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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. MICV2010-04261

JANE DOE, individually and as parent and next friend,[1] & others,[2]
Plaintiffs

vs.

ACTON-BOXBOROUGH REGIONAL SCHOOL DISTRICT & others,[3, 4]
Defendants

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Pursuant to statute, all Massachusetts public school children recite the Pledge of Allegiance ("Pledge") "at the commencement of the first class of each day in all grades . . . ." G.L. c. 71, § 69. Congress has set forth the official words of the Pledge: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation *under God*, indivisible, with liberty and justice for all." 4 U.S.C. § 4 (emphasis added). The plaintiffs, three public school students, their parents, and the American Humanist Association (collectively, "Plaintiffs"), base their request for declaratory and injunctive relief on the theory that daily recitation of the Pledge that includes the above-italicized phrase violates the equal protection clause of the Massachusetts

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[1]Of Doechild-1, Doechild-2, and Doechild-3

[2]John Doe, individually and as parent and next friend of Doechild-1, Doechild-2, and Doechild-3; and the American Humanist Association

[3]The Town of Acton Public Schools; and Dr. Stephen E. Mills, in his capacity as Superintendent of Schools

[4]Daniel Joyce and Ingrid Joyce, individually and as parents and next friends of D. Joyce and C. Joyce, and the Knights of Columbus were permitted to intervene as defendants

Constitution, G.L. c. 76, § 5, and their school district's nondiscrimination policy. Although the Plaintiffs acknowledge that they may opt out of reciting the Pledge, they seek the removal of that italicized phrase from the daily recitation of the Pledge.

The Plaintiffs have brought this action against the Acton-Boxborough School District, the Town of Acton Public Schools, and Superintendent Dr. Stephen E. Mills (collectively, "School Defendants"); on October 25, 2011, this court (Leibensperger, J.) allowed the unopposed motion to intervene of Daniel Joyce and Ingrid Joyce, individually and as parents and next friends of D. Joyce and C. Joyce, and the Knights of Columbus (collectively, "Defendant-Intervenors"). The Plaintiffs have moved for summary judgment on all of their claims against the School Defendants and the Defendant-Intervenors (collectively, "Defendants"); the School Defendants and the Defendant-Intervenors have moved, separately, for summary judgment as well.[5] For the following reasons, the Defendants' motions for summary judgment are **ALLOWED** and the Plaintiffs' motion for summary judgment is **DENIED**.[6]

STIPULATED FACTS

The parties have stipulated to the following facts.

Defendants Town of Acton Public Schools and Acton-Boxborough Regional School District

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[5]Although they filed separate motions, the School Defendants and Defendant-Intervenors incorporated by reference each other's motion to the extent there was no conflict between them.

[6]The Defendants have also filed motions to strike the affidavits of Greg M. Epstein (Exhibit L), Rev. David J. Miller (Exhibit M), Barry A. Kossmin and its attached report (Exhibit N), Phil Zuckerman and its attached article (Exhibit O), and Jessica Ahlquist (Exhibit Q). Given this court's ultimate conclusion allowing the Defendants' motions for summary judgment, this court takes no action on these motions except to note that these affidavits do not weigh in favor of denying the Defendants' motions for summary judgment or allowing the Plaintiffs' motion for summary judgment.

(collectively, "Schools") are public school systems in Acton, Massachusetts. In his capacity as superintendent of schools, Defendant Dr. Stephen E. Mills ("Dr. Mills") is the chief executive officer of the Schools. Dr. Mills is responsible for enforcing all provisions of law and all rules and regulations relating to management of the Schools.

Plaintiffs John and Jane Doe are the parents of Doechild-1, age fourteen, Doechild-2, age twelve, and Doechild-3, age ten (collectively, "Doechildren").[7] Defendant-intervenors Daniel Joyce and Ingrid Joyce are the parents of D. Joyce and C. Joyce (collectively, "Joyce children"). The Doechildren live in Acton, Massachusetts with their parents, as do the Joyce children. The Doechildren and the Joyce children all attend the Schools. At the Schools they attend, the Doechildren and the Joyce children regularly recite the Pledge pursuant to G.L. c. 71, § 69, and pursuant to regular school policy and practice.

Defendant-intervenor Knights of Columbus ("KOC") is a Connecticut tax-exempt corporation.

BACKGROUND

The following facts are undisputed and, where disputed, viewed in the light most favorable to the Plaintiffs. See Nelson v. Salem State Coll., 446 Mass. 525, 535 (2006).

The Doechildren and their parents are atheists, denying the existence of a deity. They also affirm Humanist views.

> "Whereas atheism is a view that essentially addresses only the specific issue of the existence of a deity, . . . Humanism 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

[7]As of the August 2011 date of their affidavits, Doechild-1 was in the ninth grade, Doechild-2 was in the sixth grade, and Doechild-3 was in the fourth grade.

> as the primary means of attaining truth; an affirmative recognition of ethical duties; and a strong commitment to human rights."

Exhibit G, par. 2; Exhibit M, par. 10. This "naturalistic philosophy and lifestance . . . . enables its adherents to affirm their ethical principles and epistemological views just as other religions do, with profound appreciation for nature and humanity." Exhibit L, par. 4. Humanism has a "formal religious structure, with clergy [and] chaplains . . . and with formal entities dedicated to the practice of religious humanism . . . ." Exhibit G, par. 3; Exhibit L, par. 5; Exhibit M, par. 11.

"Humanist principles are promoted and defended by formal organizations such as" plaintiff American Humanist Association ("AHA"). Exhibit L, par. 6; Exhibit M, par. 11. The AHA is a nonprofit organization incorporated in Illinois and with a principal place of business in Washington, D.C. Seven of AHA's 120 nationwide chapters and affiliates and 1,000 of AHA's 20,000 members and supporters are in Massachusetts. Among the AHA's members and supporters are Massachusetts public school teachers and parents of children who are or who will be attending the Schools.

The KOC "is the world's largest lay Catholic fraternal organization with more than 1.8 million members[,]" more than 41,000 of whom are in Massachusetts. Exhibit U, pars. 2, 3. In the early 1950s, the KOC was part of the effort to insert the words "under God" into the Pledge because it

> "believes that the words 'under God' represent an accurate summary of this country's political philosophy, and an understanding of our historical national identity that has been reaffirmed thousands of times by judges, legislators, and presidents: that our rights come from God, not from the state, and that governments are accountable to 'Nature and Nature's God,' as our Founding Fathers expressed it in the Declaration of Independence."

Exhibit U, par. 4.

DISCUSSION

The parties are in agreement that the recitation of the Pledge is part of a flag-salute ceremony meant to instill values of patriotism and good citizenship. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 6 (2004) ("Elk Grove") ("As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles."); Opinions of the Justices to the Governor, 372 Mass. 874, 879 (1977)[8] ("The Legislature's purpose in requiring schoolteachers to lead students in a recitation of the Pledge of Allegiance is to instill attitudes of patriotism and loyalty in those students."). The Plaintiffs are aware that they have the right to refuse participation in the Pledge recitation. They assert, however, that the phrase "under God" is a "religious truth" that contradicts their own beliefs. Further, they claim that daily recitation of the phrase "under God" discriminates against them as atheist-Humanists because it marginalizes them by classifying them as unpatriotic.[9] "Thus, this case presents a familiar dilemma in our pluralistic society – how to balance conflicting interests when one group wants to do something for patriotic reasons that another group finds offensive to its religious (or atheistic) beliefs." Newdow v. Rio

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[8]"Although advisory opinions of the Supreme Judicial Court are not binding precedents," the parties have provided and this court has found "nothing to indicate that the Supreme Judicial Court would reach a different conclusion upon reexamination of the issues in the context of litigation." HTA Ltd. P'Ship v. Massachusetts Turnpike Auth., 51 Mass. App. Ct. 449, 453 (2001); see Commonwealth v. Welosky, 276 Mass. 398, 399 (1931) ("It has been uniformly and many times held that such opinions, although necessarily the result of judicial examination and deliberation, are advisory in nature, . . . are not adjudications by the court, and do not fall within the doctrine of stare decisis."), cert. denied, 284 U.S. 684 (1932).

[9]The Doechildren do not claim that their atheist and Humanist views have caused others to single them out personally in a negative way; however, they and their parents understand that society does not view atheists in a favorable light. Exhibit G, par. 5; Exhibit H, par. 14; Exhibit I, par. 6; Exhibit J, par. 6; Exhibit K, par. 6.

Linda Union Sch. Dist., 597 F.3d 1007, 1013 (9th Cir. 2010); see Freedom from Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 6 n.13 (1st Cir. 2010) (listing every federal circuit court case addressing various state pledge statutes, all of which "rejected the claim of unconstitutionality"), cert. denied, 131 S. Ct. 2992 (2011).[10]

I. Voluntariness of Pledge

As an initial matter, the court addresses the voluntary nature of the Pledge. Although the Plaintiffs concede that the Doechildren's participation in the recitation of the Pledge is voluntary, they also note that such voluntariness violates the express language of G.L. c. 71, § 69, which mandates daily recitation of the Pledge.

The language of the statute is mandatory: "Each teacher at the commencement of the first class of each day in all grades in all public schools *shall lead* the class in a group recitation of the 'Pledge of Allegiance to the Flag'." G.L. c. 71, § 69 (emphasis added). The mandatory language of the statute, however, extends only to teachers.[11] As the Supreme Judicial Court observed, G.L.

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[10]This court recognizes not only that the First Circuit's Freedom from Religion Found. decision and the Ninth Circuit's Newdow decision do not serve as binding authority on this court but also that the questions before the First Circuit and Ninth Circuit concerned, inter alia, whether the Pledge violated certain clauses of the United States Constitution. That notwithstanding, and in light of the fact that many of the Plaintiffs' arguments in this case mirror the plaintiffs' arguments in Freedom from Religion Found. and Newdow, this court finds the courts' reasoning in those cases instructive for purposes of analyzing the significance of the phrase "under God" in the Pledge.

[11]That statutory language notwithstanding, the Pledge requirement "'coupled with a fine for non-compliance'" would "'be an unconstitutional infringement of teachers' rights under . . . the First Amendment of the Constitution of the United States . . . .'" Opinions of the Justices to the Governor, 372 Mass. at 875, 879-880; see Opinion of the Attorney General, Rep. A.G., Pub. Doc. 12, at 170 (1977) ("[W]ith certain qualifications, a teacher's right to refuse to direct or participate in recitation of the pledge is constitutionally protected."). Regardless, the Supreme Judicial Court has observed that the 1977 elimination of the flag-salute requirement arguably renders the statutory penalty "inapplicable to a teacher who fails to lead his class in a group

c. 71, § 69, "contains no criminal penalty for a student who fails to participate in the recitation of the pledge . . . . [and, in fact,] no punishment of any kind may be imposed on a student who elects, as a matter of principle, to abstain from participation." Opinions of the Justices to the Governor, 372 Mass. at 880;[12] see Opinion of the Attorney General, Rep. A.G., Pub. Doc. 12, at 170 n.1 (1977) (citing other Attorney General opinions that have held that "students may not constitutionally be compelled to salute the flag or recite the Pledge"); see also Parker v. Hurley, 514 F.3d 87, 106 (1st Cir.) ("Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them."), cert. denied, 555 U.S. 815 (2008). Therefore, participation in all or part of the Pledge is each student's decision, and the School Defendants cannot punish the Doechildren for choosing not to participate.[13]

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recitation of the pledge of allegiance to the flag." Opinions of the Justices to the Governor, 372 Mass. at 876; see G.L. c. 71, § 69 (fining teacher not more than five dollars for failing "for a period of two consecutive weeks . . . to salute the flag *and* recite said pledge" (emphasis added)).

[12]In Nicholls v. Mayor & Sch. Comm. of Lynn, 297 Mass. 65 (1937), the plaintiff student refused to participate in the flag salute and Pledge recitation, claiming that the two acts "constituted an act of adoring and of bowing down to the flag, which [was] contrary to" his religious beliefs as a Jehovah's Witness. Id. at 67-68. The Court upheld the defendant school committee's decision to expel the plaintiff student for his refusal to participate. Id. at 73. The Court has since acknowledged that the result it reached in Nicholls "could not stand today in light of West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)." Attorney Gen. v. Desilets, 418 Mass. 316, 333 n.14 (1994), citing Opinions of the Justices to the Governor, 372 Mass. at 878; see Opinion of the Attorney General, Rep. A.G., Pub. Doc. 12, at 64 (1943) (considering effect of Barnette on St. 1935, c. 258, and opining "that pupils in the public schools may not be required to salute the flag nor to recite" Pledge, and "[n]either can pupils refusing to participate in such ceremonies be disciplined for their refusal or required to state the reasons for such refusal").

[13]If, as the Plaintiffs speculate, the Doechildren someday face negative repercussions from their classmates as a result of their choice not to participate in the Pledge or say the phrase "under God," Massachusetts law protects them by placing affirmative duties on the School Defendants.

II. The Pledge and Religion

The underlying premise of the Plaintiffs' claims is that the "under God" phrase in the Pledge is a "religious truth" that serves as a daily affirmation that their core religious beliefs are wrong. Based on this premise, the Plaintiffs argue that having to endure this daily affirmation pursuant to G.L. c. 71, § 69, violates the Doechildren's equal protection rights under the Massachusetts Constitution, and constitutes unlawful discrimination in violation of G.L. c. 76, § 5, and the Schools' nondiscrimination policy. Stressing the historical and traditional context of the Pledge, the Defendants argue that the Pledge is not a religious document or ceremony but a patriotic exercise and statement of political philosophy that teachers and students may opt out of if they choose.

Prior to the insertion of "under God" into the Pledge, the Supreme Judicial Court described the Pledge as "an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed[,]" and held that it "do[es] not in any just sense relate to religion." Nicholls v. Mayor & Sch. Comm. of Lynn, 297 Mass. 65, 70, 71 (1937). Over twenty years after the insertion of "under God," the Court maintained its position that the Pledge is meant "to instill attitudes of patriotism and loyalty in . . . students." Opinions of the Justices to the Governor, 372 Mass. at 879. However, the Court was not addressing the actual words of the Pledge in that case; this matter is one of first impression. The question the Plaintiffs have raised is whether G.L. c. 71, § 69, with the insertion of "under God" into the Pledge, does "relate to religion" in such a way as to violate the Doechildren's rights. See Freedom from Religion Found.,

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See G.L. c. 71, § 37O(b) (prohibiting bullying); G.L. c. 71, § 37O(d) (requiring school district to "develop, adhere to and update a plan to address bullying prevention and intervention"). The Plaintiffs, however, have not alleged that others have singled out the Doechildren in a negative way as a result of any Pledge-related choice.

626 F.3d at 7 (acknowledging that while "the phrase 'under God' has some religious content[,]" it "is not determinative of [state statute's] constitutionality"); Newdow, 597 F.3d at 1013 (addressing question of "whether this patriotic activity [i.e., Pledge] is turned into a religious activity because it includes words with religious meaning").

It is a well-established principle of statutory interpretation that the court looks to the intent of the legislation by considering all of the words of a statute, Fordyce v. Hanover, 457 Mass. 248, 257 (2010), "'but not in isolation from the statute's purpose or divorced from reason and common sense.'" Case of Cornetta, 68 Mass. App. Ct. 107, 112 (2007). Therefore, to resolve legislative intent, one "must examine the Pledge as a whole, not just the two words the Plaintiffs find offensive." Newdow, 597 F.3d at 1014; see, e.g., id. at 1019 n.9 (recognizing that words "have different meanings in different contexts" and opining that it "would . . . make a difference" if Pledge "were solely: 'We are under God's rule'" because "[t]here would be an argument that this was nothing more than a prayer").

A consideration of the history of the Pledge is helpful to this analysis. See Finch v. Commonwealth Health Ins. Connector Auth., 461 Mass. 232, 236 (2012) (considering constitutionality of statute may involve "an especially thorough inquiry into legislative motive, including 'such circumstantial and direct evidence of intent as may be available'"); 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) (interpreting statute by looking to "external sources, including the legislative history of the statute, its development, its progression through the Legislature, prior legislation on the same subject, and the history of the times"); Commonwealth v. Welosky, 276 Mass. 398, 402 (1931) ("General expressions may be restrained by circumstances showing a legislative intent that they be narrowed and used in a particular sense."), cert. denied, 284

U.S. 684 (1932).

A. Federal Law

The Pledge of Allegiance was written in 1892 "[a]s part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus' discovery of America . . . ." Elk Grove, 542 U.S. at 6. The words of the original version of the Pledge were: "'I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all.'" Id. Congress first codified the Pledge in 1942 with the stated intent of "emphasiz[ing] existing rules and customs pertaining to the display and use of the flag of the United States of America." Pub. L. 77-623, 56 Stat. 377 (June 1942), amended by Pub. L. 77-829, 56 Stat. 1074 (December 1942)[14] (amended 1954). At that time, the words of the Pledge were as follows: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all[.]" Pub. L. 77-829, § 7; see West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 n.17 (1943) ("Barnette") (noting that Pub. L. 77-829, 56 Stat. 1074 (December 1942) "prescribes no penalties for nonconformity").

In 1954, Congress amended the Pledge to include the phrase "under God" to supplement "indivisible" as a modifier for "one Nation[.]" Pub. L. 83-396, § 7, 68 Stat. 249 (1954); see Newdow, 597 F.3d at 1032 (explaining that "under God" was added "primarily to reinforce the idea that our nation is founded upon the concept of a limited government, in stark contrast to the unlimited power exercised by communist forms of government[,]" and to reinforce "the belief that

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[14]The June 1942 version instructed that the Pledge "be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side." Pub. L. 77-623, § 7, 56 Stat. 377. The December 1942 version merely instructed that the Pledge "be rendered by standing with the right hand over the heart." Pub. L. 77-829, § 7, 56 Stat. 1074 (amended 1954).

our nation was one of individual liberties granted to the people directly by a higher power"); Exhibit U, par. 4 ("[KOC] helped organize a nationwide effort to insert the words 'under God' into the Pledge . . . . [because] the words . . . represent an accurate summary of this country's political philosophy, and . . . our historical national identity . . . that our rights come from God, not from the state . . . ."). The House Report in support of the addition of "under God" expressly noted

> "that the adoption of this legislation in no way runs contrary to the provisions of the first amendment to the Constitution. 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. The phrase 'under God' recognizes only the guidance of God in our national affairs.*"

H.R. Report No. 83-1693 (1954) (emphasis added), reprinted in 1954 U.S. Code Cong. & Admin. News. 2339, 2341-2342.[15] In further support for this position, the House Report observed that

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[15]This House Report also stated:

> "At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. *The inclusion of God in our pledge* therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it *would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual.*"

H.R. Report No. 83-1693 (1954) (emphasis added), reprinted in 1954 U.S. Code Cong. & Admin. News. 2339, 2340; see Elk Grove, 542 U.S. at 25-26 (Rehnquist, C.J., concurring) (noting that while "[1954] amendment's sponsor, Representative Rabaut, said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism[,]. . . . [w]e do not know what other Members of Congress thought about the purpose of the amendment" (internal citation omitted)); Newdow, 597 F.3d at 1033 (conceding that seeking "to promote religion and to combat atheism" are unconstitutional motives, but stating that court's focus must not be "solely on what individuals say when they are making political statements to their constituencies" but also on "what Congress did when it enacted and amended the Pledge over time" (emphases omitted)).

> "[t]he Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment . . . . In so construing the first amendment, the Court pointed out that, if this recognition of the Almighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and this Honorable Court[.]'"

Id. at 2342, citing Zorach v. Clauson, 343 U.S. 306, 312-313 (1952); see Elk Grove, 542 U.S. at 7 (quoting House Report as "observ[ing] that '[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God'" (second alteration in original)); Exhibit U, par. 4.

The version enacted in 1954 still exists today as 4 U.S.C. § 4. In fact, in 2002, Congress reaffirmed the language of the Pledge, Pub. L. 107–293, § 2, 116 Stat. 2057, 2060, and made findings in support of this reaffirmation. Pub. L. 107–293, § 1(1)-(16), 116 Stat. 2057, 2060. These findings recount historical events that span 1620 to 2002, id., and include the express finding that the 1954 amendment "was clearly consistent with the text and intent of the Constitution of the United States . . . ." Pub. L. 107–293, § 1(9), 116 Stat. 2057, 2058; see H.R. Report No. 107-659, at 4 (2002), reprinted in 2002 U.S. Code Cong. & Admin. News. 1304, 1304 ("It is an accepted legal principle that government acknowledgment of the religious heritage of the United States of America is consistent with the meaning of the Establishment Clause of the First Amendment to the U.S. Constitution."); id. at 8, 1308 ("America has a rich history of referring to God in its political and civil discourse and acknowledging the important rule faith and religion have played throughout our Nation's history."); id. at 5, 1305 ("The Pledge of Allegiance is not a religious service or prayer, but is a statement of historical beliefs."). With these findings, Congress attempted to make clear that it

> "was not trying to impress a religious doctrine upon anyone. Rather, [Congress] had two main purposes for keeping the phrase 'one Nation under God' in the Pledge: (1) to underscore the political philosophy of the Founding Fathers that God granted certain inalienable rights to the people which the government cannot take away; and (2) to add the note of importance which a Pledge to our Nation ought to have and which in our culture ceremonial references to God arouse."

Newdow, 597 F.3d at 1028; see also H.R. Report No. 107-659, at 4, 8, reprinted in 2002 U.S. Code Cong. & Admin. News. 1304, 1304, 1308. Therefore, "the addition of 'under God' was used to describe an attribute of the Republic, 'one Nation under God' – a reference to the historical and religious traditions of our country, not a personal affirmation through prayer or invocation that the speaker believes in God." Newdow, 597 F.3d at 1023 (emphasis omitted). Stated otherwise, inclusion of the phrase was a reflection of the times.

B. Massachusetts Law

The legislative history of G.L. c. 71, § 69, begins in 1902. At that time, the Legislature required that "[t]he school committee of every city and town shall provide for each school house in which public schools are maintained and which is not otherwise supplied, a United States flag . . . and suitable apparatus whereby such flag may be displayed" either inside or outside, depending on the weather. R.L. (1902), c. 42, § 50. The Legislature amended this statute in 1909 by making the flag display mandatory, changing "may be displayed" to "shall be displayed . . . ." St. 1909, c. 229. In 1919, the Legislature changed the wording of this portion of the statute but left its meaning intact. St. 1919, c. 84. At this time, the Legislature also added penalties for failing to comply with the statute: "the principal or teacher in charge of a school equipped" with a flag and apparatus who failed to display the flag "for a period of five consecutive days . . . shall be punished by a fine of not more than five dollars for each such period[;]" the school committee's failure "to equip a school as

provided in this section shall subject the members thereof to a like penalty." Id.

The Legislature added the Pledge requirement in 1935; the statute otherwise remained essentially the same. St. 1935, c. 258. The added language provided: "Each teacher shall cause the pupils under his charge to salute the flag and recite in unison with him at said opening exercises at least once each week the 'Pledge of Allegiance to the Flag'. . . . [F]ailure for a period of two consecutive weeks by a teacher to salute the flag and recite said pledge as aforesaid, or to cause the pupils under his charge so to do, shall be punished for every such period by a fine of not more than five dollars." Id.

Shortly after this enactment, the Supreme Judicial Court described the flag salute and Pledge recitation as

> "a ceremony clearly designed to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the Constitutions of the State and nation. The study of those instruments is a proper subject for instruction in the public schools. . . . [because] [a]n understanding of these matters enables citizens to comprehend and to assert their rights and to seek and obtain their safety and happiness."

Nicholls, 297 Mass. at 69. The Court further held that the flag salute and Pledge "do not in any just sense relate to religion. They are not observances which are religious in nature. They do not concern the views of any one as to his Creator. They do not touch upon his relations with his Maker. They impose no obligations as to religious worship. They are wholly patriotic in design and purpose." Id. at 70. While the flag symbolizes government's aim "to establish liberty and to provide justice for all within [its] borders[,]" id. at 69, the Pledge "is an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed." Id. at 71.

In 1969, the Legislature added a sentence to the statute requiring "[a] flag . . . [to] be displayed in each classroom in each such schoolhouse." St. 1969, c. 77. Finally, in 1977, the Legislature eliminated the flag-salute requirement and amended the Pledge-recitation requirement as follows: "Each teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag'." St. 1977, c. 333. The statute that is now G.L. c. 71, § 69, has remained unchanged since 1977, with one minor exception. See St. 1998, c. 463, § 65 ("striking out, in line 20, the word 'or' and inserting in place thereof the following word: - of").

Interestingly, the Massachusetts Legislature passed St. 1977, c. 333, without the governor's approval.[16] Massachusetts' governor at the time returned the bill that eventually became G.L. c. 71, § 69, "to the House of Representatives, the branch in which it originated, with his objections thereto . . . ." St. 1977, c. 333 (italics omitted). The bill "was passed by the House of Representatives, June 14, 1977, and, in concurrence, by the Senate, June 15, 1977, the objections of the Governor notwithstanding, in the manner prescribed by the Constitution; and thereby has the 'force of a law'." Id.; see Mass. Const., Part II, c.1, § 1, art. 2 (setting forth legislative process).

C. Conclusion

According to the Massachusetts Constitution,

> "it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns;

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[16]The governor likely based his objections on the Supreme Judicial Court's answers to his questions concerning the then-proposed amendments to G.L. c. 71, § 69, set forth in Opinions of the Justices to the Governor, 372 Mass. 874 (1977). See id. at 874 (noting that, in making his inquiry of the Court, "Governor states that he has grave doubts as to the constitutionality of the bill"); see also supra n.13.

> to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people."

Mass. Const., Part II, c.5, § 2. The Supreme Judicial Court has held the Legislature's enactment of G.L. c. 71, § 69, is consistent with this constitutional obligation. Nicholls, 297 Mass. at 69. The flag salute and Pledge are "clearly designed to inculcate patriotism and to instill a recognition of the blessings conferred by orderly government under the constitutions of the State and nation." Id. Further, also consistent with G.L. c. 71, § 69, public schools have a statutory obligation to teach "American history and civics . . . as required subjects for the purpose of promoting civic service and a greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship." G.L. c. 71, § 2.

General Laws c. 71, § 69, impliedly incorporates by reference 4 U.S.C. § 4 which sets forth the words of the Pledge. As recently as 2002, Congress reaffirmed the terms of the Pledge, making findings that support the conclusion that including the phrase "under God" did not transform the Pledge into a religious exercise but rather was intended to reflect the history and political philosophy of the United States. See Pub. L. 107–293, § 1(1)-(16), 116 Stat. 2057, 2060; see Newdow, 597 F.3d at 1019 (holding that Congress' "purpose in reaffirming the Pledge" in 2002 "was predominantly secular"). While deference to congressional findings may not be required, particularly in the context of a state statute, they are nonetheless instructive, if not persuasive, in this analysis.

Based on the legislative history of G.L. c. 71, § 69, and of 4 U.S.C. § 4, I can only conclude that the insertion of "under God" into the Pledge has not converted it from a political exercise that

is "an acknowledgment of sovereignty, a promise of obedience, a recognition of authority above the will of the individual, to be respected and obeyed[,]" Nicholls, 297 Mass. at 71, and into a prayer, which the Supreme Court has defined as "a solemn avowal of divine faith and supplication for the blessings of the Almighty." Engel v. Vitale, 370 U.S. 421, 424 (1962); see Freedom from Religion Found., 626 F.3d at 8 ("The Pledge and the phrase 'under God' are not themselves prayers, nor are they readings from or recitations of a sacred text of a religion."). "In reciting the Pledge, students promise fidelity to our flag and our nation, not to any particular God, faith, or church." Freedom of Religion Found., 626 F.3d at 10; see Newdow, 597 F.3d at 1019 ("The phrase 'under God', when read in context with the whole of the Pledge, has the predominant purpose and effect of adding a solemn and inspiring note to what should be a solemn and inspiring promise – a promise of allegiance to our Republic."). Moreover, neither G.L. c. 71, § 69, nor 4 U.S.C. § 4 compels the Doechildren to participate; they are free to refrain from speaking any part of the Pledge. See Newdow, 597 F.3d at 1021 (conceding that if "students were required to say the Pledge," the court would be more inclined to agree "that the mere recitation of 'under God' . . . is an affirmation that God exists").

Accordingly, the Pledge is not a religious exercise, and, in that context, the daily recitation of "under God" does not constitute an affirmation of a "religious truth."

III. Equal Protection

The Plaintiffs assert that the Doechildren's having to endure the daily recitation of "under God" in the Pledge pursuant to G.L. c. 71, § 69, violates their equal protection rights under the Massachusetts Constitution. Since 1976, the Massachusetts equal rights amendment has provided:

> "All people are born free and equal and have certain natural, essential and

> unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. *Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.*"

Mass. Const., Part I, art. 1, as amended by art. 106 of the Amendments ("art. 1 of the Massachusetts Declaration of Rights") (emphasis added); see Finch v. Commonwealth Health Ins. Connector Auth., 459 Mass. 655, 662 (2011) ("The court traditionally has located a right to equal protection under art. 1 and, thus, under its successor art. 106."); see also id. at 665-666 (discussing purpose of final sentence of art. 1 of Declaration of Rights, and analyzing differences between amendment and original version); Trustees of Smith Coll. v. Board of Assessors of Whately, 385 Mass. 767, 769 n.2 (1982) (explaining that "[in] 1976 the people approved art. 106 of the Amendments to the Constitution of the Commonwealth, which amended art. 1 of the Declaration of Rights" by adding final sentence.). Relying specifically on the above-italicized equal protection clause that expressly mentions "creed," the Plaintiffs argue that G.L. c. 71, § 69, does not treat them equally because the "under God" language validates theistic religion over non-theistic religion.

"Classification is an integral part of the legislative task and will not be interfered with by a judicial body unless the distinctions drawn by the enactment are 'arbitrary or irrational,' or result in 'invidious' discrimination." Paro v. Longwood Hospital, 373 Mass. 645, 649 (1977). Although "the requirements of the Equal Rights Amendment . . . to the Massachusetts Constitution are more stringent than the Fourteenth Amendment's equal protection requirements[,]" Lowell v. Kowalski, 380 Mass. 663, 665-666 (1980), "'[t]he standard for equal protection analysis under our Declaration of Rights is the same as under the Federal Constitution.'" Commonwealth v. Weston W., 455 Mass. 24, 30 n.9 (2009) (citation omitted); Case of Tobin, 424 Mass. 250, 252 (1997) (same). There are

two tests by which one judges "arbitrariness and invidiousness of legislative acts." Paro, 373 Mass. at 649. The first test, strict scrutiny, applies "whenever a legislative discrimination 'trammels fundamental personal rights or is drawn upon inherently suspect distinctions,' . . . [and] requires, for the sustenance of the statute, a showing that the difference in treatment is necessary to the promotion of a compelling State interest." Id. (internal citations omitted). "Where there is no infringement of fundamental rights or any suspect class, a statutory discrimination will be upheld if it is 'rationally related to a legitimate State interest.'" Id. The foregoing is the second test in an equal protection claim.

Applying the strict standard of review, the Plaintiffs argue that the daily "under God" affirmation constitutes a classification on the basis of religion and implicates the fundamental rights of free exercise of religion, free speech, and free expression. See LaCava v. Lucander, 58 Mass. App. Ct. 527, 532, 533 (2003) ("Suspect classes for equal protection purposes include classifications based on . . . religion . . . . [and] [f]undamental rights generally are those that stem explicitly from or are implicitly guaranteed by the constitution."). While the Defendants argue that rational basis applies, they also contend that G.L. c. 71, § 69, passes strict scrutiny analysis as well. As set forth above, the inclusion of "under God" in the Pledge does not convert its recitation from a patriotic exercise into "a formal religious exercise." Freedom from Religion Found., 626 F.3d at 13; see id. at 11 (rejecting as "flawed" plaintiff's argument "that children who choose not to recite the Pledge become outsiders based on their beliefs about religion" because "children are not *religiously* differentiated from their peers merely by virtue of their non-participation in the Pledge" given that children may choose not to participate for religious or non-religious reasons, or for "no reason at all" (emphasis added)); Newdow, 597 F.3d at 1038 (holding that, as Pledge "is not a prayer and its

recitation is not a religious exercise" but rather "a patriotic exercise, ... students are not being forced to become involuntary congregants listening to a prayer"). Thus, the rational basis test rather than strict scrutiny is the applicable standard.

"Where a statute does not burden a protected class or a fundamental right, it is presumed to be constitutional and will survive an equal protection challenge if 'the classification drawn by the statute is rationally related to a legitimate state interest.'" Police Dep't of Salem v. Sullivan, 460 Mass. 637, 641 (2011) (citations omitted). "For equal protection challenges, the rational basis test requires that 'an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.'" Goodridge, 440 Mass. at 330.

In conducting rational basis analysis, one must be mindful that "'[l]egislative line drawing "requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line."'" Harlfinger v. Martin, 435 Mass. 38, 48 (2001), quoting Chebacco Liquor Mart, Inc. v. Alcoholic Beverages Control Comm'n, 429 Mass. 721, 722 (1999), in turn quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315-316 (1993). "'[S]uch line drawing does not violate equal protection principles simply because it "is not made with mathematical nicety or because in practice it results in some inequality."'" Id., quoting Chebacco Liquor Mart, Inc., 429 Mass. at 722, in turn quoting Dandridge v. Williams, 397 U.S. 471, 485 (1970). Consistent with this principle is the notion that "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them." Parker, 514 F.3d at 106.

The Pledge is a voluntary patriotic exercise, and the inclusion of the phrase "under God" does not convert the exercise into a prayer. See Opinions of the Justices to the Governor, 372 Mass. at 879; Nicholls, 297 Mass. at 71; see also Engel, 370 U.S. at 424; Freedom from Religion Found., 626 F.3d at 8; Newdow, 597 F.3d at 1023; H.R. Report No. 107-659, at 5 (2002), reprinted in 2002 U.S. Code Cong. & Admin. News. 1304, 1308. Having public school children recite the Pledge each day has a rational basis in the Legislature's constitutional obligations

> "to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people."

Mass. Const., Part II, c.5, § 2; Nicholls, 297 Mass. at 69. This daily act is also rationally related to the statutory obligation of public schools to teach "American history and civics . . . as required subjects for the purpose of promoting civic service and a greater knowledge thereof, and of fitting the pupils, morally and intellectually, for the duties of citizenship." G.L. c. 71, § 2; cf. Johnson v. Deerfield, 25 F. Supp. 918 (D. Mass.) (holding that earlier version of G.L. c. 71, § 69, St. 1935, c. 258, was rationally related to Legislature's decision to require "youth of the State [to] give some overt expression of their loyalty to and respect for the institutions of their country"), aff'd 306 U.S. 621 (1939).

As the above discussion of the federal and state history of the Pledge demonstrates, the inclusion of the phrase "under God" in this daily recitation is also rationally related to these constitutional and statutory obligations, because the phrase serves as an acknowledgment of the Founding Fathers' political philosophy, and the historical and religious traditions of the United

States. See Newdow, 597 F.3d at 1023, 1028; see, e.g., Exhibit U, par. 4 ("[KOC] helped organize a nationwide effort . . . to insert the words 'under God' into the Pledge . . . . [because] the words . . . represent an accurate summary of this country's political philosophy, and an understanding of our historical national identity . . . ."). This legitimate public purpose transcends any harm the Doechildren purport to suffer as a result of hearing this phrase each day. See Goodridge, 440 Mass. at 330; see also Parker, 514 F.3d at 106; Harlfinger, 435 Mass. at 48.

Moreover, participation in the Pledge, in whole or in part, is voluntary; a student may choose not to participate for a religious reason, or a non-religious reason, or for no reason. See Opinions of the Justices to the Governor, 372 Mass. at 880; Opinion of the Attorney General, Rep. A.G., Pub. Doc. 12, at 170 n.1 (1977); Opinion of the Attorney General, Rep. A.G., Pub. Doc. 12, at 64 (1943); cf. Barnette, 319 U.S. at 642 ("[C]ompelling the flag salute and pledge transcends constitutional limitations on [local legislature's] power and invades the sphere or intellect and spirit which is the purpose of the First Amendment to our Constitution to reserve from all official control."). It follows, then, that G.L. c. 71, § 69, does not treat students differently but rather applies equally to all students. See art. 1 of the Massachusetts Declaration of Rights ("Equality under the law shall not be denied or abridged because of . . . creed . . . ."); see also Newdow, 597 F.3d at 1021; Parker, 514 F.3d at 106.

Accordingly, G.L. c. 71, § 69, passes the rational basis test.

IV. Unlawful Discrimination

The Plaintiffs also argue that enduring this daily recitation of "under God" constitutes unlawful discrimination in violation of G.L. c. 76, § 5, and the Schools' nondiscrimination policy. Section 5 of G.L. c. 76 provides, in pertinent part, that "[n]o person shall be excluded from or

discriminated against . . . in obtaining the advantages, privileges and courses of study of such public school on account of . . . religion[] . . . ." The Schools' nondiscrimination policy similarly protects against religious discrimination in the context of school activities, providing that the Schools "do not discriminate on the basis of . . . religion[] . . . in admission to, or [the Schools'] treatment or employment in, [their] programs, and activities." Amended Complaint, pars. 54, 57 (emphasis omitted).

In discussing the legislative history of G.L. c. 76, § 5, the Supreme Judicial Court noted that with the addition of the final sentence to art. 1 of the Massachusetts Declaration of Rights – "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin" – Massachusetts "constitutional law has caught up to [G.L. c. 76, § 5]." Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 378 Mass. 342, 344 n.5 (1979). As a result, the Court assumed without deciding that G.L. c. 76, § 5, "equates with" art. 1 of the Massachusetts Declaration of Rights. Id. This court does the same and holds that G.L. c. 71, § 69, does not violate G.L. c. 76, § 5, or the Schools' nondiscrimination policy for the same reasons as set forth above in the context of the Plaintiffs' equal protection claim.

In any event, as discussed above, the phrase "under God" is not a religious truth. Therefore, as the Pledge does not constitute a daily affirmation of any religion's views, state sponsored or otherwise, then choosing not to participate in the voluntary daily recitation does not deny the Doechildren an advantage and privilege of their education on the basis of religion. See G.L. c. 76, § 5.

V. Declarations

In their amended complaint, the Plaintiffs seek declarations concerning the propriety of the

Pledge. Based on the foregoing analysis of this opinion, the court makes the following declarations:

1. The daily recitation of the Pledge in a form including the "under God" language does not violate the Plaintiffs' equal protection rights under art. 1 of the Massachusetts Declaration of Rights (Counts I, II, and III).
2. The daily recitation of the Pledge in a form including the "under God" language does not violate the Schools' nondiscrimination policy (Counts IV and V).
3. The daily recitation of the Pledge in a form including the "under God" language does not violate G.L. c. 76, § 5 (Count VI).

ORDER

For the foregoing reasons, the Defendants' motions for summary judgment are **ALLOWED** and the Plaintiffs' motion for summary judgment is **DENIED**. The court makes the declarations set out in Section V of this opinion. Further, the court takes no action on the Defendants' motions to strike.

S. Jane Haggerty
S. Jane Haggerty
Justice of the Superior Court

Date: June 5, 2012