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

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

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ARGUMENT

The Plaintiffs ask this Court to do what no other court has done: to rule that merely hearing the Pledge of Allegiance willingly recited by third parties is a violation of an atheist student's equal protection rights. This would extend New Jersey equal protection law far beyond its current boundaries and create a rule for New Jersey schools that would be nearly impossible to administer.

I. The Plaintiffs have not alleged facts sufficient to make a claim of religious discrimination.

Plaintiffs now concede that the Pledge is voluntary. Dkt. 46, ("Oppo.") at 1. (Plaintiff American Humanist Association launched campaign to highlight "the voluntary nature of the Pledge exercise"). They contend nevertheless that the Pledge "classifies" students. Oppo. at 2. Yet as we demonstrated in our opening brief, merely referring to words that have religious meaning in some contexts does not classify groups of people for different treatment on the basis of their religious beliefs. Dkt. 44, ("Mot.") at 7-8. Classification means sorting people into groups, not referring to ideas that students may have differing reactions to. Some religious people may not want to learn about religions other than their own in school, or about evolution. See Parker v. Hurley, 514 F.3d 87, 106 (1st Cir. 2008) (religious parents wanted an exemption for their children from nondiscrimination curriculum); Crowley v. Smithsonian Inst., 636 F.2d 738 (D.C. Cir. 1980) (objection to museum exhibit on evolution). But *government* is not sorting or classifying those people, or treating them unequally, when it does so. Presenting curriculum content that happens to offend someone—especially where there is an opt-out—simply is not classification, or unequal treatment.

Despite Plaintiffs' concession that the Pledge is voluntary, Plaintiffs submit an exhibit purporting to contain emails from twenty students around the country—apparently collected

from an online form—who say that they have been pressured to say the Pledge by their teachers. It is unclear what Plaintiffs hope to prove by this, since they haven't alleged that Doechild himself is being forced to say the Pledge, and since Doechild himself doesn't allege that any similar episodes have happened in his school.[1] In any case, these emails are inadmissible. In New Jersey, if the response to a motion "relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit . . . ." R. 1:6-2. That affidavit must be "made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify." R. 1:6-6. Those criteria are blatantly disregarded here, and the exhibit should be excluded from the record. The emails are accompanied by no affidavits, and thus contain no indication of personal knowledge. Furthermore, the emails are all inadmissible hearsay.[2]

II. The Plaintiffs' views cannot be protected as *religious* beliefs.

In our motion to dismiss, we argued that the Plaintiffs have not stated a claim that their views rise to the level of a religious belief protectable under the New Jersey Equal Protection Clause. Mot. at 9-10. Plaintiffs insist that their views deserve protection as a religion. Oppo. at 3-6 ("[i]t is clear from a legal standpoint that Humanism qualifies as religion and that theistic

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[1] Only one of the emails claims to be from New Jersey, but it does nothing to show that there is religious discrimination toward the Plaintiffs or differential treatment toward one religious group. If the allegations are true—and we have no way of knowing—that one teacher "shouts" the Pledge and allegedly doesn't allow students to remain seated during the Pledge, she is wrong about the law, and it is the relevant school district's responsibility to correct this violation of freedom of speech under the First Amendment. Lipp v. Morris, 579 F.2d 834, 836 (3d Cir. 1978)

[2] If the Court does not exclude additional "factual material," the motion to dismiss must be converted in to a motion for summary judgment. Albrecht v. Corr. Med. Servs., 422 N.J. Super. 265, 268 (App. Div. 2011) (plaintiff's opposition to motion included evidence outside complaint).

belief is not a requirement for religious definition"). This is wrong for three reasons. First, Plaintiffs fundamentally confuse religious beliefs with views on religious questions. One can have views on religious questions without having any religious beliefs. Classical Marxism categorically negates all religious claims. See, e.g., Karl Marx, Critique of Hegel's Philosophy of Right (1844) ("Religion is the opium of the people."). But Marx's belief that all religious beliefs are false is not itself a religious belief—it is an answer ("No") to a religious question; that answer is rooted in a philosophical worldview, not transcendent belief. And it is religious beliefs that are protected by the federal and New Jersey constitutions, not views on religious questions rooted in philosophical views. As the Supreme Court famously pointed out in Wisconsin v. Yoder, Thoreau's conscientious beliefs were not rooted in religious belief and thus would not have enjoyed protection under the First Amendment: "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, 216 (1972). This does not mean that government can disqualify someone for giving the wrong answer to a religious question. U.S. Const. Art. VI, cl. 3 ("no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"); Torcaso v. Watkins, 367 U.S. 488 (1961) (First and Fourteenth Amendments prohibit religious tests for public office); State v. Levine, 109 N.J.L. 503, 510 (Sup. Ct. 1932) ("the belief or the disbelief of any person on religious topics shall not debar him from rights which the law affords to others"). But that rule against disqualification does not transmute philosophical beliefs into religious ones.[3]

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[3] Of course some actual religions—for example some forms of Buddhism—are atheistic. But those Buddhist teachings are rooted in Buddhist understandings of the transcendent and are religious beliefs. Plaintiffs, by contrast, proceed from a philosophical worldview.

Plaintiffs' string-cites to cases involving others calling themselves Humanists, Oppo. at 3-4, do not detract from this point. What matters is not the beliefs of others not before the court, but *Plaintiffs' own beliefs*. As Plaintiffs admit, people who go by the name "Humanists" are hardly monolithic, and have a variety of different viewpoints. Dkt. 1, ("Complaint") ¶ 10 ("Humanism encompasses a variety of nontheistic views"). They therefore cannot be treated interchangeably—Plaintiffs must put forward evidence of their own beliefs to support their claims.

But Plaintiffs have not described a single religious belief in their complaint. Indeed, they specifically state that they are acting based on their rejection of the idea of the supernatural in human affairs. Complaint ¶ 9 ("[T]he Humanism affirmed by the Does is a broader religious world view that includes, in addition to a non-theistic view on the question of deities, an affirmative naturalistic outlook; an acceptance of reason, rational analysis, logic, and empiricism as the primary means of attaining truth; an affirmative recognition of ethical duties; and a strong commitment to human rights."). But calling "reason, rational analysis, logic, and empiricism" "religious" does not make actually make those things religious.

Second, even if one accepts their premise, Plaintiffs' claim puts them in the awkward position of asking the Court to tailor the School District's curriculum to show preference for their beliefs over all others. But Plaintiffs cannot have it both ways. If it is true that their beliefs constitute a religion, they cannot force the government to bend its curriculum to comport with their views.

School curricula of many kinds are bound to have some references to religion. That is not in itself unconstitutional or discriminatory. But religion-related content cannot be presented in a way that makes everyone happy all the time. Religious views are by definition in conflict

with one another, and courts and legislatures have wisely realized that they cannot possibly compromise in such a way as to accept all of them. And the Supreme Court has held that the Constitution "does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." Epperson v. State of Ark., 393 U.S. 97, 106 (1968).

The state must remain neutral toward the various religious groups, and may not "prefer one religion over another." Larson v. Valente, 456 U.S. 228, 246 (1982) (internal quotation marks omitted). If Plaintiffs are truly a religious group, as they say they are, doing what they ask is not to be "treated as equals," but to have their views unconstitutionally forced upon everyone else. If they are to be religious, they must instead accept the protection that all other religious observers receive: the right not to say the Pledge.

Third, enjoining recitation of the Pledge would demonstrate forbidden (if utterly misplaced) hostility towards religion. It would send a powerful message that the word "God"—and thus any words or concepts that are even arguably religions—are unwelcome in a government context. This is just such "hostility toward the religious viewpoint" that the Supreme Court condemned in Good News Club v. Milford Central Sch., 533 U.S. 98, 118 (2001). This argument does not try to "have it both ways" as Plaintiffs claim. Oppo. at 9-11. Plaintiffs' only reason for seeking to remove the words 'under God' from the Pledge is their claim that those words have religious content. Therefore, if they are 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. Misprision of fact does not excuse a religion-hostile motive. Cf. Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2009) (criminalizing offenses against "actual or *perceived*" status) (emphasis

added). The Plaintiffs' belief that their views are superior to religious belief is on display in their Complaint, in which they explain, without citation, that "secular societies" are more educated and orderly than "conservatively [r]eligious societies," such as "Bible-belt" states in the United States. Complaint ¶ 32. This Court should not adopt the Plaintiffs' hostility toward anything with perceived religious content.

III. The Pledge does not make a theological claim.

Plaintiffs now concede Defendant-Intervenors' argument, Mot. at 10-16, that the Pledge was intended to be a statement of political philosophy. Oppo. at 6 ("Plaintiffs concede that the exercise contains some language that, in a very general way, is intended (and can be understood) to be a statement of political philosophy . . . ."). In doing so, they overlook that the intent of the legislature is the central element in a New Jersey equal protection claim. Rutgers Council of AAUP Chapters v. Rutgers, 298 N.J. Super. 442, 462 (App. Div. 1997) ("In New Jersey when a statute is facially neutral, as here, even if it has a disparate impact on a class of individuals, an equal protection challenge based on the New Jersey Constitution will succeed only if the Legislature intended to discriminate against the class."). Plaintiffs insist that "religion and religious discrimination are at the heart of this case," Oppo. at 6, but saying it doesn't make it so. If Congress and the Legislature intended a statement of political philosophy, Plaintiffs can't require it to be read as a theological creed instead based on the personal offense they take. Nor are they correct that this lawsuit is about "[t]he importance of theistic belief to the core philosophy of America," Oppo. at 7, when neither the Pledge nor the Legislature make theistic belief a requirement for saying or affirming the Pledge. See generally, Matthew Stewart, Nature's God: The Heretical Origins of the American Republic (2014) (arguing that the Founders' public references to God were references to a political philosophy, not a belief in a religious God). Moreover, Plaintiffs complain that "Defendant-Intervenors have cited no

authority for the notion that Plaintiffs' Complaint must be dismissed as a matter of law because the Pledge is a 'statement of political philosophy.'" Oppo. at 7. But they completely ignore all of the cases dismissing identical complaints against the Pledge "as a matter of law." See, e.g., Doe v. Acton-Boxborough Regional Sch. Dist., 468 Mass. 64, 75 (2014) (dismissing Equal Protection claim as a matter of law on summary judgment); Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1014 (9th Cir. 2010) (granting summary judgment in favor of Pledge because "under God" "underscore[s] the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away"); Freedom From Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 15 (1st Cir. 2010) (affirming dismissal of complaint against the Pledge). As in Acton-Boxborough, Plaintiffs' only claim is that the Pledge creates a religious classification. And that claim fails both because the Pledge doesn't create any classification, supra Section I, and separately because the Pledge is not religious.

IV. The context of the Pledge does not heighten the sensitivity of students toward the Pledge.

Plaintiffs also attempt to distinguish the Pledge of Allegiance from other portions of school curricula that may offend religious sensibilities by making an argument from Establishment Clause jurisprudence that the Pledge is coercive because of the nature of the Pledge ceremony. Oppo. at 11. See Lee v. Weisman, 505 U.S. 577, 592 (1992). However, this exact argument has rightly been rejected in Establishment Clause cases regarding the Pledge of Allegiance. "The Pledge is not a prayer and its recitation is not a religious exercise." Rio Linda, 597 F.3d at 1038; see Hanover, 626 F.3d at 13. Since "[c]hildren are coerced into doing all sorts of things in school," Lee is applicable only where a religious observance is involved. Rio Linda, 597 F.3d at 1038-39; see also Hanover, 626 F.3d at 13-14 (distinguishing Lee because children expressed their participation in a prayer by remaining silent, while the Pledge is spoken aloud).

Indeed, in the Supreme Court's most recent Establishment Clause case, both the majority and the principal dissent treated the Pledge as entirely unproblematic. Town of Greece v. Galloway, 134 S. Ct. 1811, 1825 (2014) (legislative prayer similar to "similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions.") (Kennedy, J.); Id. at 1853 (agreeing with majority about the Pledge of Allegiance) (Kagan. J., dissenting).

Plaintiffs continue to claim that remaining silently seated while others voluntarily recite the Pledge is inherently coercive, even though they admit that reciting the Pledge is voluntary. Oppo. at 2, 11. But Plaintiffs' theory proves too much. If it were correct, the Jehovah's Witness plaintiffs in Barnette were being coerced to violate their religious beliefs even after the Court ruled in their favor. In Barnette, of course, the remedy given was not to outlaw the Pledge altogether, but to allow the Jehovah's Witness children to opt out of participating. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 629 (1943)[4] Since that is precisely the choice Plaintiffs already have, they can claim no coercion, nor any license to silence the speech of others.

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[4] Plaintiffs wrongly claim that Barnette was a Free Speech case, or exclusively a Free Speech case. The complaint in the case actually pleaded the primary claim under the Free Exercise Clause, which had been incorporated against the States not long before in Cantwell v. Connecticut, 310 U.S. 296 (1940).

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,

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CERTIFICATION OF SERVICE

I hereby certify that on this date an original and two copies of the within Brief, has been filed via hand delivery with the Superior Court Clerk of Monmouth County at the Monmouth County Court House, 71 Monument Park, Freehold, New Jersey 07728, and a copy has been provided to the following counsel e-mail and regular mail:

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