IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-B-1544(PAC)

ZACHARY LANE, et al.;
Plaintiffs,

v.

BILL OWENS, et al.;
Defendants.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

I. THE MANDATORY PLEDGE LAW CANNOT BE JUSTIFIED AS A CURRICULAR PROVISION

The defendants defend the Mandatory Pledge Law as part of a proper school curriculum. *See, e.g.,* State Response at 9-16; Jefferson County Response at 8. This assertion is flatly contrary to both the applicable law and the facts of this case. Specifically, the United States Supreme Court rejected the identical proposition in *Barnette*.

A. The Mandatory Pledge Law Is Not And Was Never Intended To Be Curricular

1. *The Mandatory Pledge Law Promotes No Educational Goals*

The Mandatory Pledge law cannot be defended as advancing legitimate curricular objectives because it promotes no educational goals. Plaintiffs do not dispute that school

districts have an enormous amount of autonomy over *legitimate* curricular decisions. But close attention to the words of the Pledge of Allegiance reveals that it is not a form of instruction, but a type of loyalty oath; it requires citizens to declare their loyalty to the United States flag and to the country itself. 4 U.S.C. § 4. Claims of the Pledge's curricular legitimacy have been rejected by nearly every court that has examined the issue, beginning with *Barnette*. Most instructively, in *Barnette*, the Court stated:

> [T]he State may 'require *teaching by instruction and study* of all in our history and in the structure and organization of our government, including the guaranties of civil liberty which tend to inspire patriotism and love of country.' . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.

319 U.S. at 631 (citing *Gobitis*, 310 U.S. at 604) (emphasis added).

Similarly, cases that have applied *Barnette* to teachers' First Amendment rights have also rejected the notion that Pledge requirements have curricular value in and of themselves. For example, in *Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623, 633-34 (2d Cir. 1972), while the Court recognized that schools generally have discretion to determine curricular priorities, it rejected the idea that requiring teachers to recite the Pledge can be justified as a curricular decision. Similarly, in *State v. Lundquist*, 262 Md. 534, 539, 273 A.2d 263, 266 (1971), the Court distinguished between teachers' instruction in curricular matters related to patriotic and democratic ideals and sheer compulsion of allegiance**.**

The Tenth Circuit has also recognized that there is a clear constitutional difference between legitimate curricular decisions and compelling teachers to declare a belief. *See Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist.*, 598 F.2d 535, 541 (10th

Cir. 1979). While the discussion of this principle was indeed dicta as the defendants have pointed out, the Tenth Circuit could not have been clearer in its interpretation of *Barnette* as an outright rejection of the claim that required recitation of the Pledge is related to curriculum. *Id*.

The only case in which a state's power to require a teacher to recite the Pledge has been upheld involved a requirement where the Pledge was but one part of a broader directive requiring teachers to teach children patriotic songs and provide instruction about and celebrate specified national holidays. *See Palmer v. Bd. of Educ. of Chicago*, 603 F.2d 1271 (7th Cir. 1979). In *Palmer*, a probationary teacher argued that the cumulative effect of these requirements interfered with her rights of religious freedom. The law, however, was targeted to matters more closely identified with a school's traditional educational mission, such as teaching about President Lincoln and why his birthday is observed. *Id*. at 1274. In contrast, Colorado's Pledge law requires no education, no instruction, and no edification of students, but only the rote recitation of the words of the Pledge, every day, for the duration of their public school years. To the extent that *Palmer* rejects at teacher's First Amendment rights to not recite the Pledge, it is inconsistent with *Barnette* and the vast majority of cases addressing teachers' rights in this context.

Neither does the State's invocation of *Sherman v. Community Consolidated School Dist. 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), support the defendants' claims. It is noteworthy that *Sherman* begins with the proposition that "[a] State . . . may not compel any person to recite the Pledge of Allegiance to the flag." *Id*. at 439. The result in *Sherman* is entirely dependent upon the Court's interpretation of the

Pledge statute in that case as non-compulsory. *Id*. at 442 ("If Illinois requires every pupil to recite the Pledge, then *Barnette* scuttles the statute.").

2. *The Language Of The Statute Reveals That The Legislature Did Not Intend The Mandatory Pledge Law As A Curricular Measure*

The plain language of a statute is the best indication of legislative intent. *In re 2000-2001 Dist. Grand Jury ex rel. First Judicial Dist., State of Colo., Concerning Grand Jury Report on Proland Annexation*, 22 P.3d 922, 925 (Colo. 2001); *People v. J.J.H.*, 17 P.3d 159, 162 (Colo. 2001). The plain language of Colorado's Mandatory Pledge law makes it clear that this statute was not drafted as a curricular or pedagogical matter. This is particularly evident in examining the structure and content of the statute's exemptions.

First, if the Legislature had been in interested in teaching about patriotism rather than promoting a selected orthodoxy, the Legislature would not have exempted non-citizens. *See* C.R.S., § 22-1-106(2)(a). Knowledge about our country is at least as useful to non-citizens as citizens, perhaps more so. From an educational standpoint, an exemption for non-citizens from a program supposedly tied to teaching civics and history would be illogical, ay a minimum. On the other hand, the non-citizen exception makes sense if the Legislature viewed the Pledge for what it is: a serious, meaningful oath of loyalty to the nation. It would obviously be unreasonable to ask a non-citizen to pledge allegiance to a country not his or her own.

Second, along similar lines, if the Legislature intended the Pledge to be regarded as a curricular matter rather than a statement of sincere belief, there would be no purpose for a religious exemption. As authority cited by the defendants suggests, even teachers' valid religious objections may be subordinate to genuine curricular advancement. *See*

State Response at 10 (citing *Webster v. New Lenox School Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990)). Thus, while the religious exemption does not make sense if the Pledge requirement is truly an educational requirement, the exemption is logical and necessary under *Barnette* if the Legislature intended the Pledge to operate as a genuine affirmation of belief.

Third, it is inconceivable that daily recitation of the Pledge for up to thirteen straight school years could possibly be needed for Colorado students to learn the words of the Pledge, to have knowledge of the Pledge, or to learn whatever civics lesson the Legislature intended that they assimilate.

Fourht, the claim of curricular purpose does not make sense in light of the failure to mandate the Pledge in private schools. It is absurd to suggest that the Legislature somehow thought that children attending private schools would be in less need of a citizenship lesson than those attending public schools. Other Colorado statutes that actually address civics and knowledge of our country's institutions apply to private as well as public schools. *See, e.g.*, C.R.S. § 22-1-108 (requiring instruction on the United States Constitution in all public and private schools).

B. Even If The Law Were Curricular, It Could Not Meet The Narrow Tailoring Requirement Of The Strict Scrutiny Test

Even if one were to indulge a claim that Colorado's Mandatory Pledge Law advances a curricular interest, the law would fail the narrow-tailoring requirement of strict scrutiny. As the State recognizes, though schools may have a legitimate interest in instilling respect for the symbols of national government, their means must be narrowly drawn. State Brief at 13 (citing *Russo*, 469 F.2d at 632 (citation omitted)). As the Second Circuit explained in *Russo*, the government must seek whatever less drastic

means are available to achieve its educational objectives. *Id*. The Court concluded that the regulation, which required teachers to stand and recite the Pledge, was insufficiently tailored to advance the school's goals. In other words, there were numerous other ways to accomplish the government's goals without compromising the teacher's right of conscience. Moreover, as the court stated:

> [P]atriotism that is forced is a false patriotism just as loyalty that is coerced is the very antithesis of loyalty. We ought not impugn the loyalty of a citizen-especially one whose convictions appear to be as genuine and conscientious as Mrs. Russo's-merely for refusing to pledge allegiance, any more than we ought necessarily to praise the loyalty of a citizen who without conviction or meaning, and with mental reservation, recites the pledge by rote each morning. Surely patriotism and loyalty go deeper than that.

Russo, 469 F.2d at 634.

II. COLORADO'S MANDATORY PLEDGE LAW CANNOT BE INTERPRETED AS VOLUNTARY

The defendants argue that Colorado's Mandatory Pledge law is consistent with the First Amendment and *Barnette* because—contrary to the statute's plain language—the Mandatory Pledge law is actually voluntary. This argument appears in two versions. First, it appears in the State's repeated assertion that the statute is voluntary—assertions which simply ignore the language of the statute. *See* State Response at 3 (law does not compel the speech of any unwilling student); State Response at 4 (students can opt out of participation at any time and for any reason).

Second, the districts suggest that the law is somehow less mandatory than it is written, because the districts do not intend to comply with the statute's terms and clear intent. *See* Cherry Creek Response at 3 and Exhibit 1 at 2 (allowing teacher to opt out for

any reason); *id.* at 3 ("there is no instance where any student or teacher . . . would be required, over their objection, to recite the Pledge"); Aurora Response at 4 (suggesting that teachers who object for non-religious reasons will not be disciplined).[1]

A. The Defendants' Strange Construction Of the Mandatory Pledge Law Indicates That They Recognize That Law Is Unconstitutional Under Any Reasonable, Text-Based Construction

Before turning to the merits of the defendants' argument that the term "shall" in the statute actually means "may," it is useful to point out what the defendants are conceding when they make this argument. *See* Aurora Response at 2 (noting that "may" is the permissive term in contrast to Pledge statute's use of "shall recite"); Cherry Creek Response at 2 (declining to address constitutionality of the statute). It appears that the defendants recognize that the law goes too far and is unconstitutional as written, as would anyone who has measured the Mandatory Pledge Law against Supreme Court precedents prohibiting compelled citizen speech. Compelling citizens to pledge allegiance to a government-selected orthodoxy was held unconstitutional sixty years ago in *Barnette*. *See also Sherman v. Community Consol. School Dist. 21 of Wheeling Tp.*, 980 F.2d 437, 442 (7th Cir. 1992) (if statute is mandatory, *Barnette* "scuttles" the statute). Yet, on its face, this is what Colorado's Mandatory Pledge Law purports to do; this appears to be why the school districts have forwarded "interpretations" of the law that flatly contradict the law's plain language and attempt to render its mandate without effect.

B. The Mandatory Pledge Statute Is A Broad Mandate To Say The Pledge With Specific, Limited Exceptions

[1] As discussed below, Jefferson County and Aurora stop short of asserting that they will not discipline teachers who object for other reasons. Compare Cherry Creek Response Exhibit 1 at 2 (stating commitment that it will not discipline) with Jefferson County Response at 4 (silent on whether will discipline or not).

Colorado's law is phrased as a mandatory command followed by limited and specific exceptions. Here is the command:

> The teacher and students in each classroom in each public elementary, middle, and junior high school in the state of Colorado *shall* begin each school day by reciting aloud the pledge of allegiance to the flag of the United States of America.

C.R.S., § 22-1-106(2)(a) (emphasis added); compare State Response at 4 (students "can opt out of participation at any time and for any reason").

It is impossible to read this text as creating anything other than a mandatory requirement. The word "shall" indicates a command rather than a request for compliance. *Woldt v. People*, 64 P.3d 256, 269 (Colo. 2003); *Pearson v. Dist. Court,* 924 P.2d 512, 516 (Colo.1996) ("The generally accepted and familiar meaning of 'shall' indicates that this term is mandatory."). Adopting another interpretation of the term would have bizarre consequences, including causing complete confusion in Colorado's educations laws which use the word "shall" to denote a mandate well over 600 times. *E.g*. C.R.S. § 22-1-123(3) ("A school district shall not release the education records of a student" without prior written consent); C.R.S. § 22-7-409(1) ("shall" used to mandate CSAP testing); C.R.S. § 22-30.5-303 ("shall" used to require charter schools to meet or exceed state performance standards).[2]

[2] Similarly, as discussed further below, the argument that the absence of an express enforcement provision in this statutory section or subsection means that the law is somehow voluntary is not persuasive. *See, e.g.,* Cherry Creek Response at 5-6 (subsection fails to create any enforcement provisions and therefore "does not require recitation of the Pledge of Allegiance"); Jeffco Response at 2 (apparently arguing that mandatory "shall" should be read as permissive "may" because no penalties in this section). The vast majority, perhaps all, of Colorado's education statutes does not contain express enforcement provisions but the requirements of these statutes are nonetheless entirely mandatory.

Following the statute's command are two limited "exceptions." The first defines the only exception that teachers and students may assert themselves, if they "object" on religious grounds:

> Nothing in this subsection . . . shall be construed to require a teacher or a student to recite the pledge of allegiance described in paragraph (a) of this subsection (2) if the teacher or student objects to the recitation of the pledge on religious grounds.

C.R.S., § 22-1-106(2)(b).[3]

The second exception allows parents to excuse their children from the Pledge mandate:

> A student shall be exempt from reciting the pledge of allegiance if a parent or guardian of the student objects in writing to the recitation of the pledge on any grounds and files the objection with the principal of the school.

Id. By its terms, parents—not students—must exercise this exception. Neither teachers nor students can opt out using this provision.

When the Legislature lists exceptions to a statute, the Legislature presumably intends to exclude any categories not listed. *See, e.g., City of Arvada v. Colorado Intergovernmental Risk Sharing Agency*, 19 P.3d 10, 13 n.6 (Colo. 2001) (*expressio unius est exclusio alterius* means legislature did not intend to created exceptions that it did not list); *Lunsford v. W. States Life Ins.*, 908 P.2d 79, 84 (Colo.1995) ("When the legislature speaks with exactitude, we must construe the statute to mean that the inclusion or

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[3] It is worth noting that, although this passage is referred to as an "exception," it might be better described as "a basis for being excused from the Pledge requirement," because it is not actually an exception to the operation of the law. Even those who do not wish to be compelled to say the Pledge must comply with the law and "object" to be excused from the Pledge. State Response at 12 (noting that district can require teachers to lead Pledge if teachers "refuse to avail themselves of the opt-out provision.") An actual "exception" to the law would remove the burden on First Amendment rights entirely. E.g. C.R.S., § 22-1-106(2)(c)(excluding the entire class of non-citizens.)

specification of a particular set of conditions necessarily excludes others."). Thus, contrary to the assertion that students and teachers are free to opt out of recitation of the Pledge at any time for any reason, it is apparent that the statute narrowly circumscribes a valid, self-asserted objection to religious grounds.

Although it is undoubtedly true that a court may construe a statute to avoid constitutional questions, *see* Jefferson County Response at 3 n.2, statutory construction may not be pressed " 'to the point of disingenuous evasion.' " *United States v. Locke*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933)). There is simply no basis in the statute's language for the notion that "[s]tudents who object to reciting the Pledge can opt out of participation at any time and for any reason." State Response at 4. Neither is there a basis for suggesting that teachers can opt out for any reason. *E.g*. Jeffco at 4. The failure of a district to comply with a law does not change the meaning of the law, though it may be a laudable instance of civil disobedience. *See* Cherry Creek Response at 3 (will implement the law so that there is "no instance" where any student or teacher will be required to say the Pledge over objection).

III. ABSENT AN INJUNCTION, THE MANDATORY PLEDGE LAW CAUSES IRREPARABLE HARM TO PLAINTIFFS BY CHILLING PLAINTIFFS IN THE EXERCISE OF THEIR FIRST AMENDMENT RIGHTS

The school district defendants (absent DPS) argue that plaintiffs face no irreparable harm because the school districts currently have taken the position that they intend not to enforce the Mandatory Pledge Law. Specifically, Adams-Arapahoe and Jefferson County have stated the same position, disavowing any intention to impose

consequences on either students or teachers for violating the law.[4] Similarly, defendant Cherry Creek maintains that under its guidelines, "there is no instance where any student or a teacher, let alone the named Plaintiffs would be required, over their objection, to recite the Pledge of Allegiance, there is no instance where they would be required to provide a specific reason for not reciting the Pledge, and there is no instance where there would be any disciplinary action imposed, any retaliation or harassed [sic] in any manner." Cherry Creek Response at 3.

The school districts' current position regarding enforcement of the law in no way excuses or mitigates the unconstitutionality of the Mandatory Pledge Law, and cannot provide a guarantee that plaintiffs will not suffer serious consequences for exercising their First Amendment rights. The chilling effect of the underlying statute is unaltered by the defendants' current interpretations; as such, the Mandatory Pledge Law burdens plaintiffs' free speech rights, thereby causing irreparable harm.

First, the defendants' stated positions regarding enforcement are inconsistent with the language of the statute. As discussed in greater detail in Section II, *supra*, the Pledge Law (1) mandates recitation of the Pledge; (2) narrowly defines permissible exemptions; (3) and sets forth the permissible procedures for obtaining those exemptions. Both the state defendants and the school districts apparently have recently discovered that the

[4] "Retaliation and/or harassment of any individual based upon their participation or nonparticipation shall not be tolerated. . . . The state law does not require discipline of teachers who object on grounds other than religion." Adams-Arapahoe Response at 4; Jefferson County Response at 4. Further, the districts assert, the expectation is "that any teacher who objects to reciting the Pledge should confer with his or her principal so that arrangements may be made to insure the teacher's decision does not disrupt the classroom, interfere with student learning, or permit the classroom to be used to forward a personal agenda." Adams-Arapahoe Response at 4-5 (footnote omitted); Jefferson County Response at 4-5(footnote omitted).

statute does not mean what it plainly says, i.e, they now assert that the Mandatory Pledge Law is, in fact, purely voluntary. But this interpretation cannot be reconciled with the text of the statute.

Second, the existence of the school districts' lenient interpretations does not change the fact that students and teachers who do not comply with the statute's mandate will be violating state law. The very knowledge that expression of one's conscience places an individual in violation of the law alone creates an unacceptable chilling effect on freedom of speech. *See United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (recognizing in context of void-for-vagueness challenge that chilling effect may arise out of individual's fear that his or her conduct violates statute). Further, contrary to the defendants' arguments, the fact that the precise penalties for dissent are not set forth in the statute in no way eliminates the possibility of punishment. Rather, the uncertainty regarding the consequences of violating the Pledge Law only increases its chilling effect. *See id.* (vague statute that permits discriminatory enforcement may produce chilling effect due to its imprecision).

Third, putting the school districts' current promises not to enforce the law aside, the existing legal framework clearly authorizes punishment of individuals who do not comply with state law. Defendants Adams-Arapahoe and Jefferson County argue that there can be no prediction of harm befalling those who dissent from mandatory recitation of the Pledge because no such reprimand occurred during the previous era of voluntary recitation. *See* Adams-Arapahoe Response at 6; Jefferson County Response at 6. This assertion utterly ignores the fact that recitation of the Pledge has never previously been mandated by the government in Colorado under force of law.

While the school districts have currently adopted the position that they will not enforce the Pledge Law's strictures, there is nothing to prevent a school district from changing its position overnight. If that were to happen, it is apparent that existing statutes pertaining to the discipline of students and teachers could be used to punish those who object to mandatory recitation of the Pledge on their own grounds of conscience.

Under existing law, a student may be suspended or expelled for "[c]ontinued willful disobedience or open and persistent defiance of proper authority." C.R.S. § 22-33-106(1)(a). The Mandatory Pledge Law patently grants school authorities a basis for insisting that students recite the Pledge unless they fit within one of the defined exceptions under the statute. Thus, a student who exercises her right to not to recite the Pledge based on her own beliefs, asserted on the strength of her own, individually-held rights (rather than seeking permission to exercise her rights form her parents), could be found in defiance of a "proper authority" and be suspended or expelled. The school districts may assert that they do not intend to take such action, but it cannot be denied that the language of the statutes, in combination, permit such a harsh approach.

Teachers also face real threats for failing to abide by the legal duties imposed by the Mandatory Pledge Law. Under existing law, "[a] teacher may be dismissed for . . . neglect of duty, immorality, unsatisfactory performance, insubordination, . . . or other good and just cause." C.R.S. § 22-63-301. Insubordination under this provision has been defined as the failure to obey a reasonable order. *Ware v. Morgan Cty. Sch. Dist. No. RE-3*, 748 P.2d 1295, 1300 (Colo. 1988). Presumably, because the requirement that teachers recite the Pledge is state law, an order requiring a teacher to do so would be considered eminently "reasonable." Further, a *single incident* of disobedience may

amount to insubordination for which a teacher may be dismissed. *School Dist. No. 1 v. Cornish*, 58 P.3d 1091, 1095 (Colo. App. 2002). Insubordination may result from refusal to obey a direct or an *implied* order. *Thompson v. Bd. of Educ. of Roaring Fork Sch. Dist. RE-1*, 668 P.2d 954 (Colo. App. 1983). Thus, the concept of insubordination is broadly defined, and could certainly encompass dissent from mandatory recitation of the Pledge.

Along similar lines, "neglect of duty" may include refusal to teach the prescribed curriculum, *Cornish*, 58 P.3d at 1095, and failure to carry out obligations and responsibilities in connection with classroom and other school-sponsored activities, *W. Yuma Sch. Dist. RJ-1 v. Flanning*, 938 P.2d 151, 159 (Colo. 1997). Thus, the concept of "neglect of duty" is also broad enough to encompass a teacher's failure to comply with the Mandatory Pledge Law.

Fourth, the defendants' own arguments give lie to their claim that the teachers, in particular, will face no consequences for their dissent. Specifically, Adams-Arapahoe and Jefferson County both argue that the Pledge is a component of the civics curriculum, such that a teacher's dissent from the practice of mandatory recitation may be considered disruptive, and teachers must "clear" the form of their dissent with their principal. Adams-Arapahoe Response at 6-7; Jefferson County Response at 6-7. *See also* State Defendants' Response at 16 ("those authorities charged by state law with curriculum development have the right to require the obedience of subordinate employees, including the classroom teachers").

In asserting that teachers who dissent will be considered as "disrupting" their classrooms, the defendants have demonstrated that teachers may face serious consequences for expression of their conscience. This implicit threat of retribution for

non-participation chills the exercise of First Amendment rights. The only way to guarantee that such consequences will not befall plaintiffs is through the issuance of a court order.

DATED this _____ day of August, 2003

Respectfully submitted,

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