Courtesy of Zegarelli

summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

Eric C. Rassbach, of the District of Columbia (Diana M. Verm, of the District of Columbia, & J. Patrick Kennedy with him) for the interveners.

Geoffrey R. Bok for the defendants.

David A. Niose for the plaintiffs.

The following submitted briefs for amici curiae:

Andrew P. Blake, David S. Petron, Judith C. Gallagher, & Christopher R. Mills, of the District of Columbia, for Steven Palazzo & others.

David A. Cortman, of Georgia, Jeremy D. Tedesco, of Arizona, & Andrew D. Beckwith for Alliance Defending Freedom & another.

Jay Alan Sekulow, Stuart J. Roth, & Colby M. May, of the District of Columbia, Erik M. Zimmerman, of Virginia, & Carly F. Gammill, of Tennessee, for American Center for Law and Justicepeaaose

claim.

[8] The American Humanist Association sought essentially the same relief in this case as the individual plaintiffs. The individual plaintiffs, Jane Doe and John Doe, are members of the association. Because it is clear that the individual plaintiffs have standing to pursue their claims, asserting their rights individually and the rights of their children, we need not consider whether the association, by itself, has standing to bring the types of claims made in the case. See Tax Equity Alliance for Mass., Inc

judgment record, which in this case included numerous affidavits filed by both sides. No party contended that there were any genuine issues of material fact that precluded the granting of summary judgment.

The pledge is recited in the defendants' schools on a daily basis. The language of the pledge states: "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." This language is codified at 4 U.S.C. § 4 (2012).[10] The pledge was first codified in 1942, but at that time it did not include the words "under God." Those words were added to the statute in 1954, in circumstances we shall describe below.

The pledge is recited in the defendants' schools, and in schools across Massachusetts, pursuant to G. L. c. 71, § 69, which provides, in relevant part, that "[e]ach teacher at the commencement of the first class of each day in all grades in all public schools shall lead the class in a group recitation of the 'Pledge of Allegiance to the Flag.'" The parties do not dispute that the flag ceremony, of which the pledge is a part, is

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[10] The statute provides: "The Pledge of Allegiance to the Flag: '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.', 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."

[11] Each child filed an affidavit in support of the plaintiffs' motion for summary judgment. The affidavits are for

good Americans believe in God" and that others, like them, "who don't believe in God, aren't as good as others who do believe." Jane Doe and John Doe, in their affidavits, likewise expressed concern that the recitation of the pledge "marginalizes [their] children and [their] family and reinforces [a] general public prejudice against atheists and Humanists, as it necessarily classifies [them] as outsiders, defines [them] as second-class

of the United States of America.'" Elk Grove Unified Sch. Dist., supra at 6, quoting Pub. L. No. 77-623, supra. "This resolution, which marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of

the Pledge would view the Pledge as a product of this nation's history and political philosophy").[16]

Although 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. See, e.g., Elk Grove Unified Sch. Disttp.rs,o2tinge, coe as a pro woAlive aod, evolvDisduct comm

schools acknow a pt12 0 0 12 194.4 51396r422, 542 U v. Rio

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[16] Although the Federal statute sets forth the language of the pledge, it says nothing about its recitation in public schools or elsewhere. As stated earlier, the pledge is recited in Massachusetts schools pursuant to G. L. c. 71, § 69. The plaintiffs point to nothing in the legislative history of the Massachusetts statute suggesting that it, or any of its amendments throughout the years, was motivated by religious concerns.

[17] The Supreme Court has not yet expressly decided whether a

address the substantive merits of the challenge made to the pledge in that case; although their opinions demonstrate differing views of jurisprudence arising under the First

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previously to so state, we take this opportunity to confirm what has been obvious and understood to be the case for the decades since the Barnette case was decided: no Massachusetts school student is required by law to recite the pledge or to participate in the ceremony of which the pledge is a part. Recitation of the pledge is entirely optional. Students are free, for any reason or for no reason at all, to recite it in its entirety, not recite it at all, or recite or decline to recite any part of it they choose, without fear of punishment.

impermissible State endorsement of theistic religions. Id. at 6-14. Although the plaintiffs in this case are not asserting an establishment clause claim, or for that matter any claim under the Federal Constitution, we find one part of the court's discussion of that claim particularly instructive on the equal protection claim that we have here. The plaintiffs in that case, similar to the plaintiffs here, maintained that the recitation of the pledge would effectively cast them as outsiders. Id. at 10. As part of its discussion of the so-called endorsement mode of analysis,[21]

[21] "Under the . . . endorsement analysis, courts must consider whether the challenged governmental action has the purpose or effect of endorsing, favoring, or promoting religion." Freedom From Religion Found. v. Hanover Sch. Dist., 626 F.3d 1, 10 (1st Cir. 2010), cert. denied, 131 S. Ct. 2292 (2011), citing County of Allegheny v. American Civ. Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 593-594 (1989).

[22] The plaintiffs cite an incident in Rhode Island in which an atheist high school student was treated hostilely by fellow students (and others in the community) who objected to her public

to remove a "prayer mural" from the school auditorium. It suffices to say that the circumstances of that case are readily distinguishable from what is before us, and we therefore decline to consider it. See Ahlquist v. Cranston, 840 F. Supp. 2d 507 (D. R.I. 2012).

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constitutional right of free movement); Brackett v. Civil Service Comm'n, 447 Mass. 233, 234 (2006) (claiming that plaintiffs were impermissibly bypassed for job promotions); Goodridge v. Department of Pub. Health, 440 Mass. 309, 312 (2003) (claiming that same-sex couples were denied right to civil marriage). The plaintiffs nevertheless claim that stigmatization alone can sometimes constitute a cognizable injury, without a corresponding loss or denial of some type of benefit, imposition of a penalty, or other interference with one's established legal rights or duties. We need not answer such a broad question. We hold only that the very limited type of "stigma" alleged in this case -- the feeling of rejection or exclusion arising from the State's uniform implementation of a voluntary program or activity that is antithetical to one's religious beliefs but which is not shown to violate the First Amendment or cognate provisions of the Massachusetts Constitution -- is not actionable.

[24] We disagree with the plaintiffs' suggestion that, for these purposes, there would be a meaningful difference between the voluntary nonparticipation (or partial participation) in the recitation of the pledge, on the one hand, and classroom lessons on human sexual education, homosexuality, evolution, gender equality, and other similar topics, on the other hand. Under the

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mere exposure at public schools to offensive programs does not amount to a violation of free exercise. Parents have no right to tailor public school programs to meet their religious or moral

6, supra. They cite Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, 378 Mass. 342, 344 n. 5 (1979) ("With the passage of [the equal rights amendment,] our constitutional law has caught up to § 5"), and appear willing to assume, as we did in that case, that the antidiscrimination provisions of the statute equate with the provisions of art. 106. They argue that, because the daily recitation of the pledge violates art. 106, it also violates § 5. For the same reasons we hold that the pledge does not violate art. 106, however, we also hold that it does not violate the statute. Moreover, as we have stated, reciting the pledge is a voluntary patriotic exercise, but it is not a litmus test for defining who is or is not patriotic. The schools confer no "privilege" or "advantage" of patriotism within the meaning of the statute to those who recite the pledge in its entirety.

4. Conclusion. The judgment of the Superior Court is affirmed. The judge's declarations that the daily recitation of the pledge of allegiance does not violate art. 1 of the

(1994) (differential treatment is "[o]ne indispensable element of