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Attorneys for Intervenor-Defendants The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176

AMERICAN HUMANIST ASSOCIATION, and JOHN DOE and JANE DOE, INDIVIDUALLY and AS PARENTS AND NEXT FRIENDS OF DOECHILD,

Plaintiffs,

vs.

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT and DAVID M. HEALY, in his capacity as Superintendent of Schools,

Defendants,

and

THE AMERICAN LEGION, THE AMERICAN LEGION DEPARTMENT OF NEW JERSEY, and THE AMERICAN LEGION MATAWAN POST 176,

Intervenor-Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

DOCKET NO.: MON-L-1317-14

Civil Action

NOTICE OF MOTION TO DISMISS COMPLAINT

TO: Arnold N. Fishman, Esq.
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Attorneys for Plaintiffs

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Attorneys for Defendants

PLEASE TAKE NOTICE that on September 19, 2014, at 9:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys for intervenor-defendants The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176, will move before the Superior Court of New Jersey, at the Monmouth County Courthouse, Freehold, New Jersey, for an Order dismissing the complaint of the plaintiffs American Humanist Association, and John Doe and Jane Doe, and as parents and next friends of Doechild (collectively, "Plaintiffs"), for failure to state a claim pursuant to *R.* 4:6-2(e).

PLEASE TAKE FURTHER NOTICE that in support of their motion, Defendants The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176 shall rely upon the accompanying Memorandum of Law, and the Certification of Glen A. Sproviero, Esq., with exhibits thereto. A proposed form of Order is also submitted herewith.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 1:6-2(c), oral argument is requested if timely opposition is filed.

FISHKIN LUCKS LLP
Attorneys for Intervenor-Defendants

By: Glen A. Sproviero
Glen A. Sproviero

Dated: July 31, 2014

AMERICAN HUMANIST ASSOCIATION, and JOHN DOE and JANE DOE, INDIVIDUALLY and AS PARENTS AND NEXT FRIENDS OF DOECHILD, Plaintiffs, vs. MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT and DAVID M. HEALY, in his capacity as Superintendent of Schools, Defendants, and THE AMERICAN LEGION, THE AMERICAN LEGION DEPARTMENT OF NEW JERSEY, and THE AMERICAN LEGION MATAWAN POST 176, Intervenor-Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY Docket No. MON-L-1317-14 *Civil Action* ORDER

This matter having been opened to the Court upon the motion of intervenor-defendants The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176 (collectively, the "Legion"), for entry of an Order dismissing the plaintiffs' Complaint in its entirety and with prejudice pursuant to *R.* 4:6-2(e); and it appearing that good and sufficient notice of the Motion having been provided to the parties; and for good cause appearing;

IT IS, on this ___ day of _____, 2014;

ORDERED that the Legion's Motion to Dismiss shall be, and hereby is, GRANTED; and it is further

ORDERED that plaintiffs' Complaint shall be, and hereby is, DISMISSED in its entirety and with prejudice; and it is further

ORDERED that counsel for the Legion shall serve a copy of this Order on all counsel of record within seven (7) days of the date hereof.

_____

J.S.C.

CERTIFICATION OF SERVICE

I hereby certify that on July 31, 2014, the within Notice of Motion, Memorandum of Law, Certification of Glen A. Sproviero, Esq., with exhibits thereto, and proposed form of Order were served via New Jersey Lawyers' Service upon Arnold N. Fishman, FISHMAN & FISHMAN, LLC, counsel for plaintiffs American Humanist Association, and John Doe and Jane Doe, individually and as parents and next friends of Doechild, and upon David B. Rubin, DAVID B. RUBIN, P.C., counsel for defendants Matawan-Aberdeen Regional School District and David M. Healey, in his capacity as superintendent of schools. These papers were also served upon David A. Niose, Esq. and Monica L. Miller, Esq., co-counsel to plaintiffs, via Federal Express.

Glen A. Sproviero

Dated: July 31, 2014

AMERICAN HUMANIST ASSOCIATION, and JOHN DOE and JANE DOE, INDIVIDUALLY and AS PARENTS AND NEXT FRIENDS OF DOECHILD, Plaintiffs, vs. MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT and DAVID M. HEALY, in his capacity as Superintendent of Schools, Defendants, and THE AMERICAN LEGION, THE AMERICAN LEGION DEPARTMENT OF NEW JERSEY, and THE AMERICAN LEGION MATAWAN POST 176, Intervenor-Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY DOCKET NO.: MON-L-1317-14 *Civil Action* CERTIFICATION OF GLEN A. SPROVIERO IN SUPPORT OF MOTION TO DISMISS

GLEN A. SPROVIERO, being of full age, certifies under the penalty of perjury that the following is true and correct:

1. I am an attorney-at-law of the State of New Jersey and an associate with the law firm of FISHKIN LUCKS LLP ("Fishkin Lucks"), attorneys for intervenor-defendants The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176 (collectively, the "Legion"). I am familiar with the matters set forth below, and I make this certification in support of the Legion's motion to dismiss the Complaint of plaintiffs American Humanist Association, and John Doe and Jane Doe, individually and as parents and next friends of Doechild (collectively, "Plaintiffs"), pursuant to *R.* 4:6-2(e).

2. Annexed hereto as Exhibit A is a true and correct copy of Plaintiffs' Complaint in this action, dated March 28, 2014.

I certify under penalty of perjury that the foregoing statements made by me are true and correct. I am aware that if the foregoing statements made by me are willfully false, I am subject to punishment.

Glen A. Sproviero

Dated: July 31, 2014

AMERICAN HUMANIST ASSOCIATION, and JOHN DOE and JANE DOE, INDIVIDUALLY and AS PARENTS AND NEXT FRIENDS OF DOECHILD,

Plaintiffs,

vs.

MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT and DAVID M. HEALY, in his capacity as Superintendent of Schools,

Defendants,

and

THE AMERICAN LEGION, THE AMERICAN LEGION DEPARTMENT OF NEW JERSEY, and THE AMERICAN LEGION MATAWAN POST 176,

Intervenor-Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY

Docket No. MON-L-1317-14

Civil Action

MEMORANDUM OF LAW IN SUPPORT OF THE INTERVENOR-DEFENDANTS' MOTION TO DISMISS

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Attorneys for Intervenor-Defendants

The American Legion, The American Legion Department of New Jersey, and The American Legion Matawan Post 176 respectfully move the Court to dismiss this case with prejudice due to the plaintiffs' failure to state a claim upon which relief can be granted.

This case concerns a single, peculiar claim—that the equal protection principles of Article I, Paragraph 5 of the New Jersey Constitution are violated when students are permitted to voluntarily say the words "under God" when they recite the Pledge of Allegiance (the "Pledge") in New Jersey public schools. That argument fails as a matter of well-settled New Jersey law. Although cast as an equal protection claim, plaintiffs' claim is reminiscent of Establishment Clause cases addressing, and allowing, continued recitation of the Pledge. Further, the plaintiffs' theory is unworkable as a practical matter, and would open up every aspect of school curricula to endless equal protection challenges, a position that has been soundly rejected by courts across the country.

Pursuant to well-settled law, an equal protection claim must, at a minimum, allege that the government is unequally providing legal benefits to or imposing legal burdens on a group because of some impermissible characteristic. The sole claim in this case fails to satisfy this threshold requirement. Under any permissible reading of the plaintiffs' complaint, there is no allegation that Matawan-Aberdeen Regional School District or its superintendent (together, "School" or "Defendants") treat the plaintiffs differently from any of the other students who attend schools within the district. Plaintiffs' unspecific and vague factual allegations do not even hint at a contrary conclusion.

Where, as here, there is no allegation of actual unequal treatment, there can be no equal protection claim as a matter of law and plaintiffs' complaint must be dismissed.

STATEMENT OF FACTS

The Pledge, like the nation's flag and the national motto, represents a firmly-established acknowledgment of the bedrock principles on which our country was founded. Although the words of the Pledge are familiar, they bear repeating here: "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." N.J.S.A. 18A:36-3(c); *see also* 4 U.S.C. § 4. New Jersey law requires that every board of education provide flags for each classroom and that students be given the opportunity to salute the flag and recite the Pledge on school days. N.J.S.A. 18A:36-3. Participation in the Pledge is completely voluntary, and, as the statute makes undeniably clear, any student who has any "conscientious scruples" may decline to recite the Pledge. N.J.S.A. 18A:36-3(c). And although a student's decision not to participate may be noticed, the student is not required to explain his decision to anyone. There is no requirement that any school official inquire, record, or take any action with respect to students who choose not to recite the Pledge, for whatever reason.

Plaintiffs Jane and John Doe, who identify as atheists and humanists, assert that they are the parents of a child who attends a public school in the Matawan-Aberdeen Regional School District where the Pledge is regularly recited at the beginning of each day.[1] Sproviero Cert., Exh. A at ¶¶ 4, 7, 19, 22. The plaintiffs allege that they are offended by the recitation of the Pledge because, to them, it is not sufficiently respectful of their beliefs. *See id.* at ¶¶ 23-24. The plaintiffs candidly acknowledge that their child is not forced to recite the Pledge, but, they do not

[1] Allegations are drawn from the plaintiffs' complaint and are assumed to be true for the purpose of this motion. *See Sammarone v. Bovino*, 395 *N.J. Super.* 132, 134 (App. Div. 2007). Plaintiffs' complaint is attached to the Certification of Glen A. Sproviero, dated July 31, 2014 ("Sproviero Cert."), and annexed thereto as Exhibit A.

view that option as reasonable. *Id.* at ¶ 27. Simply listening to the Pledge being recited (or perhaps knowing that the Pledge is being recited) is too much for them to bear. They would prefer to ban the voluntary recitation of the current version of the Pledge for all students. *See id.* at ¶ 47. They brought this one-count equal protection claim asserting that the foregoing disadvantages their child. *Id.* at ¶ 47.

I. Standard of Review

The Plaintiffs have the "obligation . . . 'to make allegations, which, if proven, would constitute a valid cause of action.'" *Sickles v. Cabot Corp.*, 379 *N.J. Super.* 100, 106 (App. Div. 2005) (quoting *Leon v. Rite Aid Corp.*, 340 *N.J. Super.* 462, 472 (App. Div. 2001)). Thus, to survive a motion to dismiss under Rule 4:6-2(e), "the legal requisites for plaintiffs' claim must be apparent from the complaint itself." *Teamsters Local 97 v. State*, 434 *N.J. Super.* 393, 413 (App. Div. 2014) (quotation and citation omitted). Along with the requirements of stating a recognized legal claim, "a plaintiff must plead the facts and give some detail of the cause of action." *Printing Mart–Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 768 (1989) (quotation and citation omitted). Under this standard, "[i]t has long been established that pleadings reciting mere conclusions without facts and reliance on subsequent discovery do not justify a lawsuit." *Glass v. Suburban Restoration Co.*, 317 *N.J. Super.* 574, 582 (App. Div. 1998). Therefore, although reasonable inferences will be drawn in the plaintiffs' favor, "[c]omplaints cannot survive a motion to dismiss where the claims are conclusory or vague and unsupported by particular overt acts." *Delbridge v. Office of Pub. Defender*, 238 *N.J. Super.* 288, 314 (Law Div. 1989), *aff'd sub nom. A.D. v. Franco*, 297 *N.J.Super.* 1 (App. Div. 1993). Rather, "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." *Rieder v. N.J. Dep't of Transp.*, 221 *N.J. Super.* 547, 552 (App. Div.

1987).

As a matter of black-letter law, the plaintiffs' complaint fails to state a valid equal-protection claim under Article I, Paragraph 5 of the New Jersey Constitution and should be dismissed with prejudice.[2]

II. Voluntary Recitation of the Pledge of Allegiance Does Not Violate the Equal Protection Clause of the New Jersey State Constitution

The New Jersey constitution, like its federal counterpart, guarantees the equal protection of the laws by forbidding "the unequal treatment of those who should be treated alike." *Greenberg v. Kimmelman*, 99 *N.J.* 552, 568 (1985); *see also In re Regulation of Operator Serv. Providers*, 343 *N.J. Super.* 282, 323 (App. Div. 2001) ("The equal protection clauses are 'essentially a direction that all persons similarly situated should be treated alike.'" (quoting *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 *U.S.* 432, 439 (1985))). "To establish a violation of the equal protection clause, a plaintiff must show that the allegedly offensive categorization invidiously discriminates against the disfavored group." *In re Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly*, 210 *N.J.* 29, 48 (2012) (quotation and citation omitted). New Jersey's constitutional protection of equal protection principles therefore generally "prohibits the State from adopting statutory classifications that treat similarly situated people differently." *Stubaus v. Whitman*, 339 *N.J. Super.* 38, 57 (App. Div. 2001).

As these cases and innumerable others make clear, equal protection guarantees are

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[2] Although courts have the general authority to dismiss defective complaints without prejudice, when an equal protection claim is defective New Jersey courts most often dismiss the claim with prejudice. *J.D. ex rel. Scipio-Derrick v. Davy*, 415 *N.J. Super.* 375, 397 (App. Div. 2010) ("[W]hen an equal protection challenge fails to state a claim, our courts have not hesitated to dismiss the complaint with prejudice."); *see also Teamsters Local 97*, 434 *N.J. Super.* at 413 ("[O]ur courts have not hesitated to dismiss complaints with prejudice when a constitutional challenge fails to state a claim.").

implicated only when the government classifies (or categorizes) individuals or groups for different treatment. *See, e.g., Caviglia v. Royal Tours of Am.*, 178 *N.J.* 460, 479 (2004) ("[W]e find no classification in violation of equal protection."); *LULAC v. Perry*, 548 *U.S.* 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) (explaining how racial classifications "divvy[] us up by race.").

Where, as here, there is no classification, there can be no equal protection violation. *Greenan v. Hyland*, 149 *N.J. Super.* 7, 19 (App. Div. 1977) ("In the absence of a classification, equal protection analysis should proceed no further."); *see also Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 468 *Mass.* 64, 75 (2014) ("Classification, and differing treatment based on a classification, are essential components of any equal protection claim, Federal or State.").

Particularly instructive here is the New Jersey Appellate Division's decision in *Epstein v. State*, 311 *N.J. Super.* 350, 358 (App. Div. 1998). *Epstein* concerned an equal protection challenge under Article 1, Paragraph 5 to New Jersey's selection of state-wide holidays. The plaintiff argued that New Jersey violated the State constitution's equal protection principles by designating Christmas and Good Friday as legal holidays but not treating Yom Kippur similarly, therefore discriminating against Jewish people. *Id.* The trial court rejected the argument in short order, which decision was affirmed on appeal. As the Appellate Division explained, "[t]he fact that many religious days having significance to adherents of various faiths have not been designated as legal holidays does not, as plaintiff asserts, deny to those adherents the equal protection of the laws or effect a discrimination because of religious principles, contrary to N.J. Const. art. I, ¶ 5." *Id.* That conclusion is fundamentally at odds with the plaintiffs' theory here. Surely the plaintiff in *Epstein* felt "marginalized and not fully accepted," Compl. ¶ 47, because the State did not designate as a holiday the holiest day on the Jewish calendar. Yet that feeling

of offense was not enough to state a claim. Nor is it enough here.

Consistent with *Epstein*, state and federal courts throughout the Country have repeatedly held that Pledge laws like the one challenged here do not implicate—let alone violate—equal protection guarantees.[3] *Id.* at 76; *see also Freedom from Religion Found. v. Hanover Sch. Dist.*, 626 *F.3d* 1 (1st Cir. 2010).

Most recently, in the case of *Acton-Boxborough*, the Massachusetts Supreme Court struck down an equal protection challenge to the voluntary recitation of the Pledge, in an action brought by a group of anonymous plaintiffs (along with the American Humanist Association). 468 *Mass.* 64 (2014). Like New Jersey's Pledge law, the Massachusetts law provided for the voluntary recitation of the Pledge in public schools for those who chose to participate. And like their allegations here, the plaintiffs alleged that the recitation of the Pledge "cast[] them as outsiders" and left them feeling "marginalize[d]" and "stigmatize[d]." *Acton-Boxborough*, 468 *Mass.* at 79. The Court unanimously rejected that argument, holding that the voluntary recitation of the Pledge raised no equal protection concerns because it created no classification. *Acton-Boxborough*, 468 *Mass.* at 75 ("The flaw in the argument, however, 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."). As the Court explained, there was no classification because the voluntary recitation of the Pledge did not lead to any

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[3] These cases, involving practically indistinguishable challenges to the Pledge, are instructive guides given that they concern analogous equal protection guarantees. *See F.H.U. v. A.C.U.*, 427 *N.J. Super.* 354, 375 (App. Div. 2012) ("[M]any federal and state courts have considered the question and their interpretations, though not binding, are instructive."), *certification denied*, 212 *N.J.* 198 (2012); *see also Greenberg*, 99 *N.J.* at 568 ("In the future, as in the past, we shall continue to look to both the federal courts and other state courts for assistance in constitutional analysis."); *Sojourner A. v. N.J. Dep't of Human Servs.*, 177 *N.J.* 318, 329 (2003) ("Plaintiffs bring this action under the New Jersey Constitution. Nonetheless, when cognate provisions of the Federal Constitution are implicated, we have turned to case law relating to those provisions for guidance.").

"differing treatment of any class or classes of students based on their sex, race, color, creed, or national origin." Rather, the Court concluded that far from being treated unequally, "[a]ll students are treated alike." This was so because "[t]hey are free, if they choose, to recite the pledge or any part of it that they see fit. They are entirely free as well to choose to abstain. No one," the court continued, "is required to say all or even any part of it. And significantly, 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." *Acton-Boxborough*, 468 *Mass.* at 76. That reasoning is fully applicable to the claims here and plaintiffs' claims here should likewise be rejected.

The United States Court of Appeals for the First Circuit has similarly concluded that the voluntary recitation of the Pledge does not violate the Equal Protection Clause of the Fourteenth Amendment. *Hanover*, 626 *F.3d* at 14. In *Hanover*, a group of atheists argued that the voluntary recitation of the Pledge of Allegiance in New Hampshire public schools violated the Equal Protection Clause of the Fourteenth Amendment because "those students who choose not to recite the Pledge for reasons of non-belief in God are quite visibly differentiated from other students who stand and participate." *Id.* at 10. Like plaintiffs here, the *Hanover* plaintiffs contended that "children who choose not to recite the Pledge become outsiders based on their beliefs about religion." *Id.*

The First Circuit rejected that argument upon its finding that voluntary recitation of the Pledge did not classify the students because "[t]he reasons pupils choose not to participate are not themselves obvious." *Id.* Nor, the Court recognized, could a reason be deduced. "There are a wide variety of reasons," the Court explained, "why students may choose not to recite the Pledge, including many reasons that do not rest on either religious or anti-religious belief. These include political disagreement with reciting the Pledge, a desire to be different, a view of our

country's history or the significance of the flag that differs from that contained in the Pledge, and no reason at all." *Id.* Moreover, the decision to remain silent could not even be reasonably construed as implying disagreement because "[e]ven students who agree with the Pledge may choose not to recite the Pledge." *Id.* For all these reasons, the court held that "the Doe children are not *religiously* differentiated from their peers merely by virtue of their non-participation in the Pledge." *Id.* (emphasis in original).

In light of *Epstein*, *Acton-Boxborough*, and *Hanover*, there is no colorable argument that the New Jersey law challenged by the plaintiffs classifies anyone based on anything. Like the challenged statutes in *Acton-Boxborough* and *Hanover*, N.J.S.A. 18A:36-3(c) simply permits the voluntary recitation of the Pledge. Students may decline to participate for any reason, religious or not, or indeed, for no reason at all. If a student chooses not to recite the Pledge, no teacher, no principal, and no superintendent may force the student to explain his or her choice.

Under these undisputed facts, and the language of the statute, the Defendant is not imposing any legal burden or withholding any legal right from any of its students. Moreover, because there are a limitless number of reasons that a student may choose not the recite the Pledge, it is impossible for the school to tell why a student chose not to participate. Because the defendants are categorically indifferent about participation in the voluntary recitation of the Pledge, there is no classification, let alone one based on religion. Every court to consider the question has reached the same conclusion. The straightforward application of basic equal protection principles should guide the court here to reach the same conclusion.

III. Plaintiffs Have Failed to Adequately Plead Facts to Support Any Equal Protection Claim

The complaint should be dismissed for another independent reason: the plaintiffs have

not alleged any concrete facts to support their claim. Rather, they rely exclusively on allegations that are "conclusory or vague and unsupported by particular overt acts." *Delbridge*, 238 *N.J. Super.* at 314. That will not do.

By its terms, the Pledge statute does not require any action on the part of the defendants once a student declines to recite the Pledge. The complaint, which is devoid of any allegation of specific actions by defendants to improperly classify the plaintiffs, has not alleged anything to the contrary. Instead, the plaintiffs have chosen to attempt to use of the Pledge statute as a proxy for their wider dissatisfaction with the alleged treatment of atheism in public life. But their general dissatisfaction is simply not actionable here.

The congeries of historical and sociological allegations about alleged discrimination against atheists, even if true, have no bearing on their claims because the Pledge statute requires the plaintiffs to do nothing, and in any event creates no improper classification cognizable under the New Jersey Constitution. For instance, the plaintiffs allege they "have personally experienced the public's prejudice against atheists, as they have frequently heard and read strong public opinions disfavoring atheists and atheism. They have been told directly that atheists are 'arrogant for not believing in God.'" Sproviero Cert., Exh. A at. ¶ 15. Although the plaintiffs' memories of these events appear quite vivid, they are unable to identify the speaker or connect them to a legally-actionable classification, which the case law makes clear is required. If that paragraph of the complaint refers to the defendants, the plaintiffs surely could have made that clear. Likewise, the complaint alleges that the Doechild "has been personally confronted and shouted at in response to his openly identifying as atheist." *Id.* at ¶ 17. Yet again, the plaintiffs fail to identify the alleged shouter. Nor do they explain how this allegation relates to unequal protection under the New Jersey Constitution. This failing is fatal to their claim because the

statute does not require the plaintiffs to identify as atheists, or as anything else; there is therefore no factual allegation to support an improper classification even remotely close to a viable equal protection claim.

Indeed, the complaint includes not a single allegation of actual harm caused by the defendants. This is quintessentially what the pleading rules are intended to prevent. *See, e.g.*, *Ayala v. N.J. Dep't of Law & Pub. Safety, Div. of State Police*, No. L-2829-08, 2011 WL 5041395, at *4 (App. Div. Oct. 25, 2011) (dismissing complaint that was "bereft of any specifics" and "include[d] only anecdotal references rather than factual assertions . . . ."). Here, if the plaintiffs could have pled sufficiently detailed facts about *any* conduct of the defendants, "they presumably would have done so." *J.D. ex rel. Scipio-Derrick*, 415 *N.J. Super.* at 396. This basic pleading failure alone warrants dismissal of this suit.

IV. Plaintiffs' Claim is Simply a Disguised Establishment Clause Claim, Which Has Been Soundly Rejected by the Courts

Plaintiffs' claim here -- that the "Pledge recitation directly contradicts the religious beliefs and principles of the plaintiffs" -- has historically been plead (and unanimously lost) by litigants as an Establishment Clause claim (i.e., that the government is endorsing or favoring religion). Plaintiffs' attempt to recast their claim as a purported equal protection violation is a transparent attempt to circumvent well established law that the Pledge does not violate the Establishment Clause. *See, e.g.*, *Hanover*, 626 *F.3d* at 15 ("[V]oluntary, teacher-led recitation of the Pledge by the state's public school students do not violate the Constitution."); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 *F.2d* 437, 439 (7th Cir. 1992) ("We conclude that schools may lead the Pledge of Allegiance daily, so long as pupils are free not to participate."); *see also Croft v. Perry*, 624 *F.3d* 157, 164 (5th Cir. 2010) (noting how the U.S. Supreme Court "has suggested

in dicta, time and again, that the pledge is constitutional."). The judicial unanimity on this issue has been noteworthy. *See Myers v. Loudon Cnty. Pub. Schs.*, 418 *F.3d* 395, 406 (4th Cir. 2005) (explaining that, despite "the vast number of Establishment Clause cases to come before the Court, *not one Justice has ever suggested that the Pledge is unconstitutional.* In an area of law sometimes marked by befuddlement and lack of agreement, such unanimity is striking." (emphasis in original)). As Chief Justice Rehnquist explained, "the mere fact that [one] disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 *U.S.* 1, 32 (2004) (Rehnquist, C.J., concurring).

The plaintiffs cannot escape these cases by recasting their claim as one of equal protection. *See Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 *U.S.* 573, 593-94 (1989) (noting that regardless of the "key word" used in the allegations, the charge of "favoritism," "promotion," or "endorsement" all touch on Establishment Clause principles), *abrogated on other grounds by Town of Greece v. Galloway*, 134 *S. Ct.* 1811 (2014). The court should see through plaintiffs' gamesmanship.

V. Finding an Equal Protection Claim Would Cripple the State's Ability to Govern

The plaintiffs' equal protection claim, which fails for all of the foregoing reasons, is also unworkable in practice. Under their theory, a government actor violates equal protection anytime it "directly contradicts the religious beliefs and principles of the plaintiffs." Sproviero Cert., Exh. A at ¶ 23. This theory, at its core, is based on the premise that government conduct becomes unconstitutional if it "caus[es]" someone "to feel marginalized and not fully accepted."

Id. at ¶ 47. This, in turn, is based on the idea that the public school curriculum must be constructed in a manner that will not offend anyone's religious sensibilities. Plaintiffs are wrong.

Over sixty-five years ago, Justice Jackson identified the fatal flaw in the argument the plaintiffs make today. "If we are to eliminate everything that is objectionable to any [religious group] or inconsistent with any of their doctrines," he observed, "we will leave public education in shreds. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits." *Illinois ex rel. McCollum v. Board of Educ.*, 333 *U.S.* 203, 235 (1948) (Jackson, J. concurring). Because of our nation's incredible diversity of faiths, it is impossible for the state "to satisfy every citizen's religious needs and desires." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 *U.S.* 439, 452 (1988). There is no getting around the fact that "[a] broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activities deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion." *Id.* Indeed, practically everything government does may be considered by some to be "incompatible with their own search for spiritual fulfillment and with the tenets of their religion." *Id.* But this does not make most of what government does unconstitutional. Instead, it has been long recognized that because disagreement is "inevitable," the government may "adopt and pursue programs and policies *within its constitutional powers*" even when those initiatives "are contrary to the profound beliefs and sincere convictions of some of its citizens." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 *U.S.* 217, 229 (2000) (emphasis added). Under any other approach, like the one

advanced by the plaintiff here, "it is not easy to imagine how government could function . . . ." *Pleasant Grove City v. Summum*, 555 *U.S.* 460, 468 (2009).

The New Jersey Supreme Court, like other courts across the nation, has appreciated that these disagreements do not run afoul of constitutional guarantees. *See Smith v. Ricci*, 89 *N.J.* 514 (1982); *see Lanner v. Wimmer*, 662 *F.2d* 1349, 1354 (10th Cir. 1981) ("Courts have rarely entered the thicket of trying to supervise the manner in which public schools teach traditional subjects which may conflict with or offend the religious sensibilities of some students."); *see also Evans-Marshall v. Bd. of Educ.*, 624 *F.3d* 332, 342 (6th Cir. 2010) ("If even the most happily married parents cannot agree on what and how their own children should be taught, as [we] suspect is not infrequently the case, what leads anyone to think the federal judiciary can answer these questions?"). Instead, courts are mindful to note that, in interpreting these constitutional guarantees, "[i]t is to be stressed that 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference.'" *Bethany Baptist Church v. Deptford Twp.*, 225 *N.J. Super.* 355, 364 (App. Div. 1988) (quoting *Braunfeld v. Brown*, 366 *U.S.* 599, 606 (1961)); *see also Burwell v. Hobby Lobby*, No. 13-354, 2014 WL 2921709, at *29 (S. Ct. June 30, 2014) ("[T]he American community is today, as it long has been, a rich mosaic of religious faiths." (quoting *Town of Greece*, 134 *S. Ct.* at 1849 (Kagan, J., dissenting))); *Joseph Burstyn, Inc. v. Wilson*, 343 *U.S.* 495, 528 (1952) (Frankfurter, J., concurring) (our nation is one with "hundreds of sects, with widely disparate and often directly conflicting ideas of sacredness . . . ."). As this State's Supreme Court explained in a challenge to the sexual education curricula in public high schools, the constitutionality of what is taught in public schools does not hinge on the consent of each student and parent. *Ricci*, 89 *N.J.* at 521-22. Instead, the Constitution only requires that the participation be voluntary. *Id.* at 521 ("[W]e

believe that the simple fact that parents can remove their children from any objectionable part of the program is dispositive."). This remains true even if the plaintiffs subjectively believe that declining "exerts an intolerable pressure" on the students. *Id.* That the Doechild would like to participate in the parts of the Pledge that the Doechild currently finds unobjectionable, *see* Compl. ¶ 27, and force the defendants to jettison those parts found objectionable, does not change this conclusion.

New Jersey's approach is echoed by state and federal courts throughout the country. As the U.S. Court of Appeals for the First Circuit explained, "[p]ublic schools are not obliged to shield individual students from ideas which potentially are religiously offensive, *particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.*" *Parker v. Hurley*, 514 *F.3d* 87, 106 (1st Cir. 2008) (emphasis added); *see also Bauchman v. W. High Sch.*, 132 *F.3d* 542, 558 (10th Cir. 1997) ("[P]ublic schools are not required to delete from the curriculum all materials that may offend any religious sensibility." (quoting *Florey v. Sioux Falls Sch. Dist. 49-5*, 619 *F.2d* 1311, 1318 (8th Cir. 1980))); *Ware v. Valley Stream High Sch. Dist.*, 75 *N.Y.2d* 114, 125 (N.Y. 1989) ("[P]arents have no constitutional right to tailor public school programs to individual preferences, including religious preferences . . . ").

Courts speak with one voice because they realize that public schools would be radically transformed under the plaintiffs' conception of equal protection. Indeed, the very concept of a Pledge recited in public school—in any form—would be open to constitutional challenge under the plaintiffs' theory. As the Massachusetts Supreme Judicial Court recently recognized, "any Jehovah's Witness could claim under the plaintiffs' theory that the recitation of the pledge, even without its reference to God, offends his or her religion and thereby impermissibly stigmatizes

him or her." *Acton-Boxborough*, 468 *Mass.* at 81 n.25. The rest of the school day would not fare much better. Science and history curricula could be successfully challenged on the grounds that they are offensive to certain faiths. *See, e.g., Malnak v. Yogi*, 592 *F.2d* 197, 209 n.41 (3d Cir. 1979) (Adams, J., concurring) (noting that the "widespread practice" of teaching "Darwin's theory of evolution . . . is offensive to some religious groups . . . ."); *C.F. ex. rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 *F.3d* 975, 978 (9th Cir. 2011) (Advanced Placement European History class challenged for being "derogatory, disparaging, and belittling regarding religion and Christianity in particular."). So, too, could English or Literature classes. *See, e.g., Montiero v. Tempe Union High Sch. Dist.*, 158 *F.3d* 1022, 1030 (9th Cir. 1998) ("There is, of course, an extremely wide—if not unlimited—range of literary products that might be considered injurious or offensive, particularly when one considers that high school students frequently take Advanced Placement courses that are equivalent to college-level courses.").

Even odder, according to the plaintiffs' theory it would violate Article I, Paragraph Five of the New Jersey Constitution to recite at least two parts of the New Jersey Constitution itself. *See* N.J. Const. pmbl.; *see also* N.J. Const. art. I, ¶ 3. There is simply no way to square the plaintiffs' arguments about the inclusion of "under God" in the Pledge of Allegiance with the Preamble's religious core.[4] Paragraph 3, the very provision of the New Jersey Constitution that protects religious liberty, also would not be able to overcome the hurdle the plaintiffs seek to erect.[5] This cannot be the law. Surely the Constitution itself is not unconstitutional.

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[4] "We, the people of the State of New Jersey, grateful to Almighty God for the civil and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this Constitution."

[5] Article 3 provides, in part, that "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his own conscience . . . ."

CONCLUSION

In this case, the plaintiffs have attempted to disguise a universally-rejected Establishment Clause claim as a suit based on equal protection guarantees. Their claim is unsound in principle, unworkable in practice, and foreclosed by binding precedent. Because the plaintiffs cannot overcome these obstacles, their claim should be dismissed with prejudice.

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