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PRELIMINARY STATEMENT

The Supreme Court has spoken repeatedly on the central issue in this case: whether the voluntary recitation of the Pledge of Allegiance by willing students violates the Establishment Clause. Each time, the Court has said, without equivocation, that it does not. Two Supreme Court decisions have unqualifiedly stated that the Pledge is consistent with the Establishment Clause, and have used the Pledge as a baseline for weighing the constitutionality of other forms of government action. See Lynch v. Donnelly, 465 U.S. 668, 675-77 (1984); County of Allegheny v. ACLU, 492 U.S. 573, 602-03 (1989). Those decisions are binding here, and this Court need not look beyond them to resolve this case.

What is more, in a line of cases stretching from Engel v. Vitale, 370 U.S. 421 (1968), to, most recently, Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), the Supreme Court and many individual Justices have repeatedly reaffirmed that patriotic and ceremonial references to God — including the Pledge’s reference to a “Nation under God” — do not offend the Establishment Clause. Indeed, no Justice of the Supreme Court has ever concluded otherwise. This is because the Pledge’s brief reference to a generic God does not convert its recitation from a patriotic exercise into a religious one. Regardless of the doctrinal test employed, the Pledge cannot reasonably be viewed as threatening to establish a state religion or anything of the sort.

History confirms why this understanding of the Establishment Clause must be so. Similar references to God are replete in our Nation’s heritage, from the founding documents to the motto stamped on our currency (“In God we trust”). The Founders’ firm belief that the unalienable rights of man were God-given laid the groundwork for the concept of individual rights enshrined in the Declaration of Independence (“all men are . . . endowed by their Creator with certain unalienable Rights”). These religious roots survive today, embedded in such practices as Presidential inaugural

speeches and legislative prayer, and in common rituals like public oaths (“So help me God”) and formal court cries (“God save the United States and this Honorable Court”). Our Nation’s history is uniquely and indelibly etched by religious influences, and the Establishment Clause does not forbid the government from officially acknowledging that heritage. That is all the Pledge does.

In this case, Plaintiffs challenge the constitutionality of 4 U.S.C. § 4, which codifies the wording of the Pledge of Allegiance, and three New Hampshire public school districts’ Pledge-recitation practices. This is but the latest iteration in a series of lawsuits targeting the Pledge. In 1998, Plaintiffs’ attorney, Rev. Dr. Michael A. Newdow (“Newdow”), filed an analogous federal lawsuit in the Southern District of Florida challenging the constitutionality of a public school district’s Pledge practices. That action was rejected on standing grounds. Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), aff’d, No. 99-4136 (11th Cir. Jan. 4, 2000). In 2000, Newdow filed a second Pledge challenge in the Eastern District of California. That case was ultimately dismissed by the Supreme Court on standing grounds, although the three Justices who would have reached the merits all expressed the view that the Pledge is constitutional. Elk Grove, 542 U.S. 1 (2004). In an effort to cure his standing defect, Newdow added as co-plaintiffs three minor children and their parents and, in 2005, filed a third lawsuit, again in the Eastern District of California. The district court denied in part the defendants’ motions to dismiss and their appeals are now pending before the Ninth Circuit. Newdow v. U.S. Congress, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), appeal pending, Nos. 05-17257, 05-17344, 06-15093 (9th Cir.) (argued Dec. 4, 2007).

In the present case, Newdow represents three minor children, DoeChild-1, DoeChild-2, and DoeChild-3; their parents, Jan and Pat Doe; and the Freedom From Religion Foundation. The United States of America (“United States”) and the United States Congress (“Congress”) are named as defendants (collectively “Federal Defendants”), as are three local school districts: the Hanover

School District, the Dresden School District, and School Administrative Unit 70.

Plaintiffs' claims against the Federal Defendants all relate to their contention that 4 U.S.C. § 4 ("Pledge statute") is unconstitutional on its face. Although, as noted earlier, these claims are foreclosed by Supreme Court precedent, this Court need not reach the merits of that question, for the claims founder on two jurisdictional grounds. First, Plaintiffs lack standing. **The Pledge statute does not compel anyone to recite (or lead others in reciting) the Pledge,** and Plaintiffs thus cannot show that the statute has injured them. Second, Congress is shielded from Plaintiffs' claims by the Constitution's Speech or Debate Clause, and Plaintiffs' claims against all the Federal Defendants are barred by the doctrine of sovereign immunity.

Plaintiffs' claims against the school districts all relate to their contention that the school districts' Pledge-recitation practices are unconstitutional.¹ These claims should also be dismissed. First, Plaintiffs lack standing to challenge the Pledge practices of the Dresden School District and School Administrative Unit 70. Because no Plaintiff attends a school operated by either district, Plaintiffs cannot establish that they are injured by those districts' Pledge practices. For those Plaintiffs with standing to sue the Hanover School District, the Pledge's underlying constitutionality does not change when it is said by willing students in a public school classroom. The Pledge's reference to a "Nation under God" permissibly acknowledges the role that faith in God has played in the formation, political foundation, and continuing development of the Republic. **Children may be taught about that heritage in their History classes, and acknowledging the same in the Pledge is equally permissible.** For all of these reasons, Plaintiffs' claims should be dismissed.

¹ Because these claims technically lie against only the school districts, simultaneously with this brief the United States is filing an assented-to motion to intervene to defend the constitutionality of 4 U.S.C. § 4 as applied by the school districts' Pledge-recitation practices. The arguments in Part IV of this memorandum support the constitutionality of those practices.


BACKGROUND

A. Statutory Background

1. The federal Pledge statute

In 1942, as part of an effort “to codify and emphasize the existing rules and customs pertaining to the display and use of the flag of the United States of America,” Congress enacted a Pledge of Allegiance to the United States flag. S. Rep. No. 77-1477, at 1 (1942); see H.R. Rep. No. 77-2047, at 1 (1942). It read: “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.” Act of June 22, 1942, Pub. L. No. 77-623, § 7, 56 Stat. 377, 380.

Twelve years later, Congress amended the Pledge of Allegiance by adding the words “under God” after the word “Nation.” Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249. Accordingly, the Pledge of Allegiance, set forth at 4 U.S.C. § 4, now reads: “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. Both the Senate and House Reports expressed the view that, under Supreme Court case law, the 1954 amendment “is not an act establishing a religion or one interfering with the ‘free exercise’ of religion.” H.R. Rep. No. 83-1693, at 3 (1954) (citing Zorach v. Clauson, 343 U.S. 306 (1952)), reprinted in 1954 U.S.C.C.A.N. 2339, 2341; see also S. Rep. No. 83-1287, at 2 (1954).

In 2002, Congress enacted legislation that (i) made extensive findings about the historic role of religion in the political development of the Nation, (ii) reaffirmed the text of the Pledge as it “has appeared . . . for decades,” and (iii) repeated Congress’s judgment that the Pledge statute is constitutional both facially and as applied by school districts whose teachers lead willing students in its recitation. See Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057. 

2. The New Hampshire Pledge-recitation statute

As part of a “policy of teaching our country’s history” to elementary and secondary school students, New Hampshire law requires that each school district in the State “authorize a period of time during the school day for the recitation of the pledge of allegiance.” N.H. Rev. Stat. Ann. § 194:15-c (2007). Plaintiffs allege that, in furtherance of this requirement, the defendant school districts have their teachers lead classes attended by the Doe children in reciting the Pledge. See Compl. ¶¶ 28, 34, 45, 55, 67. Actual recitation of the Pledge is voluntary. N.H. Rev. Stat. Ann. § 194:15-c (“Pupil participation in the recitation of the pledge of allegiance shall be voluntary.”); see Compl. ¶ 37 (“stipulat[ing]” that “none of [the Plaintiffs] are or have been actually compelled to say the words, ‘under God,’ in the Pledge”).

B. Prior Pledge Litigation

1. Newdow’s first district court challenge

In 1998, Newdow filed an action similar to this one in the Southern District of Florida, raising a First Amendment challenge to a public school district’s Pledge practices. The district court held that Newdow lacked standing, in part because his daughter was not enrolled in the defendant school district. Newdow v. United States, No. 98-6585 (S.D. Fla. Dec. 1, 1998), slip op. at 3-4 & n.3 (attached). It held in the alternative that Newdow’s challenge was foreclosed by Supreme Court precedent suggesting that the Pledge is consistent with the First Amendment. Id. at 4. The Eleventh Circuit affirmed, addressing only the question of standing. Newdow v. United States, No. 99-4136 (11th Cir. Jan. 4, 2000), slip op. at 3 (attached).

2. Newdow’s second district court challenge

In March 2000, Newdow filed a second Pledge challenge, this time in the Eastern District of California. Acting on his own behalf and as “next friend” of his minor daughter, Newdow raised

Establishment Clause challenges to 4 U.S.C. § 4; a California statute requiring patriotic exercises, such as the Pledge, to be conducted daily in public elementary schools; and the voluntary Pledge-recitation policies of two public school districts, Elk Grove and Sacramento City Unified. The district court rejected those challenges and dismissed Newdow's complaint.

A divided panel of the Ninth Circuit reversed. In its initial opinion, the court held that Newdow had standing as a parent to challenge Elk Grove's Pledge-recitation practices and that Newdow himself had standing to challenge 4 U.S.C. § 4. See Newdow v. U.S. Congress, 292 F.3d 597, 602-05 (9th Cir. 2002) ("Newdow I"). However, it concluded that Newdow did not have standing to sue Sacramento City Unified because his daughter was "not currently a student" there. Id. at 603. The court also ruled that Newdow's claims against Congress were barred by the Speech or Debate Clause. Id. at 601-02. On the merits, it held that both 4 U.S.C. § 4 and Elk Grove's Pledge practices violate the Establishment Clause. See id. at 605-12.

After the panel's original decision, the mother of Newdow's daughter intervened to contest Newdow's standing because she had sole legal custody over their child. The panel nevertheless reaffirmed Newdow's standing to challenge Elk Grove's Pledge practices as a "noncustodial parent." Newdow v. U.S. Congress, 313 F.3d 500, 502-05 (9th Cir. 2002) ("Newdow II").

After various defendants sought rehearing, the panel issued a third order, which denied panel rehearing and amended the opinion in Newdow I. Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2002) ("Newdow III"). The amended opinion once again held that Elk Grove's Pledge-recitation practices violate the Establishment Clause, but it deleted Newdow I's further holding that 4 U.S.C. § 4 violates the Establishment Clause on its face. See id. at 485-90. Nine judges dissented from the denial of rehearing en banc. See id. at 471-82.

The Supreme Court reversed. Elk Grove, 542 U.S. at 17-18. The Court reasoned that Newdow lacked prudential standing because his custody arrangement with his daughter's mother gave the mother final decision-making authority in the event of a disagreement between the parents. See id. at 14-15 & n.6. As a result, it had been "improper for the federal courts to entertain" Newdow's claim. Id. at 17.²

Three concurring Justices would have upheld the challenged Pledge-recitation policy on the merits. Chief Justice Rehnquist, after demonstrating that "[e]xamples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound," id. at 26 (opinion concurring in the judgment), concluded that "our national culture allows public recognition of our Nation's religious history and character," id. at 30. He further reasoned that the phrase "under God" in the Pledge "is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H.R. Rep. No. 1693, at 2: 'From 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.'" Id. at 31. And because reciting the Pledge "is a patriotic exercise, not a religious one," the Chief Justice concluded, its use "of the descriptive phrase 'under God' cannot possibly lead to the establishment of a religion, or anything like it." See id. at 31-32.

Justice O'Connor concluded that the challenged Pledge policy was constitutional because a reasonable observer would not view it as a governmental endorsement of religion. She reasoned that

² Newdow filed a petition for certiorari seeking review of the Ninth Circuit's determination that Congress was immune from suit under the Speech or Debate Clause. See Petition for Writ of Certiorari, Newdow v. U.S. Congress, No. 03-7 (June 26, 2003), 2003 WL 22428407, at *18-20. That petition also sought review of the Ninth Circuit's judgment to the extent it declined to find the United States liable. See id. (disputing the United States's argument that no federal statute waives its sovereign immunity from a suit for declaratory or injunctive relief under the First Amendment). Newdow's petition was denied. Newdow v. U.S. Congress, 540 U.S. 962 (2003).

“some references to religion in public life and government are the inevitable consequences of our Nation’s origins,” which a reasonable observer would not perceive as “signifying a government endorsement of any specific religion, or even of religion over nonreligion.” Id. at 35-36 (opinion concurring in the judgment). She stressed that the Pledge for decades could “fairly be called ubiquitous” in American public life; that reciting the Pledge is not an act of worship or prayer; that the Pledge does not refer to any particular religion; and that the Pledge contains only “minimal religious content.” Id. at 37-44.

Justice Thomas concluded that the challenged Pledge policy was constitutional because it “has not created or maintained any religious establishment,” has not “granted government authority to an existing religion,” and “does not expose anyone to the legal coercion associated with an established religion.” Id. at 53 (opinion concurring in the judgment).

The Elk Grove majority did not definitively decide the constitutionality of the challenged Pledge practices. Nonetheless, it began by noting that “the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes,” and that its “recitation is a patriotic exercise designed to foster national unity and pride in those principles.” Id. at 6.

3. Newdow’s third district court challenge

After the Supreme Court’s ruling in Elk Grove, Newdow filed a third action, again in the Eastern District of California, on his own behalf and as counsel for three minor children and their parents. As in Elk Grove, Newdow raised Establishment Clause challenges to 4 U.S.C. § 4; the California “patriotic exercises” statute; and the Pledge-recitation practices of certain California school districts. See Newdow v. U.S. Congress, 383 F. Supp. 2d 1229, 1231-33 (E.D. Cal. 2005).

The district court dismissed Newdow’s claims for lack of standing, id. at 1237-39, and dismissed the facial challenges to 4 U.S.C. § 4 on mootness grounds, see id. at 1242. However, the

court declined to dismiss the challenges of the other parents to the Pledge practices at their children's schools, considering itself bound by the Ninth Circuit's (reversed) judgment in Newdow III. See id. at 1239-42. The defendants' appeals are now pending before the Ninth Circuit. Nos. 05-17257, 05-17344, 06-15093 (9th Cir.) (argued Dec. 4, 2007).

4. Other Pledge litigation

Two federal Courts of Appeals have rejected Establishment Clause challenges to state statutes providing for the voluntary recitation of the Pledge by public school students. See Myers v. Loudoun County Pub. Schs., 418 F.3d 395 (4th Cir. 2005) (upholding Virginia statute); Sherman v. Cmty Consol. Sch. Dist. 21, 980 F.2d 437 (7th Cir. 1992) (upholding Illinois statute), cert. denied, 508 U.S. 950 (1993).

C. Factual Background

This case, like Elk Grove, implicates the constitutionality of 4 U.S.C. § 4; a state Pledge-recitation statute; and several public school districts' practices of leading willing students in the voluntary recitation of the Pledge. To establish standing, Plaintiffs allege that each of the Doe children is "currently" enrolled in an elementary school in the Hanover School District. See Compl. ¶¶ 11, 14, 27, 32. They further allege that, after completing elementary school, the Doe children will "subsequently" attend a school run by the Dresden School District or School Administrative Unit 70, which operate the public middle and high schools in Hanover. See id. ¶¶ 11, 15, 29. According to the Complaint, the Pledge is recited in the Doe children's current classrooms, id. ¶ 28, 45, and in the schools run by the Dresden School District and School Administrative Unit 70, id. ¶ 30. Each of the Doe children is an atheist or agnostic who denies or doubts the existence of God. Id. ¶ 33. Though Plaintiffs stipulate that the Doe children have never been forced to recite the Pledge, they claim that the children are unconstitutionally "coerced" and made to feel like political "outsiders"

by the districts' Pledge practices. See id. ¶¶ 37-38.

Jan and Pat Doe are the parents of the Doe children and have "full legal custody" of them. Compl. ¶ 10. Jan is an atheist who denies the existence of God; Pat is an agnostic who doubts the existence of God. Id. ¶ 25-26. Plaintiffs allege that the Doe parents live in and own property in Hanover, and pay property taxes that fund the defendant school districts. Id. ¶¶ 10, 52. They further allege that the Doe parents pay federal income tax, federal sales tax, New Hampshire state income tax, and New Hampshire state sales tax. Id. ¶ 52. Plaintiffs allege that the Doe parents' federal tax dollars are used to fund a variety of expenses associated with the Pledge, such as paying teachers for the time spent reciting the Pledge, printing copies of the U.S. Code that contain 4 U.S.C. § 4, distributing pamphlets that bear the text of the Pledge, and supporting an annual "Pause for the Pledge of Allegiance" event in the state of Maryland. See id. ¶¶ 53-56, 60, 62.

The Freedom from Religion Foundation ("FFRF") is an association of atheists and agnostics based in Madison, Wisconsin. See Compl. ¶ 9. According to the Complaint, about 60 of its roughly 11,000 members are "from" New Hampshire. Id. An unspecified number of these 60 "live in, pay taxes in, and have children (or are children) who attend public schools" in New Hampshire. Id. These FFRF members allegedly "suffer the same or similar harms" as the Doe plaintiffs. Id.

On the merits, Plaintiffs challenge 4 U.S.C. § 4 and the school districts' Pledge practices on several grounds. Plaintiffs' principal claim is that the Pledge statute and the school districts' Pledge practices violate the Establishment Clause. See Compl. ¶¶ 37, 38, 64. Plaintiffs also contend that 4 U.S.C. § 4 violates the Free Exercise Clause, the Equal Protection component of the Fifth Amendment, and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. Id. ¶¶ 37, 46, 65, II. They further allege that the school districts' Pledge practices violate the Free Exercise Clause, the Equal Protection Clause, RFRA, and analogous provisions of the New

Hampshire Constitution. Id. ¶¶ 37, 39, 46, 65, 67, III. Finally, Plaintiffs submit that the school districts' Pledge practices violate a New Hampshire statute that protects the religious preferences of troubled children placed by the State in foster homes, see id. ¶¶ 68, III (citing N.H. Rev. Stat. Ann. § 169-D:23), as well as the New Hampshire Pledge-recitation statute itself, see id. ¶¶ 67, III.

Plaintiffs seek several forms of relief. With respect to the Federal Defendants, they seek (i) a declaration that “Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses”; (ii) a declaration that the inclusion of the words “under God” in the Pledge violates the Establishment and Free Exercise Clauses, the Equal Protection component of the Fifth Amendment, and RFRA; (iii) an injunction requiring Congress to “immediately act to remove the words ‘under God’ from the Pledge . . . as now written in 4 U.S.C. § 4”; and (iv) an injunction requiring the United States to “use its power to remove the words ‘under God’ from the United States Code as now written in 4 U.S.C. § 4.” Compl. ¶¶ I, II, IV, V.

With respect to the defendant school districts, Plaintiffs seek (i) a declaration that the districts' Pledge practices violate the Establishment and Free Exercise Clauses, the Fourteenth Amendment's Equal Protection Clause, Article 6 of Part I of the New Hampshire Constitution, RFRA, and New Hampshire Revised Statutes §§ 169-D:23 and 194:15-c; and (ii) an injunction requiring the districts to “cease and desist” from reciting the Pledge in their schools. Id. ¶¶ III, VI.

ARGUMENT

Our argument proceeds in four parts. Part I demonstrates that all Plaintiffs lack standing to challenge the Pledge statute and that certain Plaintiffs also lack standing to challenge the school districts' Pledge practices. Part II shows that Plaintiffs' claims against the Federal Defendants are barred by the Speech or Debate Clause and/or sovereign immunity. Part III establishes that 4 U.S.C. § 4 is constitutional. Part IV shows that the school districts' Pledge practices are constitutional.

I. PLAINTIFFS LACK STANDING

Standing doctrine imposes both constitutional and prudential restraints on the exercise of federal judicial power. See Elk Grove, 542 U.S. at 11; Osediacz v. City of Cranston, 414 F.3d 136, 139 (1st Cir. 2005). To satisfy the constitutional requirements, a plaintiff must establish: (1) an “actual or imminent” injury; (2) that is “fairly . . . trace[able] to the challenged action of the defendant”; and (3) that would “likely . . . be redressed by a favorable decision.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (internal quotation marks and citations omitted; alterations in original). As the parties invoking the Court’s jurisdiction, Plaintiffs bear the burden “clearly to allege facts demonstrating” each of these three elements. Warth v. Seldin, 422 U.S. 490, 518 (1975); United States v. AVX Corp., 962 F.2d 108, 114 (1st Cir. 1992). In ruling on a motion to dismiss, the Court must accept as true all material allegations in the Complaint; however, it need not credit conclusory statements or generalized averments. See AVX, 962 F.2d at 114-15. Indeed, “where standing is at issue, heightened specificity is obligatory at the pleading stage.” Id. at 115.

“[T]he standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” Allen v. Wright, 468 U.S. 737, 752 (1984). As explained below, all Plaintiffs lack standing to challenge 4 U.S.C. § 4 on its face. In addition, all Plaintiffs lack standing to challenge the Pledge practices of the Dresden School District and School Administrative Unit 70. Moreover, FFRF lacks standing to raise any claim on behalf of its members. The Federal Defendants do not at this time contest the standing of the Doe plaintiffs to challenge the Pledge practices of the Hanover School District based upon Plaintiffs’ allegations that (i) Jan and Pat Doe are the parents, with full legal custody, of the Doe children; and (ii) the Doe children attend an elementary school run by the

Hanover School District in which the Pledge is recited. See Compl. ¶¶ 10, 28.³

A. All Plaintiffs Lack Standing to Challenge the Federal Pledge Statute on Its Face Causation. With respect to their facial challenge to 4 U.S.C. § 4, see Compl. ¶¶ 64-66, 70, I-II, Plaintiffs cannot point to an injury that is caused by the challenged statute. The principal injury asserted in the Complaint is that the Doe children are unconstitutionally “coerced” and made to feel like political “outsiders” by the practice of teacher-led Pledge recitation in their classrooms. See id. ¶¶ 27-39, 45, 47-50, 59, 65. This injury is not caused by the Pledge statute, which **does not compel anyone to do anything.**

In 1954, Congress amended 4 U.S.C. § 4 by adding the words “under God” after the word “Nation,” so that the Pledge now reads: “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” **The statute itself does not injure Plaintiffs,** for it does not compel the State of New Hampshire, the State’s school districts, or anyone else to recite (or lead others in reciting) the Pledge. It merely sets forth the wording of the Pledge and provides the manner of addressing the Flag when the Pledge is recited.⁴

Indeed, it is New Hampshire law — not federal law — that since 2002 has required each school district in the State to “authorize a period of time during the school day for the recitation of the pledge of allegiance.” N.H. Rev. Stat. Ann. § 194:15-c (2002). Prior to 2002, New Hampshire

³ As set forth below, however, the Federal Defendants contest any claim of Doe taxpayer standing. See Compl. ¶¶ 52-63.

⁴ The statute also provides, as it has since 1942, that the Pledge “should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.” 4 U.S.C. § 4. These provisions are not at issue in this case.

law permitted, but did not require, school districts to authorize recitation of the Pledge in elementary (but not secondary) schools. See N.H. Rev. Stat. Ann. § 194:15-a (1975). And before 1975, New Hampshire law contained no Pledge-recitation requirement. Thus, to the extent Plaintiffs are injured, it is not by Congress’s 1954 modification of the Pledge statute, but by later developments in New Hampshire law and the school districts’ efforts to comply with that law. See Council of Ins. Agents v. Juarbe-Jimenez, 443 F.3d 103, 108 (1st Cir. 2006) (“[T]he injury must be fairly traceable to the defendant’s challenged action rather than to some third party’s independent action.”). It is perhaps for this reason that in Myers and Sherman, the plaintiffs did not challenge the federal Pledge statute; rather, they challenged (and the courts upheld) the application of state statutes requiring recitation of the Pledge. See Myers, 418 F.3d at 398-99 & n.4; Sherman, 980 F.2d at 439-40.

Cognizable Injury. Plaintiffs also appear to suggest they are injured by the mere fact that the Pledge is codified in its current form. See Compl. ¶¶ 64, I, II. But this objection, standing alone, is not the sort of individualized, direct, and concrete injury required to support Article III standing. Even in the Establishment Clause context, the Supreme Court has consistently “rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law.” Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, 454 U.S. 464, 482-83 (1982) (citation and internal quotation marks omitted); see also Allen, 468 U.S. at 754-55 (same). Moreover, “the psychological consequence presumably produced by observation of conduct with which one disagrees” is likewise insufficient to confer Article III standing, “even though the disagreement is phrased in constitutional terms.” Valley Forge, 454 U.S. at 485-86. Plaintiffs plainly believe that the inclusion of the words “under God” in the Pledge renders 4 U.S.C. § 4 unconstitutional. Absent injury to some concrete interest, however, their disagreement with the law cannot create standing. See id.

Plaintiffs further contend that they have federal taxpayer standing to challenge the Pledge statute. See Compl. ¶¶ 52-63. This is meritless. As a general rule, a federal taxpayer cannot rely on an interest in ensuring that the government spends tax revenues lawfully as a basis for standing to challenge federal action. See Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923). This rule is subject to a “narrow exception,” first recognized in Flast v. Cohen, 392 U.S. 83 (1968), in certain types of Establishment Clause cases. See Bowen v. Kendrick, 487 U.S. 589, 618 (1988). To establish federal taxpayer standing under Flast, a plaintiff must show: (i) that the challenged action is an “exercise[] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution”; and (ii) that “the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.” Flast, 392 U.S. at 102-03; see also Valley Forge, 454 U.S. at 481 (Flast’s two-part test is applied with “rigor”).

The Flast exception has no application here because 4 U.S.C. § 4 was not enacted under Congress’s taxing and spending powers — in fact, it authorizes no expenditures whatsoever. The Taxing and Spending Clause provides constitutional authority for “taxing and spending programs,” Flast, 392 U.S. at 101; that is, programs that promote the “general welfare” through the “expenditure of public moneys for public purposes,” South Dakota v. Dole, 483 U.S. 203, 207 (1987) (citation and internal quotation marks omitted).⁵ The Pledge statute indisputably does not establish a federal

⁵ The Supreme Court has consistently rejected claims of federal taxpayer standing where the plaintiff did not challenge an exercise of Congress’s taxing and spending powers. See Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 228 (1974) (no standing where plaintiffs “did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status”); United States v. Richardson, 418 U.S. 166, 175 (1974) (no standing where plaintiffs’ challenge was “not addressed to the taxing or spending power, but to the statutes regulating the CIA”); Valley Forge, 454 U.S. at 480 (no standing where the challenged government action “was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8”).

“taxing and spending program.” It does not require, authorize, or even mention the expenditure of federal funds; it merely codifies the text of the Pledge of Allegiance. Because 4 U.S.C. § 4 neither mandates nor authorizes the use of public moneys, there is no “logical link” between Plaintiffs’ legal challenge and their alleged status as federal taxpayers and, thus, no federal taxpayer standing. See Flast, 392 U.S. at 102-103.⁶

Redressability. Finally, Plaintiffs’ claims against the Federal Defendants are not redressable. A court has never, to our knowledge, attempted to redress an injury caused by an allegedly unconstitutional statute by purporting to order Congress to repeal or amend the challenged law. See Compl. ¶ IV (seeking this relief). Indeed, as the Supreme Court has stated: “[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly — by passing new legislation.” Bowsher v. Synar, 478 U.S. 714, 733-34 (1986); see also Mississippi v. Johnson, 71 U.S. 475, 500 (1867) (“Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in

⁶ Plaintiffs also assert taxpayer injury arising from the alleged use of federal funds to pay “governmental agents who lead . . . students” in reciting the Pledge, Compl. ¶ 55; to pay federal employees who recite the Pledge during working hours, see id. ¶ 56-57; to print and distribute “the United States Code (including 4 U.S.C. § 4) as well as pamphlets, etc., that contain the Pledge,” id. ¶ 60; and to “support the ‘Pause for the Pledge of Allegiance’ (Pub. L. 99 Stat. 97) annual festivities,” id. ¶ 62. However, the Supreme Court has explicitly rejected the view that the Flast exception covers “any expenditure of government funds [allegedly] in violation of the Establishment Clause.” Hein v. Freedom from Religion Found., 127 S. Ct. 2553, 2565 (2007) (plurality opinion) (emphasis added; internal quotation marks omitted). Rather, to be considered an exercise of Congress’s taxing and spending powers under Flast, a challenged expenditure must be “made pursuant to an express congressional mandate and a specific congressional appropriation.” Id.; Hinrichs v. Speaker of the Indiana House of Reps., 506 F.3d 584, 598 (7th Cir. 2007). As explained in the text, the Pledge statute authorizes no expenditures whatsoever, and Plaintiffs identify no “specific congressional appropriations” that fund the incidental expenditures they allege in ¶¶ 53-63 of the Complaint. Thus, these allegations, too, fail to establish federal taxpayer standing.

proper cases, subject to its cognizance.”); Franklin v. Massachusetts, 505 U.S. 788, 829 (1992) (Scalia, J., concurring) (“[W]e cannot direct . . . Congress to perform particular legislative duties.”).

Plaintiffs’ claims against the United States pose further redressability problems. Plaintiffs seek an injunction requiring the United States to “use its power to remove the words ‘under God’ from the United States Code as now written in 4 U.S.C. § 4.” Compl. ¶ V. Even if the Court were to order the United States to “remove” “under God” from the United States Code, the Statutes at Large would still contain those words and the current Pledge would thus remain the law. See Five Flags Pipe Line Co. v. Dep’t of Transp., 854 F.2d 1438, 1440 (D.C. Cir. 1988) (“[W]here the language of the Statutes at Large conflicts with the language in the United States Code that has not been enacted into positive law, the language of the Statutes at Large controls.”); see also United States v. Welden, 377 U.S. 95, 98 n.4 (1964). Thus, unless Congress were to ratify the removal of the words “under God” from the Code by affirmatively enacting this change into positive law, the Pledge itself would remain unchanged, see Five Flags, 854 F.2d at 1440, and any “injury” Plaintiffs suffer by the inclusion of the words “under God” in the Pledge would be left unremedied. For all of these reasons, Plaintiffs lack standing to challenge 4 U.S.C. § 4 on its face.

B. All Plaintiffs Lack Standing to Sue the Dresden School District and School Administrative Unit 70

Actual or imminent injury. Plaintiffs lack standing to sue the Dresden School District and School Administrative Unit 70 because no Plaintiff attends a school operated by either district and, therefore, Plaintiffs are not “injured” by those districts’ Pledge practices. It is Plaintiffs’ burden to establish an “injury in fact” that is “actual or imminent.” Lujan, 504 U.S. at 560. The Complaint alleges that the Doe children are “currently” enrolled in an elementary school in the Hanover School District, see Compl. ¶¶ 11, 14, 27, 32, and that, “after completing elementary school,” they will

“subsequently” attend a school run by the Dresden School District or School Administrative Unit 70, which operate the public middle and high schools in Hanover, see id. ¶¶ 11, 15, 29. Hence, any alleged injury from the latter districts’ Pledge practices is surely not “actual.” Neither is there any “assurance that the asserted injury is ‘imminent’ — that it is ‘certainly impending.’” Daimler Chrysler Corp. v. Cuno, 126 S. Ct. 1854, 1863 (2006) (citation omitted). The Complaint is silent as to the Doe childrens’ ages or grade levels, and there is no basis to conclude that there is anything “impending” or “certain” about their eventual plans to enroll in a school run by either the Dresden School District or School Administrative Unit 70. See id.; AVX, 962 F.2d at 115 (“facts necessary to support standing must clearly appear in the record and cannot be inferred argumentatively from averments in the pleadings”) (citation and internal quotation marks omitted). Accordingly, Plaintiffs are not “injured” by those districts’ Pledge practices and lack standing to challenge them. See also Newdow III, 328 F.3d at 485, rev’d on other grounds, 542 U.S. 1 (2004).

Cognizable injury. Moreover, Plaintiffs lack state taxpayer standing for the same reasons they lack federal taxpayer standing. See Compl. ¶¶ 52, 56-59. “The . . . rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers.” Cuno, 126 S. Ct. at 1863. Accordingly, state taxpayers generally cannot challenge state action “simply by virtue of their status as taxpayers,” id. at 1864, and to invoke the Flast exception must demonstrate that the challenged expenditure is “made pursuant to an express [legislative] mandate and a specific [legislative] appropriation.” See Hein, 127 S. Ct. at 2565; Hinrichs, 506 F.3d at 598 (denying state taxpayer standing because “plaintiffs have not pointed to any specific appropriation of funds by the legislature to implement the [challenged] program”). Furthermore, the challenge must target a “measurable appropriation or loss of revenue” that results in a “direct dollars-and-cents injury” to the plaintiffs. See Schneider v. Colegio de Abogados de Puerto Rico, 917 F.2d 620, 639 (1st Cir.

1990) (quoting Doremus v. Board of Education, 342 U.S. 429, 434 (1952)). “[I]ncidental expenses” incurred by the government in administering a challenged activity are insufficient. See id.

Plaintiffs cannot establish state taxpayer standing here. First, the New Hampshire Pledge-recitation statute, N.H. Rev. Stat. Ann. § 194:15-c, like the federal Pledge statute, neither requires, authorizes, or even mentions an expenditure of state funds, and Plaintiffs point to no specific legislative appropriation that implements the state statute. That alone dooms Plaintiffs’ claim of state taxpayer standing. See Hein, 127 S. Ct. at 2565; Hinrichs, 506 F.3d at 598. In addition, Plaintiffs fail to establish the requisite “dollars-and-cents” injury because they identify no “measurable appropriation or disbursement of school-district funds occasioned solely by the [Pledge] activities complained of.” See Doremus, 342 U.S. at 434 (rejecting state taxpayer standing in Establishment Clause challenge to state statute requiring daily Bible reading) (emphasis added). Indeed, any costs associated with the school districts’ Pledge practices are, at best, indirect and incidental: existing buildings are used and no additional employees are hired, see Schneider, 917 F.2d at 639, and expenses for teachers’ salaries for the sliver of the school day devoted to Pledge exercises would be incurred whether or not the Pledge were recited, see Doremus, 342 U.S. at 431 (quoting the state court’s judgment that plaintiffs failed to show that “the brief interruption in the day’s schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable scintilla the economy of the day’s work”). See also Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794 (9th Cir. 1999) (en banc) (“This case is legally indistinguishable from Doremus, in which the school’s expenditures for teachers’ salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing despite their indirect support


of the Bible reading.”). For these reasons, Plaintiffs lack state taxpayer standing.⁷

C. FFRF Lacks Standing to Raise Any Claim in This Case

Finally, FFRF lacks standing to raise any claim in this lawsuit. FFRF asserts no injury to itself as an organization; rather, its standing is premised on injuries allegedly suffered by its members. See Compl. ¶¶ 9, 24. Its allegations, however, are inadequate to establish associational standing to sue on its members’ behalf.

“An association has standing to sue on behalf of its members when three requisites have been fulfilled: (1) at least one of the members possesses standing to sue in his or her own right; (2) the interests that the suit seeks to vindicate are pertinent to the objectives for which the organization was formed; and (3) neither the claim asserted nor the relief demanded necessitates the personal participation of affected individuals.” AVX, 962 F.2d at 116. This Court need look no further than the First Circuit’s opinion in AVX to conclude that FFRF’s assertion of associational standing fails the first of these prongs, because FFRF fails to allege a particularized injury to “any one” of its members that is “sufficient to meet the requirements of Article III.” See id. Indeed, FFRF makes “only the most nebulous allegations regarding its members’ identities” and a “generalized allegation of individual harm.” See id. at 117. Of FFRF’s roughly 11,000 members nationwide, about 60 are “from” New Hampshire. Compl. ¶ 9. Of those 60, an unspecified number “live in, pay taxes in, and

⁷ Doremus likewise defeats any claim of municipal taxpayer standing to the extent one is asserted. See Compl. ¶ 52. Although municipal taxpayer standing rests on a different conceptual footing than federal and state taxpayer standing and, thus, may be subject to less stringent restrictions, see Frothingham, 262 U.S. at 486-87; Donnelly v. Lynch, 691 F.2d 1029, 1031-32 (1st Cir. 1982), rev’d on other grounds, 465 U.S. 668 (1984), a municipal taxpayer must nevertheless meet Doremus’s pocketbook injury requirement, see Doremus, 342 U.S. at 433-34 (rejecting state and municipal taxpayer allegations); Elk Grove, 542 U.S. at 18 n.8 (weighing under Doremus whether taxes paid to local school district suffice for taxpayer standing); ACLU-NJ ex rel. Miller v. Twp. of Wall, 246 F.3d 258, 262 (3d Cir. 2001) (applying Doremus to municipal taxpayer standing; collecting like cases from the Second, Fifth, Seventh, Ninth, and D.C. Circuits).

have children (or are children) who attend public schools” in “this judicial district” — a district that, of course, spans the entire state. Id. The Complaint says nothing more about these FFRF members. None is named. None is said to live in or around Hanover. None is alleged to attend a school operated by the defendant school districts. See AVX, 962 F.2d at 117 (“The averment has no substance: the members are unidentified; their places of abode are not stated; the extent and frequency of any individual use of affected resources is left open to surmise.”). Further, in terms of actual injury, FFRF alleges nothing more than that these members suffer “the same or similar harms” as the Doe plaintiffs. Compl. ¶ 9. Under AVX, such meager allegations are plainly insufficient to demonstrate the particularized injury required for associational standing. 

II. THE FEDERAL DEFENDANTS ARE IMMUNE FROM PLAINTIFFS’ CLAIMS

A. Plaintiffs’ Claims Against Congress Are Barred by the Speech or Debate Clause

Plaintiffs seek three specific forms of relief against Congress. They seek: (i) a declaration that “Congress, in passing the Act of 1954, violated the Establishment and Free Exercise Clauses”; (ii) a declaration that the inclusion of the words “under God” in the Pledge violates the Establishment and Free Exercise Clauses, the Equal Protection component of the Fifth Amendment, and RFRA; and (iii) an injunction requiring Congress to “immediately act to remove the words ‘under God’ from the Pledge . . . as now written in 4 U.S.C. § 4.” Compl. ¶¶ I, II, IV. Plaintiffs also suggest that they seek mandamus relief under 28 U.S.C. § 1361. See id. ¶ 4. All of these claims are barred by the Constitution’s Speech or Debate Clause.

The Speech or Debate Clause precludes courts from exercising jurisdiction over Congress, or any of its Members, for claims arising from the enactment or amendment of legislation. It provides that “for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place.” U.S. Const. art. I, § 6, cl. 1. The Clause “reinforc[es] the

separation of powers,” United States v. Johnson, 383 U.S. 169, 178 (1966), and is “modeled to ensure that the Legislative Branch will be able to perform without undue interference the whole of the legislative function ceded to it by the Framers,” Nat’l Ass’n of Soc. Workers v. Harwood, 69 F.3d 622, 629-30 (1st Cir. 1995).

The Speech or Debate Clause “protects not only speech and debate per se.” Id. at 630. The Supreme Court has read the Speech or Debate Clause “broadly to effectuate its purposes,” such that any conduct falling within the “sphere of legitimate legislative activity” is absolutely immune from scrutiny by the courts. See Eastland v. U.S. Servicemen’s Fund, 421 U.S. 491, 501 (1975); see also Harwood, 69 F.3d at 630 (the Clause “extends to any act generally done in a session of the House by one of its members in relation to the business before it.”) (citation and internal quotation marks omitted). The passage of legislation is quintessential legislative activity. See Gravel v. United States, 408 U.S. 606, 624 (1972) (voting by Members protected); Eastland, 421 U.S. at 504 (the Clause protects activities “integral” to the “consideration and passage or rejection of proposed legislation”) (citation and internal quotation marks omitted); Harwood, 69 F.3d at 635 (the Clause protects the “core legislative activities” of “debating, voting, [and] passing legislation”). Thus, Plaintiffs’ claims for relief against Congress for its passage of the 1954 Act amending the Pledge statute — including their request that Congress partially repeal or amend 4 U.S.C. § 4 by removing the words “under God” — are squarely barred by the Speech or Debate Clause. See also Newdow III, 328 F.3d at 484 (“[I]n light of the Speech and Debate Clause . . . , the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.”).⁸

⁸ Plaintiffs also seek an injunction requiring the United States to “use its power to remove the words ‘under God’ from the United States Code as now written in 4 U.S.C. § 4” — the same relief they seek against Congress. Compare Compl. ¶ IV with id. ¶ V. For the reasons explained supra at pages 16-17, and consonant with separation-of-powers principles, such an act can be

B. Plaintiffs’ Constitutional Claims Against the Federal Defendants Are Barred by Sovereign Immunity

Plaintiffs’ constitutional claims against all the Federal Defendants are barred by sovereign immunity. A body of the sovereign “is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” United States v. Mitchell, 445 U.S. 535, 538 (1980) (citation and internal quotation marks omitted; alteration in original); see also Muirhead v. Mecham, 427 F.3d 14, 17 (1st Cir. 2005). Such consent “cannot be implied” and must be “unequivocally expressed” by Congress. Mitchell, 445 U.S. at 538; see also Lane v. Pena, 518 U.S. 187, 192 (1996). Absent an applicable waiver, a court lacks jurisdiction to entertain a claim against the sovereign, whether the named defendant is the United States, one of its agencies, or Congress. See FDIC v. Meyer, 510 U.S. 471, 475 (1994) (sovereign immunity “shields the Federal Government and its agencies from suit”); Keener v. U.S. Congress, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (Congress is “protected from suit by sovereign immunity”); Rockefeller v. Bingaman, 234 Fed. Appx. 852, 855 (10th Cir.) (sovereign immunity “forecloses [plaintiff’s] claims against the House of Representatives and Senate”), cert. denied, 128 S. Ct. 619 (2007). Plaintiffs bear the burden of establishing an unambiguous textual waiver of immunity. See Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987).

Here, although Plaintiffs invoke the Court’s jurisdiction under a variety of statutes, see Compl. ¶¶ 1-5, they identify no statute waiving the sovereign immunity of Congress or the United

performed only by Congress. See also Newdow III, 380 F.3d at 484 (“[T]he President has no authority to amend a statute or **declare a law unconstitutional**, those functions being **reserved to Congress and the federal judiciary** respectively.”)



States from their constitutional claims for declaratory and injunctive relief.⁹ See, e.g., Powelson v. United States, 150 F.3d 1103, 1104 (9th Cir. 1998) (“[A] statute that purports to create jurisdiction alone does not necessarily eliminate sovereign immunity.”).¹⁰ Accordingly, the Federal Defendants are immune from those claims, and the Court lacks jurisdiction to consider them.¹¹ See Muirhead, 427 F.3d at 17; Baker, 817 F.2d at 562.

III. 4 U.S.C. § 4 IS CONSTITUTIONAL

If the Court determines to reach the merits of Plaintiffs’ facial challenge to 4 U.S.C. § 4, it should reject that challenge. Plaintiffs ask the Court “to judge the constitutionality of an Act of Congress — the gravest and most delicate duty that [a court] is called upon to perform.” Rostker

⁹ Although we do not concede that the relief Plaintiffs seek constitutes “appropriate relief” as contemplated by RFRA’s waiver of sovereign immunity, see 42 U.S.C. § 2000bb-1(c), the Court need not address that issue, for Plaintiffs’ RFRA claim is barred as against Congress by the Speech or Debate Clause, see supra Part II.A, and fails on the merits as discussed infra at note 16.

¹⁰ Claims challenging federal statutory or regulatory provisions typically are raised against an Executive Branch agency or official who, in administering or enforcing the challenged provision, has taken some action that “injures” the plaintiff, and the waiver of immunity typically is supplied by the Administrative Procedure Act (“APA”). See 5 U.S.C. § 702. Plaintiffs do not invoke the APA here. Indeed, Plaintiffs have not sued any federal agency or official, presumably because 4 U.S.C. § 4 merely sets forth the words of the Pledge, and neither requires nor authorizes any federal agency or official to do anything; thus, no federal agency or official has “injured” Plaintiffs. Moreover, the only substantive mention of the United States in the Complaint is the allegation that the “United States of America has . . . permit[ted] the Congress to further (Christian) monotheistic dogma.” Compl. ¶ 66. The APA’s waiver of sovereign immunity, however, is limited to claims stated against “an agency or an officer or employee” of the United States. 5 U.S.C. § 702; Puerto Rico v. United States, 490 F.3d 50, 57-58 (1st Cir. 2007) (waiver applies to actions for relief “against a Federal agency or officer acting in an official capacity”); Muirhead, 427 F.3d at 18 (same). In addition, Congress is not an “agency” as defined by the APA. 5 U.S.C. § 701(b)(1)(A). Accordingly, the APA supplies no waiver of sovereign immunity in this case.

¹¹ Plaintiffs’ invocation of the mandamus statute, see Compl. ¶ 4 (citing 28 U.S.C. § 1361), is similarly unavailing. The mandamus statute “applies only to officers and employees of the United States, rather than to the United States itself,” and its provisions therefore “do not waive the sovereign immunity of the United States.” Muirhead, 427 F.3d at 18. Nor is Congress subject to the mandamus statute. See Liberation News Serv. v. Eastland, 426 F.2d 1379, 1384 (2d Cir. 1970).

v. Goldberg, 453 U.S. 57, 64 (1981) (citation omitted). It is well established that Acts of Congress are presumptively constitutional. See United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963). In fact, Congress has expressly reaffirmed its view that 4 U.S.C. § 4 is constitutional. See Act of Nov. 13, 2002, Pub. L. No. 107-293, 116 Stat. 2057. Moreover, because Plaintiffs challenge the Pledge statute on its face, see Compl. ¶¶ 64-66, 70, I-II, to prevail they must show that “no set of circumstances exists under which the [statute] would be valid,” United States v. Salerno, 481 U.S. 739, 745 (1987).

Plaintiffs cannot meet this test. As explained below, their contention that the Pledge of Allegiance violates the Establishment Clause is squarely foreclosed by Supreme Court precedent. Two Supreme Court decisions have **said without qualification that the Pledge is consistent with the Establishment Clause**, and have used the Pledge as a baseline for weighing the constitutionality of other forms of government action. See Lynch, 465 U.S. at 675-77; County of Allegheny, 492 U.S. at 602-03. Those decisions are binding here, and the Court need not look further to resolve this case. Moreover, in many other cases, the Supreme Court and individual Justices have repeatedly reaffirmed that patriotic and ceremonial references to God such as the one in the Pledge do not offend the Establishment Clause. Viewed in the context of our unique history, these opinions make clear that the Establishment Clause does not forbid the federal government from officially **acknowledging the religious heritage, foundation, and character of the Nation. That is precisely what the Pledge of Allegiance does.**

A. Supreme Court Precedent Forecloses Plaintiffs' Establishment Clause Claims

In two cases, the Supreme Court has unreservedly described the Pledge of Allegiance as consistent with the Establishment Clause and used it as a benchmark to measure the constitutionality of other government action. In Lynch, the Court held that the Establishment Clause permits a city

to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly “depicts the historical origins of this traditional event long recognized as a National Holiday,” 465 U.S. at 680, and noted that similar “examples of reference to our religious heritage are found,” among other places, “in the language ‘One nation under God,’ as part of the Pledge of Allegiance to the American flag,” which the Court said “is recited by many thousands of public school children — and adults — every year.” *Id.* at 676. The words “under God” in the Pledge, the Court explained, are an “acknowledgment of our religious heritage” similar to the “official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers,” which are “replete” in our Nation’s history. *Id.* at 675, 677.

Likewise, in County of Allegheny, the Supreme Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated the isolated display of a creche at a county courthouse. In so holding, the Court reaffirmed Lynch’s approval of the reference to God in the Pledge, noting that all of the Justices in Lynch viewed the Pledge as “consistent with the proposition that government may not communicate an endorsement of religious belief.” 492 U.S. at 602-03 (citations omitted). The Court then used the Pledge and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, *id.*, and concluded that the display of the creche by itself was unconstitutional because, unlike the Pledge, it gave “praise to God in [sectarian] Christian terms.” *Id.* at 598; *see id.* at 603.

Although County of Allegheny and Lynch did not involve direct challenges to the Pledge, they are controlling precedent on the Pledge’s constitutionality. “When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion **necessary to that result by which we are bound.**” Seminole Tribe v. Florida, 517 U.S. 44, 67 (1996); *see also* Rossiter v. Potter, 357 F.3d 26, 31 (1st Cir. 2004). The Supreme Court’s analysis of the Pledge in Lynch and

reading aloud of Lincoln’s Gettysburg Address, which contains an allusion to” the “historical fact that our Nation was believed to have been founded ‘under God.’” Abington Sch. Dist. v. Schempp, 374 U.S. 203, 304 (1963) (Brennan, J., concurring); see Sherman, 980 F.2d at 447. Most recently, in Elk Grove, while the Court resolved the case on standing grounds, it described recitation of the Pledge as “a patriotic exercise designed to foster national unity and pride.” 542 U.S. at 6. Three concurring Justices wrote separately to explain, in more detailed terms, why recitation of the Pledge by willing students does not contravene any conceivably applicable Establishment Clause standards. See id. at 26-32 (Rehnquist, C.J., concurring in the judgment) (“Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound,” and the Pledge is “a simple recognition of the fact . . . [that] ‘our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God’”) (citation omitted); id. at 40 (O’Connor, J., concurring in the judgment) (“[A]n observer could not conclude that reciting the Pledge, including the phrase ‘under God,’ constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive”); id. at 54 (Thomas, J., concurring in the judgment) (voluntary recitation of Pledge “does not expose anyone to the legal coercion associated with an established religion”).¹³

As these decisions illustrate, the reference to God in the Pledge is not reasonably understood as endorsing, or coercing individuals into silent assent to, any particular religious doctrine. Rather,

¹³ In other cases as well, various individual Justices have specifically and repeatedly stated that the Pledge is consistent with the Establishment Clause. See, e.g., Lee, 505 U.S. at 638-39 (Scalia, J., dissenting); County of Allegheny, 492 U.S. at 674 n.10 (Kennedy, J., concurring in part and dissenting in part); Wallace v. Jaffree, 472 U.S. 38, 78 n.5 (1985) (O’Connor, J., concurring); id. at 88 (Burger, C.J., dissenting); Engel, 370 U.S. at 449 (Stewart, J., dissenting).

Praise the Pow’r that hath made and preserved us a nation! Then conquer we must, when our cause is just, And this be our motto ‘In God is our Trust.’” See Engel, 370 U.S. at 449 (Stewart, J., dissenting). In 1956, Congress passed legislation to make “In God we trust” the National Motto, and provided that it be inscribed on all United States currency, above the main door of the Senate, and behind the Chair of the Speaker of the House of Representatives. See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. There thus “is an unbroken history of official acknowledgment by all three branches of government,” as well as by the States, “of the role of religion in American life from at least 1789.” Lynch, 465 U.S. at 674.

3. The Pledge of Allegiance’s reference to God is a permissible acknowledgment of religion’s role in the formation of the Nation.

That uninterrupted pattern of official acknowledgment of the role that religion has played in the foundation of the Country, the formation of its governmental institutions, and the cultural heritage of its people, counsels strongly against construing the Establishment Clause to forbid such practices. “If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.” Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922). In the Establishment Clause context in particular, the Supreme Court has recognized that actions of the First Congress are ““contemporaneous and weighty evidence”” of the Constitution’s ““true meaning,”” Marsh, 463 U.S. at 790 (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)), and that “an unbroken practice . . . is not something to be lightly cast aside,” Walz v. Tax Comm’n, 397 U.S. 664, 678 (1970). See also The Pocket Veto Case, 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions . . .”); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 328 (1936) (construction “placed upon the Constitution . . . by the men who were contemporary with its

IV. THE PLEDGE OF ALLEGIANCE MAY BE RECITED IN PUBLIC SCHOOL CLASSROOMS

In addition to challenging 4 U.S.C. § 4 on its face, Plaintiffs contend that the Pledge statute is unconstitutional as applied to the voluntary recitation of the Pledge by public school students in the defendant school districts. In determining whether recitation of the Pledge in public school classrooms violates the Establishment Clause, the question is “whether government acted with the purpose of advancing or inhibiting religion” and whether reciting the Pledge has the “‘effect’ of advancing or inhibiting religion.” Agostini v. Felton, 521 U.S. 203, 222-23 (1997); see Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 306-08 (2000); cf. Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) (there is “no single mechanical formula that can accurately draw the constitutional line in every case”). Voluntary recitation of the Pledge in public schools has no such impermissible purpose or effect.

A. The Purpose of Reciting the Pledge is to Promote Patriotism and National Unity

A practice violates the Establishment Clause’s purpose inquiry if it is “entirely motivated by a purpose to advance religion.” Wallace, 472 U.S. at 56; see Lynch, 465 U.S. at 680 (law invalid if “there [is] no question” that it is “motivated wholly by religious considerations”); cf. McCreary County v. ACLU of Ky., 545 U.S. 844, 863 (2005) (law invalid if it has a “predominant purpose of advancing religion”); Van Orden, 545 U.S. at 701 (2005) (Breyer, J., concurring in the judgment).

2005) (“[T]his is not the classic violation of equal protection in which a law creates different rules for distinct groups of individuals based on a suspect classification.”); Sturm v. Clark, 835 F.2d 1009, 1016 (3d Cir. 1989) (“Government action cannot violate the equal protection clause if it does not create classifications among, or discriminate between, those affected.”). Second, neither religion nor irreligion has ever been held to be a suspect classification. See Wirzburger, 412 F.3d at 285 & 283 n.6. Accordingly, even if the Court were to engage in equal protection analysis, it should find that the Pledge statute bears a rational relationship to the legitimate goals of fostering national unity and patriotism. See id. at 282-83, 285 (applying rationality review to First Amendment claims recast under the rubric of equal protection); infra at pages 37-40 (discussing legitimate goals of Pledge).

individual, and its continuing demographic character — a statement that itself is simply one component of a larger, more comprehensive patriotic message. See Elk Grove, 542 U.S. at 31 (Rehnquist, C.J., concurring in the judgment) (the Pledge is a “promise [of] fidelity to our flag and our nation, not to any particular God, faith, or church”); Myers, 418 F.3d at 407.

2. Reciting the Pledge is not a religious exercise.

The Supreme Court repeatedly has made clear that not every reference to God amounts to an impermissible government-endorsed religious exercise. As explained above, it repeatedly has cited the Pledge as a quintessential example of a permissible reference to God. And it repeatedly has distinguished descriptive or ceremonial references to God, like that contained in the Pledge, from formal religious exercises like prayer and Bible reading. In Engel, for example, the Supreme Court struck down the New York public school system’s practice of reciting a nondenominational Regents prayer because that formal “invocation of God’s blessings” was a religious activity — “a solemn avowal of divine faith and supplication for the blessings of the Almighty.” 370 U.S. at 424. The Court contrasted the Regents prayer with the “recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity,” concluding that “[s]uch patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored.” Id. at 435 n.21. Thus, while the official prayer transgressed the boundary between church and state, no Justice questioned New York’s practice of preceding the prayer with recitation of the Pledge. See id. at 440 n.5 (Douglas, J., concurring).

Likewise, in striking down school prayer in Schempp, the Court noted, without a hint of disapproval, that the students also recited the Pledge of Allegiance immediately after the invalidated prayer. Schempp, 374 U.S. at 207. That is because, as Justice Brennan explained in his extended concurrence, “daily recitation of the Pledge of Allegiance . . . serve[s] the solely secular purposes

‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion, thus ‘preferring those who believe in no religion over those who do believe.’”) (citation omitted).

3. The school districts’ Pledge practices are not unconstitutionally coercive.

Plaintiffs acknowledge that the Pledge practices at issue do not involve the level of compulsion that would render them unconstitutional under West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943). See Compl. ¶ 37. Although Plaintiffs claim that the Pledge practices nevertheless are unlawfully “coercive” under Lee v. Weisman, 505 U.S. 577 (1992), it is Barnette, not Lee, that establishes the relevant standard for analyzing whether a school’s Pledge practice safeguards the “opt-out” rights of students.

Barnette involved a challenge by Jehovah’s Witnesses to a policy that compelled public school students to salute the flag and recite the pre-1954 version of the Pledge. See 319 U.S. at 629 (“[f]ailure to conform is ‘insubordination’ dealt with by expulsion”). The Jehovah’s Witnesses claimed the Pledge ceremony violated their religious beliefs by forcing them to salute a “graven image.” Id. The Court agreed, and held that the Jehovah’s Witnesses could not be compelled to salute the flag and recite the Pledge: “[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Id. at 642.

Barnette thus makes perfectly clear, with specific reference to the Pledge, that it is only compelled recitation without the possibility of opting out — the coerced “confess[ion] by word or act,” id. — that transgresses constitutional bounds. Mere exposure to classmates reciting the Pledge does not rise to the level of unconstitutional coercion. The Elk Grove majority recognized this point: “The Elk Grove Unified School District has implemented the state law by requiring that ‘[e]ach elementary school class recite the pledge of allegiance to the flag once each day.’ Consistent with

our case law, the School District permits students who object on religious grounds to abstain from the recitation.” 542 U.S. at 7-8 (citing Barnette). Barnette thus forecloses Plaintiffs’ claim of unconstitutional coercion.²⁰

The coercion principles applied in Lee “have no relevance here, because the Pledge is a patriotic utterance, not a religious one.” Habecker v. Town of Estes Park, 452 F. Supp. 2d 1113, 1124 (D. Colo. 2006) (rejecting Establishment Clause challenge). In Lee, the Supreme Court held that the Establishment Clause proscribes prayer at public secondary school graduation ceremonies. See 505 U.S. at 599. What made those prayers unconstitutionally coercive, however, was their character as a pure “religious exercise” and the government’s “pervasive” involvement in institutionalizing the prayer, to the point of making it a “state-sponsored and state-directed religious exercise.” Id. at 587. Coercion thus arose because (i) the exercise was so profoundly religious that even quiet acquiescence in the practice would exact a toll on conscience, id. at 588 (“the student had no real alternative which would have allowed her to avoid the fact or appearance of participation”); and (ii) the force with which the government endorsed the religious exercise sent a signal that dissent would put the individual at odds not just with peers, but with school officials as well, id. at 592-94.

Those concerns have little relevance here. As the Supreme Court made clear in Elk Grove, reciting the Pledge “is a patriotic exercise designed to foster national unity and pride” in the principles the flag symbolizes. 542 U.S. at 6. It is not a religious exercise at all, let alone a core

²⁰ Although the claim in Barnette was discussed in free speech terms, the Jehovah’s Witnesses objected to reciting the Pledge based on their religious views. See Barnette, 319 U.S. at 629, 633 & n.13. Thus, while Plaintiffs here raise Establishment Clause claims, Barnette provides the controlling standard. See Elk Grove, 542 U.S. at 8 (citing Barnette). Indeed, the government would have no greater right to coerce political orthodoxy (the issue in Barnette) than it would to coerce religious orthodoxy (the issue here). See Barnette, 319 U.S. at 642 (“[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”) (emphasis added).

component of worship like prayer. See id. at 31 & n.4 (Rehnquist, C.J., concurring in the judgment) (phrase “under God” in the Pledge does not “convert[] its recital into a ‘religious exercise’ of the sort described in Lee”); id. at 44 (O’Connor, J., concurring in the judgment) (“Any coercion that persuades an onlooker to participate in an act of ceremonial deism [such as reciting or listening to the Pledge] is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character.”).

Plaintiffs allege that “opting out” of the Pledge recital would make students feel like political “outsiders.” See Compl. ¶ 38. But the government does not make “religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.” Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring). Whatever “incidental” benefit might befall religion from the government’s acknowledgment of the Nation’s religious heritage does not implicate the Establishment Clause. 515 U.S. at 768 (opinion of Scalia, J.). Put another way, the Establishment Clause is not violated just because a governmental practice “happens to coincide or harmonize with the tenets of some or all religions.” McGowan, 366 U.S. at 442; see also Lynch, 465 U.S. at 683.

Second, any analysis of the alleged coercive effect of voluntary recital of the Pledge must take into account the Supreme Court’s repeated assurances that the “many manifestations in our public life of belief in God,” Engel, 370 U.S. at 435 n.21, far from violating the Constitution, have become “part of the fabric of our society,” Marsh, 463 U.S. at 792, including in public school classrooms. In particular, over the last half century, the text of the Pledge of Allegiance, with its reference to God, “has become embedded” in the American consciousness and “become part of our national culture.” Dickerson v. United States, 530 U.S. 428, 443 (2000). Public familiarity with the Pledge’s use as a patriotic exercise and a solemnizing ceremony for public events ensures both that

Pledge of Allegiance is an official and patriotic acknowledgment of what all students — Christian, Jewish, Muslim, Hindu, Buddhist, or atheist — may properly be taught in the public schools. Voluntary recitation of the Pledge by willing students thus fully comports with the Establishment Clause.²¹

CONCLUSION

For all the foregoing reasons, the Federal Defendants' motion to dismiss should be granted.

Dated: January 18, 2008

Respectfully submitted,

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²¹ Plaintiffs' claims that the school districts' Pledge practices violate the Free Exercise Clause, RFRA, and the Equal Protection Clause fail for the reasons discussed supra at pages 35-36 and notes 16-17.

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Michael A. Newdow and Rosanna T. Fox, counsel for the Plaintiffs, and David Bradley, counsel for the School District Defendants.

I further certify that on January 18, 2008, a true and correct copy of the foregoing document was sent via e-mail to Nancy Smith, counsel for proposed intervenor-defendant the State of New Hampshire, at Nancy.Smith@doj.nh.gov.

/s/ Eric B. Beckenhauer

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