AMERICAN HUMANIST ASSOCIATION and JOHN DOE and JANE DOE, individually and as parents and next friends of DOECHILD,
Plaintiffs,

v.

MATAWAN ABERDEEN REGIONAL SCHOOL DISTRICT and DAVID M. HEALY, in his capacity as Superintendent of Schools,
Defendants,

and

FRANK JONES and MICHELE JONES, individually and as parents of next friends of S. JONES, F. JONES and H. JONES and THE KNIGHTS OF COLUMBUS, a Connecticut tax-exempt corporation,
Defendant-Intervenors,

and

THE AMERICAN LEGION, THE AMERICAN LEGION DEPARTMENT OF NEW JERSEY, AND THE AMERICAN LEGION MATAWAN POST 176,
Defendant-Intervenors.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
MONMOUTH COUNTY

DOCKET NO. MON-L-001317-14

Civil Action

BRIEF IN SUPPORT OF
DEFENDANT-INTERVENORS' RULE 4:6-2 MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

STATUTES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

This lawsuit is the latest in a series of challenges to the national Pledge of Allegiance that Plaintiffs and their allies have brought in numerous courts around the country.[1] These challenges were originally brought primarily as claims that the Pledge violated the Establishment Clause of the First Amendment to the United States Constitution. However, recently Plaintiffs and their allies have changed tack, seeking to avoid federal court by transforming their federal Establishment Clause claims into state Equal Protection claims, presumably in hopes of better results in state court than they have been having in federal courts.

This case falls into the new category of challenge. Plaintiffs' only claim in this lawsuit is that having to hear other schoolchildren voluntarily recite the Pledge of Allegiance while they remain silent imposes religion-based unequal treatment on Plaintiffs under the New Jersey Constitution. Several federal and state courts have considered identical Equal Protection claims and they have uniformly rejected them. Most notably, earlier this year the Massachusetts Supreme Judicial Court unanimously upheld the dismissal of a complaint in Massachusetts state court from which Plaintiffs' complaint in this lawsuit was cut-and-pasted. As these other courts

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[1] Doe v. Acton-Boxborough Regional Sch. Dist., 468 Mass. 64 (2014); Freedom From Religion Foundation v. Hanover Sch. Dist., 626 F.3d 1, 9 (1st Cir. 2010); Croft v. Perry, 624 F.3d 157 (5th Cir. 2010) (Texas State Pledge); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1019 (9th Cir. 2010); Myers v. Loudoun Cnty. Pub. Sch., 418 F.3d 395 (4th Cir. 2005); Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp., 980 F.2d 437 (7th Cir. 1992). In Rio Linda and Hanover, the plaintiffs brought free exercise and equal protection claims as well as Establishment Clause claims. Those claims were dismissed as well. See, e.g., Newdow v. Congress of U.S., 383 F. Supp. 2d 1229, 1232 n.2 (E.D. Cal. 2005).

have concluded, there are many different reasons this claim fails, even if all of Plaintiffs' allegations are deemed to be true:

First, the United States Constitution and New Jersey law forbid the Matawan-Aberdeen School District from forcing Plaintiffs to recite the Pledge. This case is thus not about Plaintiffs' speech or silence, but the voluntary speech of others. And Plaintiffs enjoy precisely the same rights and are treated exactly the same way as every other student: they have the right to recite the Pledge or the right to remain silent. Equal treatment of this sort cannot give rise to an Equal Protection claim.

Second, Plaintiffs specifically allege that the beliefs they say are subject to discrimination are philosophical rather than religious. But philosophical objections cannot be the basis for a religious discrimination claim for the simple reason that philosophy is not religion. Just as Plaintiffs cannot rely on the voluntary speech of others to claim unequal treatment, they also cannot rely on the alleged religious beliefs of others to claim religion-based discrimination against them. Under New Jersey law, Plaintiffs must explain how the alleged discrimination is rooted in religious principles.

Third, as many state and federal courts across the country have found, the Pledge is not in fact a religious creed or prayer to God. Instead, centuries of historic use of the phrase "under God" demonstrate that it is a classic restatement of the Anglo-American political philosophy holding that rights do not come from the State but instead precede the existence of the State. Indeed, the Founders fought for inalienable rights granted them "under God" on the very ground where this Courthouse stands. Plaintiffs' claim of religious discrimination thus separately fails because they have mistaken a statement of political philosophy for a statement of theology, and wrongly believe that the word "God" cannot be uttered in public life.

Fourth, Plaintiffs' claim, if upheld, would put the New Jersey Constitution in direct conflict with federal law, both because the wording of the Pledge is set by a federal statute, 4 U.S.C. § 4, and because striking down the Pledge on the erroneous belief that it contains religious content evinces hostility towards religion that is forbidden by the United States Constitution.

Finally, Plaintiffs' approach would lead to absurd results. New Jersey's Equal Protection Clause would be turned into a heckler's veto over New Jersey public school curricula. Anyone with a gripe could sue a school district and New Jersey state courts would have to decide every one.

Any one of these reasons would suffice to reject Plaintiffs' claims, but together they show just how wrong-headed this lawsuit is. Defendant-Intervenors the Jones family and the Knights of Columbus want to keep reciting the Pledge of Allegiance as set forth in federal statute, with the historic words "under God" included. They therefore respectfully move this Court to dismiss this case with prejudice for failure to state a claim upon which relief can be granted.

FACTUAL AND PROCEDURAL BACKGROUND

The words "under God" were added by Congress to the Pledge of Allegiance in 1954, as a way of contrasting the American view of human rights—that they inhere in people and cannot be taken away by the government—with that of the Soviet Union—that rights are granted by the government. 4 U.S.C. § 4 (2006); H.R. Rep. No. 83-1693, at 1-2 (1954). New Jersey law requires the daily recitation of the Pledge of Allegiance in public schools. N.J.S.A. 18A:36-3(c).

The Plaintiffs are the American Humanist Association and John Doe and Jane Doe, individually and on behalf of their child Doechild. The Plaintiffs filed a complaint on March 31,

2014 alleging that the presence of the words "under God" in the Pledge of Allegiance "contradicts" their religious views, Compl. at ¶ 23, and discriminates on the basis of religion under the New Jersey Constitution, Art. 1 v.5. Compl. at ¶ 35. The Plaintiffs acknowledge that the Pledge is voluntary and that Doechild may opt out. Compl. at ¶ 27. Instead, Plaintiffs wish for others to not say the Pledge of Allegiance in New Jersey schools.

On July 29, 2014, Frank and Michele Jones, individually and on behalf of their minor children S. Jones, F. Jones, and H. Jones, along with the Knights of Columbus, moved to intervene in the case. S. Jones, F. Jones, and H. Jones are students in New Jersey Public schools, and wish to continue saying the full words of the Pledge. Amended Answer at ¶ 6.

The Knights of Columbus is a Connecticut tax-exempt corporation. Id. The Knights have over 63,000 members in New Jersey, including in the school district of Matawan-Aberdeen, at least one of which has a child attending Matawan-Aberdeen public schools. Id. The Knights were one of the organizations responsible for the adoption of the Pledge in its current form, Id., and have defended the constitutionality of the Pledge and its recitation in public schools around the country. Acton-Boxborough, 468 Mass. 64; Hanover, 626 F.3d 1; Rio Linda, 597 F.3d 1007.

On July 31, The American Legion, the American Legion Department of New Jersey, and the American Legion Matawan Post 176 requested to intervene in the case. Dkt. No. 24.

The Court granted both motions to intervene on September 18.[2] Defendant-Intervenors the Jones family and the Knights of Columbus now respectfully request that the Court dismiss Plaintiffs' complaint with prejudice pursuant to Rule 4:6-2(e) for failure to state a claim upon which relief may be granted.

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[2] As this Court entered the Order granting the Motion to Intervene, it is appropriate for this Court to take judicial notice of a record of this Court. N.J.R.E. 201(b)(4).

STANDARD OF REVIEW

Rule 4:6-2(e) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Id. "[A] court must dismiss the plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief." Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005). In order to survive a motion to dismiss, the plaintiff must "make allegations, which, if proven, would constitute a valid cause of action." Id. (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472, (App. Div. 2001). Thus, "[a] pleading should be dismissed if it states no basis for relief and discovery would not provide one. Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011). The arguments in this motion are preserved in the Answer and the Amended answer. O'Connor v. Altus, 67 N.J. 106, 116 (1975) (issue preserved "where the answering pleading recites the complaint's 'failure to state a claim upon which relief can be granted'") (citations omitted).

ARGUMENT

Plaintiffs have not alleged facts that would support their claim that the Pledge of Allegiance violates the Equal Protection provisions of the New Jersey Constitution. Their complaint must therefore be dismissed under Rule 4:6-2.

I. The Pledge of Allegiance does not violate the Equal Protection Clause of the New Jersey Constitution.

The Pledge of Allegiance is a patriotic exercise supported by history and tradition. Plaintiffs' claim that the Pledge violates the Equal Protection Clause of the New Jersey Constitution is based on an erroneous understanding of the nature of the Pledge. In order to succeed in their claims, Plaintiffs must be able to show that the Pledge distinguishes between classes of citizens based on religion. In re Regulation of Operator Serv. Providers, 343 N. J. Super. 282, 323 (App. Div. 2001) ("The equal protection clauses are 'essentially a direction that

all persons similarly situated should be treated alike.'") In re Regulation of Operator Serv. Providers, 343 N.J. Super. 282, 323 (App. Div. 2001) (quoting City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432 (1985)); Greenan v. Hyland, 149 N.J. Super. 7, 19 (App. Div. 1977) ("In the absence of a classification, equal protection analysis should proceed no further"). Statutes subject to discrimination claims under the New Jersey Equal Protection provisions receive significant deference from courts. See Lewis v. Harris, 188 N.J. 415, 459 (2006) ("[w]hatever the path the Legislature takes, our starting point must be to presume the constitutionality of legislation"). An Equal Protection challenge must show that "the Legislature intended to discriminate against the class." Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442, 462 (App. Div. 1997).

Moreover, in evaluating an equal protection challenge, New Jersey courts consider "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Greenberg v. Kimmelman, 99 N.J. 552, 567 (1985). If legislation "distinguish[es] between two classes of people," it must "bear a substantial relationship to a legitimate governmental purpose." Lewis, 188 N.J. at 443. And in reviewing Equal Protection challenges under the New Jersey Constitution, New Jersey courts typically "have turned to case law relating to [federal Equal Protection] provisions for guidance." Sojourner A. v. New Jersey Dep't of Human Servs., 177 N.J. 318, 329 (2003).

As set forth below, Plaintiffs do not come close to meeting the relevant New Jersey Equal Protection standards. Their claims fail because (1) no one (including Plaintiffs) is forced to say the Pledge, (2) Plaintiffs raise a philosophical rather than a religious objection, and (3) the Pledge is not a religious creed or prayer, but a statement of Founding-era American political philosophy.

A. Under Barnette and Holden, all students are treated equally: they are free to say the Pledge or remain silent.

The School District cannot force any student to recite the Pledge of Allegiance. This equal treatment does not create separate classes of citizens based on religion and therefore cannot violate New Jersey's Equal Protection Clause. All students are encouraged to say the Pledge of Allegiance, and since at least 1943, all are allowed to opt out of saying it. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no 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."). See also Lipp v. Morris, 579 F.2d 834, 836 (3d Cir. 1978) (government may not "require[e] a student to engage in what amounts to implicit expression by standing at respectful attention while the flag salute is being administered and being participated in by other students."); Holden v. Bd. of Educ., 46 N.J. 281, 287 (1966) (American freedoms "are broad enough to encompass the beliefs of those who, like the petitioners, claim conscientious scruples"). Simply because it has words with religious content does not mean that the Pledge discriminates against a class of people. There are many acceptable reasons one could opt out from saying the Pledge, and not all of them are religious.

For example, in Holden, the New Jersey Supreme Court considered a Muslim's objection to the Pledge of Allegiance. 46 N.J. 281 (1966). The Board argued that the student's objection was not religious, but political. Id. at 284. The Court held that this was an unnecessary distinction: "The basic question is whether petitioners in this case can rightly invoke 'conscientious scruples' as their reason for claiming exemption from the pledge of allegiance." Id. See also Hanover, 626 F.3d at 9 ("There are a wide variety of reasons why students may choose not to recite the Pledge, including many reasons that do not rest on either religious or

anti-religious belief."). Whatever their objections to the Pledge, the Plaintiffs have not alleged that they have been denied the remedy granted in Lipp, Holden, and Barnette. Indeed, they freely admit that "Doechild has the right to refuse participation in the flag-salute exercise and Pledge recitation." Compl. at ¶ 27. Yet they request a new remedy, one that, if granted on an equal basis to everyone, would dramatically change the nature of public education in New Jersey.

Every court to consider a challenge similar to this case has rejected the idea that the Pledge classifies children. In May of this year, the Massachusetts Supreme Judicial Court held in Doe v. Acton-Boxborough Regional School District that "there is no classification, let alone a suspect classification based on religion, created by the practice of reciting the pledge in the manner it is presently recited, voluntarily." 468 Mass. 64, 75 (2014). The First Circuit and the Ninth Circuit have also rejected federal equal protection challenges to the Pledge. Hanover, 626 F.3d at 14 ("'[p]ublic schools are not obliged 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, or even participate in discussions about them.'") (quoting Parker v. Hurley, 514 F.3d 87, 106 (1st Cir. 2008)); Rio Linda, 597 F.3d at 1021 ("If in fact the students were required to say the Pledge, [it might be unconstitutional.] But the California legislature has already taken this consideration into account by allowing anyone not to say the Pledge, or hear the Pledge said, for any personal reason."); Newdow v. Congress of U.S., 383 F. Supp. 2d 1229, 1232 n.2 (E.D. Cal. 2005) (noting that Plaintiffs brought an Equal Protection claim but ruling on Establishment Clause grounds). Plaintiffs are therefore seeking to have this Court become the only court in the country to hold that the Pledge violates Equal Protection principles.

B. The Pledge does not discriminate against Humanists on the basis of religion because Humanism is a set of philosophical beliefs, not a religion.

In order to raise a viable equal protection claim under the New Jersey Equal Protection Clause, Plaintiffs must show also that they, as Humanists, are "segregated . . . in the public schools, because of religious principles . . . ." N.J. Const. Art. I, ¶ 5. But Plaintiffs do not claim that they are motivated by religious principles. Instead, Plaintiffs allege that Humanism contains "a comprehensive worldview and set of ethical values . . . that are grounded in . . . philosophy, informed by scientific knowledge, and driven by a desire to meet the needs of people in the here and now." Complaint at ¶ 10. Yet as Justice Brennan explained in Wisconsin v. Yoder, philosophy is not the same thing as religion, and does not enjoy the same protections:

> to have the protection of the Religion Clauses, . . . claims must be rooted in religious belief. Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses.

Wisconsin v. Yoder, 406 U.S. 205, 215-216 (1972) (footnote omitted). Humanism (or at least Plaintiffs' version of Humanism) is like Thoreau's strongly-held philosophical beliefs, not the religious beliefs of the Amish.

Nor does it matter that Plaintiffs say that the Pledge answers a religious question differently than they do. First, as demonstrated below, the Pledge does not answer a religious question. See Section I.C infra. Second, taking a position on a religious question is not the same thing as having religious beliefs, or religious principles. Plaintiffs do not believe that God exists,

but that belief is not itself a religious belief reached based on religious principles. They are not reasoning religiously, nor do they invoke the transcendent but instead claim to use reason and observation. Of course, some religions, such as some forms of Buddhism, also teach that there is no God. But Buddhists reach that answer to a religious question based on religious beliefs and a concept of the transcendent, not philosophical beliefs like Plaintiffs' beliefs. Similarly, some Christians do not believe that evolution is reconcilable with the Biblical account. That does not mean that a public school discriminates against them by teaching evolution in science class. Cf. Crowley v. Smithsonian Inst., 636 F.2d 738, 743 (D.C. Cir. 1980) (museum exhibit on evolution does not make religious claims).

Plaintiffs' disagreement with the Pledge is thus a philosophical disagreement, not a disagreement rooted in their religious beliefs. This disagreement therefore cannot serve as the predicate for a religious discrimination claim.[3]

C. The Pledge does not discriminate against Humanists on the basis of religion because the Pledge is a statement of political philosophy, not a religious creed.

Plaintiffs' claim must also fail because it rests on the faulty premise that the Pledge of Allegiance offers theological conclusions. Compl. at ¶ 34-35. But the Pledge does not make any religious claims, and thus cannot discriminate against Plaintiffs. Fairly viewed, the Pledge is a statement of political philosophy and a patriotic exercise, not a religious prayer. Federal and state courts have uniformly treated the Pledge this way. Acton-Boxborough, 468 Mass. at 742 ("[T]he

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[3] This is different than an Establishment Clause claim, where government can violate the law by imposing unequal treatment based on a person's answer to a religious question. See, e.g., Torcaso v. Watkins, 367 U.S. 488 (1961) (Maryland violated Establishment Clause by requiring belief in God as qualification for public office). However, the Establishment Clause is not relevant here since Plaintiffs have specifically designed this test case to avoid making or raising an Establishment Clause claim; presumably they have done so because every court to consider an Establishment Clause claim challenging the Pledge has rejected it.

pledge is a fundamentally patriotic exercise, not a religious one."); Hanover, 626 F.3d at 10 (The "primary effect [of Pledge statute] is not the advancement of religion, but the advancement of patriotism through a pledge to the flag as a symbol of the nation."); Rio Linda, 597 F.3d at 1038 ("The Pledge is not a prayer and its recitation is not a religious exercise.").

The historical and political context of the Pledge help us to understand why it is a philosophical statement instead of a religious one. That context demonstrates that the phrase "under God" has been used throughout English and then American history as a means of proclaiming limited government and inalienable human rights.

That history goes back a long way. The first use of the phrase "under God" comes in the perhaps earliest known compendium of English law, written by Henry de Bracton in the 13th Century. Bracton states that "[t]he king must not be under man but under God and under the law, because law makes the king." Bracton, 2 De Legibus Et Consuetudinibus Angliae 33.[4] Since the King embodied the government in his person at that time, this early English legal writer was thus already limiting government by declaring it to be "under God and the Law." Id. In 1607, Sir Edward Coke cited Bracton's phrase to justify his power as Chief Justice of the Court of Common Pleas to overrule the King's findings with respect to the common law: "With which the King was greatly offended, and said, that then he should be under the Law, which was Treason to affirm, as he said; To which I said, that Bracton saith, *Quod Rex non debet esse sub homine, sed* ***sub Deo et Lege.***" Prohibitions Del Roy, 77 Eng. Rep. 1342, 1343 (K.B.1608).

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[4] A Latin rendering of this phrase ("NON SUB HOMINE SED SUB DEO ET LEGE") is carved into the pediment of the Harvard Law School Library. Surely this does not segregate the anti-theist community at Harvard.

This English tradition of limiting the power of government by reference to God continued in the American colonies. In arguing for defiance of British oppression, and 18-year-old Alexander Hamilton wrote in February 1775 that: "The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of the Divinity itself, and can never be erased or obscured by mortal power." Alexander Hamilton, The Farmer Refuted (1775) (quoted in Ron Chernow, Alexander Hamilton 60 (2004)).

In the Declaration of Independence itself, Thomas Jefferson's defense of the American Revolution proceeds from the "self-evident" truth that all persons "are endowed by their Creator with certain unalienable rights." The Declaration of Independence, para. 2 (U.S. 1776). Proceeding from this premise, the Declaration explains to a "candid world" that these God-given rights provided a basis for Americans to reject a tyrannical government and assume the "*equal* station to which the Laws of Nature and of Nature's God entitle them." Id. at para. 1, 14 (emphasis added).

The phrase "under God" was part and parcel of the political philosophy of the Revolutionaries, who were firm in their belief that the Revolution was to be carried out "under God." For example, George Washington used the phrase "under God" itself to describe the predicament of the nation just then being born. In his General Orders issued on July 2, 1776 (when the Declaration had been agreed but not published), Washington stated: "The fate of unborn Millions will now depend, under God, on the Courage and Conduct of this army—Our cruel and unrelenting Enemy leaves us no choice but a brave resistance, or the most abject submission; this is all we can expect—We have therefore to resolve to conquer or die . . . ." 3 Writings of George Washington 449 (Boston: Jared Sparks, ed. 1834) (emphasis added).

Seven days later, Washington used the phrase "under God" again in his General Orders of July 9, 1776, when he ordered the Declaration of Independence to be read to all the troops: "The General hopes this important Event will serve as a fresh incentive to every officer, and soldier, to act with Fidelity and Courage, as knowing that now the peace and safety of his Country depends (under God) solely on the success of our arms . . . ." [5] Just two years later, Washington's troops won the Battle of Monmouth Courthouse against the British Army on the site this Courthouse on June 28, 1778. At the conclusion of the peace, the Continental Congress commissioned James Madison, Alexander Hamilton, and later Chief Justice Oliver Ellsworth to draft an "Address to the States, by the United States in Congress Assembled." The Address, written in Madison's hand, ended with a resounding statement of the idea that rights inhere in human nature and proceed from an "Author": "Let it be remembered, finally, that it has ever been the pride and boast of America, that the rights for which she contended were the rights of human nature. By the blessing of the Author these rights on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states." 1 Elliot's Debates 100 (2d ed. 1854). Madison and Hamilton thus agreed that the American revolution was a fight for "the rights of human nature," rights which had an "Author."

The idea of inborn natural rights granted by God continued in the fight against chattel slavery. Just two years after helping to draft the Address, Hamilton in 1785 helped found the nation's first abolitionist society, the New York Society for Promoting the Manumission of Slaves. At its opening meeting the following statement was read: "The benevolent creator and father of men, having given to them all an equal right to life, liberty, and property, no sovereign

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[5] *George Washington, July 9, 1776, General Orders*, available at http://memory.loc.gov/cgi-bin/ampage?collId=mgw3&fileName=mgw3g/gwpage001.db&recNum=308 (emphasis added).

power can deprive them of either." Chernow at 214. Thus, at its very outset, the anti-slavery movement relied on the argument that the government was wrong when it tried to take inalienable rights away from the slaves.

In fact, the entire abolitionist movement was premised on the idea that slaves, like other human beings, had rights bestowed by God, and that the government, and even the United States Constitution itself, had no right to take them away. At each stage of the abolitionist movement, its leaders called on those inalienable rights as a justification for their attacks on the Constitutional order. For example, later Chief Justice Salmon P. Chase argued in his briefing on behalf of John Van Zandt, who had been charged with violating the Fugitive Slave Act, that "The law of the Creator, which invests every human being with an inalienable title to freedom, cannot be repealed by any interior law which asserts that man is property." Argument for the Defendant, Jones v. Van Zandt, 2 McLean 596 (Ohio Cir. Ct. 1843). When the case reached the Supreme Court, Chase argued: "No court is bound to enforce unjust law; but to the contrary every court is bound, by prior and superior obligations, to abstain from enforcing such laws." Argument for the Defendant, Jones v. Van Zandt, 46 U.S. 215 (1847).[6]

The Great Emancipator, Abraham Lincoln, would have been aware of the abolitionist argument from natural law, as well as Washington's statements and Coke's opinion overruling the King, when he wrote in the Gettysburg Address 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 this earth." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), reprinted in Abraham Lincoln - Great Speeches 104 (Dover Thrift Eds. 1991) (emphasis added). Lincoln

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[6] The Court denied the claim on positive law grounds. Id.

consistently subordinated government interests to human rights and the ultimate Author of those rights. For example, in the Emancipation Proclamation he wrote: "And upon this act sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind and the gracious favor of Almighty God." Lincoln, First Emancipation Proclamation, Jan. 1, 1863, reprinted in Great Speeches at 100.

From this long history, it is incontestable that since even before the Declaration of Independence, it has been an important part of our national ethos that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority higher than the State. In this way, the Pledge, like the Declaration and the Gettysburg Address, is a statement of political philosophy, not of theology. Nevertheless, it is a statement of political philosophy that depends for it force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by its "Creator."

Thus the words "under God" were not a newly minted phrase or idea that Congress added to the Pledge in 1954 in an attempt to force individuals to profess monotheism. Instead, they were added as an effort to echo and reaffirm a political philosophy that has animated this country throughout its history, and that is reflected in seminal documents like the Declaration and Gettysburg Address. For example, Representative Rodin stated: "These two words ['under God' in the amended Pledge] are . . . taken from the Gettysburg Address, and represent the characteristic feeling of Abraham Lincoln, who towers today in our imaginations as typical of all that is best in America."[7] In other words, the primary effect of the words "under God" in the

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[7] 100 Congressional Record 7764 (1954) (statement of Rep. Rodin). See also Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J. concurring) ("the reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that

Pledge is to evoke and conform the Pledge to the quintessential American political philosophy that recognizes the subservience of the State to the God-given, inalienable rights of individual citizens, not to draw distinctions between theists and non-theists.

This history establishes that the Pledge proclaims that human rights are not subject to the whims of shifting majorities—not for the state to create or destroy at will, but to recognize and respect according to some ultimate standard. The point of the phrase is political, not theological. But by fixating on the word "God" in the Pledge, Plaintiffs here attempt to generate a theological challenge to the political principle of limited government.

II. Plaintiffs' legal theories regarding the Pledge would put the New Jersey Constitution in conflict with federal law.

A. Plaintiffs' requested remedy would violate the Supremacy Clause.

The Plaintiffs have carefully attempted to avoid implicating federal law in their complaint, Compl. at 1, ¶ 41, but conflict with federal law is inevitable because the text of the Pledge is defined by federal statute. 4 U.S.C. § 4 (2006). A New Jersey ruling that conflicted with the federal law on the language of the Pledge would violate the Supremacy Clause, U.S. Const., art. VI, cl. 2, of the federal Constitution in two separate ways. It would (1) render "compliance with both federal and state regulations . . . a physical impossibility" and (2) would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Edgar v. MITE Corp., 457 U.S. 624, 631 (1982) (citations omitted). Changing the

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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.").

wording of the Pledge in New Jersey schools would make it impossible for the Jones children to comply with both the wording of the federal Pledge and a "New Jersey" version.

Separately, removing words from the Pledge would present an obstacle to the "purposes and objectives of Congress." Id. When reaffirming the Pledge in 2002, Congress noted the controversy over the words "under God" and delineated the history of those words in American political thought. H.R. Report No. 107-659 at 5, 8 ("The Pledge of Allegiance is not a religious service or prayer, but is a statement of historical beliefs"). Omitting the words that Congress expressly chose to include would be a direct contradiction of Congress' purpose in promulgating the Pledge. Indeed, any number of other federal statutes would be implicated were this Court to hold the national Pledge of Allegiance to violate New Jersey's constitution. For example, presumably states would then claim the right to display an alternative version of the national flag, contrary to 4 U.S.C. § 1.

Congress was well aware that the Pledge is recited in schoolrooms across the country. In its 2002 re-enactment of the Pledge, Congress criticized the Ninth Circuit decision that had declared the Pledge unconstitutional in the context of schools. Pub. L. No. 107-293 (2002) ("The 9th Circuit Court of Appeals erroneously held . . . that . . . a school district's policy and practice of teacher-led voluntary recitations of the Pledge of Allegiance is unconstitutional.").

B. Plaintiffs' requested remedy would evince hostility toward religion, thus violating the First Amendment.

Plaintiffs' requested remedy would also violate the command of both Religion Clauses forbidding government hostility toward religion. Though the Pledge is not religious, this Court could not strike it down without affirming Plaintiff's claim that it makes a religious statement. In a number of cases, the Supreme Court has considered whether a particular action would demonstrate hostility toward religion or create religiously-based divisiveness. See Lynch v.

Donnelly, 465 U.S. 668, 673 (1984) (stating that the Constitution "forbids hostility toward any [religions]"); Van Orden v. Perry, 545 U.S. 677, 684 (2005) (plurality op.) (impermissible to "evince hostility to religion by disabling the government from in some ways recognizing our religious heritage") (citation omitted).

In Van Orden, Justice Breyer's controlling concurrence expressed a concern that "the relation between government and religion" be "one of separation, but not of mutual hostility and suspicion . . . ." 545 U.S. at 700 (Breyer, J., concurring). Rejecting a bright-line test in "difficult borderline cases," Id., Justice Breyer emphasized that judges must evaluate whether their "conclusion[s]" would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions," or whether their holdings would "encourage disputes . . . thereby creat[ing] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." Id. at 704 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 717-729 (2002)) (Breyer, J., dissenting)).

On balance, enjoining recitation of the Pledge would send a powerful message that the word "God"—and thus any words or concepts that arguably contain religious references—are unwelcome in a government context. This purported remedy would be just the sort of "hostility toward the religious viewpoint" that the Supreme Court has condemned. Good News Club v. Milford Central Sch., 533 U.S. 98, 118 (2001); cf. Boyajian v. Gatzunis, 212 F.3d 1, 5 (1st Cir. 2000) ("This does not mean that the law's purpose must be unrelated to religion—that would

amount to a requirement that the government show a callous indifference to religious groups.") (quotation omitted).[8]

III. Plaintiffs' requested remedy would give students and parents a heckler's veto over New Jersey school curricula.

Reciting the Pledge is not the only means through which New Jersey schoolchildren are immersed in the political philosophy that the Pledge expresses. If reciting the Pledge of Allegiance is unconstitutional in schools, it is not difficult to imagine how much of American history could be successfully edited out of New Jersey public school curricula. The Declaration of Independence, the Federalist Papers, and the Gettysburg Address all refer to the ideas incorporated in the Pledge with language that would be questionable under Plaintiffs' standards: Both the Declaration of Independence and the Federalist Papers refer to "nature's God" (Federalist No. 43) and "Providence" (Federalist No. 2), with the Declaration of Independence adding the adjective, "*divine* Providence" (Declaration of Independence at para. 5). Further, the Declaration of Independence insists that human equality and human rights ultimately derive from a "Creator." In the Gettysburg Address, President Lincoln encouraged his listeners to resolve "that this nation under God shall have a new birth of freedom." Great Speeches at 103. Like "under God" in the Pledge, these references need not be interpreted as having any substantial theological content or even affirming the existence of a personal God. But they do express the political philosophy to which Plaintiffs object, and if their lawsuit succeeds, teaching these texts

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[8] Nor is it a contradiction to say that the Pledge of Allegiance is both a philosophical statement and that removing it would be a sign of hostility to religion. Indeed, Plaintiffs' only reason for seeking to remove it is their claim that it has religious content. Therefore, if it is removed, it will be out of a motive of hostility toward religion, even though that motive would be based on erroneous views about what the Pledge actually means.

to students will likewise be unconstitutional. Schools will have a choice: either stop teaching these foundational American documents, or censor them.

The absurdity of this outcome becomes all the more clear when one considers that the New Jersey Constitution itself contains much more theologically-laden references to God than do the Pledge or other foundational American documents. For example:

- "We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy . . . " N.J. Const., preamble
- "No person shall be deprived of the inestimable privilege of worshipping Almighty God . . ." N.J. Const., art. 1 § 3.

This absurd effect—that granting Plaintiffs' requested relief would force courts to strike down numerous other government affirmations of American political values—is no mere speculation. It is indeed Plaintiff AHA's ultimate goal, as can be seen in the agenda it pursues in its other litigation and advocacy. For example, AHA not long ago sued to enjoin Chief Justice Roberts from adding the traditional "So help me God" to the end of President Obama's oath of office. Carol Cratty, Lawsuit Seeks to Take "So Help Me God" out of Inaugural, CNN.com, Dec. 31, 2008, available at http://articles.cnn.com/2008-12

-31/politics/inauguration.lawsuit_1_michael-newdow-atheists-joint-congressional-committee?_s=PM:POLITICS. It also opposes the use of the motto "In God We Trust," whether as an official statement of Congress or merely as an optional sticker Georgians can purchase to add to their license plates. American Humanist Association Decries "In God We Trust" Motto Resolution, americanhumanist.org, March 18, 2011, available at http://www.americanhumanist.org/news/details/2011-03-american-humanist-association-decries-

in-god-we-trus; Humanists Demand Alternative to "In God We Trust" License Plate Sticker, americanhumanist.org, July 14, 2011, available at http://www.americanhumanist.org/news/details/2011-07-humanists-demand-alternative-to-in-god-we-trust-lice-2.

These examples show that Plaintiffs' constitutional claim, if granted, will lead to absurd results that are by no means hypothetical or speculative. These results become still worse when one considers that Plaintiffs' Equal Protection claim, unlike an Establishment Clause claim, would permit not merely atheists but any religious group to challenge elements of the public school curriculum that "portrays [them] as outsiders" by encouraging students to accept beliefs with which they disagree. Compl. at ¶ 28.

Humanists are not the only group that disagrees with the content of public school curricula. Instruction intended to inculcate ideals of diversity and inclusiveness will ostracize members of the Louis Farrakhan-led Nation of Islam, which preaches separation of the races and gender-segregated education. Instruction advocating equality of the sexes, depending on its content, will be objected to by some conservative Christians, Jews, and Muslims who believe in differentiated gender roles, as will instruction on gay rights issues and same-sex marriage. See, e.g., Parker, 514 F.3d 87 (rejecting religious claim by Massachusetts parents who wished to exempt their children from elements of the kindergarten and second-grade curricula that endorsed same-sex marriage).

Likewise, it is difficult to imagine a program of sexual education that does not frequently run afoul of at least some students' religious beliefs. Members of some faiths will object to anything but abstinence-only education because they believe other types of sexual education endorse premarital sex. Others will object to an abstinence-only program because it teaches a

negative attitude toward sex and implicitly condemns their religious belief that whether to have sex before marriage is a deeply personal individual choice.

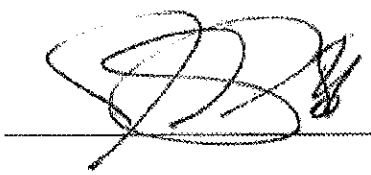
In a state as diverse as New Jersey, such conflicts between ideals the state seeks to inculcate and students' religious beliefs are inevitable, and they often cause the "harms" Plaintiffs complain of. Though it is important for schools to deal with such problems carefully and respectfully, Plaintiffs' proposed solution simply cannot work. Plaintiffs' theory of equal protection would apply strict scrutiny to every element of the public school curriculum that contradicts any student's religious beliefs. Even if the school curriculum usually passes strict scrutiny, this theory would encourage more religious lawsuits against the public school system, entangle courts in the operation of public schools to an unprecedented degree, and waste substantial public educational resources on litigation at a time when school budgets are under increasing pressure.

CONCLUSION

For the reasons set forth above, the Plaintiffs' complaint has failed to state a claim upon which relief can be granted, and it should therefore be dismissed.

Respectfully submitted,

Dated:



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