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A PATRIOTIC PLAYGROUND: REEXAMINING THE CONSTITUTIONALITY OF THE DAILY RECITATION OF THE PLEDGE OF ALLEGIANCE IN PUBLIC SCHOOLS

“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 . . . [T]he children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins. As they grow and advance in this understanding, they will assume the responsibilities of self-government equipped to carry on the traditions that have been given to us. Fortify our youth in their allegiance to the flag by their declaration to ‘one Nation, under God.’”¹

I. INTRODUCTION

Although the foundation of the American government is strongly rooted in the concept of separation of church and state, religious references are ever-present in our Nation’s currency, on insignia in state and federal buildings, and most notably, in the language of the Pledge of Allegiance (“Pledge”).² Traditionally, litigants have argued in vain that the recitation of the Pledge of Allegiance in public schools violates the Establishment Clause, while arguments involving Equal Protection have remained in the background as a secondary issue.³ With the Massachusetts Supreme

¹ H.R. REP. NO. 83-1693 (1954), *reprinted in* 1954 U.S.C.A.N. 2339, 2340-41.

² See John E. Thompson, Note, *What’s the Big Deal? The Unconstitutionality of God in the Pledge of Allegiance*, 38 HARV. C.R.-C.L. L. REV. 563, 577 (2003) (noting religious references in various government practices used in condoning government sponsorship of religion); see also Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 399 (2012) (discussing how seemingly harmless government expressions of religion perpetuate stereotypes of nonbelievers).

³ See 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, 666 (2008) (arguing government expressions of religion should be primarily analyzed under Equal Protection Clause). The Equal Protection Clause is better suited for government expressions of

Judicial Court's ("SJC") decision in *Doe v. Acton-Boxborough Regional School District*,⁴ a new argument against the recitation of the Pledge in public schools has been formed out of the remains of the traditional constitutional argument.⁵

The appellants, echoing the same Equal Protection argument used to legalize same-sex marriage in the Commonwealth, argued that the daily recitation of the Pledge of Allegiance violated their rights as atheists and Humanists under the Equal Rights Amendment to the Massachusetts Constitution.⁶ Although the Supreme Judicial Court did not find for the plaintiffs, the strategic advocacy choice employed in *Doe* will impact the way litigants approach this issue, particularly in those jurisdictions that have similarly legalized same-sex marriage under their state's Equal Rights Amendment.⁷

religion, given that the harm in such instances is marginalization, rather than proselytization. See *id.* at 702; cf. Lorianne Sainsbury-Wong, Benjamin Wilson & Alyssa Vangeli, *The Useful But Overlooked Massachusetts Equal Rights Amendment*, M.B.A. MASS. LAW. J., August 2011, at 14, 17 (August 2011), available at <http://massbar.org/publications/lawyers-journal/2011/august/the-useful-but-overlooked-massachusetts-equal-rights-amendment> (discussing SJC's broad application of equal protection under Massachusetts Constitution).

⁴ 8 N.E.3d 737 (Mass. 2014).

⁵ See *Doe*, 8 N.E.3d at 745-46 (noting limited nature of plaintiffs' constitutional claim); see also Tim Martin, *Pledge Allegiance to a Foreign-Made Flag? Kids Deserve Better*, GUEST OPINION/EUREKA TIMES STANDARD (Oct. 27, 2013, 2:17:58 AM PDT), http://www.times-standard.com/guest_opinion/ci_24397445/pledge-allegiance-foreign-made-flag-kids-deserve-better (highlighting plaintiffs' unique departure from Pledge jurisprudence by arguing under state, rather than federal law).

⁶ See *Doe*, 8 N.E.3d at 740; see also Steve Annear, *BU Law Professor: Pledge Case Before Supreme Court is 'Unique'*, BOSTON MAGAZINE, (Sept. 5, 2013, 3:27 PM), <http://www.bostonmagazine.com/news/blog/2013/09/05/pledge-of-allegiance-massachusetts-under-god-supreme-judicial-court/> (arguing plaintiffs' argument, while novel, still poses difficult challenge); Kimberly Winston, *Mass. Supreme Court to Hear Challenge to Pledge*, ON FAITH/WASHINGTON POST (August 30, 2013), <http://ncronline.org/news/faith-parish/mass-supreme-court-hear-challenge-pledge-allegiance> ("This change of tack in pledge challenges is modeled on a successful precedent laid down in the same court on gay marriage.").

⁷ See *infra* Part III (discussing similarities between same-sex marriage litigation and Pledge of Allegiance litigation); sources cited *supra* note 6 (recognizing similarities between arguments and potential impact on litigation in same-sex marriage and Pledge cases); see also *'Under God' No Good for New Jersey School Students, Says Humanist Group*, AHA NEWS (Feb. 19, 2014), <http://americanhumanist.org/news/details/2014-02-under-god-no-good-for-new-jersey-school-students-say> (summarizing similar case in New Jersey). The American Humanist Society ("AHA"), a plaintiff in *Doe*, sent a letter to the Superintendent of the Matawan-Aberdeen Regional School District in New Jersey, alleging that the daily recitation of the Pledge violated the New Jersey Constitution. See *'Under God' No Good for New Jersey School Students, Says Humanist Group*, *supra*. After the school district failed to remedy the situation, the AHA filed suit on behalf of a local family. See *Humanists File Lawsuit Against 'Under God' in the Pledge of Allegiance in New Jersey*, AHA NEWS (Apr. 21, 2014), <http://americanhumanist.org/news/details/2014-04-humanists-file-lawsuit-against-under-god-in-the-pled> (comparing New Jersey case to Massachusetts case).

Although there is arguably a viable claim that the inclusion of the phrase “under God” in the Pledge of Allegiance is a violation of the Establishment Clause, this note instead addresses the issue of whether the inclusion of such language violates the Equal Protection Clause.⁸ This note will first describe the circumstances that led to the litigation in *Doe v. Acton-Boxborough*, the plaintiffs’ novel argument against the Pledge, and the Supreme Judicial Court of Massachusetts’s ultimate decision.⁹ It will then discuss the history of the Pledge, as well as the numerous failed attempts to challenge its constitutionality under the Establishment Clause.¹⁰ This note will then review the steps of an Equal Protection Analysis, and go on to address the Equal Rights Amendment (“ERA”) to the Massachusetts Constitution, and similar provisions in other state constitutions, as well as discuss how a number of states have shown a willingness to broaden the rights afforded to their citizens under their state’s constitution.¹¹ Following this is an analysis of whether the daily recitation of the Pledge in public schools creates a suspect classification, resulting in a disparate impact on atheists and other nonbelievers and thus violating the Massachusetts Constitution as well as other similarly drafted state constitutions.¹² The conclusion provides insight into the most advantageous forums for practitioners to litigate this issue and argue that the state-mandated daily recitation of the Pledge violates their state’s Equal Rights Amendment.¹³

II. THE NOVEL ARGUMENT CHALLENGING THE CONSTITUTIONALITY OF THE PLEDGE

In Massachusetts, public school teachers are required to begin each day with a classroom recitation of the Pledge of Allegiance.¹⁴ The purpose of this practice is to instill values of patriotism and good citizenship among the students.¹⁵ Jane and John Doe, individually and on behalf of their three children, together with the AHA, brought action challenging the Pledge statute against the Acton-Boxborough Regional School District, the Town

⁸ See *infra* Parts II-V.

⁹ See *infra* Part II.

¹⁰ See *infra* Part III.A.

¹¹ See *infra* Part III.B.

¹² See *infra* Part IV.

¹³ See *infra* Part V.

¹⁴ See MASS. GEN. LAWS ch. 71, § 69 (2012) (“Pledge statute”) (providing for daily recitation of Pledge in all public schools).

¹⁵ See Opinions of the Justices to the Governor, 363 N.E.2d 251, 255 (Mass. 1977) (discussing Legislature’s purpose in enacting Pledge statute).

of Acton Public Schools, and the Superintendent.¹⁶

The plaintiffs in *Doe*, as atheists and Humanists, alleged that this practice violated their rights under the Massachusetts Constitution.¹⁷ Curiously, the plaintiffs brought their claim specifically under the Massachusetts Constitution, and avoided any argument under the Federal Constitution.¹⁸ The plaintiffs argued that the Commonwealth's Pledge statute promoted and defined patriotism in terms that favor one class (God believers) over another (atheists) by portraying God-belief as a key element of patriotism.¹⁹

In their complaint, plaintiffs' reasoned that this daily affirmation, that the United States is a nation "under God," has made them feel excluded and marginalized, just as Jews or Muslims would feel if they were told on a daily basis that the United States was "under Jesus."²⁰ Therefore,

¹⁶ See *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 740 (Mass. 2014) (indicating parties to action). The American Humanist Association advocates for humanists and nontheists, and "strive[s] to bring about a progressive society where being good without a god is an accepted and respected way to live life." AMERICAN HUMANIST ASSOCIATION, <http://americanhumanist.org/AHA> (last visited Mar. 2, 2014) (fighting for defense of civil liberties and secular government). Notably, the Knights of Columbus, an organization that was instrumental in amending the Pledge to include the words "under God" in 1954, intervened as a defendant. See *Doe*, 8 N.E.3d at 737 n.3 (listing Knights of Columbus as intervener); see also Todd Collins, *Lost in the Forest of the Establishment Clause: Elk Grove v. Newdow*, 27 CAMPBELL L. REV. 1, 16 (2004) (describing history of Knights of Columbus's involvement in adding "under God" to Pledge).

¹⁷ See Brief of the Plaintiffs-Appellants, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2012 WL 8684858, at *11-12 [hereinafter *Plaintiffs' Brief*] (arguing phrase "under God" in the Pledge asserts, "theistic supremacy, directly disaffirming plaintiffs' religious beliefs"); Complaint at 5, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, No. MICV2010-04261 (Mass. Super. Ct. June 5, 2012) [hereinafter *Complaint*] ("Despite [plaintiffs' religious beliefs], on a daily basis the defendants' public schools assert, through an official, school-sponsored ceremony, that in fact the Does' religious views are wrong."). Plaintiffs reasoned that the language of the Pledge of Allegiance affirms that the nation is in fact "under God" and therefore favors monotheistic students, classifying them as quintessential patriots, while necessarily classifying non-theistic students, such as the plaintiffs, as less patriotic or even unpatriotic. *Complaint, supra*, at 12; cf. Corbin, *supra* note 2, at 399 (asserting phrase "under God" in Pledge links God and patriotism, thereby embodying and perpetuating stereotypes). Plaintiffs' "hold and affirm religious views that are Humanists. With regard to the existence of a divinity, [plaintiffs] are atheists, as they do not accept the existence of any type of God or gods." *Complaint, supra*, at 2 (discussing Doe family's religious beliefs).

¹⁸ See *Plaintiffs' Brief, supra* note 17, at *13-14 (asserting Superior Court's erroneously relied on federal precedent because plaintiffs are not raising federal claims).

¹⁹ See Reply Brief of the Plaintiffs-Appellants, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2013 WL 3858253, at *1 [hereinafter *Plaintiffs' Reply*] (rebutting defendants' assertion that plaintiffs are not classified or treated differently than any other students). "The exercise denies atheists and Humanists the ability to meaningfully participate in an official patriotic practice that favors similarly situated Christians and other God-believers." *Id.*

²⁰ *Complaint, supra* note 17, at 5. During oral arguments, Chief Justice Ireland poked fun at

the plaintiffs maintained that the daily recitation stigmatized atheists and perpetuated existing prejudices.²¹ During oral arguments, plaintiffs' counsel noted the long history of prejudice and animosity towards atheists and nontheists in this country.²² Furthermore, while participation is not compulsory, the Doe children wished to "stand and participate with their schoolmates as equals."²³

The plaintiffs alleged that they had suffered and continue to suffer actual harm as a result of the defendants' actions, "thereby having their religious beliefs publically rejected, having their patriotism and the patriotism of their religious class brought into question, and being portrayed as outsiders and second-class citizens."²⁴ However, plaintiffs were unable to present any evidence that they had been treated, or even

the plaintiffs' argument by asking plaintiffs' counsel to repeat what the court officer said when the session opened. *See* Oral Argument at 2:15, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), *available at* http://www2.suffolk.edu/sjc/archive/2013/SJC_11317.html (noting courts across Massachusetts are opened with "God save the Commonwealth"). In response, plaintiffs' counsel argued that opening session with "God save the Commonwealth" is a truly ceremonial act, unlike the daily recitation of the Pledge in public schools, which is an affirmation of patriotism and an indoctrination of the belief that this country is "one Nation under God." *See id.* at 3:17.

²¹ *See Plaintiffs' Reply*, *supra* note 19, at *1 (arguing stigmatization creates suspect classification between god-believers and non-believers). *But see* Brief of the Defendants/Interveners-Appellees, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2013 WL 3858255, at *27 [hereinafter *Interveners' Brief*] (contending stigmatization alone does not warrant equal protection claim absent denial of equal treatment).

²² *See* Oral Argument, *supra* note 20, at 11:57 (highlighting that not one of 535 congressmen and representatives in this country is openly atheist).

²³ *Plaintiffs' Brief*, *supra* note 17, at *11; *Complaint*, *supra* note 17, at 6 (stating Doe children want to meaningfully participate in ceremony that does not discriminate against them). Plaintiffs asserted that the exercise itself still discriminates, regardless of its voluntary nature. *See* Oral Argument, *supra* note 20, at 9:47. Furthermore, the plaintiffs maintained that the daily recitation of the Pledge in Massachusetts public schools perpetuates the negative preconceptions about atheists and non-believers by essentially classifying them as outsiders in our society and in turn regarding them as second-class citizens. *See Plaintiffs' Brief*, *supra* note 17, at *10; Brief of Amicus Curiae Center for Inquiry, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2013 WL 6850789, at *9-10 [hereinafter *Inquiry Brief*] ("It is impermissible for the State to condition the benefit of participation in a public school group activity on a pupil's renunciation of her religious beliefs, even when participation in the activity is voluntary."); *see also* Corbin, *supra* note 2 at 398-99 (arguing government expressions of religion perpetuate negative stereotypes that atheists are immoral and unpatriotic). Corbin addressed the history of persistent distrust of nonbelievers and noted that atheism is often linked with a lack of patriotism. *See* Corbin, *supra* note 2, at 366.

²⁴ *Complaint*, *supra* note 17, at 6; *see* *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 742 (Mass. 2014) ("[Plaintiffs] claimed that it is inappropriate for their children to have to draw attention to themselves by not participating, possibly leading to unwanted attention, criticism and potential bullying, and that at their children's ages, fitting in is an important psychological need.") (internal quotation marks omitted).

perceived, any differently by school administrators, teachers, or other students because of their religious beliefs.²⁵

The defendants relied on federal precedent and the United States Constitution and argued that the plaintiffs' equal protection claim under the Massachusetts Constitution must fail.²⁶ The defendants' argument hinged on the voluntary nature of the daily exercise, reasoning that if any classification exists, it is the individual students, not the statute or even the School Districts, who create such classification.²⁷ During oral arguments,

²⁵ *Doe*, 8 N.E.3d at 749 (“[T]here is nothing empirical or even anecdotal in the summary judgment record to support a claim that the children actually have been treated or perceived by others as ‘outsiders,’ ‘second-class citizens,’ or ‘unpatriotic.’”).

²⁶ See 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 *3 [hereinafter *Defendants' Brief*] (maintaining that equal protection standards under Massachusetts Constitution are identical to those under Fourteenth Amendment). The defendants reasoned that this was significant because the federal circuit courts have consistently held that the voluntary recitation of the Pledge in public schools does not violate the United States Constitution. See *id.* at *3-4; see also Brief for Amici Curiae Alliance Defending Freedom and Massachusetts Family Institute, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2013 WL 3858254, at *11-12 [hereinafter *Alliance Brief*] (arguing protections under Federal Constitution are broader than those under Massachusetts Constitution). The Alliance Brief reasoned that the United States Constitution provides greater protection than the Massachusetts Constitution because the latter prohibits discrimination based on specific enumerated classes of people, whereas the former prohibits all discrimination. See *Alliance Brief*, *supra*, at *12. But see *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959 (Mass. 2003) (emphasizing Massachusetts Constitution provides broader protection than Federal Constitution). In its decision in *Goodridge*, the SJC reasoned that the Massachusetts Constitution protects “both ‘freedom from’ unwarranted government intrusion ... and ‘freedom to’ partake in benefits created by the State for the common good.” *Id.*

²⁷ See *Defendants' Brief*, *supra* note 26, at *13-16 (reasoning statute does not mandate different treatment of, or confer benefit to, any religious class); see also *Intervenors' Brief*, *supra* note 21, at *14 (arguing right to opt out does not create a discriminatory classification). But see Oral Argument, *supra* note 20, at 19:21 (showing Justice Lenk note to defense counsel “it’s hard for a six-year-old to opt out”); *Inquiry Brief*, *supra* note 23, at *17 (“That a school activity is voluntary does not immunize it from a challenge to a classification scheme that bars a class of individuals from participating.”). In addition, the defendants-intervenors reason that the words “under God” do not classify people according to religion “any more than the word ‘allegiance’ can be said to classify people into groups of citizens and non-citizens.” *Intervenors' Brief*, *supra* note 21, at *14. Furthermore, since the Pledge is a statement of political philosophy rather than a religious statement, the defendants-intervenors argue that it cannot be said to classify people on the basis of religion. See *id.* at *17-19 (demonstrating Pledge was designed as statement of political philosophy and national loyalty); see also Amicus Curiae Brief of the American Center for Law and Justice in Support of Defendants-Appellees, *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (Mass. 2014) (No. SJC-11317), 2013 WL 3858256, at *3-6 [hereinafter *ACLJ Brief*] (reasoning phrase “one Nation under God” in Pledge “describes an indisputable historical fact”). But see H.R. REP. NO. 83-1693 (1954), reprinted in 1954 U.S.C.A.N. 2339, 2340 (“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.”); *Plaintiffs' Reply*, *supra* note 19, at *8 (“The exercise takes place on school property, during class time, and is even led by

defense counsel emphasized that there was no language implicating religion in the Pledge statute, and that the only religious language is in the language of the Pledge itself.²⁸ In addition, defense counsel argued that notwithstanding this religious language, the Pledge is not an affirmation, but rather it is a statement of our political philosophy.²⁹ As such, the defendants' asserted that since the Pledge statute does not create a classification on its face, the plaintiffs were required to prove discriminatory intent in order to prevail on their claim.³⁰

The Massachusetts Pledge statute, as the defendants argued, did not violate the Massachusetts Constitution because it applied equally to both theistic and non-theistic students, given that a student could elect to abstain from participation for any or no reason at all.³¹ Furthermore, during oral arguments, defense counsel called attention to the fact that the plaintiffs failed to offer any evidence of a single student anywhere in the Commonwealth that claimed to have been forced or pressured into reciting the Pledge since "under God" was added in 1954.³² However, the plaintiffs rebutted the defendants' assertion by reasoning that an atheist student could only gain the same benefit from this daily patriotic exercise as his or her

a school official. These facts establish state action for ERA purposes."). The plaintiffs emphasize that while voluntariness is a central element to First Amendment analysis; it is irrelevant for Equal Protection analysis. *See Plaintiffs' Reply*, *supra* note 19, at *8; *see also* Oral Argument, *supra* note 20, at 26:29 (discussing how voluntariness affects equal protection analysis). When defense counsel argued that there was no equal protection violation because recitation was voluntary, Justice Lenk quickly asserted "voluntariness has nothing to with equal protection analysis, does it?" Oral Argument, *supra* note 20, at 26:29.

²⁸ Oral Argument, *supra* note 20, at 20:17; *see* MASS. GEN. LAWS ch. 71, § 69 (2012) (providing for daily recitation of Pledge in all public schools).

²⁹ Oral Argument, *supra* note 20, at 20:23 ("[Pledge] is a statement of our political philosophy ... that our rights did not come from the king, or the tsar, or the queen, they came from something higher ... innate.").

³⁰ *See Interveners' Brief*, *supra* note 21, at *28-29 (noting plaintiffs have offered no evidence that named defendants had any discriminatory intent). Although the plaintiffs' cited Congress' intent in adding the phrase "under God" to the Pledge, and in turn argue that Congress did in fact have a discriminatory intent, the defendants-interveners noted that Congress was not a named defendant in this case, and therefore their intent, however discriminatory it might have been, was irrelevant. *See id.* at 29. *But see Plaintiffs' Reply*, *supra* note 19, at *13-19 (citing *Goodridge* and other Massachusetts cases, plaintiffs argue ERA does not have "discriminatory intent" requirement); *see also Goodridge*, 798 N.E.2d at 971-72 (Greaney, J., concurring) ("That our marriage laws, unlike antimiscegenation laws, were not enacted purposely to discriminate in no way neutralizes their present discriminatory character.").

³¹ *See Defendants' Brief*, *supra* note 26, at *13-14 (reasoning no religious classification because students may abstain for reasons other than religion); *Alliance Brief*, *supra* note 26, at *20 ("Plaintiffs are entitled to equal laws, not equal results.") (internal quotation marks omitted); *see also* *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 14 (1st Cir. 2010) (dismissing plaintiffs' equal protection claim, reasoning New Hampshire Pledge Statute applied equally to all students).

³² Oral Argument, *supra* note 20, at 24:32.

God-believing peers, by disaffirming the very trait that characterizes atheists and non-believers as a class: disbelief in God.³³

Furthermore, the plaintiffs argued that religion, being among the classifications specified in the ERA, the SJC must apply strict scrutiny.³⁴ It is well established that the classifications enumerated in Article 106 of the Massachusetts Constitution are subject to the strictest judicial scrutiny.³⁵ In their complaint, the plaintiffs stressed that although there might be a legitimate governmental interest in instilling values of patriotism and good citizenship through a daily recitation of the Pledge, “there is no rational basis, let alone compelling reason, for inclusion of the discriminatory term ‘under God’ in such recitation.”³⁶ The defendants, on the other hand, stressed that the Doe children were not classified or treated differently than any other students, and insisted that the plaintiffs’ Equal Protection claim should therefore fail.³⁷ However, the defendants argued that even if the court found that the Pledge statute created a classification, it should only apply rational basis scrutiny, because the Pledge statute—both written and implied—does not create a suspect classification so as to warrant the application of strict scrutiny.³⁸ Even assuming there was a classification,

³³ See *Plaintiffs’ Reply*, *supra* note 19, at *2 (citing Iowa and Massachusetts highest courts’ reasoning in legalizing same-sex marriage); see also *Varnum v. Brien*, 763 N.W.2d 862, 885 (Iowa 2009) (“[A] gay or lesbian person can only gain the same rights under the statute as a heterosexual person by negating the very trait that defines gay and lesbian people as a class—their sexual orientation.”); *Goodridge*, 798 N.E.2d at 952-53 (finding statute classified on basis of sexual orientation even though it was facially neutral).

³⁴ See *Plaintiffs’ Brief*, *supra* note 17, at *12 (rejecting Superior Court’s application of mere rational basis scrutiny); see also MASS. CONST. pt. 1, art. 1, as amended by MASS. CONST. amend. art. 106 (“All people are born free and equal and have certain natural, essential and unalienable rights ... Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).

³⁵ See *Finch v. Commonwealth Health Ins. Connector*, 946 N.E.2d 1262, 1268-69 (Mass. 2011) (asserting Article 106 mandates strict scrutiny of enumerated classifications); *Goodridge*, 798 N.E.2d at 960 (highlighting strict scrutiny as appropriate standard of review where statute uses suspect classification); *Lowell v. Kowalski*, 405 N.E.2d 135, 139 (Mass. 1980) (applying strict scrutiny for gender classification, as required under ERA); *Commonwealth v. King*, 372 N.E.2d 196, 206 (Mass. 1977) (reasoning all enumerated classifications are subject to strictest judicial scrutiny); see also *Plaintiffs’ Brief*, *supra* note 17, at *15-16 (noting purpose of Article 106 was to guarantee courts applied strict scrutiny for enumerated classifications).

³⁶ *Complaint*, *supra* note 17, at 7 (noting government interest was achieved before “under God” was added to Pledge in 1954).

³⁷ See *Defendants’ Brief*, *supra* note 26, at *14-18 (“[I]t is undisputed that all public school students (whether they be Christian, Jewish, Muslim, Hindu or Atheist) in the School Districts may participate or not participate in the Pledge of Allegiance on any given day for any or no reason.”).

³⁸ See *Defendants’ Brief*, *supra* note 26, at *27-29 (“[T]he only possible distinction in this dispute is between students who want to say the Pledge ... and those who do not, which is not a distinction based on a suspect classification.”). However, the defendants maintained that section

defendants maintained that the Pledge statute nonetheless satisfies strict scrutiny, because the voluntariness of the act make it the least discriminatory method possible of furthering the government's compelling interest in promoting patriotism and loyalty.³⁹

The Superior Court followed the defendants' argument and applied rational basis scrutiny.⁴⁰ The court reasoned that the daily recitation of the Pledge is a patriotic exercise, and inclusion of the phrase "under God" in the Pledge does not convert it to a religious exercise.⁴¹

Ultimately, the SJC rejected the plaintiffs' argument and upheld the Superior Court's decision.⁴² In its decision, the SJC noted that there was some indication in the legislative history that the purpose behind amending the language of the Pledge to include the phrase "under God" was non-secular.⁴³ Nonetheless, it reasoned that "[a]lthough the words 'under God' undeniably have a religious tinge, courts that have considered the history of the pledge and the presence of those words have consistently concluded that the pledge, notwithstanding its reference to God, is a fundamentally patriotic exercise, not a religious one."⁴⁴

The SJC found the plaintiffs' reliance on *Finch* misguided.⁴⁵ It

sixty-nine would satisfy even strict scrutiny, as it would be difficult, if not impossible to more narrowly tailor a law that is already completely voluntary. *See id.* at *34-35. *But see Plaintiffs' Brief, supra* note 17, at *36 (arguing practice not narrowly tailored to compelling government interest of instilling patriotism and loyalty). The plaintiffs insisted that, "assuming, therefore, that the government has a compelling interest in instilling attitudes of 'patriotism and loyalty,' the means chosen to achieve those ends—specifically, a daily exercise affirming a central religious belief that favors some students over others—is not narrowly tailored to avoid discrimination in achieving such ends." *Id.* at *35-36 (describing multiple alternative means of instilling patriotism and loyalty).

³⁹ Oral Argument, *supra* note 20, at 27:55.

⁴⁰ *See Doe v. Acton-Boxborough Reg'l Sch. Dist.*, No. MICV2010-04261, slip op. at 19-20 (Mass. Super. Ct. June 5, 2012) (rejecting plaintiffs' argument and refusing to apply strict scrutiny). The Superior Court reasoned that the Pledge statute did not classify students on the basis of religion simply as a result of their non-participation because students may choose not to participate for any or no reason at all. *See id.* at 19 (citing *Freedom From Religion Foundation*); *see also* *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13 (1st Cir. 2010) (providing basis for Superior Court's decision).

⁴¹ *See Doe*, slip op. at 19 (applying strict scrutiny only when statute infringes upon fundamental right or involves suspect class); *see also* *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1038 (9th Cir. 2010) (classifying Pledge as patriotic exercise rather than prayer or religious exercise). *But see Newdow*, 597 F.3d at 1038 ("We agree that the students in elementary schools are being coerced to listen to the other students recite the Pledge. They may even feel induced to recite the Pledge themselves.").

⁴² *See Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 752 (Mass. 2014) (holding daily recitation of Pledge does not violate Massachusetts Constitution).

⁴³ *See id.* at 743 (recognizing Pledge was amended during escalation of Cold War).

⁴⁴ *Id.* at 744.

⁴⁵ *See id.* at 746 (noting *Finch* reaffirmed article 106 classifications subjected to strict

reasoned that “the flaw in the argument . . . is that there is no classification, let alone a suspect classification based on religion, created by the practice of reciting the pledge in the manner it is presently recited, voluntarily.”⁴⁶ The SJC’s finding hinged on the voluntary nature of the daily recitation of the Pledge, reasoning that any child can abstain from reciting all or part of the Pledge for any reason, religious or otherwise.⁴⁷

Although the SJC’s equal protection inquiry could have ended there, the court further discredited the legitimacy of the plaintiffs’ alleged injury.⁴⁸ Although the plaintiffs insisted that their children’s decision not to recite the Pledge may lead to potential bullying, the SJC emphasized that there was no evidence indicating that the plaintiffs’ children, or any other children in Massachusetts, were in fact bullied as a result of their decision to abstain from reciting the Pledge.⁴⁹ As such, the SJC held “that this very limited type of consequence alleged by the plaintiffs—feeling stigmatized and excluded—is not cognizable under art. 106.”⁵⁰ Ironically, the SJC criticized the plaintiffs’ strategic advocacy choice to limit their constitutional claim to the Equal Rights Amendment, and cautioned against

scrutiny). The SJC explained that “if the practice of reciting the pledge did in fact single out the plaintiffs and treat them differently from others in any legally cognizable way (in other words, create a ‘classification’) because of their religious beliefs, their argument might be commendable.” *Id.*

⁴⁶ *Id.* (rejecting plaintiffs’ argument that Pledge should be subject to strict scrutiny). The SJC asserted that all students are treated alike, and that there is no discriminatory classification based on religion because the practice is entirely voluntary. *See id.* at 747 (“[S]ignificantly, no student who abstains from reciting the pledge, or any part of it, is required to articulate a reason for his or her choice to do so.”).

⁴⁷ *See Doe*, 8 N.E.3d at 747-49 (“[O]ne student’s choice not to participate because of a religiously held belief is . . . indistinguishable from another’s choice to abstain for a wholly different, more mundane, and constitutionally insignificant reason.”).

⁴⁸ *See id.* at 749 (emphasizing plaintiffs’ children were not treated or perceived any differently because of religious beliefs).

⁴⁹ *See id.* (describing circumstances of plaintiffs’ alleged injury).

[Plaintiffs] contend that the mere recitation of the pledge in the schools is itself a public repudiation of their religious values and, in essence, a public announcement that they do not belong. It is this alleged repudiation that they say causes them to feel marginalized, sending a message to them and to others that, because they do not share all of the values that are being recited, they are unpatriotic outsiders.

Id. (labeling plaintiffs’ claim of stigma as “more esoteric” and therefore not cognizable) (internal quotation marks omitted).

⁵⁰ *Id.* (rejecting plaintiffs’ equal protection argument). The SJC reiterated that where a program or activity is entirely voluntary, any feeling of “stigma” caused by seeing or hearing others participate is not cognizable for purposes of equal protection. *Id.* at 750-51 (“The fact that a school . . . operates a voluntary program or offers an activity that offends the religious beliefs of one or more individuals, and leaves them feeling ‘stigmatized’ or ‘excluded’ as a result, does not mean that the program or activity necessarily violates equal protection principles.”).

using equal protection as a fallback constitutional claim.⁵¹

Most notably, Justice Lenk wrote separately to express her view that the inclusion of the words “under God” in the Pledge “creates a classification that is potentially cognizable under the equal rights amendment of the Massachusetts Constitution.”⁵² Justice Lenk reasoned that the phrase “under God,” by its very nature, has a religious connotation that cannot be diminished merely by the fact that the daily exercise is voluntary.⁵³ As such, she cautioned that the court’s holding should not be construed as a bar on any and all like claims, and avowed that “should future plaintiffs demonstrate that the distinction created by the pledge as currently written has engendered bullying or differential treatment, [she] would leave open the possibility that the equal rights amendment might provide a remedy.”⁵⁴

III. THE STALEMATE BETWEEN THE PLEDGE OF ALLEGIANCE AND THE CONSTITUTION

A. The History of the Pledge & Its Challengers

In 1954, during the height of the Cold War and in an attempt to distinguish America from “atheistic” communism and the Soviet Union, Congress amended the language of the Pledge of Allegiance to read: “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.”⁵⁵ The Knights of Columbus, a Catholic fraternal

⁵¹ See *id.* at 751 (“Where the plaintiffs do not claim that a school program or activity violates anyone’s First Amendment [rights] ... they cannot rely instead on the equal rights amendment, and claim that the school’s even-handed implementation ... and the plaintiffs’ exposure to it, unlawfully discriminates against them on the basis of religion.”) (internal emphasis omitted).

⁵² *Doe*, 8 N.E.3d at 752 (Lenk, J., concurring) (noting Pledge creates potentially cognizable classification, although not in present case).

⁵³ See *id.* (finding existence of suspect classification notwithstanding Pledge’s voluntariness). Justice Lenk asserted that the fact that recitation was voluntary, in no way lessened the clear non-secular implication of the words “under God.” See *id.* (“A reference to a supreme being, by its very nature, distinguishes between those who believe such a being exists and those whose beliefs are otherwise. This distinction creates a classification, one that is based on religion.”).

⁵⁴ *Id.* at 752-53.

⁵⁵ See Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954) (codified at 4 U.S.C. § 4 (2000)) (adding phrase “under God” to Pledge of Allegiance); H.R. REP. NO. 83-1693 (1954), reprinted in 1954 U.S.C.A.N. 2339, 2340 (“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.”); see also Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2118-21 (1996) (stating “under God” added to recognize God

organization, played an integral role in altering the Pledge.⁵⁶ Even before the phrase “under God” was added to the Pledge, litigants challenged its constitutionality.⁵⁷ Since 1954, many litigants have challenged the constitutionality of the Pledge as a violation of the Establishment Clause, but the Supreme Court has never ruled on the issue.⁵⁸ Ultimately, lower courts have been left to decide this issue for themselves; however notwithstanding the lack of guidance, these courts have remained fairly consistent in holding that the Pledge does not violate the United States Constitution.⁵⁹

as definitive factor in American way of life); Bill W. Sanford, Jr., *Separation v. Patriotism: Expelling the Pledge from School*, 34 ST. MARY'S L.J. 461, 464-65 (2003) (detailing principles, history, and reasoning behind Pledge); Thompson, *supra* note 2, at 564 (describing history of Pledge of Allegiance). The Pledge of Allegiance, as written by a socialist Baptist minister in 1892, did not include the words “under God” until 1954. See Thompson, *supra* note 2, at 564.

⁵⁶ See Collins, *supra* note 16, at 16 (providing history of Knights of Columbus's involvement in adding “under God” to Pledge). The Knights of Columbus is a Catholic-based fraternal benefit organization. *Our Principles*, KNIGHTS OF COLUMBUS, <http://www.kofc.org/un/en/about/principles/index.html> (last visited Mar. 2, 2014). One of the organization's core principals is patriotism. *Id.* (“Members of the Knights of Columbus ... are patriotic citizens. We are proud of our devotion to God and country, and believe in standing up for both. Whether it's in public or private, the Knights remind the world that Catholics support their nations and are amongst the greatest citizens.”); see Collins, *supra* note 16, at 16 (discussing history of Knights of Columbus and organization's values). Collins explained that, “out of their patriotism and as a showing against communism, the Knights of Columbus began adding the phrase ‘under God’ [to the] Pledge in their ceremonies.” Collins, *supra* note 16, at 16. In 1952, the Knights of Columbus began its crusade to amend the language of the Pledge, and in 1954, President Eisenhower signed a bill into law that officially added the phrase “under God” to the Pledge. See *id.* at 16-17 (arguing legislative history of Pledge indicates religion as basis for change).

⁵⁷ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641-42 (1943) (holding regulations requiring students to recite Pledge violated First and Fourteenth Amendments). The Supreme Court's holding in *Barnette* ultimately established the standard that students could not be compelled to recite the Pledge of Allegiance in school, thus implying that any recitation must be voluntary. See *id.* at 642; Tara P. Beglin, Note, “One Nation Under God,” *Indeed: The Ninth Circuit's Problematic Decision to Change our Pledge of Allegiance*, 20 ST. JOHN'S J. LEGAL COMMENT. 129, 137-38 (2005) (discussing Supreme Court's decision in *Barnette*).

⁵⁸ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (avoiding deciding whether Ninth Circuit erred in holding phrase “under God” violated Establishment Clause); see also U.S. CONST. amend. I (prohibiting making of any law respecting establishment of religion or infringing freedom of religion). However, the Supreme Court has decided a number of other cases that have addressed the constitutionality of various other government actions respecting religion. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000) (holding student-led, student-initiated prayer before football games impermissibly coercive and violated Establishment Clause); *Lee v. Weisman*, 505 U.S. 577, 581-83 (1992) (finding invocation by rabbi at middle school graduation unconstitutional); *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987) (striking down law promoting teaching of creationism); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223-25 (1963) (holding statutes and policies requiring reading of Bible in public schools violated Establishment Clause).

⁵⁹ See, e.g., *Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 6-15 (1st Cir.

Litigants have rarely brought challenges to government expressions of religion under the Equal Protection Clause, and when they do, it usually constitutes an unimportant and unaddressed secondary claim.⁶⁰ Only two cases have ever specifically addressed whether the Pledge violates the Equal Protection Clause of the United States Constitution.⁶¹ In both *Freedom from Religion* and *Sherman*, the courts were able to gloss over the Equal Protection issue because it was used as a secondary claim.⁶² Instead, litigants have relied on the Establishment Clause, but this reliance has proven inadequate and arguably inappropriate, particularly for those challenging the Pledge.⁶³

Despite the Court's decision in *Barnette*, children have been continuously punished for refusing to recite the Pledge in school.⁶⁴

2010) (holding Pledge does not violate Establishment, Free Exercise, Due Process, or Equal Protection Clauses); *Myers v. Loudoun Cnty. Pub. Sch.*, 418 F.3d 395, 397 (4th Cir. 2005) (asserting Pledge is patriotic activity and statement of loyalty to flag, not religious exercise); *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979) (holding teacher not free to disregard school's policy requiring teachers lead daily recitation of Pledge); *Circle Sch. v. Phillips*, 270 F. Supp. 2d 616, 621-22 (S.D.N.Y. 2003) (reasoning statute did not violate *Barnette* because it included opt-out provision); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 758 F. Supp. 1244, 1251-52 (N.D. Ill. 1991) (holding Illinois Pledge statute constitutional under First and Fourteenth Amendments), *aff'd in part, rev'd in part on other grounds*, 980 F.2d 437 (7th Cir. 1992). Both *Freedom from Religion* and *Sherman* specifically held that the Pledge did not violate the Equal Protection Clause. See *Freedom from Religion*, 626 F.3d at 14 (reasoning New Hampshire statute did not provide different treatment of any class based on religion); *Sherman*, 758 F. Supp. at 1251 (holding Illinois statute rationally related to legitimate state interest in adhering to "suitable curriculum").

⁶⁰ See Gellman & Looper-Friedman, *supra* note 3, at 666 ("[T]he First Amendment clauses are less effective when the problem is neither interference nor true coercion, but unequal treatment."). Gellman and Looper-Friedman asserted that reliance on the Establishment Clause is a mistake because its analysis focuses on coercion, religious purpose, or entanglement of government and religion, rather than on equality. See *id.* at 672.

⁶¹ See *Freedom from Religion*, 626 F.3d at 14 (reasoning New Hampshire statute applies equally to God-believers and nonbelievers giving people right to opt-out); *Sherman*, 758 F. Supp. at 1251 (failing to apply strict scrutiny because no fundamental right or suspect classification involved).

⁶² See *Freedom from Religion*, 626 F.3d at 14 (addressing Equal Protection claim in one paragraph of its fifteen-page decision); *Sherman*, 758 F. Supp. at 1251 (addressing Equal Protection claim at end of decision in less than one half page).

⁶³ See Gellman & Looper-Friedman, *supra* note 3, at 702-04 (arguing "Equal Protection [i]s a [b]etter [f]it [w]here the [p]roblem is [m]arginalization"). The inclusion of the phrase "under God" in the Pledge is rooted in separatism, making it better suited for the Equal Protection Clause. See *id.* at 703-04.

⁶⁴ See Lori A. Catalano, Comment, *Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy*, 34 CAP. U. L. REV. 601, 609-10 (2006) (describing recent incidents of teachers punishing students for refusing to recite Pledge); see also *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 641-42 (1943) (establishing standard that students could not be compelled to recite Pledge). For example, in recent years a thirteen-year-old Jehovah's Witness in Washington was forced to stand outside in the rain for refusing to recite the Pledge in school,

Incidents such as these illustrate the unequal treatment of a class of students because of their religion, and therefore demonstrate the appropriateness of the Equal Protection Clause for challenges to the Pledge.⁶⁵

B. Equal Protection

Equal Protection is rooted in the notion that the states must treat those who are similarly situated alike.⁶⁶ “All equal protection issues pose the same basic question: Is the government’s classification justified by a sufficient purpose?”⁶⁷ More specifically, all equal protection claims are subject to a three-prong analysis.⁶⁸

Determining how the government is drawing a distinction between people is the fundamental first step to any equal protection analysis.⁶⁹ The

while a sixteen-year-old atheist student in California was given detention for failing to recite the Pledge. Catalano, *supra*, at 610; see Brad K. Brown, *The Pledge Not Taken*, S.F. CHRON., June 29, 1998, at A3 (reporting incident of atheist student given detention); Dionne Searcey, *Student May Sue District Over Pledge*, SEATTLE TIMES, Mar. 10, 1998, at B1 (reporting story of Jehovah’s Witness forced to stand in rain by teacher). Even more striking, when “a high school senior in Alabama refused to recite the Pledge ... the school gave him the choice of receiving detention (and not graduating) or being paddled.” Catalano, *supra*, at 610; see *Holloman v. Harland*, 370 F.3d 1252, 1261 (11th Cir. 2004) (describing details of Alabama teen’s punishment).

⁶⁵ See Gellman & Looper-Friedman, *supra* note 3, at 702-04 (asserting appropriateness of Equal Protection Clause for religious expressions by governments).

⁶⁶ See Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 587 (2011) (discussing concept of “similarly situated”). In her examination of the concept of “similarly situated,” Shay notes that many opinions repeat similar language in emphasizing that the Constitution requires states to treat those similarly situated alike, but that it does not require things that are different “to be treated in law as though they were the same.” *Id.* However, the concept of “separate but equal” has long been discredited as a justification for disparate treatment. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting argument that equal application of law satisfies Fourteenth Amendment); *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964) (“Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (finding separate educational facilities based on race inherently unequal).

⁶⁷ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669 (3d ed. 2006).

⁶⁸ See *id.* at 670 (asserting “all equal protection issues can be broken down into three questions”). Chemerinsky identifies the three major questions that make up any equal protection analysis: “What is the classification? What level of scrutiny should be applied? Does the particular government action meet the level of scrutiny?” *Id.*

⁶⁹ See *id.* at 670 (emphasizing equal protection analysis must always begin with determining government’s classification). “There are two basic ways of establishing a classification. One is where the classification exists on the face of the law, that is, where the law in its very terms draws a distinction among people ... Alternatively, sometimes laws are facially neutral, but there is a discriminatory impact.” *Id.* When a law is neutral on its face, the Supreme Court has required its

Supreme Court has firmly established that the type of classification determines the appropriate level of scrutiny.⁷⁰ Laws implicating a fundamental right or “suspect” class are subject to heightened judicial scrutiny, while all others must satisfy at least rational basis scrutiny.⁷¹ Although the standard for equal protection analysis under both the Massachusetts Constitution and the Federal Constitution is identical, the protections afforded by the two are not.⁷²

There are notable differences between the United States Constitution and the Massachusetts Constitution.⁷³ Under the United States Constitution, people are afforded equal protection of the laws, but the Massachusetts Constitution goes further by declaring that everyone is

challengers to prove both a discriminatory impact and a discriminatory purpose for their equal protection claim to stand. *See, e.g.,* McCleskey v. Kemp, 481 U.S. 279, 292 (1987) (noting claimant has burden of proving existence of legislative discriminatory purpose); *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273-74 (1979) (“[Discriminatory] impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.”) (internal quotation marks omitted); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (asserting law is not unconstitutional solely because of racially disproportionate impact absent discriminatory purpose); *Palmer v. Thompson*, 403 U.S. 217, 224-26 (1971) (stressing discriminatory purpose alone is not sufficient and requiring proof of discriminatory impact). *But see* *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 971-972 (Mass. 2003) (Greaney, J., concurring) (arguing lack of discriminatory purpose does not mitigate a law’s present discriminatory impact).

⁷⁰ *See* CHEMERINSKY, *supra* note 67, at 671 (noting different levels of scrutiny are applied depending on type of classification).

⁷¹ *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-69 (2007) (discussing history and modern application of strict scrutiny). The Supreme Court has firmly established that under the Fourteenth Amendment, classifications based on race or national origin, or those implicating a fundamental right, are subject to strict scrutiny. *See* CHEMERINSKY, *supra* note 67, at 671 (discussing different levels of judicial scrutiny). However, state courts, such as the SJC, have applied strict scrutiny to other classifications where the Equal Rights Amendment to their state’s constitution specifically enumerates certain suspect classifications. *See* *Finch v. Commonwealth Health Ins. Connector Auth.*, 946 N.E.2d 1262, 1268-69 (Mass. 2011) (asserting Article 106 mandates strict scrutiny of enumerated classifications); *Commonwealth v. King*, 372 N.E.2d 196, 206 (Mass. 1977) (reasoning all enumerated classifications are subject to strictest judicial scrutiny).

⁷² *See* *Brackett v. Civil Serv. Comm’n*, 850 N.E.2d 533, 545 (Mass. 2006) (noting equal protection analysis under Massachusetts Constitution is same as that under Federal Constitution); *Goodridge*, 798 N.E.2d at 948-49 (“The Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution.”).

⁷³ *See* U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); MASS. CONST. pt. 1, art. 1, *as amended by* MASS. CONST. amend. art. 106 (“All people are born free and equal and have certain natural, essential and unalienable rights ... Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).

equal.⁷⁴ Furthermore, the Massachusetts Constitution, unlike the Federal Constitution, specifically enumerates certain “suspect” classifications that are to be subject to strict scrutiny.⁷⁵ Among these specifically enumerated suspect classes are classifications based on creed, or religion.⁷⁶ Therefore, under the Massachusetts Constitution, any religious classification by the government is subject to the strictest judicial scrutiny.⁷⁷

Twenty-one states, including Massachusetts, have some form of an Equal Rights Amendment to their state constitutions.⁷⁸ Some of these

⁷⁴ See *Goodridge*, 798 N.E.2d at 948 (“The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.”).

⁷⁵ Compare U.S. CONST. amend. XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”), with MASS. CONST. pt. I, art. I, as amended by MASS. CONST. amend. art. CVI (“All people are born free and equal and have certain natural, essential and unalienable rights ... Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).

⁷⁶ MASS. CONST. pt. I, art. I, as amended by MASS. CONST. amend. art. CVI (“Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”).

⁷⁷ See sources cited *supra* notes 34-35 and accompanying text (discussing SJC’s application of strict scrutiny to classifications enumerated in Article 106).

⁷⁸ ARK. CONST. art. II, § 3 (“The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition.”); CAL. CONST. art. I, § 7 (“A person may not be ... denied equal protection of the laws A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens.”); COLO. CONST. art. II, § 29 (“Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex.”); CONN. CONST. art. I, § 20 (“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.”); FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law and have inalienable rights No person shall be deprived of any right because of race, religion, national origin, or physical disability.”); HAW. CONST. art. I, § 5 (“No person shall be ... denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”); ILL. CONST. art. I, § 2 (“No person shall be ... denied the equal protection of the laws.”); IOWA CONST. art. I, § 6 (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.”); LA. CONST. art. I, § 3 (“No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.”); MD. CONST. DECLARATION OF RIGHTS art. XLVI (“Equality of rights under the law shall not be abridged or denied because of sex.”); MASS. CONST. pt. I, art. I, as amended by MASS. CONST. amend. art. CVI (“All people are born free and equal and have certain natural, essential and unalienable rights Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.”); MONT. CONST. art. II, § 4 (“The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or

states have shown a willingness to broaden the rights afforded to their citizens under their state's constitution.⁷⁹ Notably, these Equal Rights Amendments have been employed in same-sex marriage cases and six states have judicially legalized same-sex marriage.⁸⁰ Although each of these six high courts approached the issue differently, each held that prohibiting same-sex marriage violated the protections afforded to their citizens under their constitutions' Equal Rights Amendments.⁸¹

institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."); N.H. CONST. pt. I, art. II ("Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.J. CONST. art. I, § 5 ("No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."); N.M. CONST. art. II, § 18 ("No person shall be ... denied equal protection of the laws."); PA. CONST. art. I, § 26 ("Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); UTAH CONST. art. I, § 24 ("All laws of a general nature shall have uniform operation."); VA. CONST. art. I, § 4 ("That no man, or set of men, is entitled to exclusive or separate emoluments or privileges from the community."); WASH. CONST. art. I, § 12 ("No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."); WYO. CONST. art. I, § 3 ("Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."); see ILL. CONST. art. I, § 20 ("To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial ethnic, national or regional affiliation are condemned.").

⁷⁹ See Jeffrey A. Parness, *American State Constitutional Equalities*, 45 GONZ. L. REV. 773, 774-776 (2009-2010) (noting state constitutions often contain specific affirmative rights); see, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 420 (Conn. 2008) (recognizing certain instances in which Connecticut Constitution provides greater protection than Federal Constitution); *Goodridge*, 798 N.E.2d at 948-49 ("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."); Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1029-30 (2003) ("[S]ome state supreme courts have afforded their state equality guarantees a wider scope than the Federal Equal Protection Clause in order to protect rights beyond those recognized in the federal arena.").

⁸⁰ See *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5 (*invalidated by Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010)); *Kerrigan*, 957 A.2d at 482; *Varnum v. Brien*, 763 N.W.2d 862, 906-07 (Iowa 2009); *Goodridge*, 798 N.E.2d at 969-70; *Garden State Equality v. Dow*, 82 A.3d 336, 369 (N.J. Super. Ct. 2013); *Griego v. Oliver*, 316 P.3d 865, 888 (N.M. 2013).

⁸¹ Compare *Goodridge*, 798 N.E.2d at 961 (concluding same-sex marriage ban does not even survive rational basis review), and *In re Marriage Cases*, 183 P.3d at 401 (finding sexual orientation a constitutionally suspect classification and applying strict scrutiny), with *Griego*, 316 P.3d at 884 (reasoning classification based on sexual orientation requires intermediate scrutiny),

IV. THE FUTURE OF THE PLEDGE

The inclusion of the words “under God” in the Pledge was undeniably rooted in religion.⁸² In turn, the statutorily mandated daily recitation of the Pledge by all students in public schools across the Commonwealth is a violation of Article 106 of the Massachusetts Constitution.⁸³ Because the Pledge statute mandates the daily recitation of the Pledge, the language of the Pledge, in turn, becomes part of the statute.⁸⁴ A strong argument can be made that the language “under God” in and of itself creates a classification between God-believers and nonbelievers.⁸⁵ However, even if the statute is deemed facially neutral, there still exists a discriminatory impact.⁸⁶

Given that religion is one of the suspect classes specifically enumerated in Article 106, any religious classification must be subject to

and Varnum, 763 N.W.2d at 883 (“[E]qual protection before the law demands more than the equal application of the classifications made by the law. The law itself must be equal.”), *and Kerrigan*, 957 A.2d at 430-32 (recognizing sexual orientation as quasi-suspect classification). *But see Garden State*, 82 A.3d at 361-62 (noting differences between equal protection analysis under New Jersey Constitution and Federal Constitution). In *Greigo*, the Supreme Court of New Mexico concluded that, “intermediate scrutiny must be applied in this case because the LGBT community is a discrete group that has been subjected to a history of purposeful discrimination, and it has not had sufficient political strength to protect itself from such discrimination.” *Greigo*, 316 P.3d at 884 (holding law denying same-sex couples right to marry does not survive intermediate scrutiny); *accord Varnum*, 763 N.W.2d at 895-96 (considering traditional factors established by Supreme Court and applying intermediate scrutiny); *Kerrigan*, 957 A.2d at 432 (“Gay persons have been subjected to and stigmatized by a long history of purposeful and invidious discrimination that continues to manifest itself ... [L]aws singling them out for disparate treatment are subject to heightened judicial scrutiny to ensure [they] are not the product of such historical prejudice and stereotyping.”).

⁸² See *supra* notes 55-56 and accompanying text (detailing purpose of adding “under God” to language of Pledge).

⁸³ Cf. *supra* notes 17, 19, and 21 and accompanying text (arguing stigmatization of nonbelievers creates classification based on religion); *supra* note 71 and accompanying text (noting application of strict scrutiny when ERA specifically enumerates suspect classifications). Prior to the 1954 amendment, the recitation of the Pledge continued to instill values of patriotism and good citizenship, demonstrating that this compelling government interest could be achieved without the inclusion of the words “under God.” See *supra* notes 55-56 and accompanying text (summarizing history of Pledge prior to 1954 amendment).

⁸⁴ See MASS. GEN. LAWS ch. 71, § 69 (2012) (providing for daily recitation of the Pledge in all public schools).

⁸⁵ See *supra* notes 17, 19, and 21 and accompanying text (arguing stigmatization of nonbelievers creates classification).

⁸⁶ See *supra* notes 17, 19, 21-23, and 33 and accompanying text (detailing basis of plaintiffs’ equal protection claim); see also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 971-72 (2003) (Greaney, J., concurring) (noting Massachusetts ERA does not have “discriminatory intent” requirement).

strict scrutiny.⁸⁷ Surely, recitation of the pre-1954 Pledge adequately promoted and instilled values of patriotism and good citizenship without the words “under God.”⁸⁸ This compelling government interest was readily achieved by far less discriminatory means.⁸⁹ Therefore, inclusion of the phrase “under God” is not necessary to further the compelling government interest in instilling values of patriotism and good citizenship among school children.⁹⁰

Although the SJC found in favor of the defendants, the plaintiffs in *Doe* may have still gotten what they wanted; they got the SJC to discuss this issue in depth and not simply gloss over it as other courts have done.⁹¹ Although the plaintiffs had a viable claim, they ultimately failed to execute and emphasize the strongest points of their argument.⁹²

Likely the biggest hurdle a litigator will face is establishing the existence of a classification in their state’s Pledge Statute, although Justice Lenk provides persuasive support for the existence of such.⁹³ Arguably, one of the strongest arguments in favor of challengers is Congress’ clear non-secular purpose in inserting the phrase “under God” into the Pledge.⁹⁴ This phrase was added to the Pledge to distinguish “us”—God-believing America—from “them”—atheist Communist Russia.⁹⁵ The message implying that one cannot be a “true American” and be an atheist at the same time.⁹⁶

Another argument that the plaintiffs made, but failed to fully execute is that the issue of voluntariness has no place in equal protection

⁸⁷ See *supra* note 71 and accompanying text (noting application of strict scrutiny when ERA specifically enumerates suspect classifications).

⁸⁸ See *supra* notes 55-56 and accompanying text (examining history of Pledge).

⁸⁹ Cf. *supra* notes 55-56 and accompanying text (discussing how language of Pledge was amended to include words “under God”).

⁹⁰ Cf. *supra* notes 55-56 and accompanying text (summarizing history of Pledge prior to 1954 amendment).

⁹¹ See cases cited *supra* notes 61-62 and accompanying text (discussing holdings in *Freedom from Religion* and *Sherman*).

⁹² See *supra* notes 17-24, 33-34, and 36 and accompanying text (detailing plaintiffs’ arguments).

⁹³ See *Doe v. Acton-Boxborough Reg’l Sch. Dist.*, 8 N.E.3d 737, 752 (Mass. 2014) (Lenk, J., concurring) (arguing “under God” distinguishes between theists and nontheists thereby classifying students based on religion).

⁹⁴ See *supra* note 55 and accompanying text (addressing history of Pledge and Congress’ purpose in adding phrase “under God”).

⁹⁵ See *supra* notes 55-56 and accompanying text (setting forth history of Pledge and Knights of Columbus’s involvement in its amendment).

⁹⁶ See *supra* note 55 and accompanying text (noting how inclusion of “under God” had non-secular purpose).

analysis.⁹⁷ Many courts have brushed off any claim that the Pledge is unconstitutional on the basis of the Supreme Court's holding in *Barnette* that its recitation must be voluntary.⁹⁸ However, the conclusion that a statutorily mandated daily recitation of the Pledge does not violate equal protection solely because such recitation is voluntary is without merit.⁹⁹ Even Justice Lenk questioned the validity of any argument that the Pledge statute did not offend the Massachusetts Constitution because recitation is voluntary.¹⁰⁰ Although the plaintiffs asserted that voluntariness in no way neutralizes the discriminatory impact, they failed to use this argument to their advantage.¹⁰¹

The plaintiffs also failed to adequately attack the validity of the defense's assertion that the Pledge statute did not violate the Equal Rights Amendment because it applied equally to all public school students across the Commonwealth.¹⁰² The plaintiffs rebutted this assertion by reasoning that an atheist student could only gain the same benefit as his or her God-believing peers, by disaffirming the very trait that characterizes atheists and non-believers as a class: disbelief in God.¹⁰³ Although the plaintiffs' made a compelling argument, they failed to take advantage of the landmark decisions that effectively destroyed any validity of the notion that mere equal application of the law satisfies an equal protection inquiry.¹⁰⁴

⁹⁷ See *Plaintiffs' Reply*, *supra* note 19, at *8 (emphasizing while voluntariness is central to First Amendment analysis, it is irrelevant for Equal Protection).

⁹⁸ See *supra* note 57 and accompanying text (discussing *Barnette* decision and its implications); cases cited *supra* note 59 and accompanying text (citing cases post-*Barnette* that have addressed Pledge's constitutionality).

⁹⁹ See *Inquiry Brief*, *supra* note 23, at *9-10 ("It is impermissible for the State to condition the benefit of participation in a public school group activity on a pupil's renunciation of her religious beliefs, even when participation in the activity is voluntary.").

¹⁰⁰ See *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737, 752 (Mass. 2014) (Lenk, J., concurring) ("[T]he logical implication of the phrase 'under God' is not diminished simply because children need not say those words aloud."); Oral Argument, *supra* note 20, at 26:29 (showing Justice Lenk questioning validity of "voluntariness" argument). When defense counsel argued that there was no equal protection violation because recitation was voluntary, Justice Lenk quickly asserted "voluntariness has nothing to with equal protection analysis, does it?" See Oral Argument, *supra* note 20, at 26:30.

¹⁰¹ See *supra* notes 23 and 33 (recognizing atheist student can only gain same benefit of participation by disaffirming his/her fundamental beliefs); see also *supra* note 27 (addressing defendants' argument that right to opt-out does not create religious classification).

¹⁰² See sources cited *supra* note 31 and accompanying text (discussing defendants' "equal application" argument). Defendants reasoned that the Pledge statute did not violate the Massachusetts Constitution because a student could elect to abstain from participation for any or no reason at all. See *Defendants' Brief*, *supra* note 26, at *13-14.

¹⁰³ See *Plaintiffs' Reply*, *supra* note 19, at *2 (citing Iowa and Massachusetts high courts' reasoning in legalizing same-sex marriage).

¹⁰⁴ See *supra* note 66 and accompanying text (discussing decisions in *Brown*, *Loving*, and *McLaughlin*).

However, the plaintiffs' inability to show any specific occasions on which their children were treated or perceived differently at school because they did not recite the Pledge proved to be their biggest blunder.¹⁰⁵ Litigators seeking to bring an equal protection claim challenging the constitutionality of the Pledge must be able to establish more than a mere feeling of being stigmatized or excluded in order to be cognizable.¹⁰⁶

Litigators seeking to challenge the phrase "under God" in the Pledge should be mindful of their state's constitution when making an Equal Protection argument.¹⁰⁷ State constitutions that specifically enumerate "religion" or "creed" as a suspect classification in their Equal Rights Amendments would serve as ideal forums.¹⁰⁸ This is because any classification based on religion would be considered "suspect" and therefore subject to a more heightened scrutiny.¹⁰⁹ In particular, those

¹⁰⁵ See *supra* notes 49-50 and accompanying text (discussing SJC's reasoning in rejecting plaintiffs' equal protection claim); see also *supra* notes 52-53 and accompanying text (outlining Justice Lenk's concurring opinion).

¹⁰⁶ See *supra* notes 52-54 and accompanying text (leaving open possibility of ERA violation where plaintiff demonstrates Pledge engendered bullying or differential treatment).

¹⁰⁷ See sources cited *supra* note 78 and accompanying text (identifying and describing Equal Rights Amendments to twenty-one states' constitutions).

¹⁰⁸ See CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."); FLA. CONST. art. I, § 2 ("All natural persons, female and male alike, are equal before the law and have inalienable rights No person shall be deprived of any right because of race, religion, national origin, or physical disability."); HAW. CONST. art. I, § 5 ("No person shall be ... denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry."); LA. CONST. art. I, § 3 ("No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."); MASS. CONST. pt. I, art. I, *amended by* MASS. CONST. amend. art. CVI ("All people are born free and equal and have certain natural, essential and unalienable rights Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); MONT. CONST. art. II, § 4 ("The dignity of the human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."); N.H. CONST. pt. I, art. II ("Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."); N.J. CONST. art. I, § 5 ("No person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin."); see also *supra* note 71 and accompanying text (noting application of strict scrutiny when ERA specifically enumerates suspect classifications).

¹⁰⁹ See *supra* note 71 and accompanying text (noting application of strict scrutiny when ERA

states that have judicially legalized same-sex marriage under their state constitution would likely be the most advantageous.¹¹⁰ These states in particular have shown a willingness to broaden the rights afforded to their citizens under their state's constitution.¹¹¹

While the specific enumeration of religion as a suspect classification makes it easier for the litigator, it is by no means necessary for a viable claim.¹¹² Challengers in states whose constitution does not specifically list religion as a suspect class are anything but barred from bringing an equal protection claim, they, however, will face the challenge of advocating for an application of heightened scrutiny.¹¹³ On the other hand, challengers in states with no Equal Rights Amendments to their state's constitution would instead have to bring a claim under the Equal Protection Clause of the Federal Constitution, which would likely prove to be difficult.¹¹⁴

V. CONCLUSION

The state mandated daily recitation of the Pledge of Allegiance, as currently read: "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" is a violation of the Equal Rights Amendment to the Massachusetts Constitution. Although the SJC did not find in favor of the plaintiffs in *Doe v. Acton-Boxborough*, the plaintiffs still achieved a victory of their own. They got the SJC to address this issue in depth, rather than gloss over it like so many other courts have done. Notwithstanding the decision, the novel argument made in *Doe* will likely ignite a wave of similar challenges in state courts across the country.

Litigants seeking to bring a challenge to the Pledge under an equal protection claim should be mindful of the specific language of their state's constitution. States that have shown a willingness to broaden the rights afforded to their citizens under their state's constitution would serve as particularly advantageous forums. With everyone once again talking about

specifically enumerates suspect classifications).

¹¹⁰ See *supra* notes 79-81 and accompanying text (discussing same-sex marriage cases and analysis applied by state high courts).

¹¹¹ See *supra* notes 79-81 and accompanying text (noting broader liberties afforded under some states' constitutions).

¹¹² See *supra* note 71 and accompanying text (providing application of strict scrutiny for specifically enumerated suspect classifications).

¹¹³ See *supra* notes 69-71 (outlining standards of equal protection analysis).

¹¹⁴ Cf. cases cited *supra* notes 61-62 and accompanying text (citing two federal cases holding Pledge did not violate Fourteenth Amendment).

the constitutionality of the Pledge, the Supreme Court of the United States will eventually have to stop avoiding this controversial issue.

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