

ONE NATION, UNDER GOD . . . EXCLUDING ATHEISTS,
WITH LIBERTY AND JUSTICE FOR ALL: A NEW APPROACH
TO A HISTORIC CONFLICT REACHES THE SUPREME
JUDICIAL COURT OF MASSACHUSETTS

DOE v. ACTON-BOROUGH REGIONAL SCHOOL DISTRICT

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I. INTRODUCTION

*“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.”*

– The Pledge of Allegiance

In the United States of America, the Pledge of Allegiance (the Pledge) has been historically recognized as a symbol of patriotism, unity, and the undying spirit of the American people. However, setting aside the Pledge’s symbolism and significance, there have been a myriad of challenges to its constitutionality, specifically regarding the routine, government mandated, recitation of it in public school across the country since 1954, when it was changed by Congress to include the phrase, “under God.” Challengers have zealously argued that, given the inclusion of “under God” in the Pledge, its required recitation is a violation of the Establishment Clause as well as an infringement of the First Amendment.² To date, all such arguments brought before the courts have failed to pass judicial scrutiny.³ But who have these challengers been and who has initiated these disputes? Have children been complaining?

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² Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665 (2008) (“Where government action interferes with or coerces religious practice, challenges are almost always analyzed under the Free Exercise and Establishment Clauses, respectively, which require a compelling state interest for any interference with religion or coercion.”).

³ *Id.*

If you attended public school as a child, you are most likely familiar with the daily routine of standing up in a classroom, at the instruction of a teacher or other officer of your school, facing the American flag, reciting the words of the Pledge, and you most likely never gave what you were saying a second thought. You were a child. You were doing what you were told. It is interesting that in a country that is so unequivocally grounded upon freedom and independence, children must follow instructions. Their instincts, beliefs, temperaments, and convictions are all gradually developed, and manipulated, by social institutions; true freedom of decision and the cultivation of opinion is left to the discretion of time and chance.⁴ With respect to religion, one of such social institutions, children are generally vested with the faith of their parents, whether devout God-belief, atheism, or otherwise.⁵ Typically, no thinking, studying, analysis, divine intervention, or choice is required for children to obtain their faith. Children are told what religion they are.⁶ Naturally, they lack the sophisticated knowledge of the subject to be offended when they encounter religious beliefs unlike their own. As a result, children are unlikely to raise a religious challenge to the construction and constitutionality of the Pledge or its recitation. They are told to recite it, and they just follow instructions.

As expected, challengers of Pledge recitation have been, but are not limited to, parents – parents that seem highly motivated to demonstrate that the exercise being administered in their children’s school is a problem requiring strict legal attention.⁷ Why do they care so much? After all, these parents are no longer in grade school. Their children are probably not exhibiting a passion, or even a semi-complex understanding of the dispute. Imagine a

4 PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 77-80 (1966) (“Institutions . . . by the very fact of their existence, control human conduct by setting up predefined patterns of conduct, which channel it in one direction as against the many other directions that would theoretically be possible This is generally called a system of social control.”).

5 *See id.* (“Society is a human product. Society is an objective reality. Man is a social product.”).

6 *Id.*

7 *See generally* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004) (showing an example of parental legal action against a school district). *See also*, e.g., Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007 (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).

child coming home from school and saying something similar to, “I take serious issue with the language of the Pledge of Allegiance. It violates my rights as an American with enumerated religious freedoms.” That would be ridiculous. So what is the big deal? Naturally, specific motivations vary case by case, in which case-specific details are left to the whims of speculation. But perhaps the motivation arises from parental awareness that children are very impressionable, and expected to conform to school rules, regulations, and instructions. Perhaps parents are concerned that this conformity could lead to a coerced belief system toward anything, religion included, outside of their control, and despite their interests in how to raise a child. Regardless of motivation, the legal arguments presented against the Pledge have been fairly consistent.⁸ While some attempts were valiant, and certainly swayed judges toward a favorable decision, ultimately, all of the challenges to the Pledge have been in vain.⁹ There is an old saying that if you keep doing the same things, you will keep achieving the same results, and that to believe otherwise is the definition of insanity. Most challengers of the Pledge have exhibited this theory to the fullest by consistently arguing that the Pledge burdens their free exercise of religion in violation of the Establishment Clause, despite these challenges making little, if any, progress. However, one group of plaintiffs has recently decided to take a new approach that has not yet been considered.

In *Doe v. Acton-Borough Regional School District*,¹⁰ the Massachusetts Supreme Judicial Court is currently reviewing a new Pledge dispute, but, for the first time, the plaintiffs’ argument has been presented on the grounds of Equal Protection, focusing on government discrimination, rather than the typical inhibition of

8 See *Elk Grove*, 542 U.S. at 1; see also *Sherman*, 980 F.2d at 437.

9 See *Newdow v. U.S. Congress*, 292 F.3d 597 (2002). The Ninth Circuit decided that adding “under God” to the Pledge, and the school policy of teacher-led recitation are unconstitutional because they are both, “highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God.” *Id.* at 611. The case was ultimately resolved on appeal because the Supreme Court found that the plaintiff lacked standing to bring the suit. See *Elk Grove*, 542 U.S. at 1.

10 Jane Doe and John Doe are atheists and Humanists, and they are parents of three children. Brief of the Plaintiffs-Appellants, *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJ-C-11317) 2012 WL 8684858, at *2 [hereinafter “AB”]. They commenced this action in Middlesex County Superior Court in November 2010, which is currently on appeal in the Commonwealth of Massachusetts Supreme Judicial Court. *Id.*

free religious exercise.¹¹ The Does argue that the inclusion of the words “under God” within the Pledge draws a clear line between God-believers and atheists, thereby classifying individuals on the basis of creed, which is expressly prohibited in the Massachusetts Equal Rights Amendment (“ERA”).¹² The defendants counter argue that the words “under God” are not meant to draw religious lines, but rather have historically been a symbol of patriotism.¹³ In response, the Does assert that if the Pledge is a symbol of patriotism, it nevertheless portrays God-belief as an essential element, and consequently stigmatizes atheists, classifying them as second-class citizens, and not real Americans.¹⁴

Further, the Does assert that, even if the Pledge truly is a symbol of patriotism, by requiring students to recite the Pledge every day, the government requires public schools to exalt students of one religious class over others, which is inherently unjust.¹⁵ The Does ask the Court to deem government-mandated recitation of the Pledge in public schools unconstitutional.¹⁶ Should they emerge from litigation victorious, the Massachusetts court’s decision could have ripple effects throughout the United States, and potentially alter the fabric of how government religious expression cases are handled in the future. This note will examine in further detail the history of Pledge challenges and Establishment Clause jurisprudence. It will provide a critical analysis of *Doe v. Acton-Borough Regional School District*, beginning with the ideology behind the Does’ new approach, followed by the substantive arguments of both parties, and finally will offer the author’s objective opinion, with critical comments about the dispute.

11 *See id.*

12 MASS CONST. art. I, amended by MASS. CONST. amend. art. CVI; *See* AB at *11-14.

13 Brief of the Defendants-Appellees, *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317) 2013 WL 3858252, at *30 [hereinafter “DB”].

14 AB, *supra* note 10, at *2.

15 *Id.*

16 *Id.*

II. HISTORY OF THE PLEDGE OF ALLEGIANCE & ESTABLISHMENT CLAUSE JURISPRUDENCE

A. *The Pledge of Allegiance*

The original Pledge was written in 1892 by Francis Bellamy.¹⁷ During the time the Pledge was first written, there was a strong fabric of American pride sweeping throughout the United States, and the Pledge was recognized as a reflection of that pride.¹⁸ In the first half of the twentieth century, many states had flag laws, and students would be encouraged to salute the American flag as a symbol of their American affinity.¹⁹ Almost all present day state governments now require public schools to administer daily, organized, recitations of the Pledge.²⁰ Further, forty-three states have statutes that expressly authorize public schools to require such recitation.²¹

Bellamy's original Pledge did not include the words "under God."²² His original version read, "I pledge allegiance to my flag and to the Republic for which it stands – one nation indivisible – with liberty and justice for all."²³ It was not until 1923 when changes were made.²⁴ The words "my flag" were changed to "the flag of the United States," while the words "of America" were added in 1924, thus completing the version Congress first adopted in 1942 as the official Pledge of Allegiance.²⁵ In 1954, following instigation from a religious group, the Knights of Columbus, which

17 Steven G. Gey, "Under God," *The Pledge of Allegiance, and Other Constitutional Trivia*, 81 N.C. L. REV. 1865, 1874 (2003).

18 Carrie Nie, Note, *The Pledge of Allegiance, Croft v. Perry, and the Supreme Court's Second Chance to Clarify Establishment Clause Jurisprudence*, 64 SMU L. REV. 1463, 1466 (2011) (citing Vincent Blasi & Seana V. Shiffrin, *The Story of West Virginia State Board of Education v. Barnette: The Pledge of Allegiance and the Freedom of Thought*, in CONSTITUTIONAL LAW STORIES, 433-34, (Michael C. Dorf ed., 2004)).

19 *Id.*

20 David A. Toy, *The Pledge: The Constitutionality of an American Icon*, 34 J.L. & EDUC. 25, 33 n.34 (2005).

21 *Id.*

22 Gey, *supra* note 17 ("One of the many ironies of the Pledge of Allegiance controversy is that the author of the original Pledge was a Socialist who was forced to resign his position as a Baptist minister because of his leftist political and pro-racial integration activities.").

23 *Id.* at 1875.

24 *Id.*

25 *Id.*

was motivated to “encompass the fabric of America,” Congress amended the Pledge to include the phrase “under God.”²⁶ Congress subsequently constructed a legislative history called the House Report, expressing the religious origins and motives behind the phrase.²⁷ The House Report asserts that, “under God” is intended to communicate that the nation’s political structure derives its authority from God since America is a nation “founded upon a fundamental belief in God.”²⁸

It is argued that the House Report made its religious disseminations with an additional purpose of separating the nation’s foundation from those who choose to follow versions of atheism instead of the majority’s preferred religious ideals.²⁹ These arguments are supported by additional evidence that further illuminate the House Report’s religious intentions.³⁰ First, in 1954, drafted subsequently to the House Report, the Senate Report³¹ maintained a theme that belief in God is the single most important factor in distinguishing the United States from Communist nations like the Soviet Union.³² Next, and most significantly, President Eisenhower expressed his religious sentiments and motivations when he signed the amended Pledge into legislation.³³ He stated:

26 Nie, *supra* note 18, at 1467 (citing Brian Wheeler, *The Pledge of Allegiance in the Classroom and the Court: An Epic Struggle over the Meaning of the Establishment Clause of the First Amendment*, 2008 BYU EDUC. & L.J. 281, 285 (2008)).

27 Gey, *supra* note 17, at 1876.

28 *Id.* (internal citations and quotations omitted).

29 *Id.*

30 *Id.*

31 Gey, *supra* note 17, at 1877-78 (“The substance of the Senate Report is contained in a letter to the Senate Judiciary Committee by Senator Homer Ferguson, who sponsored the 1954 ‘under God’ legislation. The Committee incorporated this letter into its Report, after describing the letter as having expressed ‘the most cogent and compelling reasons for the passage of the resolution.’”(internal citations omitted)).

32 *Id.* at 1878 (“The spiritual bankruptcy of the Communists is one of our strongest weapons in the struggle for men’s minds.”) (quoting 100 Cong. Rec. S6231-32 (1954)).

33 *Id.* at 1878-80 (“The intent is unambiguous and undeniable: Every single political actor who had a hand in the decision to add the words “under God” to the Pledge specifically intended (to borrow Justice O’Connor’s phrasing) to send ‘a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’”) (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring)).

From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons, which forever will be our country's most powerful resource, in peace or in war.³⁴

After signing the amended Pledge into legislation, President Eisenhower and the United States Congress quickly recognized that doing so might evoke future Establishment Clause controversy. Effectively skirting around the issue, Congress quickly stated, in part, "This is not an act establishing a religion or one interfering with the 'free exercise' of religion. A distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God."³⁵ Thus, a clearly preemptive attempt to quash arguments about the Pledge's constitutionality was ultimately ineffective since such arguments were raised numerous times thereafter.

B. The Establishment Clause

Challengers of the Pledge have contended that any government mandated recitation burdens their First Amendment right to free religious exercise under the Establishment Clause. The Establishment Clause provides that, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof"³⁶ Applied to the States, the Establishment Clause prevents a State government from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion.³⁷ Determining whether an individual's rights under the Establishment Clause have been violated has famously been a

³⁴ *Id.* at 1878.

³⁵ *Id.* at 1880.

³⁶ U.S. CONST. amend. I.

³⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-49 (2002) (quoting *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997)).

frustrating process.³⁸ The job of creating a universal test, or a bright line rule to follow, has consistently been the proverbial elephant in the room, and judges have not addressed it.³⁹ Judges have used their discretion to create a variety of tests applicable to various cases, thus opening the door for others to choose which they would like to apply.⁴⁰ Further, judges have not been restricted to just one test and many have applied multiple to the issues before them simultaneously, undoubtedly contributing to the ambiguous morass of Establishment Clause jurisprudence we have today.⁴¹

The dominant test of constitutionality, accepted by most, has been that set forth by the Supreme Court in *Lemon v. Kurtzman*.⁴² What is now known as the *Lemon* test is as follows: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, and finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁴³ The test was created to help distinguish which government acts were permissible under the Establishment Clause.⁴⁴ Also, it was created “to prevent, as far as possible, the intrusion of either the state or religious institutions into the precincts of the other.”⁴⁵ In other words, church and state should remain separate, and not interfere with the operations of the other.⁴⁶ Of course, the *Lemon* test has

38 See Nie, *supra* note 18, at 1468.

39 *Id.*

40 *Id.*

41 See Gey, *supra* note 17, at 1883 (“The problem is not that the Supreme Court has failed to articulate a standard for deciding Establishment Clause cases; the problem is that the Court has articulated too many standards for deciding Establishment Clause cases.”).

42 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

43 *Id.* at 612-13 (citing *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

44 *Id.*; See also Gellman & Looper-Friedman, *supra* note 2, at 673 n.17 (“The Court has not always applied the *Lemon* test. In some cases, for example, the Court has applied the “endorsement” test suggested by Justice O’Connor in her concurring opinion in *Lynch v. Donnelly* (citation omitted), the “coercion” test suggested by Justice Kennedy in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and (especially in funding cases) the “neutrality” test described in *Zelman v. Simmons-Harris* (citation omitted). The *Lemon* test has never been rejected, however, and indeed the other tests are often seen less as independent analyses than as approaches to one or another of the three *Lemon*-test prongs.”).

45 *Lemon*, 403 U.S. at 614.

46 See *id.*

received criticism, but nevertheless it is still applicable law.⁴⁷

Notwithstanding the tests judges have chosen to apply,⁴⁸ no claims challenging the constitutionality of the Pledge under the Establishment Clause have been successful. Note however that the Ninth Circuit in *Newdow v. U.S. Congress* determined that the Pledge was unconstitutional under the “coercion test.”⁴⁹ The *Newdow* court stressed that because of the “age and impressionability of school children, and their understanding that they are required to adhere to the norms set by their school, their teacher, and their fellow students,” requiring students to recite the Pledge was a clear violation of the Establishment Clause.⁵⁰ The *Newdow* court did not even require any evidence that the plaintiff’s daughter was actually being coerced into reciting the Pledge.⁵¹ The court was satisfied with the daughter’s mere presence while fellow students and the instructor recited the Pledge to find an Establishment Clause violation.⁵²

Stepping outside the scope of coercion, the *Newdow* court offered comments, expressing distaste of the original 1954 amendment to add “under God” to the Pledge. Specifically, the court pointed to President Eisenhower’s statement regarding school children proclaiming “the dedication of our Nation and our people to the Almighty,”⁵³ and asserted that pledging “under God” can in no way be neutral in a religious context.⁵⁴ Ultimately, the Supreme Court reversed the Ninth Circuit’s decision, but the reversal was not based on an assessment of the merits.⁵⁵ The case was dismissed because the plaintiff lacked standing to bring the suit.⁵⁶ Currently, this is the closest a plaintiff has come to a favorable decision in cases of this nature. The Supreme Court has never revisited the Ninth Circuit’s decision that “schools may not

47 Nie, *supra* note 18, at 1469.

48 *Lemon*, 403 U.S. at 614.

49 *Newdow v. U.S. Cong.*, 328 F.3d 466, 487-90 (9th Cir. 2003); *see also* Lee v. Weisman, 505 U.S. 577, 587 (1992) (The “coercion test” provides that the government “may not coerce anyone to support or participate in religion or its exercise . . .”).

50 *Newdow*, 328 F.3d at 488.

51 *Id.*

52 *Id.*; *See also* Nie, *supra* note 18, at 1474.

53 *Newdow*, 328 F.3d at 488.

54 *Id.* at 487; *see also* Nie, *supra* note 18, at 1475 (“The court also noted that the Pledge put the public school students ‘in the untenable position of choosing between participating in an exercise with religious content or protesting.’”).

55 Nie, *supra* note 18, at 1475.

56 *See id.*; *see* Elk Grove Unified Sch. Dist. v. *Newdow*, 542 U.S. 1 (2004).

coerce impressionable young schoolchildren to recite the Pledge, or even to stand mute while it is being recited by their classmates.”⁵⁷

III. FORGETTING THE ESTABLISHMENT CLAUSE – A NEW APPROACH TO PLEDGE OF ALLEGIANCE CONSTITUTIONALITY DISPUTES

Framing the issue in government religious expression cases under the Establishment Clause has been proven to be a difficult undertaking. Once again, if you keep doing the same things, you will keep achieving the same results, as Establishment Clause arguments in government religious expression cases have shown. Numerous cases, all employing substantially similar arguments, have been struck down for many years. And oddly, plaintiffs have not considered that maybe the problem is actually their approach, and not necessarily the courts’ analysis of their approach.

Perhaps if standing had not been an issue in *Newdow*, the Supreme Court would have upheld the Ninth Circuit’s determination that government mandated recitation of the Pledge violated the Establishment Clause because of its coercive effect on schoolchildren.⁵⁸ But perhaps the most significant problem created by government religious expression is not of coercion at all, but rather of equality.⁵⁹ Government religious expression may cause minority religious groups, or atheists having no religious affiliation, to feel like “second-class citizens, tolerated outsiders . . . marginalized for not holding the majority’s religious beliefs . . .”⁶⁰ If that is the case, religious coercion may not be the issue that deserves attention, nor would the idea that the government is burdening or inhibiting free religious exercise.⁶¹ Instead, the issue becomes one of government discrimination.⁶² Are government religious expressions impermissibly treating members of some groups differently than others? If so, then the Establishment

57 *Id.* (citation omitted).

58 *See supra* note 56.

59 Gellman & Looper-Friedman, *supra* note 2, at 672.

60 *Id.*

61 *Id.*

62 *See id.* (“The Establishment Clause is poorly suited to address the equality issue, primarily because its various tests focus on proselytization, coercion, religious purpose, or entanglement of government and religion - not on equality. Some judges simply do not believe that the Establishment Clause protects this equality interest; others might, but have trouble grasping the problem. So plaintiffs lose cases they might have won under the more apt Equal Protection Clause tests, and the equality issues never even get addressed.”).

Clause is a misguided approach, and instead plaintiffs should frame their arguments under the Equal Protection Clause of the Fourteenth Amendment.⁶³

The plaintiffs in *Doe v. Acton-Borough Regional School District* are doing just that, and the Massachusetts Supreme Judicial Court is charged with determining whether government mandated recitation of the Pledge in public schools has resulted in discrimination, undue marginalization, and stigmatization of students with differing religious beliefs.⁶⁴ The task before the Court is a sensitive one, and a decision could have lasting effects on future government religious expression cases throughout the United States. Maybe this new approach will lead to a new result.

IV. DOE V. ACTON-BOROUGH REGIONAL SCHOOL DISTRICT

A. Overview

The plaintiffs in this case are John and Jane Doe, husband and wife, and residents of Acton, Massachusetts, as well as their children, and the American Humanist Association (“AHA”).⁶⁵ The AHA⁶⁶ is a non-profit organization that promotes Humanism⁶⁷ and aims to defend the rights of Humanists and other non-theistic individuals. The AHA has numerous members and supporters, some of which are schoolteachers and parents of children that are, or will be, attending public schools in Acton, Massachusetts.⁶⁸ The Does’ claims are against Defendants Acton-Borough Regional School District, the town of Acton Public Schools, and the

63 See generally Gellman, *supra* note 2.

64 AB, *supra* note 10.

65 AB, *supra* note 10, at *4.

66 *Id.* at *4-5 (“The plaintiff AHA is a nonprofit 501(c)(3) organization incorporated in Illinois with a principal place of business in Washington, District of Columbia. AHA is a membership organization, with over 120 chapters and affiliates nationwide (seven of which are in Massachusetts) and over 20,000 members and supporters . . .”).

67 *Id.* at *5-6 (“Humanism is a broader religious view that includes 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.”).

68 *Id.* at *5 n.3. (“The Does are members of the AHA and are involved in the activities of Humanist organizations such as Concord Area Humanists, the Harvard University Humanist Chaplaincy, the Harvard University Secular Society, and Greater Boston Humanists.”).

Superintendent of Schools, Dr. Steven E. Mills (the “District”).⁶⁹ John and Jane Doe, and their children hold Humanist religious beliefs and, as affirmed atheists, they do not accept the existence of God or a Supreme Being.⁷⁰ Collectively, the Does are aware of the public’s negative attitudes toward atheism, and have experienced public prejudice arising from it.⁷¹

Under the Massachusetts General Laws, all public school teachers, at the commencement of the first class of each day, are required to lead the class in a group recitation of the Pledge, as patriotic exercise, or else be subject to penalty.⁷² The Does, as atheists, take issue with the requirement, specifically regarding recitation of the phrase “under God.”⁷³ Since the Does do not believe in the existence of God, they also do not believe that any country is “under God.”⁷⁴ As such, the Does contend that the daily classroom exercise marginalizes and stigmatizes students by publicly rejecting their core religious beliefs, and by advocating an opposing view.⁷⁵ Further, they contend that it is all done in a manner that disparages students’ patriotism and American loyalty, effectually depriving them of equal standing in the classroom.⁷⁶ The Does understand that students opposed to the exercise are free to refuse participation. However, neither the Does nor their children want to be excluded, nor do they want their public schools to portray them negatively on a daily basis.⁷⁷ The foundation of the Does’ claims is the hope that students may eventually stand among their classmates as equals, with no exceptions.⁷⁸

B. The Does’ Argument

The Does argue that the state mandated classroom exercise of reciting the Pledge is inherently discriminatory toward a “suspect” class of individuals, and unconstitutional.⁷⁹ First, the

69 *Id.* at *2.

70 AB, *supra* note 10, at *5.

71 *Id.* at *9-10.

72 M.G.L. 71, § 69.

73 AB, *supra* note 10, at *7-8.

74 *Id.*

75 *Id.* at *8.

76 *Id.* at *10.

77 *Id.* at *10-11.

78 *Id.*

79 AB, *supra* note 10, at *12.

core of their argument has three prongs – (1) The daily classroom recitation of the Pledge discriminates on the basis of religion and creed, which violates the State Constitution’s Equal Rights Amendment (“ERA”)⁸⁰ and nondiscrimination statute; (2) because the exercise discriminates on the basis of religion and creed, which are suspect classifications under the ERA, the statute governing the exercise is subject to strict judicial scrutiny;⁸¹ (3) because strict scrutiny applies, the District must demonstrate that the statute is narrowly tailored to further a compelling government interest, and that it provides the least restrictive means of achieving its purpose which, in this case, it does not.⁸²

Second, the Does argue that the lower court erroneously considered the merits of this case through the lens of the Establishment Clause.⁸³ They argue that the ERA and the Establishment Clause are two very different bodies of law, separate and apart from one another, and the lower court mistakenly applied the latter.⁸⁴ By doing so the lower court came to a ruling that lacks substance; in the present matter, it is imperative that the correct test is applied.⁸⁵

Third, the Does argue that, notwithstanding their right to refuse participation in Pledge recitation, students remain stigmatized, whether they choose to participate or not.⁸⁶ They contend that, while a refusal of participation may lessen the degree of stigmatization, “degree” is irrelevant under the ERA, and even mild discrimination deserves strict scrutiny from the courts.⁸⁷

80 See MASS. CONST. art. I (“All people are born free and equal and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”).

81 AB, *supra* note 10, at *17-18.

82 *Id.*

83 *Id.* at *23-25.

84 *Id.*

85 *Id.*

86 AB, *supra* note 10, at *29.

87 *Id.* at *33-34. See also *Brown v. Bd. of Educ.* 347 U.S. 483, 495 (1954) (“The point of the equal protection guarantee is not to ensure that . . . in singling out disadvantaged classes, the State subjects them to only mild inequality. Rather the right to equal protection recognizes that the act of classification is itself invidious and is thus constitutionally acceptable only where it meets an exacting test. Whether § 31 results in a sharp reduction in benefits to some or all members of the plaintiff class therefore is irrelevant to the standard of review that is applicable.”).

1. The Core of the Does' Argument

The ERA states, “all people are born free and equal, and have certain natural, essential, and inalienable rights Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”⁸⁸ With respect to the enumeration of “creed,” the Does indicate that the ERA’s language is clear expression that the State may not advocate, and exhibit preference to one religious view, while marginalizing and stigmatizing others simply because their religious views are different.⁸⁹ They further indicate that the lawmakers’ intention when adopting the ERA was to ensure that Massachusetts’ courts would apply the strictest scrutiny to alleged government discrimination against the enumerated classes, and that to do otherwise would render the ERA practically, and effectually, useless.⁹⁰

The Does argue that application of the ERA to the facts of this case provides clear indication that state mandated recitation of the Pledge in public schools is inherently unconstitutional.⁹¹ They assert that including the phrase “under God” necessarily adopts national theism.⁹² Further, by statutorily requiring that students recite the phrase, particularly to cultivate patriotism, the practice exhibits a theistic supremacy to the detriment of those who are atheist.⁹³ The Does further argue that the practice discriminates against their creed, or religious beliefs, because “it portrays the ideal patriot as a believer in God, and implies that non-believers are second class citizens at best.”⁹⁴ Creed has no concrete definition, but it has been consistently recognized in a multitude of jurisdictions to mean particular religious beliefs and

88 MASS. CONST. art. 1.

89 AB, *supra* note 10, at *17-18.

90 *Id.*

91 *Id.*

92 AB, *supra* note 10, at *19. *See also* AB, *supra* note 10, at *25 n.19 (“The legislative history makes clear that the words ‘under God’ were added to indoctrinate schoolchildren in the belief that God exists. 100 Cong. Rec. 5915, 6919 (1954) The House Report stated that, [t]he inclusion of God in our pledge . . . would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.”).

93 *Id.* at *17-18.

94 *Id.* at *19.

practices.⁹⁵ It has also been recognized as a “suspect classification.”⁹⁶ A classification is “suspect” when it is based on sex, race, color, creed, or national origin; all suspect classifications are subject to strict scrutiny.⁹⁷

Because strict scrutiny applies, the District must demonstrate that the statute is narrowly tailored to further a compelling government interest in addition to providing the least restrictive means of achieving its purpose.⁹⁸ The Does contend that while cultivating patriotism in students could arguably be considered a compelling government interest, there are likely numerous other less restrictive means of achieving that goal.⁹⁹ Importantly, they add that the Massachusetts ERA is even more stringent than the Equal Protection provisions of the Fourteenth Amendment.¹⁰⁰ Citing *Goodridge v. Dept. of Pub. Health*,¹⁰¹ the Does state, “the Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights.”¹⁰²

2. The Lower Court Erroneously Considered the Merits of This Case Through the Lens of the Establishment Clause

The Does stress that there is a critical difference between the Establishment Clause and the ERA that the lower court overlooked.¹⁰³ While the Establishment Clause focuses on proselytization, the ERA focuses on discrimination and freedom of

95 See *Augustine v. Anti-Defamation League of B'nai B'rith*, 249 N.W.2d 547, 550-52 (Wis. 1977) (“Although there are no cases defining “creed” as used in Article 106, other courts have defined it as a system of religious beliefs.”).

96 AB, *supra* note 10, at 18. See also *Lacava v. Lucander*, 791 N.E. 2d 358, 532 (Mass. App. Ct. 2003) (“Suspect classes for equal protection purposes include classifications based on race, religion, alienage, national origin, and ancestry . . .”).

97 AB, *supra* note 10, at *15. See also *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1269 (Mass. 2011) (stating it is well established that the Massachusetts ERA requires strict scrutiny).

98 AB, *supra* note 10, at *23-25.

99 *Id.*

100 *Id.* at *27-28.

101 *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941, 948-49 (Mass. 2003) (holding that same-sex couples have the right to marry under Massachusetts Constitution).

102 *Id.* at *28 (citations omitted).

103 AB, *supra* note 10, at *23-24.

conscience.¹⁰⁴ The Establishment Clause states, “Congress shall make no law respecting the establishment of religion, or prohibit the free exercise thereof”¹⁰⁵ In contrast, the ERA states, “Equality under the law shall not be denied or abridged because of . . . creed.”¹⁰⁶ The lower court characterized the question before them as whether the inclusion of the phrase “under God” relates to religion in a way that violates the Does’ rights of free exercise.¹⁰⁷ The Does counter that the lower court erred by framing the question in that manner. First, it erred by assuming the Does are directly challenging Congress’ inclusion of the phrase “under God” in the Pledge.¹⁰⁸ Second, it erred by treating the analysis of the current issue, under the ERA, as it would be treated under the Establishment Clause.¹⁰⁹ The Does stress that the ERA is a distinct and unique body of law. As such, it requires its own unique analysis, and consequently any analysis of the current issue under the Establishment Clause is irrelevant.¹¹⁰ The issue in this case is not that the inclusion of theistic language in the Pledge burdens the Does’ right to free religious exercise, but rather that such language creates the appearance of, and discriminates against, a lesser class of citizens.¹¹¹ The Does argue that a correct analysis of the merits of this case is imperative to arriving at a proper conclusion.¹¹²

104 *Id.*

105 U.S. CONST. amend. I.

106 MASS CONST. art. I, amended by MASS. CONST. amend. art. CVI.

107 AB, *supra* note 10, at *23-24 (“The Superior Court’s erroneous reliance on the Establishment Clause stemmed from its incorrect belief that the plaintiffs’ arguments are identical to those in *Freedom from Religion Found v. Hanover Sch. Dist.*, 626 F.3d 1, 6 (1st Cir. 2010) (“FFRFH”) and *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1013 (9th Cir. 2010).”).

108 AB, *supra* note 10, at *24.

109 *Id.*

110 *Id.*

111 See *Goodridge*, 440 Mass. at 312 (“The Massachusetts Constitution forbids the creation of . . . second-class citizens.”).

112 AB, *supra* note 10, at *28. The Does comment that when the ERA is actually applied it must be given more weight than the Equal Protection Clause of the Fourteenth Amendment, because it is *expressly* protective of religious equality. *Id.*

3. Notwithstanding Their Right to Refuse Participation in Pledge Recitation, Students Remain Stigmatized, Whether They Choose to Participate or Not

Lastly, the Does recognize students' right to refuse participation in daily Pledge recitation.¹¹³ However, they argue voluntariness is irrelevant because an exercise that promotes patriotism, through language that stigmatizes students based on their religious beliefs and contributes to existing prejudices against those students, is discriminatory regardless of whether those students choose to participate or not.¹¹⁴ The Does contend that a students' refusal to participate does not change the fact that the students' teachers and classmates are expressing their patriotism by means of God-belief. As such, non-participation does not lessen any degradation those students are being subjected to.¹¹⁵ Additionally, the Does indicate that stigmatization alone can constitute an Equal Protection violation under both State and Federal constitutions.¹¹⁶

The Does look to *In re Senate*,¹¹⁷ a case litigated in 2004 after the decision in *Goodridge*, which legalized same-sex marriage,¹¹⁸ where a bill was proposed that would have eliminated the phrase "same-sex marriage", and substitute it with the phrase "civil union."¹¹⁹ Same-sex couples that were to enter into "civil unions" would be afforded all of the benefits and rights of married couples under the law, but the actual term "marriage" would be

113 AB, *supra* note 10, at *29.

114 *Id.* at *29.

115 AB, *supra* note 10, at *29 n.23 ("According to the schoolchildren, 'sitting out would not change anything, because the classroom would still be saying the Pledge and reinforcing the idea that Humanists, atheists, and others who don't believe in God are not as good or patriotic as everyone else.'").

116 AB, *supra* note 10, at *30. *See also* *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that this sort of non-economic injury [i.e. stigmatization] is one of the most serious consequences of discriminatory government action"); *see also* *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) ("We have repeatedly emphasized, discrimination itself . . . by stigmatizing members of the disfavored group, as 'innately inferior' and therefore as less worthy participants in the political community . . . serious non-economic injuries [are caused] to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.") (internal citations omitted).

117 *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

118 *Goodridge*, 440 Mass. 309.

119 AB, *supra* note 10, at *30-31.

reserved for couples of the same sex.¹²⁰ The bill was struck down upon reasoning that, notwithstanding the fact that same sex couples would only be denied the status of being “married,” “the bill would have the effect of maintaining and fostering a *stigma* of exclusion that the Constitution prohibits.”¹²¹ The Does argue that *In re Senate* exhibits striking similarities to their own.¹²²

C. The District’s Argument

The District argues that the government mandated recitation of the Pledge is constitutional and does not violate the Does’ rights under the ERA.¹²³ First, the District asserts that the Does have failed to demonstrate that the challenged statute¹²⁴ creates a disadvantageous classification, which requires a dismissal of their Equal Protection claim.¹²⁵ They argue that instead, by opting for non-participation in a voluntary classroom exercise, the Does create the classification themselves.¹²⁶ The District believes that there has been no showing of disparate treatment toward any protected classification or status, and therefore, punishment is not warranted.¹²⁷

Second, the District asserts that the Pledge is not inherently religious as a matter of law, and therefore the statute cannot violate the ERA.¹²⁸ They argue that the Does’ claims should not even be brought on Equal Protection grounds, but rather under the Establishment Clause, and that the Pledge’s mention of God is permitted under the current law.¹²⁹ Third, the District stresses that if the Court were to accept the Does’ claims then it would establish an unprecedented right of any student or parent to block public school teachings that are offensive to their religious beliefs, which would be harmful to other students, as well as educators.¹³⁰ In other words, the District argues that such a result would lead to substantial portions of public school curriculums, that may be

120 *Id.*

121 *Id.* (citations omitted).

122 *Id.*

123 DB, *supra* note 13, at *9.

124 M.G.L. 71, § 69.

125 DB, *supra* note 13, at *14-16.

126 *Id.*

127 *Id.*

128 *Id.* at *19-20.

129 *Id.*

130 DB, *supra* note 13, at *24-26.

offensive to a person's religious beliefs, being considered unconstitutional, which would frustrate the education process.¹³¹

Last, the District argues that if the Court were to apply any judicial scrutiny to this case at all, it should be rational basis scrutiny; however, analysis of the facts would satisfy strict scrutiny as well.¹³² It argues that rational basis scrutiny is appropriate because the statute does not include a suspect classification.¹³³ Further, the District argues that even if the Court determined that strict scrutiny is necessary, the long-standing tradition of reciting the Pledge in public schools would allow the statute to pass.¹³⁴

1. Considering the Voluntary Nature of Pledge Recitation, the Does Have Failed to Establish That the Challenged Statute Creates a Disadvantageous Classification, Which Requires a Dismissal of Their Equal Protection Claim.

The District's first argument rests on the assertion that the Does' Equal Protection claim cannot be upheld simply because recitation of the Pledge is a completely voluntary exercise.¹³⁵ The District contends that the Does are not treated or classified differently than other students, by any means.¹³⁶ Rather, it is their choice to refuse participation that creates the classification. The District quotes the lower court saying, "Children are not religiously differentiated from their peers merely by virtue of their non-participation in the Pledge, given that children choose not to participate for religious, or non-religious reasons, or for no reason at all."¹³⁷

The District next argues that a valid Equal Protection claim requires a showing of an advantage or burden upon any classification based on religion, creed, or another protected status.¹³⁸ It argues that the Does have failed to do so, and a burden, or unfair treatment, cannot exist when the conduct complained of is completely voluntary.¹³⁹ Therefore, because of the

131 *Id.*

132 *Id.* at *27-29.

133 *Id.* at *29-31.

134 *Id.* at *27.

135 DB, *supra* note 13, at *10-14.

136 *Id.* at *14.

137 *Id.* at *14-15 (citation omitted).

138 *Id.* at *15-16.

139 *Id.*

voluntariness of Pledge recitation, the District argues that the Does have not expressed a valid Equal Protection claim under the ERA.¹⁴⁰ The District attacks the notion that peer pressure from other students and teachers is stigmatizing and coercive of religious beliefs.¹⁴¹ They argue that it is well established that peer pressure exists in public schools, but peer pressure alone is not enough to advocate striking down a government mandated school policy.¹⁴²

The District further believes that the Does should not be able to tailor the school's activities to meet their personal religious preferences.¹⁴³ Quoting the First Circuit they state, "Public schools are not obligated to shield individual students from ideas that are potentially 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."¹⁴⁴

D. The Pledge is not Inherently Religious as a Matter of Law, and Therefore the Statute Does not Violate the ERA.

The District interprets the Does' claims as saying mandated Pledge recitation is unconstitutional because it favors one religion over another, burdening their ability to practice atheism. As such, the District does not believe Equal Protection analysis is appropriate.¹⁴⁵ Rather, they argue that the claims fall under the Establishment Clause.¹⁴⁶ The District argues that the Pledge is not inherently religious, nor is it akin to a prayer.¹⁴⁷ Therefore, it contends that it does not promote or disparage any particular religion.¹⁴⁸ Instead, the Pledge is an example of a legally permissible mention of God in passing.¹⁴⁹ The District claims that

140 DB, *supra* note 13, at *17 ("There is no constitutional obstacle to a provision for voluntary participation by students and teachers in a pledge of allegiance to the flag. We would construe the bill to provide an opportunity for such voluntary participation. So construed, it is not unconstitutional.") (quoting Opinions of the Justices to the Governor, 363 N.E.2d 251, 256 (Mass. 1977) (Quirico & Braucher, J., dissenting)).

141 *Id.* at *17-19.

142 *Id.*

143 *Id.*

144 *Id.* at *18 (quoting *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008)).

145 DB, *supra* note 13, at *19.

146 *Id.* at *19-20.

147 *Id.* at *22.

148 *Id.*

149 *Id.*

is not necessary to shield all religious imagery from the eyes of the public in order to prevent a burden upon free exercise.¹⁵⁰

Last, the District compares the nature of the Does' claims to those in the past that have challenged the constitutionality of the phrase "In God We Trust" that exists on United States currency, among other easily identifiable places.¹⁵¹ The District argues that just as "In God We Trust" was upheld, despite its religious dimension, so should mandated recitation of the Pledge in public schools.¹⁵²

E. If the Supreme Judicial Court Were to Accept the Does' Claims it Would Establish an Unprecedented Right for any Student or Parent to Block Public School Teachings that are Offensive to Their Religious Beliefs, Which Would Burden Other Students, and Educators as Well

The District argues that if the Does were to prevail on their claims then it would set dangerous precedent that would make substantial portions of public school curriculums, that may be offensive to a person's religious beliefs, be considered unconstitutional, which would frustrate the education process.¹⁵³ It argues that such precedent would be harmful to both students that are not so offended, and educators who are trying to abide by their lesson plans and do the job they have been hired to do.¹⁵⁴

As an example, the District discusses the teaching of sexual education in Massachusetts' public schools.¹⁵⁵ It contends that if the Court accepted the Does' arguments, sexual education could potentially be considered unconstitutional because it would likely offend students with various religious beliefs.¹⁵⁶ The District uses this example to demonstrate how the goals of public school

150 DB, *supra* note 13, at *23 ("The complete obliteration of all vestiges of religion is unnecessary to carry out the goals of non-establishment and religious freedom set forth in our State and Federal Constitutions.") (citation omitted).

151 *Id.*

152 *Id.*

153 *Id.* at *25.

154 *Id.* at *26 n.17 ("In addition, under Plaintiffs' theory public schools might not be able to conduct classes (even on optional basis) on a day (or day of the week) deemed sacred by the religious beliefs of one or more students, since such school days would be offensive to the beliefs of these students and could be viewed as indirectly coercing them to attend school in violation of their religious beliefs to avoid alleged stigmatization.").

155 DB, *supra* note 13, at *25.

156 *Id.*

education would be frustrated if the Does were to be successful.¹⁵⁷ Similarly, the District also mentions other topics potentially offensive to students' religions, such as the creation of the universe, the evolution of life on Earth, and the inherent equality of homosexual men and women.¹⁵⁸

Further, the District contends that accepting the Does' claims would also frustrate educators that need to assign readings of literature with religious allusions, including important historical documents such as the Declaration of Independence and the Gettysburg Address, even if the exercises were completely optional.¹⁵⁹ For these reasons the District believes that when the Court renders its decision, it should consider the high risk of setting dangerous precedent and the many potential ramifications.

F. If the Court Were to Apply any Judicial Scrutiny to This Case at all, it Should be Rational Basis Scrutiny, Though Analysis of the Facts Would Satisfy Strict Scrutiny as Well

The District believes that should the Court decide any level of judicial scrutiny must be applied to this case, it should be rational basis scrutiny.¹⁶⁰ Rational basis scrutiny is the lowest level of judicial scrutiny in constitutional cases, and requires the legislation at issue to be rationally related to a legitimate government interest to be constitutional.¹⁶¹ The District does not believe any scrutiny is necessary to dismiss the Does' claims, because they believe the statute makes no distinctions based on a classification.¹⁶² It argues that the only distinction made is between those that would like to recite the Pledge and those that would not, and such a distinction does not qualify.¹⁶³ Therefore, the District argues that the lower court was correct in applying rational basis scrutiny to the Does' claims, whether they were required to or not.¹⁶⁴

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at *26.

¹⁶⁰ DB, *supra* note 13, at *27.

¹⁶¹ *Id.* at *27-29.

¹⁶² *Id.*

¹⁶³ *Id.* at *29.

¹⁶⁴ *See Id.* at *29 n.19 ("The propriety of using a rational basis test is also supported by the fact that a minor student 'does not have a fundamental right to an education' under the Massachusetts Constitution.") (citation omitted).

The District argues that when rational basis scrutiny is applied, the statute mandating Pledge recitation clearly serves a legitimate government interest.¹⁶⁵ It states that the purpose of the Pledge, and the statute governing its recitation, is to cultivate patriotism and American loyalty in students.¹⁶⁶ In support, the District quotes the U.S. Supreme Court statement in *Elk Grove* that “the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.”¹⁶⁷ The District believes history demonstrates that the Pledge, at its very core, is about being a virtuous citizen, which is far beyond a legitimate government interest.¹⁶⁸

The District agrees with the lower court’s statements that the Pledge, with the inclusion of the phrase “under God”, is consistent with the Legislature’s and the School District’s legal obligations because the phrase “serves as an acknowledgement of the Founding Fathers’ political philosophy, and the historical and religious traditions of the United States.”¹⁶⁹ The District believes that there is no evidence that the purpose of the legislation was to discriminate against any class of citizens. Further, it believes that in these days of national and international conflict it is a very compelling government interest to instill patriotism in our youth – enough so even to withstand the strictest judicial scrutiny.¹⁷⁰ In concluding its argument, the District quotes Dr. Mills, the Superintendent of the School District, who stated, “compliance with the Pledge of Allegiance mandate, on a totally voluntary participation basis, serves the compelling educational and societal interest of promoting, among our youth, patriotism, virtue and national loyalty.”¹⁷¹

165 DB, *supra* note 13, at *29-30.

166 *Id.*

167 *Id.* at *30 (citation omitted) (“Similarly, in *Freedom from Religion Foundation . . .* the First Circuit held that the primary purpose of a state Pledge of Allegiance law for school children is ‘the advancement of patriotism through a pledge to the flag as a symbol of the nation.’”) *Id.* (internal citation omitted).

168 *Id.* at *30-31.

169 *Id.* at *32 (citation omitted).

170 DB, *supra* note 13, at *33.

171 *Id.* at *33.

V. THE AUTHOR'S OPINION

All parties in this dispute have what the Massachusetts Court will see as lucid, complex, well thought-out arguments, and considering that the nature of this issue is completely unprecedented, having not been argued before any court in the past, the eventual outcome is left to speculation. However, even without a ruling the ultimate outcome can be foreseen; or at least what it should be. While both arguments are interesting, the Does in this case have a stronger position. Their argument is framed under a theory of Equal Protection, an approach that is not only unprecedented in cases of a government religious expression, but apparently misunderstood by both the lower court, which believed Equal Protection did not apply and that it was reviewing an Establishment Clause case, and the District who, based on its arguments, agreed with the lower court's position.

When a new theory is presented to the courts for review, some misunderstanding can certainly be expected. However, when an opponent's argument, against a plaintiff relying upon such a theory, is based upon that opponent's misunderstanding, the opponent's arguments are fundamentally flawed from the outset. The District in this case has made this mistake and has placed itself at a disadvantage as a result. Of course, this assumes the Court will not make the same mistake. After all, the lower court did.

Conversely, notwithstanding the District's misunderstandings, the Does have taken a very innovative approach to what is a historic issue in constitutional law. The argument is so compelling that one wonders why it has not been attempted before. Framing their argument under a theory of Equal Protection makes a lot of sense; so much so that it almost seems to be the way these cases should have always been litigated. There are several good reasons for employing an Equal Protection argument in religious expression cases like this one. The issue deals less with religious coercion and proselytization, which is the concern of the Establishment Clause, but rather it falls directly under the goals of the Equal Protection Clause, concerning whether all American citizens are treated fairly and equally.

Should the Court fully understand the Does' position in this matter, and should they take into consideration all of the reasons why their argument is so compelling, the Does should be successful. However, the biggest challenge for the courts thus far seems to have been the attachment to, and misguided reliance

upon the Establishment Clause. For the Does to receive a favorable judgment, the Court must be willing to relinquish its typical *modus operandi*, and recognize that this is a new and separate approach requiring an adjusted analysis with renewed focus.

A. The District's Arguments are Flawed and Based Upon a Fundamental Misunderstanding of the Does' Position in This Dispute

In addition to a fundamental misunderstanding of the Does' approach, the District's argument is flawed at each level. First, the District argues that because the government mandated recitation of the Pledge in public schools is a completely voluntary exercise, no classification that burdens the Does, particularly to a level that meets an Equal Protection violation, can exist. The argument is flawed because a student's participation or lack thereof does not change the existence of the religious ideologies being recited. It also does not change the fact that those religious ideologies are intended as a symbol of patriotism and American loyalty. Voluntariness is irrelevant, because so long as the religious ideologies are present with such patriotic intentions, the students' feelings of stigmatization and marginalization do not change.

If students opposed to the exercise were to participate, they would do so with the blatant reminder that the school, its educators, and the country itself is telling them that they are not true patriots, not loyal citizens, and not real Americans. The same result follows if those same students were to exclude themselves. Opting for nonparticipation does not change the fact that the exercise would proceed. As such, the students would remain aware that an exercise, though one they are not participating in, is being administered, and that the exercise represents the school, its educators, and the country itself telling them that they are not true patriots, not loyal citizens, and not real Americans, all because of their religious beliefs that they have every right to possess. Nothing changes at all, so the voluntariness of the exercise does not matter.

Second, the District argues that the Does' theory should fall under Establishment Clause analysis, and because the challenged statute is not inherently religious it should be considered constitutional. The District states that the Does feel the challenged statute burdens their ability to practice their atheism freely, which is flawed, because it is actually not the Does'

argument at all. This is the first example of the District's misunderstanding of the Does' position.

The Establishment Clause precludes the government from engaging in religious expression via inherently religious legislation that has the effect of proselytizing or coercing individuals to practice a certain religion, and burdens their constitutional right to free religious exercise. If the Does in this case were making the argument that, by requiring students to recite the Pledge, the state is burdening their ability to practice their chosen religion, atheism, freely and is coercing them into God-belief, then the District would certainly have a highly compelling, viable argument. However, that is not the case. The Does do not mention any burden to their ability to practice atheism, nor do they mention any government coercion. Rather, the Does' position is about fair and equal treatment, which is their constitutional right under the Equal Protection Clause – not the Establishment Clause.

To the same effect, the District also attempts to equate the nature of the Does' claims to legal actions of the past that have challenged the constitutionality of the phrase "In God We Trust" that exists on United States currency, among other easily identifiable places. The District argue that just as "In God We Trust" was upheld despite its religious dimension under the Establishment Clause, so should mandated recitation of the Pledge in public schools; again mistakenly treating the Equal Protection and Establishment Clause analyses as parallels. The District has mischaracterized the Does' argument, and based its analysis off of that mischaracterization. As such, unless the facts suddenly change, this part of their argument also lacks merit.

Third, the District strays from countering the Does' argument and present an argument based on public policy. It argues that if the Does were to be successful in their claims, then it would lead to other students and the education process as a whole being unfairly burdened. According to the District, teachers would not be able to educate students about topics that would likely be opposed by other students with certain religious beliefs, which would be unfair to both students and educators. The argument is flawed, because the District's attempt to equate students being forced to publicly *recite* the Pledge, and the act of being *educated* about various subjects, which are actually quite different.

Let us look at education in the general sense. Public schools have varying, complex curricula that teach a variety of subjects to

their students. Included in these curricula are of course lessons about history, science, and social studies, among others, any of which may include information about various religious beliefs. These subjects are taught to the students to give them a comprehensive, thorough education; full of knowledge of how our world has evolved over time, milestones of our existence, and fundamental knowledge to help them function in society. Now look to recitation of the Pledge. Educators are required to administer the exercise in which students must salute the American flag and recite the words of the Pledge as a state mandated symbol of patriotism. The difference between the recitation of the Pledge and general public school education is simply that the recitation is not education at all – excluding, of course, students learning the words of what is an American staple.

Because the distinction between *recitation* and *education* is so significant, the existence of one can have absolutely no bearing on the other. If the Does were to be successful in their claims, and the challenged statute were to be deemed unconstitutional, meaning public schools would no longer be required to administer Pledge recitation, the education of sensitive topics, that may be opposed to the religious beliefs of other students, would not be frustrated. Educating a devout Christian, who believes that marriage should only be between a man and a woman, about the growth of acceptance in society over time of same sex couples, and more recently of same sex marriage, would not be affected whatsoever. The same can be said about educating the same student, who *arguendo* is also “pro-life” by virtue of his Christianity, about the increased acceptance of abortion, and the broadening of abortion rights throughout the United States. The student would be free to make his own conclusions about the subjects, and would not be stigmatized or marginalized because of it. Without some kind of unfair treatment or discriminatory effect as a result of the child being educated, there is no legal argument the student can make that would frustrate the education process, whether by preventing a subject from being taught, or some other means. For these reasons the District’s attempted public policy argument also lacks merit, and is yet another example of their misunderstanding of the Does’ position.

Last, the District argues that should any judicial scrutiny be applied to this case at all it should be rationale basis scrutiny, especially because the challenged statute does not make a distinction based on a classification. It argues that the only distinction made is between those who choose to recite the Pledge

and between those who do not. This assertion appears to be shortsighted because it fails to consider that the Pledge itself, by claiming this is “one nation under God”, naturally creates a distinction between God-believers and atheists. Such a distinction is religious in nature, and therefore separates people on the basis of creed. As the Does argue, creed is a suspect classification that always requires strict scrutiny, and therefore rational basis is not enough.

Before moving onto the application of strict scrutiny, recall how the District’s suggested rational basis review should be applied. Rational basis review requires a finding that the challenged legislation is rationally related to a legitimate government interest. The District argues that the challenged statute passes the test because the government interest behind requiring public school students to recite the Pledge is to cultivate patriotism and American loyalty, as well as foster national unity and pride in the principles of United States citizenship, which the District believe is clearly legitimate.

However, this argument requires the assumption that the statute does not make a distinction based on a classification which, as discussed above, seems to not be the case. The statute appears to make a distinction based on creed, which is a suspect classification triggering strict scrutiny. Not only does the statute discriminate on the basis of creed, it does so in a manner that defines loyal, proud, unified, patriotic citizens as those who believe in God. Applying strict scrutiny, the court must find that the challenged legislation is narrowly tailored to a compelling government interest to deem it constitutional. Strict scrutiny is a much higher bar to clear than rational basis scrutiny. Considering the deep stigmatizing effect that the statute governing Pledge recitation has had, it might not clear that bar safely. Collectively, these reasons demonstrate why the District’s argument is flawed. The Does’ argument is much more compelling.

B. The Does’ Argument is Compelling, Raising the Question why Others Have not Tried Equal Protection Arguments in Government Religious Expression Cases in the Past

The Does’ argument is compelling, and it is hard to not appreciate the framework of their position. It was during the Cold War era when federal legislation added “under God” to the Pledge. It was a turbulent social and geopolitical period in which the leaders of the United States felt it necessary to take overt steps to

separate American citizens from the “Godless Communists” of the Eastern Bloc. That separation was achieved by pronouncing that unlike Communist states, the United States was founded upon a belief in God. As such, the motive of adding “under God” was religious, not secular, and not neutral. Today many have attempted to argue that this religious purpose violates the Establishment Clause and burdens their free exercise of religion. However, the deeper issue, which the Does are bringing to the surface, is that by distinguishing the United States from Communist states historically through God-belief, it inherently conveys the message that atheists are not real Americans. In this general context, the religious motive behind adding “under God”, in order to *separate* “us” from “them” proves discrimination.

It is staggering that many people believe that the inclusion of “under God” should not make atheists uncomfortable. Think for a moment how various religious groups in this country would react if the Pledge were changed to “one nation, under Buddha”, or Allah, Yahweh, Jesus, or Amun Ra. Individuals that do not believe in those specific deities would rise up in opposition. Surely those individuals would feel like the government is marginalizing them and, effectually, publicly announcing, “You may live here but you are not one of us.” The same theory applies to atheists. The fact that they do not believe in a specific God does not mean they do not find the message of the Pledge offensive. For them, the Pledge effectually says, “one nation, under God . . . excluding atheists.” They look at the Pledge and see separation, and they feel exclusion. Imagine for a moment that the Pledge, with the same religious motive, read “a white Nation, under God”. Is it not reasonable to assume non-White citizens, God-believers or otherwise, would be offended? Would they not feel separated and excluded from the rest of America? The separationist insinuations of these statements are quite clear, and they have the same effect as the Pledge as currently written.

Considering the discriminatory nature of the Pledge in the general context, it lends considerable support to the Does’ argument. The Pledge is discriminatory to atheists when it stands alone. When the government then mandates that the Pledge be recited in public schools as an exercise meant to cultivate patriotism in students, another layer of discrimination is added. Not only are atheists discriminated against because they are “Godless” like Communists, but suddenly they are also not patriots. The whole of their citizenship in America appears to be a farce, and the Pledge is a daily reminder. With two layers of

discrimination, there is a lot of support for the Equal Protection approach that the Does have taken.

Unlike the Establishment Clause approaches of the past, the Does' Equal Protection approach speaks to the harm that has actually been suffered. Government religious expression cases argued under the Establishment Clause typically fail because proving that the government is "taking sides" and attempting to coerce citizens into practicing one religion over another is very difficult, and such proselytization is usually never the effect or motive of the government's actions. Consistently, it was not the government's motive when it added "under God" to the Pledge, which makes an Establishment Clause approach useless. Instead, the purpose, as mentioned above, was differentiation – differentiation of Americans from the "Godless Communists." It is that *differentiation* that harms the Does and their children.¹⁷² The government mandated recitation of the Pledge serves as a constant reminder that the Does are minorities in this country, and hold a status as tolerated outsiders. It is a reminder that although they live in this country, their citizenship will always have an asterisk. It is a reminder that God-believing Americans will always be more respected and well deserving of their constitutional rights. It is an indication that, in America, all are not actually created equal.

Considering that the Equal Protection approach to this dispute makes a lot more sense than its Establishment Clause counterparts, it is surprising that others have not attempted it in the past, especially considering that when dealing with a suspect classification such as creed, or religion, it is a direct path to strict

172 Gellman & Looper-Friedman, *supra* note 2, at 704. Gellman states that:

The inclusion of "under God" in the Pledge of Allegiance and the official adoption of "In God We Trust" as the national motto and "With God All Things Are Possible" as the Ohio motto all took place in the 1950s, as a part of the Cold War zeitgeist. The purpose was not proselytization, but it was not a response to any perceived public malaise, either--it was to distinguish "Us" from "Those Godless Communists" in the atheist Soviet Union.¹⁵⁶ Legislatures were not shy about stating that purpose, so there is ample evidence. This is a one-step argument for atheist challengers, but non-monotheists, Muslims, and Jews can extend the principle by explaining that an original purpose to proclaim "this is what We the People-- unlike other people--believe" applies to them, too.

Id.

scrutiny. Strict scrutiny is a high bar. The government immediately runs into considerable difficulty if it is triggered, and plaintiffs are given an immediate advantage.¹⁷³ Strict scrutiny is strict-but-survivable in theory but often fatal to the government in practice. Under strict scrutiny, part of the government's obligation is to show that the purpose of the challenged statute cannot be achieved by other less restrictive means. Here, with respect to mandated Pledge recitation, the government would probably have a tough time arguing successfully that there are no other feasible means of cultivating patriotism in American students without discriminating against them.

We currently live in times much different from those of the turbulent Cold War era, and the concerns and priorities of America have evolved over time. Perhaps God-belief was an important factor of patriotism under the circumstances of the past, and surely there are many who feel that it still is today. However, we can venture to guess that today, a fervent, unwavering belief in God is not the first notion to come to mind to most American citizens when asked about what patriotism and *being American* means to them. Being American means freedom. It means liberty. It also means heroism, support, opportunity, independence, and countless other things that would all likely take priority over religion. Moreover, not only would these things likely take priority over religion, none of them would be likely to discriminate against any groups of citizens. Instilling patriotism, and teaching what creates the fabric of America, should be achieved by neutral means, and history has certainly shown us that neutral is not the best word to describe the battleground of religion.

VI. CONCLUSION

For reasons unknown, the District in this case has misconstrued much of the Does' argument, and presented an unresponsive counter largely lacking merit and substance. Among various other misconceptions discussed above, the District erroneously acts as if application of the Establishment Clause is

¹⁷³ *Id.* at 707 n.163 ("Under strict scrutiny analysis, the government action must be necessary to serve a compelling state interest, or it will be struck down as unconstitutional. The threshold for strict scrutiny is so high and the threshold for the rational relationship test you are stuck with if you do not get it is so low, that the winner of the level-of-scrutiny battle is usually the winner of the ultimate question of constitutionality.").

the issue in contention, like in Pledge disputes of the past. If this were an Establishment Clause case, it would not be as unique and groundbreaking as it is; nor would it have reached the highest court in Massachusetts. The lower court also misconstrued this as an Establishment Clause case, and doing so created a collective concern. This is a case of Equal Protection, and only Equal Protection. But oddly enough, that does not seem to be understood.

The Does have made their arguments quite clear, and convincing, but have consistently been subjected to wrong, or otherwise misguided analysis, by both opposing counsel and judges alike. The only question that remains, is what analysis the Massachusetts court will employ. The Does' argument is clearer and stronger than that of the District. The Does' argument demonstrates that the government is discriminating in what seems to be an obvious fashion, but none of that matters if the court applies incorrect analysis. As an Equal Protection issue, this case must be treated as an Equal Protection issue; and should that come to fruition, the Does should emerge victorious. Placing emphasis upon the Establishment Clause, together with the other misguided approaches, would be to ignore the ugly truth of what is currently happening to a group of American citizens. It would promote separation and differentiation rather than equality. And it would disrespect the principles of justice that the law is meant to serve. Whether America was founded upon God-belief is a historic debate, but whether it was also founded upon equality, at least in theory, is no debate at all.

It is imperative that the court places strict emphasis on reaching the correct conclusion, even if it is ultimately in the District's favor. But to truly achieve fairness, that conclusion *must* be reached through correct and meaningful analysis. This is not the first Pledge of Allegiance dispute that the courts have dealt with, nor will it be the last. But, this version is unique in its own right, and the correct conclusion will only emerge through a respect of that uniqueness. Should the Does emerge successful, it will be interesting to see if copycat cases begin to arise across the country. It will also be interesting to see if any of those cases expand from the Pledge and attack other government religious

expressions that, until now, have enjoyed Establishment Clause safe harbor.¹⁷⁴

174 The Supreme Judicial Court of Massachusetts decided this case in May 2014, ruling in favor of the District. *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014). The decision comes as a disappointment to those who have long challenged the recitation of the Pledge of Allegiance in public schools. For the reasons above, it seems clear that the Does' had a stronger argument in this matter, and that the court got it wrong. However, while the Does were not victorious, we can venture to guess that this will not be the last time these issues are litigated. It will certainly be intriguing to follow any future cases that arise in this court, or other courts throughout the United States of America.