is void as against public policy for lack of any support, *see* Opinion at 34 (ADD 34), and declined to exercise supplemental jurisdiction over plaintiffs' state law claims, based on factors including "'fairness, judicial economy, convenience, and comity.'" *Id.* at 35 (App. 35). Based on all the above rulings, the district court granted all the motions to dismiss, and entered final judgment for the defendants and the defendant-intervenors. *See* ADD 37-38.

Summary of Argument

Although plaintiffs originally sought to challenge the constitutionality of the federal Pledge of Allegiance statute in this action, they later abandoned that claim. As a result, this appeal focuses solely on New Hampshire's Pledge-recitation statute, which requires New Hampshire public schools to provide a time for voluntary recitation of the Pledge during the school day.

As we explain below, however, plaintiffs' challenge to New Hampshire's Pledge-recitation statute focuses substantially on the Pledge itself and Congress's purpose for adding the words "under God" to the Pledge. As a result, the United States files this brief as an intervenor to defend plaintiffs' attempt to attack the federal Pledge statute indirectly, as well as to explain why the Pledge may be recited voluntarily by students in public schools.

1. New Hampshire's Pledge-recitation statute serves the valid, secular purposes that are stated in statute's text: to "continu[e] . . . the policy of teaching our country's history to the . . . students of this state." RSA 194:15-c(I). In light of the statute's text, and its legislative history, plaintiffs concede that the New Hampshire statute serves a permissible secular purpose.

Plaintiffs argue that the New Hampshire statute is unconstitutional because Congress allegedly was motivated by religious concerns when it added the words "under God" to the federal Pledge statute in 1954. As we have noted, however, plaintiffs are no longer challenging the federal Pledge statute in this case. Plaintiffs fail to explain why the intent of Congress in 1954 should be imputed to the session of the New Hampshire legislature that, almost 52 years later, decided to require voluntary recitation of the Pledge in New Hampshire public schools, and we are aware of no case that would support that idea.

In any event, the Committee Reports relating to Congress's 1954 amendment to the federal Pledge statute identify lawful, secular purposes for Congress's action – to acknowledge the religious heritage and traditions of our nation; to reflect the fact that the Framers believed the individual rights they were protecting were inalienable because they flowed from a creator; and to contrast our system of inalienable, individual rights with communism.

Moreover, as the Ninth Circuit recently held, even if plaintiffs were challenging the federal Pledge statute, the proper focus of that inquiry would be on Congress's reaffirmation of the Pledge in 2002. The text and legislative history of the federal 2002 reaffirmation specifically reaffirm Congress's secular purposes for retaining the words "under God" in the current version of 4 U.S.C. 4.

2. For similar reasons, plaintiffs' other criticisms of the New Hampshire statute also fall short. For example, because recitation of the Pledge is a patriotic act, as the Supreme Court recognized in *Elk Grove* v. *Newdow*, 542 U.S. 1, 6 (2004), its voluntary recitation does not involve the coercion of a religious act, an endorsement of religion, or discrimination against religion. Moreover, as the Fourth and Seventh Circuits have recognized, the issue of the Pledge's constitutionality – on its face and as recited voluntarily by students in public schools – has already been resolved by the United States Supreme Court in two majority decisions that constitute binding precedent on that point. Finally, plaintiffs' Free Exercise Claims and Fourteenth Amendment claims are plainly barred by circuit precedent.

Statement of the Standard of Review

A dismissal under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. *Estate of Bennett* v. *Wainwright*, 548 F.3d 155, 162 (1st Cir. 2008).

Argument

I. The District Court Correctly Dismissed Plaintiffs' Establishment Clause Claims.

As we explain below, plaintiffs' Establishment Clause challenge to New Hampshire's Pledge-recitation statute – and their indirect attack on the federal Pledge statute[3] – are both foreclosed by Supreme Court precedent and otherwise without merit.

A. Plaintiffs' Establishment Clause Challenge to the Pledge and its Voluntary Recitation in Public Schools is Foreclosed by Supreme Court Precedent.

1. In two majority opinions, the Supreme Court has definitively stated that the Pledge of Allegiance is consistent with the Establishment Clause and that public schools may lawfully invite willing students to recite the Pledge. As we explain below, those cases constitute binding precedent, and foreclose all the Establishment Clause claims in this case.

In the first case, *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the Supreme Court held that the Establishment Clause permitted a city to include a nativity scene as part of its Christmas display. In so ruling, the Court noted that the creche permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," *id.* at 680, and that similar "examples of reference to our religious heritage are found," among other places, "in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag." *Id.* at 676. The words "under God"

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[3] As we have already noted, plaintiffs have abandoned their challenge to the federal Pledge statute. Plaintiffs would not have had standing to challenge the federal Pledge statute in any event. *See Newdow* v. *Rio Linda Union Sch. Dist.*, 2010 WL 816986 *5 (9th Cir. 2010) ("Plaintiffs do not have standing to challenge the 1954 Amendment because no federal statute requires plaintiffs to recite the Pledge.").

in the Pledge, the Court explained, are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers," which are "replete" in our Nation's history. *Id.* at 675, 677.

Significantly, the Supreme Court in *Lynch* also observed that the Pledge to the flag "is recited by many thousands of public school children — and adults — every year." *Lynch*, 465 U.S. at 676. Thus, *Lynch* approved not only the Pledge itself, but also the Pledge's voluntary recitation in public schools.

Subsequently, in *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. 573 (1989), the Supreme Court sustained the inclusion of a Menorah as part of a holiday display, while invalidating the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed *Lynch*'s approval of the reference to God in the Pledge, noting that all of the Justices in *Lynch* viewed the Pledge as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602-03 (citations omitted).

In both *Lynch* and *County of Allegheny*, the Supreme Court used its approval of the Pledge as a benchmark for what the Establishment Clause permits. *See Lynch*, 465 U.S. at 680 (upholding the creche display at issue because, like the Pledge, it is a tolerable reference to the our nation's religious heritage); *County of Allegheny*, 492

U.S. at 598, 603 (holding a creche display unconstitutional because, unlike the Pledge, it gave "praise to God in [sectarian] Christian terms").

As a result, the Supreme Court's approval of the Pledge in *Lynch* and *County of Allegheny* is controlling Supreme Court precedent. "When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996). *See also Rossiter v. Potter*, 357 F.3d 26, 31 (1st Cir. 2004). The Supreme Court's analysis of the Pledge in *Lynch* and *County of Allegheny* falls squarely within that rule. *See Myers* v. *Loudoun Cty Pub. Schs.*, 418 F.3d 395, 405 (4th Cir. 2005) (the Supreme Court has "made clear that the Establishment Clause . . . does not extend so far as to make unconstitutional the daily recitation of the Pledge in public school"); *Sherman* v. *Consol. Sch. Dist. 21*, 980 F.2d 437, 448 (7th Cir. 1992) ("If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so.").

Moreover, even if the Court's approval of the Pledge in *County of Allegheny* and *Lynch* were mere dicta, it would still be binding on the lower courts. As this Court has recognized, "carefully considered statements of the Supreme Court . . . must be accorded great weight and should be treated as authoritative." *Crowe* v.

Bolduc, 365 F.3d 86, 92 (1st Cir. 2004); *see also McCoy* v. *MIT*, 950 F.2d 13, 19 (1st Cir. 1991) (lower federal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings"). The Supreme Court's statements regarding the Pledge in *Lynch* and *County of Allegheny* were "carefully considered," as the opinions in those cases reveal.

2. Numerous opinions of individual Supreme Court justices also express undivided approval of the Pledge's constitutionality. For example, in *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963), Justice Brennan wrote that the revised Pledge "may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to" the "historical fact that our Nation was believed to have been founded 'under God.'" *Id.* at 304 (Brennan, J., concurring). *See also Lee* v. *Weisman*, 505 U.S. 577, 638-39 (1992) (Scalia, J., dissenting); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part); *Wallace* v. *Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring); *id.* at 88 (Burger, C.J., dissenting); *Engel* v. *Vitale*, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting).

Most recently, three concurring Justices in *Elk Grove* wrote separately to explain in detail why recitation of the Pledge by willing students in public schools is constitutional. *See* 542 U.S. at 26-32 (Rehnquist, C.J., concurring in the judgment)

("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," and the Pledge is "a simple recognition of the fact . . . [that] 'our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God'") (citation omitted); *id.* at 40 (O'Connor, J., concurring in the judgment) ("[A]n observer could not conclude that reciting the Pledge, including the phrase 'under God,' constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive . . . ."); *id.* at 54 (Thomas, J., concurring in the judgment) (noting that voluntary recitation of Pledge "does not expose anyone to the legal coercion associated with an established religion").

As these decisions and individual opinions confirm, the reference to God in the Pledge permissibly acknowledges the undeniable historical facts that the Nation was founded by individuals who believed in God, that the Constitution's protection of individual rights and autonomy reflects those religious convictions, and that the Nation continues as a matter of demographic and cultural fact to be "a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Thus, in an area of law that is often mired in uncertainty, the Justices have been remarkably unanimous on one point: "[T]he Pledge is not implicated by the Court's interpretation of the Establishment Clause." *Myers*, 418 F.3d at 405.

3. Plaintiffs argue that there is "an ocean of *principled* statements," Appellant's Brief at 54 (emphasis in original), that call the Pledge's constitutionality into doubt. The "ocean of principled statements" to which plaintiffs refer, however, consists of nothing more than certain general guideposts the Court uses in various contexts to determine whether government action comports with the Establishment Clause, such as the idea that the government may not endorse or coerce the exercise of religion.

When the Supreme Court has directly spoken to the constitutionality of a particular question, as it has done here, *that* resolution is binding precedent, and lower courts are not free to ask whether general principles stated in other cases should have led to a different result. Thus, while plaintiffs clearly do not agree with what *Lynch* and *County of Allegheny* said about the Pledge, this Court is bound by those majority decisions, as the Fourth and Seventh Circuits have correctly recognized. *See Myers*, 418 F.3d at 405; *Sherman*, 980 F.3d at 448. *See also Rio Linda*, 2010 WL 816986 *9 (noting that when religious symbols "are displayed for traditional cultural purposes and in a context evoking themes other than religion, they have been found not to violate the Establishment Clause") (citing, *e.g.*, *Lynch).*

It is especially important for lower courts to honor the Supreme Court's resolution of specific issues in Establishment Clause cases. As the Supreme Court and individual Justices have consistently observed, Establishment Clause jurisprudence is highly context-specific. *See*, *e.g.*, *Van Orden* v. *Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in the judgment) (noting that "no exact formula can dictate a resolution to such fact-intensive cases"); *Elk Grove*, 542 U.S. at 33 (O'Connor, J., concurring in the judgment) (noting that there are "different categories of Establishment Clause cases, which may call for different approaches"); *Lynch*, 465 U.S. at 678 (noting that in each Establishment Clause case, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed"); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971) (noting that the Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship").[4] Thus, plaintiffs' suggestion that the Supreme Court's *general* identification of legal principles can trump the Court's *specific* resolution of a particular issue is particularly inappropriate in this case.

[4] For example, that is why, in two decisions handed down the same day, the Supreme Court could hold that one Ten Commandments display on public property was lawful, *see Van Orden*, *supra*, but that another was unconstitutional. *See McCreary County* v. *ACLU*, 545 U.S. 844 (2005). *See also County of Allegheny*, *supra* (holding that a creche display on public property violated the Establishment Clause but a menorah display did not).

Plaintiffs also rely on dissenting opinions in which certain individual justices opined that under the majority's reasoning in those cases, the Pledge would be unconstitutional. *See* Appellants' Brief at 54-55. In each of those individual opinions, however, the justice in question emphatically stated that the Pledge is constitutional. *See Elk Grove*, 542 U.S. at 45 (Thomas, J.); *County of Allegheny*, 492 U.S. at 674 n.10 (Kennedy, J.); *Lee*, 505 U.S. at 638-39 (Scalia, J.). Individual justices frequently criticize a majority's ruling by pointing out what it would lead to if it were followed its logical conclusion. *See*, *e.g.*, *Lawrence* v. *Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (arguing that the Court's holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual contact is unconstitutional as applied to activity by consenting adults in the privacy of their home calls into question the legality of state laws against bigamy, adult incest, bestiality, and obscenity, *inter alia*). The Supreme Court has never suggested, however, that any such statement in the opinion of an individual justice provides a ground upon which a lower court may hold a practice unconstitutional. Indeed, to the contrary, the Court has expressly warned lower courts *not* to assume the Court has adopted one position or another based on statements in individual opinions. *See Agostini* v. *Felton*, 521 U.S. 203, 217 (1997).

In sum, then, this Court need not look beyond the Supreme Court's own specific approval of the Pledge, and the Pledge's voluntary recitation in public schools, in resolving plaintiffs' Establishment Clause claims in this case. As we explain below, however, if the Court were to do so, it would find that the Pledge is consistent with each of the tests the Supreme Court has used on various occasions to decide Establishment Clause cases.

B. The Pledge of Allegiance is Consistent With Each of the Supreme Court's Establishment Clause Tests.

1. The Pledge is Consistent With the Supreme Court's Historical Test.

In *Marsh* v. *Chambers*, 463 U.S. 783 (1983), the Supreme Court rejected an Establishment Clause challenge to the Nebraska legislature's practice of inviting a paid clergyman to deliver an opening prayer at the beginning of each legislative session. In so ruling, the Supreme Court relied principally on the fact that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786. *See also Van Orden*, 545 U.S. at 686 (plurality opinion) (upholding Ten Commandments display on public property based on "the nature of the Monument and . . . our nation's history").

As we explain below, the words "under God" in the Pledge of Allegiance are constitutional for the same reason, since those words reflect the kinds of government ceremonial acknowledgment of religion that have been a consistent practice, in various forms, since the beginning of our nation. *See Elk Grove*, 542 U.S. at 26 (Rehnquist, C.J., & O'Connor, J., concurring in the judgment) (reaffirming the Pledge's constitutionality based in part on the fact that ("[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound"); *Rio Linda*, 2010 WL 816986 *15 (same).

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

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

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

The Framers' belief in unalienable rights endowed by a higher power also laid the philosophical groundwork for the unique governmental structure the Framers adopted. In the Framers' view, government was instituted by individuals for the purpose of protecting and cultivating the exercise of their fundamental rights. Central to that political order was the Framers' conception of the individual as the source (rather than the object) of governmental power. That view of the political sovereignty of the individual, in turn, was a direct outgrowth of their conviction that each individual was entitled to certain fundamental rights, a conviction most famously expressed in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." 1 U.S.C. at XLIII (2000). Thus, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Schempp*, 374 U.S. at 213. This is the concept embodied in the Framers' verse that this is "one Nation under God." *See* Pub. L. No. 107-293, § 1, ¶ 12, 116 Stat. 2057, *codified at* 4 U.S.C. 4 note (noting that the language "one Nation under God" in the Pledge is an "example[] of [a] reference to our religious heritage").

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

Many Framers attributed the survival and success of the new Nation to the providential hand of God. The Continental Congress itself announced in 1778 that the Nation's success in the Revolutionary War had been "so peculiarly marked, almost by direct imposition of Providence, that not to feel and acknowledge his protection would be the height of impious ingratitude." 11 *Journals of the Continental Congress* 477 (W. Ford ed., 1908). Likewise, in his first inaugural address, President Washington proclaimed that "[n]o people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States," because "[e]very step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency." *Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 2 (1989).

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

The First Congress — the same Congress that drafted the Establishment Clause — adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. *See Marsh*, 463 U.S. 783, 787 (1983). That same Congress, one day after the Establishment Clause was proposed, also urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S.

at 675 n.2 (citation omitted). President Washington responded by proclaiming November 26, 1789, a day of thanksgiving to "offer[] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.* (citation omitted). President Washington also included a reference to God in his first inaugural address: "[I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the council of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes." S. Doc. No. 101-10, at 2.

Later generations have followed suit. Since the time of Chief Justice Marshall, the Supreme Court has opened its sessions with "God save the United States and this Honorable Court." *See Engel*, 370 U.S. at 446 (Stewart, J., dissenting). President Abraham Lincoln referred to a "Nation[] under God" in the historic Gettysburg Address (1863): "[T]hat we here highly resolve that these dead shall not have died in vain; that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people, for the people, shall not perish from the earth." Every President who has delivered an inaugural address has referred to God or a Higher Power,[5] and every President, except Thomas Jefferson, has declared a Thanksgiving Day holiday.[6]

In 1865, Congress authorized the inscription of "In God we trust" on United States coins. Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 517, 518. In 1931, Congress adopted as the national anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause is just, And this be our motto 'In God is our Trust.'" *See Engel*, 370 U.S. at 449 (Stewart, J., dissenting). In 1956, Congress passed legislation to make "In God we trust" the National Motto, and provided that it be inscribed on all United States currency, above the main door of the Senate, and behind the Chair of the Speaker of the House of Representatives. *See* Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. There thus "is an unbroken history of official acknowledgment by all three branches of government," as well as by the States, "of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674.

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[5] *See Inaugural Addresses of the Presidents of the United States*, *supra*; *First Inaugural Address of William J. Clinton*, 29 Weekly Comp. Pres. Doc. 77 (Jan. 20, 1993); *First Inaugural Address of George W. Bush*, 37 Weekly Comp. Pres. Doc. 209 (Jan. 20, 2001); *Inaugural Address of Barack Obama*, 155 Cong. Rec. S668 (2009).

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

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

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

In light of these principles, the Supreme Court has stated time and again that official acknowledgments of the Nation's religious history and enduring religious character do not violate the Establishment Clause. For example, in *Marsh*, the Supreme Court upheld the historic practice of legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." 463 U.S. at 792. In so doing, the Court discussed numerous other examples of constitutionally permissible religious references in official life "that form 'part of the fabric of our society,'" *id.*, such as "God save the United States and this Honorable Court," *id.* at 786.

Likewise, in *Engel* v. *Vitale*, 370 U.S. 421 (1962), the Court was careful to contrast official school prayer, which the Court held unconstitutional, with the permissible "patriotic or ceremonial" references to God that are found in the Declaration of Independence and in our "officially espoused" national anthems. *Id.* at 435 n.21. Similarly, in *Abingdon Sch. Dist.* v. *Schempp*, 374 U.S. 203 (1963), the Court explained, in the course of invalidating laws requiring Bible reading in public schools, that the Establishment Clause does not proscribe the numerous public references to God that appear in historical documents and ceremonial practices, such as oaths ending with "So help me God." 374 U.S. at 213. *See also Lynch*, 465 U.S. at 676 (referring favorably to the National Motto, "In God we trust").

In addition, in *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004), while the Supreme Court resolved the case on standing grounds, it described recitation of the Pledge as "a patriotic exercise designed to foster national unity and pride," *id.* at 6, which "evolved as a common public acknowledgment of the ideals that our flag symbolizes" – "freedom, equal opportunity, . . . religious tolerance, and . . . goodwill for other peoples who share our aspirations." *Ibid.* (citation omitted).

As these cases make plain, official acknowledgments of religion such as the words "under God" in the Pledge are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." *Lynch*, 465 U.S. at 678. Indeed, "[a]ny notion" that such measures "pose a real danger of establishment of a state church" would be "farfetched." *Id.* at 686. Instead, such "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," *id.*, simply takes note of the historical facts that "religion permeates our history," *Edwards* v. *Aguillard*, 482 U.S. 578, 607 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of this Nation and in the founding of its government. *See Zorach*, 343 U.S. at 313 (noting that the Court has long refused to construe the Establishment Clause so as to "press the concept of separation of Church and State to . . . extremes" by invalidating "references to the

Almighty that run through our laws, our public rituals, [and] our ceremonies"). Accordingly, our Nation's history and traditions confirm what the Supreme Court and its individual Justices have repeatedly made explicit: the Pledge of Allegiance's reference to a "Nation under God" does not offend the Establishment Clause.

ii. Plaintiffs suggest that the phrase "under God" in the Pledge is not old enough to be upheld by reference to history. History, however, is relevant here in two respects. First, it shows that the words "under God" in the Pledge properly reflect the Nation's founding and constitutional framework, which was premised on the individual having inalienable rights from a higher power. Second, history shows that such official, ceremonial acknowledgment of that fact and of the ongoing import of religion unquestionably dates back to "at least 1789." *Lynch*, 465 U.S. at 674.

There is no requirement that each particular manifestation of that practice – each individual governmental reference to the Nation's religious heritage – have a comparable vintage. For example, nothing in *Lynch* suggested that the city had erected the creche display upheld there since the time of the founding, yet the Supreme Court sustained it. Likewise, the Menorah display upheld in *County of Allegheny* only dated back to 1982, *see* 492 U.S. at 582, and the Ten Commandments monument that was upheld in *Van Orden* had been standing for only 40 years when the action challenging it was brought. *See* 545 U.S. at 681.

2. The Pledge and its Voluntary Recitation in Public Schools Also Are Consistent with the *Lemon* v. *Kurtzman* Test.

In deciding Establishment Clause cases, the Supreme Court sometimes asks whether the government's action has the purpose or primary effect of advancing or inhibiting religion. *See Agostini* v. *Felton*, 521 U.S. 203, 222-23 (1997) (citing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)).[7] *See also Van Orden*, 545 U.S. at 685 (plurality opinion) (noting that "[m]any of our recent cases simply have not applied the *Lemon* test") (citations omitted). As the Ninth Circuit recently held, the words "under God" in the Pledge of Allegiance have no such impermissible purpose or effect, on the face of the federal Pledge statute, or as recited by students voluntarily in public school. *See Rio Linda*, 2010 WL 816986 *6-15.

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

i. A practice violates the Establishment Clause's purpose inquiry if it has a "predominant purpose of advancing religion." *McCreary County* v. *ACLU* , 545 U.S. 844, 863 (2005).

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[7] The *Lemon* test also requires courts to determine whether the government's action creates excessive entanglement between government and religion. *See Agostini*, 521 U.S. at 222-23. Plaintiffs do not argue that New Hampshire's Pledge-recitation statute contravenes this requirement, with good reason. *See Rio Linda*, 2010 WL 816986 at *10 (similar California Pledge-recitation statute does not create excessive entanglement between government and religion).

Plaintiffs concede that New Hampshire's Pledge-recitation statute satisfies these standards. *See* p. 6, *supra*. Nevertheless, they argue that New Hampshire may not invite willing students to recite the Pledge in the State's public schools because Congress had a religious purpose for adding the words "under God" to the Pledge of Allegiance in 1954. That argument lacks merit. As we have noted, plaintiffs have abandoned their constitutional challenge to the federal Pledge statute. *See* p. 9, *supra*. As a result, Congress's purpose for adding "under God" to the Pledge in 1954 is not relevant to this appeal, which questions only whether *New Hampshire* has violated the Constitution by inviting its public school students to recite the Pledge in school. Plaintiffs have not attempted to explain why Congress's purposes in 1954 – which in fact were not predominantly religious, *see* below – should be imputed to the New Hampshire legislature, and there is no case or legal theory that supports that idea.

In any event, the Committee Reports indicate that Congress viewed its addition of "under God" to the Pledge in 1954 as a permissible acknowledgment that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H.R. Rep. No. 83-1693, at 2 (1954); *see* S. Rep. No. 83-1287, at 2 (1954) ("Our forefathers recognized and gave voice to the fundamental truth that a government deriving its powers from the consent of the governed must look to God for divine leadership. . . . Throughout our history, the statements of our great national leaders have been filled with reference to God."). In addition, both Reports trace the numerous references to God in historical documents that are central to the founding and preservation of the United States, from the Mayflower Compact to the Declaration of Independence to the Gettysburg Address. *See* H.R. Rep. No. 83-1693, at 2; S. Rep. No. 83-1287, at 2.

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

No doubt some Members of Congress may have been motivated, in part, to amend the Pledge because of their religious beliefs. Such intentions would not undermine the constitutionality of the Pledge, however, because "those legislators also had permissible secular objectives in mind — they meant, for example, to acknowledge the religious origins of our Nation's belief in the 'individuality and dignity of the human being.'" *Elk Grove*, 542 U.S. at 41 (O'Connor, J., concurring in the judgment) (citation omitted). Moreover, "[w]hatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context." *Id.* And, more broadly, the Establishment Clause focuses on "the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 249 (1990) (emphasis added); *see McGowan* v. *Maryland*, 366 U.S. 420, 469 (1961) (opinion of Frankfurter, J.). *See also Rio Linda*, 2010 WL 816986 *19 (noting that a court is "called upon to discern Congress's ostensible and predominant purpose, not the purpose of an individual") (citing *McCreary County*, 545 U.S. at 867-68).

ii. In any event, because plaintiffs challenge contemporary Pledge recitation practices, the purpose inquiry – to the extent that it focuses on the federal Pledge statute at all, which is not at issue here – must center on Congress's reasons for reaffirming the text of the Pledge in 2002. *See Rio Linda*, 2010 WL 816986 *14 (adopting this view in rejecting a contemporary challenge to the recitation of the Pledge in two California school districts). *See generally* p. 5 *supra* (discussing the 2002 reaffirmation).

As Congress made clear in the course of reenacting the Pledge statute in 2002, the federal government's contemporary purpose for retaining the Pledge, including its reference to God, was to "acknowledg[e] . . . the religious heritage of the United States." H.R. Rep. No. 107-659, at 4 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1304. *See also* p. 5, *supra* (noting that the same purpose is identified in the text of the 2002 statute itself). Those are clearly permissible secular purposes. *See Rio Linda*, 2010 WL 816986 *15 (noting that Congress's statutory findings in reaffirming the Pledge's text "make it absolutely clear that Congress in 2002 was not trying to impress a religious doctrine upon anyone"). *See generally Wallace*, 472 U.S. at 56 (concluding that the promotion of patriotism and the instillation of shared values in children attending public schools is a "clearly secular purpose").

b. The Pledge and its Voluntary Recitation in Public Schools Have the Permissible Secular Effect of Promoting Patriotism and National Unity

The primary effect of the Pledge of Allegiance and New Hampshire's Pledge-recitation statute is to promote national unity, patriotism, and an appreciation for the values that define the Nation. "National unity as an end which officials may foster by persuasion and example is not in question." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 640 (1943). *See also Sherman*, 980 F.2d at 444 ("Patriotism is an effort by the state to promote its own survival, and along the way to teach those virtues that *justify* its survival. Public schools help to transmit those virtues and values."). Plaintiffs acknowledge, as they must, that a public school "certainly" has the "right to foster patriotism." First Amended Compl. ¶ 85 (App. 19). Plaintiffs advance other challenges to the Pledge's effects, but as we explain below, those arguments are groundless.

i. The Pledge must be considered as a whole.

In *Lynch*, the Supreme Court emphasized that Establishment Clause analysis looks at religious symbols and references in their overall setting, rather than "focusing almost exclusively on the" religious symbol alone. 465 U.S. at 680. The Court in *Lynch* thus did not ask whether the government's display of a creche — a clearly sectarian symbol — was permissible. Instead, it analyzed whether an overall display that included both religious and other secular symbols of the winter holiday season conveyed a message of endorsement, and held that it did not. *Id.* at 680-86. Likewise, in *County of Allegheny*, the Supreme Court analyzed the "combined display" during the winter holiday season of a Christmas tree, Liberty sign, and Menorah, 492 U.S. at 616, scrutinizing the content of the display as a whole, rather than focusing on the presence of the Menorah and the religious message it would convey in isolation. *Id.* at 616-20. *See also Van Orden*, 545 U.S. at 681 (upholding Ten Commandments monument on state capitol grounds because context revealed secular purpose and effect). Thus, rather than "fixating solely on the words 'under God,'" *Rio Linda*, 2010 WL 816986 *9, as plaintiffs suggest, this Court must evaluate the reference to "God" in the Pledge in light of the surrounding text as well as the historic understanding and use of the Pledge and of similar public ceremonial acknowledgments of religion. *See Rio Linda*, 2010 WL 816986 *9.

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

The Pledge's reference to a "Nation under God," in short, is a statement about the Nation's historical origins, its enduring political philosophy centered on the sovereignty of the individual, and its continuing demographic character — a statement that itself is simply one component of a larger, more comprehensive patriotic message. *See Elk Grove*, 542 U.S. at 31 (Rehnquist, C.J., concurring in the judgment) (the Pledge is a "promise [of] fidelity to our flag and our nation, not to any particular God, faith, or church"). *See also Myers*, 418 F.3d at 407.

In addition, children in public schools do not just recite the Pledge and go home. Rather, the Pledge is "integrated into the school curriculum," *Lynch*, 465 U.S. at 679 (quoting *Stone* v. *Graham*, 449 U.S. 39, 42 (1980)), where students spend months and years studying and learning about the historical, philosophical, and religious foundations of the Nation and the governmental structure that was adopted. In that regard, therefore, the Pledge stands in marked contrast to the graduation and football prayers the Supreme Court invalidated in *Lee* v. *Weisman*, 505 U.S. 577

(1992), and *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290 (2000), where the challenged prayers were not part of a secular educational process. Here, a reasonable observer's response to the Pledge's reference to a Nation "under God" will be assimilated in the larger curricular framework that gives meaning to all of the Pledge's language.

The fact that Congress added the phrase "under God" to a preexisting Pledge does not change this analysis. For example, the city government in *County of Allegheny* had likewise added the Menorah, after the fact, to a preexisting holiday display. *See* 492 U.S. at 581-82. Yet the Court focused its constitutional analysis on the display as a whole, rather than scrutinizing the message conveyed by each component as it was added seriatim. *See id.* at 616-20 & n.64. Thus, the words "under God" in the Pledge are not constitutionally suspect merely because the Pledge previously existed without them. The Establishment Clause contains no least restrictive-means requirement. *Lynch*, 465 U.S. at 682 (summarily dismissing the argument that "the city's objectives could have been achieved without including the creche in the display"). *See also Rio Linda*, 2010 WL 816986 *11 (noting that Congress's addition of "under God" to the Pledge is permissible because those words are "a reference to the historical and religious tradition of our country, not a personal affirmation through prayer or invocation that the speaker believes in God").

ii. Reciting the Pledge is not a religious exercise.

The Supreme Court also has repeatedly made clear that not every reference to God amounts to an impermissible government-endorsed religious exercise. Indeed, as explained above, it has consistently cited the Pledge in particular as a quintessential example of a permissible reference to God. And it repeatedly has distinguished descriptive or ceremonial references to God, like that contained in the Pledge, from formal religious exercises like prayer and Bible reading. Thus, it is not surprising that the Fourth, Seventh, and Ninth Circuits have all rejected the notion that the Pledge should be characterized as a prayer or some other form of religious exercise. *See Rio Linda*, 2010 WL 816986 *23; *Myers*, 418 F.3d at 417-18; *Sherman*, 980 F.2d at 445-448.

In *Engel*, for example, the Supreme Court struck down the New York public school system's practice of reciting a nondenominational Regents prayer because that formal "invocation of God's blessings" was a religious activity — "a solemn avowal of divine faith and supplication for the blessings of the Almighty." 370 U.S. at 424. The Court contrasted the Regents prayer with the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity," concluding that "[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored." *Id.* at 435 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York's practice of preceding the prayer with recitation of the Pledge. *See id.* at 440 n.5 (Douglas, J., concurring).

Likewise, in striking down state-sponsored devotional Bible-reading in schools, the Court in *Schempp* noted, without a hint of disapproval, that the students also recited the Pledge of Allegiance immediately after the invalidated prayer. 374 U.S. at 207. That is because, as Justice Brennan explained in his extended concurrence, "daily recitation of the Pledge of Allegiance . . . serve[s] the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government." *Id.* at 281 (Brennan, J., concurring). "The reference to divinity in the revised pledge of allegiance," he continued, "may merely recognize the historical fact that our Nation was believed to have been founded 'under God.'" *Id.* at 304; *see Lee*, 505 U.S. at 583 (striking down graduation prayer without suggesting that the Pledge, which preceded the prayer, was at all constitutionally questionable).

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

Thus, the Pledge is readily distinguishable from the forms of inherently religious, school-sponsored activity the Supreme Court has held are impermissible in public schools. *See Rio Linda*, 2010 WL 816986 *8 (observing that "[a]ll of the religious exercises invalidated in those cases shared a fundamental characteristic absent from the recitation of the Pledge: the exercise, observance, classroom lecture, or activity was predominantly religious in nature - a prayer, invocation, petition, or a lecture about 'creation-science.'") (footnotes omitted).

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

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

3. New Hampshire's Pledge-Recitation Statute Is not Unconstitutionally Coercive.

Plaintiffs acknowledge that the Pledge practices at issue do not involve the level of compulsion that would render them unconstitutional under *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943). *See* First Amend. Compl. ¶ 55 (App. 14-15). Although Plaintiffs claim that the Pledge practices nevertheless are unlawfully "coercive" under *Lee* v. *Weisman*, 505 U.S. 577 (1992), it is *Barnette*, not *Lee*, that establishes the relevant standard for analyzing whether a school's Pledge practice safeguards the "opt-out" rights of students.

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

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

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

By contrast, the coercion principles applied in *Lee* "have no relevance here, because the Pledge is a patriotic utterance, not a religious one." *Habecker* v. *Town of Estes Park*, 452 F. Supp. 2d 1113, 1124 (D. Colo. 2006), *aff'd on other grounds*, 518 F.3d 1217 (10th Cir. 2008). *Accord Rio Linda*, 2010 WL 816986 *24-25; *Myers*, 418 F.3d at 406-08; *Sherman*, 980 F.2d at 446-47. In *Lee*, the Supreme Court held that the Establishment Clause proscribes prayer at public secondary school graduation ceremonies. *See* 505 U.S. at 599. What made those prayers unconstitutionally coercive was their character as a pure "religious exercise," and the government's "pervasive" involvement in institutionalizing the prayers, to the point of making it a "state-sponsored and state-directed religious exercise." *Id.* at 587. *Lee*, therefore, involved unconstitutional coercion because (i) the exercise was so profoundly religious that even quiet acquiescence in it would exact a toll on conscience, *id.* at 588 ("the student had no real alternative which would have allowed her to avoid the fact or appearance of participation"); and (ii) the force with which the government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well, *id.* at 592-94.

Those concerns are not pertinent here. Reciting the Pledge "is a patriotic exercise designed to foster national unity and pride" in what the flag symbolizes, *Elk Grove*, 542 U.S. at 6, not a religious exercise, let alone a core component of worship like prayer. *See id.* at 31 & n.4 (Rehnquist, C.J., concurring in the judgment) (phrase "under God" in the Pledge does not "convert[] its recital into a 'religious exercise' of the sort described in *Lee*"); *id.* at 44 (O'Connor, J., concurring in the judgment) ("Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as reciting or listening to the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character."). *See also Rio Linda*, 2010 WL 816986 *23 (the Pledge "is not a prayer and its recitation is not a religious exercise," and students invited to recite the Pledge "are not being forced to become involuntary congregants listening to a prayer, as they were in *Lee*").

In addition, any analysis of the alleged coercive effect of voluntary recital of the Pledge must take into account the Supreme Court's repeated assurances that the "many manifestations in our public life of belief in God," *Engel*, 370 U.S. at 435 n.21, far from violating the Constitution, have become "part of the fabric of our society," *Marsh*, 463 U.S. at 792, including in public school classrooms. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, "has become embedded" in the American consciousness and "become part of our national culture." *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Public familiarity with the Pledge's use as a patriotic exercise and a solemnizing ceremony for public events ensures that the reasonable observer will not perceive an invitation to recite the Pledge as government coercion to engage in a religious act. *See Elk Grove*, 542 U.S. at 38 (O'Connor, J., concurring in the judgment) (noting that "the Pledge has become, alongside the singing of The Star-Spangled Banner, our most routine ceremonial act of patriotism"); *Van Orden*, 545 U.S. at 702-03 (Breyer, J., concurring in the judgment) (passage of 40 years without legal challenge "suggest[s] more strongly than can any set of formulaic tests that few individuals . . . are likely to have understood the [Ten Commandments] monument as . . . a government effort . . . primarily to promote religion over nonreligion").

Finally, the Pledge's brief reference to God represents a historical fact: that our Nation was founded on the principle that individuals have inalienable rights given by God that no government may take away. This Nation's history has uniquely religious roots, and teaching that history, and recognizing its import through the Pledge, does not in the remotest sense constitute coercion of religion. Thus, public schools may teach not just that the Pilgrims came to this country, but also why they came. They may teach not just that the Framers conceived of a governmental system in which inalienable rights resided in the individual, but also why they thought that way. *See*

Edwards v. *Aguilllard*, 482 U.S. 578, 606-07 (1987) (Powell, J., concurring) ("I would see no constitutional problem if schoolchildren were taught the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government."). *See also Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 235 (1948) (noting that "[i]f we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.").[8]

4. Neither the Pledge nor New Hampshire's Pledge-Recitation Statute Involves Government Endorsement of Religion.

Recitation of the Pledge does not constitute an "endorsement" of religion.[9] To

[8] Plaintiffs also allege that "opting out" of the Pledge recital would make students feel like political "outsiders." *See* First Amend. Compl. ¶ 51 (App. 14). But the government does not make "religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). Put another way, the Establishment Clause is not violated just because a governmental practice "happens to coincide or harmonize with the tenets of some or all religions." *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961); *see also Lynch*, 465 U.S. at 683.

[9] The Supreme Court sometimes phrases the endorsement question by asking whether the government has placed its imprimatur on religious activity. Thus, what plaintiffs describe as a separate "imprimatur" test is in fact no different from the Supreme Court's endorsement inquiry. *See*, *e.g.*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002) (both endorsement and imprimatur tests focus on how the hypothetical "reasonable observer" would view the government's action).

the contrary, as the Ninth Circuit held in *Rio Linda*, "the phrase 'under God" in the Pledge ' is a recognition of our Founders' political philosophy that a power greater than the government gives the people their inalienable rights." 2010 WL 816986 *23. "The Pledge is an endorsement of our form of government, not of religion or any particular sect." *Ibid. See also Van Orden*, 545 U.S. at 701-02 (Breyer, J., concurring in the judgment) (text of Ten Commandments on challenged monument, when viewed in context, "conveys a predominantly secular message").[10]

Indeed, a reasonable observer might well view the compelled omission of the familiar words "under God" from the Pledge, at this point in our Nation's history, as reflecting hostility toward religion — which itself is constitutionally impermissible. *See*, *e.g.*, *Van Orden*, 545 U.S. at 705 (Breyer, J., concurring in the judgment) (noting that to hold the Ten Commandments display at issue unconstitutional, "based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause

[10] As the Ninth Circuit correctly observed in *Rio Linda*, the proper baseline for analyzing whether New Hampshire's Pledge-recitation statute is an unconstitutional endorsement of religion is not "what a child reciting it may or may not understand about the historical significance of the words being recited." 2010 WL 816986 *23. "[T]he Supreme Court has expressly rejected this approach," *ibid.* (citing *Good News Club* v. *Milford Central Sch.* , 533 U.S. 98, 119 (2001), focusing instead on what the hypothetical reasonable observer, aware of all the relevant history and context, would perceive. *See Rio Linda*, 2010 WL 816986 *22.

traditions); *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment) (the Court "has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion"); *Schempp*, 374 U.S. at 225 ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'") (citation omitted).[11]

II. Plaintiffs' Other Constitutional Claims are Foreclosed by First Circuit Precedent and are Otherwise Groundless.

A. Plaintiffs' Free Exercise Claims and Claims Concerning the "Fundamental Right of Parenthood."

The DoeChildren allege that the New Hampshire Pledge-recitation statute violates their rights under the Free Exercise Clause by coercing them (through the setting and peer pressure) "to recite a purely religious ideology." First Amend. Compl. ¶ 56 (App. 15). This claim is entirely dependent on the notion that the Pledge

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[11] For the above reasons, and for the other reasons explained in this brief, neither the Pledge nor its voluntary recitation in our nation's public schools violates the principle that government action must be neutral toward religion. *Rio Linda*, 2010 WL 816986 *6 ("Because only a patriotic exercise is encouraged and no particular text is mandated, the California statute and the School District's [Pledge-recitation] policy are neutral toward religion.")(citation omitted).

of Allegiance represents "purely religious ideology," which lies at the heart of plaintiffs' Establishment Clause claim. As a result, for the same reasons plaintiffs' Establishment Clause claims lack merit, the DoeChildren's Free Exercise Clause claims also necessarily fail. *Cf. Newdow* v. *Lefevre*, 2010 WL 816971 (9th Cir. Mar. 11, 2010) (holding that plaintiffs' challenge to the use of "in God We Trust" on United States coins and currency under the Religious Freedom Restoration Act, 42 U.S.C. 2000bb, failed for the same reasons their Establishment Clause challenge to the use of that phrase fell short, since both claims rested on the idea that the National Motto constitutes purely religious ideology).[12]

The plaintiff-parents' Free Exercise Clause claims, and their claims based on the "fundamental right of parenthood," are foreclosed by *Parker* v. *Hurley*, 514 F.3d 87 (1st Cir.), *cert. denied*, 129 S. Ct. 56 (2008). In *Parker*, this Court held that "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive . . .." *Id.* at 106. In so ruling, this Court observed that in *Elk Grove*, the Supreme Court held that "the school's requirement that Newdow's daughter recite the pledge of allegiance every day did not 'impair[] Newdow's right to instruct his daughter in his religious views.'" *Id.* at 105-06 (citing

[12] RFRA reinstates, as a statutory right, the compelling interest analysis that governed suits brought under the Free Exercise Clause prior to *Employment Div.* v. *Smith*, 494 U.S. 872 (1990).

Elk Grove, 542 U.S. at 16).

Plaintiffs' claims under the Free Exercise Clause and the "fundamental right of parenthood" are predicated on the notion that New Hampshire's decision to expose students to the patriotic ideals represented by the Pledge of Allegiance violates plaintiffs' right as parents to instruct their children in their own atheistic views. *See* First Amended Complaint, ¶¶ 58-72 (App. 15-17). Those claims are materially indistinguishable from the claims barred in *Parker*, and are thus foreclosed by circuit precedent.[13]

B. Plaintiffs' Due Process and Equal Protection Claims

Plaintiffs' Due Process and Equal Protection claims under the Fourteenth Amendment likewise rest on plaintiffs' mistaken belief that the words "under God" in the Pledge are an endorsement of religion. *See* First Amend. Compl. ¶¶ 64 (App. 16) (alleging that the Pledge's supposed "endors[ment] of the religious notion that God exists . . . creates a social environment where prejudice against Atheists . . . is perpetuated"). Thus, as the district court correctly held, those claims fail for the reasons their Establishment Clause claim falls short – the phrase "under God" in the Pledge is not an endorsement of religion, but a patriotic acknowledgment of this

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[13] To the extent plaintiffs' Free Exercise Clause claims are predicated on the notion that the Pledge is not neutral toward religion, *see* Appellants' Brief at 60, that argument fails for reasons we have already explained.

nation's religious history and provenance. *See* Opinion at 31-32 (ADD 31-32).[14]

Conclusion

For the foregoing reasons, the order dismissing plaintiffs' complaint in its entirety should be affirmed.

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[14] Plaintiffs also argue, in passing, that the district court erred by failing to allow them to offer evidence to support their claims. *See* Appellants' Brief at 12. This argument is not properly presented in this appeal because plaintiffs did not raise it below. *See*, *e.g.*, *Silvas* v. *E-Trade Mort. Co.*, 514 F.3d 1001, 1007 (9th Cir. 2008) ("'It is well-established that an appellate court will not consider issues that were not properly raised before the district court'") (citation omitted). Moreover, plaintiffs fail to identify what well-pleaded facts they believe the district court failed to accept, and what evidence they would have liked to offer. Thus, this argument also is not properly before the Court for this additional reason. In any event, the issues in this appeal are all issues of law. *See*, *e.g.*, *Gaylor* v. *United States*, 74 F.3d 214, 217 (10th Cir. 1996) (noting that whether the National Motto is an unconstitutional endorsement of religion is an "objective inquiry" that "is not about the perceptions of particular individuals").

Respectfully submitted,

Tony West
Assistant Attorney General

Thomas P. Colantuano
United States Attorney

Robert M. Loeb
202-514-4332
s/Lowell V. Sturgill Jr.
202-514-3427
Attorneys, Civil Division
Appellate Staff, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

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CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel Wordperfect 13, the foregoing brief contains 13,578 words. The text of the brief is composed in proportionally spaced, 14-point Times New Roman typeface, which has 10 characters per inch.

s/Lowell V. Sturgill Jr.

Certificate of Service

I hereby certify that on this 7th day of April, 2010, I served a copy of the foregoing Brief for Appellee-Intervenor the United States on all counsel by use of the Court's CM/ECF system, and any counsel who are not registered CM/ECF users by Federal Express next-day delivery.

s/Lowell V. Sturgill Jr.