1 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

2

Civil Action No. 03-B-1544

3

ZACHARY LANE, ET AL.,

4 Plaintiffs,

5 vs.

6 BILL OWENS, ET AL.,
Defendants.

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REPORTER'S TRANSCRIPT

9 RULING

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11 Proceedings before the HONORABLE LEWIS T. BABCOCK, Chief Judge, United States District Court for the District of

12 Colorado, commencing at 2:00 p.m., on the 15th day of August, 2003, in Courtroom 1, Alfred A. Arraj United States Courthouse,

13 Denver, Colorado.

14 APPEARANCES

15 FOR THE PLAINTIFFS: ALAN K. CHEN, ESQ.
University of Denver College of

16 Law
2255 E. Evans Ave., #464B

17 Denver, CO 80208

18 MARK SILVERSTEIN, ESQ.
American Civil Liberties Union

19 Foundation of Colorado
400 Corona Street

20 Denver, CO 80220

21

GWEN DANIEL, Official Reporter, CM, CFRR

22 901 19th Street - A105 - Alfred A. Arraj U.S. Courthouse
Denver, Colorado 80294

23 (303) 571-4084

24

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1 FOR THE PLAINTIFFS: DAVID A. LANE, ESQ.
Kilmer & Lane
2 The Odd Fellows Hall
1543 Champa Street, #400
3 Denver, CO 80202

4 FOR THE DEFENDANT W. STUART STULLER, ESQ.
JEFFERSON COUNTY SCHOOL CAPLAN AND EARNEST LLC
5 DISTRICT R-1 AND AURORA: 2595 Canyon Boulevard, #400
Boulder, CO 80302
6
FOR THE STATE OF COLORADO: MAURICE KNAIZER, ESQ.
7 RENNY FAGAN, ESQ.
ANTONY B. DYL, ESQ.
8 JOHN R. SLEEMAN, ESQ.
State Services Section
9 1525 Sherman Street, 5th Floor
Denver, CO 80203
10
FOR SCHOOL DISTRICT 1: MARY ELLEN McELDOWNEY, ESQ.
11 General Counsel
900 Grant Street, #701
12 Denver, CO 80203

13 FOR CHERRY CREEK NO. 5: RICHARD J. BANTA, ESQ.
7979 East Tufts Avenue Parkway
14 Suite 1050
Denver, CO 80237
15

16 P-R-O-C-E-E-D-I-N-G-S

17 THE COURT: Please be seated.

18 I think I should begin with the Constitution, and as
19 applicable here, the First Amendment to the Constitution
20 provides that Congress shall make no law abridging the freedom
21 of speech.

22 In 1943, if my history is right, we were in the middle
23 of World War II. The United States Supreme Court in **West**
24 **Virginia State Board of Education vs. Walter Barnette,** 319 U.S.
25 624, overruled a case that had been decided a mere three years

1 earlier by that Court and held that, "If there is any fixed
2 star in our constitutional constellation, it is that no
3 official, high or petty, can prescribe what shall be orthodox
4 in politics, nationalism, religion, or other matters of
5 opinion, or force citizens to confess by word or act their
6 faith therein. If there are any circumstances which would
7 permit an exception, they do not occur to us now. We think the
8 action of the local authorities in compelling the flag salute
9 and pledge transcends constitutional limitations on their power
10 and invades the sphere of intellect and spirit which is the
11 purpose of the First Amendment to our Constitution to reserve
12 from all official control."
13 Now that case I think is controlling. It is a
14 bright-line rule. And as the Court there noted in that case,
15 the sole conflict was between authority and the rights of the
16 individual. The Court noted that:
17 "There is no doubt that, in connection with the
18 pledges, the flag salute is a form of utterance," and that:
19 "Objection to this form of communication when coerced
20 is an old one, well known to the framers of the Bill of Rights.
21 Whether the First Amendment to the Constitution will permit
22 officials to order observance of ritual of this nature does not
23 depend upon whether as a voluntary exercise we would think it
24 to be good, bad or merely innocuous.
25 "Nor," as the Court reflects, "does the issue as we

1 see it turn on one's possession of particular religious views
2 or the sincerity with which they are held. While religion
3 supplies appellees' motive for enduring the discomforts of
4 making the issue in this case, many citizens who do not share
5 these religious views hold such a compulsory rite to infringe
6 constitutional liberty of the individual.
7 "The question which underlies the flag salute
8 controversy is whether such a ceremony so touching matters of
9 opinion and political attitude may be imposed upon the
10 individual by official authority under powers committed to any
11 political organization under our Constitution.
12 "That they are educating the young for citizenship is
13 the reason for scrupulous protection of constitutional freedoms
14 of the individual, if we are not to strangle the free mind at
15 its source and teach youth to discount important principles of
16 our government as mere platitudes.
17 "Authority here is to be controlled by public opinion,
18 not public opinion by authority."
19 And so in reaching the holding that I recited at the
20 outset of analysis of the **Barnette** opinion, the Supreme Court
21 overruled its decision to the contrary a mere three years
22 earlier in the **Gobitis** decision, which in and of itself is a
23 remarkable thing, and in the middle of World War II is likewise
24 remarkable.
25 That's why during colloquy with counsel I considered

1 the rule in **Barnette** to be a bright-line rule. It doesn't
2 matter whether you're a teacher, a student, a citizen, an
3 administrator, or anyone else, it is beyond the power of the
4 authority of government to compel the recitation of the Pledge
5 of Allegiance.
6 The statute at issue in this case, C.R.S. 22-1-106,
7 subparagraph (2)(a) reads:
8 "The teacher and students in each classroom in each
9 public elementary, middle and junior high school in the State
10 of Colorado shall begin each school day by reciting aloud the
11 Pledge of Allegiance of the flag of the United States of
12 America. The teacher and students in each classroom in each
13 public high school in the State of Colorado shall recite aloud
14 the Pledge of Allegiance to the flag of the United States of
15 America when the school conducts its daily announcements. If a
16 public school does not conduct daily announcements, then the
17 teacher and students in each classroom in the public high
18 school shall on a daily basis recite aloud the Pledge of
19 Allegiance to the flag of the United States of America."
20 There is nothing precatory in that language, it is
21 wholly mandatory.
22 Subparagraph (b) of subsection (2) provides: "Nothing
23 in this subsection (2) shall be construed to require a teacher
24 or a student to recite the Pledge of Allegiance described in
25 paragraph (a) of this subsection (2) if the teacher or student

1 objects to the recitation of the pledge on religious grounds."

2 So both the teacher and the student have the right to

3 opt out, it is said, on religious grounds.

4 "Further, a student shall be exempt from reciting the

5 Pledge of Allegiance if a parent or guardian of the student

6 objects in writing to the recitation of the pledge on any

7 grounds and files the objection with the principal of the

8 school."

9 So different from a teacher, a student, albeit with

10 the permission and objection iterated by the parent, filed with

11 the principal, can opt out on this additional basis. An

12 additional basis not available to the teacher.

13 Then subparagraph (c) simply provides that the statute

14 is not applicable to noncitizens.

15 Now this paragraph (2)(a), (2)(b) and (2)(c) are in

16 addition to 22-1-106, subparagraph (1), which provides that,

17 "The commissioner of education shall provide the necessary

18 instruction and information so that all teachers in the grade

19 and high schools in the State of Colorado may teach the pupils

20 therein the proper respect of the flag of the United States, to

21 honor and properly salute the flag when passing in parade and

22 to properly use the flag in decorating and displaying."

23

24 So this subparagraph (1), as I read it, is curricular

25 in nature and fits nicely with 22-1-104, which concerns the

1 teaching of history, culture and civil government; and
2 22-1-108, which deals with the teaching of the federal
3 Constitution.
4 The **Barnette** decision remains good law, as it can be
5 read together with **Tinker**. And the law professor could
6 probably give me the cite to **Tinker** off the top of his head,
7 but it is recited in both plaintiffs' brief and those of the
8 defendants. There is a line of authority which is, I think,
9 necessarily implicated in this case, at least for purposes of
10 analysis.
11 The **Hazelwood School District** case, 484 U.S. 260 --
12 there's **Tinker, Tinker vs. Des Moines Independent School**
13 **District**, 393 U.S. 503. **Hazelwood** followed **Tinker**, followed it
14 in point of time, and held that school officials may regulate
15 school-sponsored speech so long as the regulations are
16 reasonably related to legitimate pedagogical interests.
17 **Hazelwood** three years later supplied the controlling
18 standard for regulating classroom speech of teachers in **Miles**
19 **vs. Denver Public Schools**, 944 F.2d 773. And the issue of
20 reasonable relation of a required Pledge of Allegiance to a
21 legitimate pedagogical concern and whether that is legitimate
22 is necessarily implicated in this case.
23 We are at an early stage in this case. We are at a
24 temporary restraining order phase where notice has been given,
25 all parties have briefed the application for injunctive relief

1 and have appeared for argument and hearing on the application.
2 The standards with respect to injunctive relief are
3 clear in the Tenth Circuit. The reason for Rule 65 injunctive
4 relief is to preserve the status quo among the parties pending
5 a final determination on the merits. Any injunctive relief is
6 extraordinary, it's an exception, rather than the rule, and the
7 right to relief must be clear and unequivocal. It invokes the
8 sound discretion of the Court. The burden is on the movant to
9 make the *prima facie* showing of a probable right to relief and
10 the probable danger of injury if the motion is denied.
11 There are four prongs to be established for
12 entitlement to injunctive relief:
13 First, a substantial likelihood of success on the
14 merits; secondly, irreparable injury if the injunction is not
15 granted; third, that the threatened injury outweighs any harm
16 the preliminary injunction will cause the opposing party;
17 fourth, the preliminary injunction is not adverse to the public
18 interest.
19 Now if the injunctive relief disturbs the status quo,
20 then the showing must be more heavily compelling than would
21 ordinarily apply.
22 The injunctive relief requested in this case does not
23 disrupt the status quo. The status quo is that the statute,
24 22-1-106, subsection (2), is enacted and has become effective,
25 but with the possible *de minimis* exception of a student at

1 Cherry Creek, who is a plaintiff, who may be enrolled in
2 their -- whatever they call it, it's a year-round program, and
3 with the possible *de minimis* exception of the Jefferson County
4 School District, which I believe commenced yesterday --
5 correct?
6 MR. STULLER: I can't represent otherwise, your Honor.
7 THE COURT: Right. The status quo, particularly in
8 light of the school district defendants' briefs and recitation
9 of present guidelines, is that the statute has not been applied
10 to the plaintiffs. So that's the status quo. And I think the
11 ordinary burden with respect to injunctive relief, therefore,
12 applies.
13 I am persuaded that the statute at issue here, and I'm
14 not looking at it as an as applied constitutional analysis,
15 given the circumstances of this case, I'm looking at it in a
16 facial analysis, given the status quo and circumstances of the
17 case, and the analysis, it appears to me, must be one under
18 strict scrutiny. And that is because the statute on its face
19 is viewpoint discriminatory, and that hasn't been rebutted. It
20 is also, as Professor Chen argued, divisive through its opt-out
21 provisions, divisive not only between those who do not choose
22 to opt out, but also divisive between the students and teachers
23 by virtue of the different grounds and bases upon which one may
24 opt out of the requirement of the statute.
25 It's also interesting in this respect, that the

1 statute places the burden, not on the school districts or
2 boards of education to make these determinations, the statute
3 places the burden on the individual plaintiffs to make these
4 determinations, so that when the defendant school districts
5 have, in essence, done so by proxy for the students and
6 teachers, it doesn't affect the burdens that are placed
7 directly by the statute on the students and the teachers, as
8 commendable as the board of education have been in their
9 approach to this very difficult statute which was given to them
10 by the General Assembly of the State of Colorado and its chief
11 executive officer, Governor Owen.
12 As the strict scrutiny standard applies, the burden
13 then shifts to the defendants to show that this statute is
14 necessary to serve a compelling state interest and narrowly
15 drawn to achieve that interest.
16 I might also note that there is a presumption of
17 irreparable harm because of the chilling effect of the statute
18 itself.
19 An interesting argument has been presented to me by
20 the school defendants that there is no imminent or irreparable
21 harm because they have drafted guidelines to ameliorate the
22 effect of the statute on the plaintiff students and teachers.
23 The problem with that argument is this: The statute speaks
24 directly to the students and the teachers. It says the teacher
25 and students "shall" recite. And the plaintiff teachers and

1 students in this case then are faced with this choice: Do I
2 comply with the statute, although I don't agree with it, and
3 although I may have no religious reason to opt out of the
4 statute, I have fundamental philosophic difference with the
5 compel to pledge, or do I just simply break the law and violate
6 this statute?
7 So that in and of itself is chilling and that in and
8 of itself, it seems to me, constitutes an irreparable harm. In
9 any event, in the First Amendment context irreparable harm is
10 ordinarily presumed.
11 The reason why I think the **Hazelwood/Miles** line of
12 cases is necessarily implicated here is because I still need to
13 look at whether there is a compelling interest and whether
14 the -- in the state and whether the statute is narrowly
15 tailored to address that compelling interest. The state has a
16 compelling interest in the education of its students, and that
17 is recognized, of course, by our Supreme Court and the Tenth
18 Circuit Court of Appeals.
19 So the question then becomes this pedagogical
20 question, the question of the education, the educational value
21 of the statute. And I think the answer to that question is
22 found in **Barnette**. Pure rote recitation of a pledge such as
23 this every day of the school year for one's tenure and
24 matriculation through the school system cannot be said to be
25 reasonable or legitimate in a pedagogical sense.

1 There is no question that the Pledge of Allegiance has
2 educational value, and that has been recognized by the
3 defendant school districts' boards of education. One need only
4 look at, for example, the clause "with liberty and justice for
5 all," to think, well, maybe we ought to look at the Declaration
6 of Independence, and the word "republic" as being unique in a
7 form of democracy, in that we are a republican democracy, and
8 what that means in our constitutional construct; or the word
9 "indivisible," which brings to mind the Civil War when the
10 division of our country was avoided.
11 So this all has instruction and meaning in terms of
12 our government and way of life and civics, but simply standing
13 alone as a rote, repetitious pledge, without more, and in
14 context, there is no legitimate or reasonable education value
15 to it. And there is nothing that in any way prohibits
16 educators, boards of education from integrating this meaningful
17 language into the curriculum for the education of our students.
18 So in terms of the factors for which injunctive relief
19 may be afforded, or upon which it may be afforded, I have to
20 conclude that there is a substantial likelihood of success on
21 the merits and irreparable injury if some form of injunctive
22 relief is not granted.
23 By the way, in terms of risk and potential injury, it
24 is acknowledged that, despite the defendant school districts'
25 reasonableness in approaching this subject, there is statutory

1 provision, 22-33-106(1)(a), that provides for suspension or
2 expulsion of children from public school for continued willful
3 disobedience or open and persistent defiance of proper
4 authorities. And with respect to teachers, in I think it's
5 22-63-301, grounds for dismissal include neglect of duty and
6 insubordination.
7 Now I credit the school boards or defendants in this
8 case, but nevertheless that threat, that risk reflects the
9 quandary that plaintiff students and plaintiff teachers are
10 placed in, not only in terms of their conscience in violating
11 this statute, but in terms of this potential threat and risk
12 that they could face in refusing to comply with the statute.
13 And any loss of a constitutional right such as a First
14 Amendment right, for however short a period of time, is
15 presumed irreparable.
16 I conclude that the threatened injury outweighs any
17 harm the preliminary injunction will cause the opposing party;
18 and this is because, as I intend to fashion this restraining
19 order, the defendant school districts will be free to continue
20 their educational curricular programs as they have to date;
21 that is, they are free to work the Pledge of Allegiance into
22 their curriculum in any way they deem fit, simply not under the
23 auspices of this statute that is complained about here.
24 I also conclude that the temporary restraining order
25 would not be adverse to the public interest, because this

1 temporary restraining order I think will give opportunity to
2 further reflect and determine the merits of this case, will
3 protect a critical and important constitutional right, while
4 leaving the defendant school districts free to establish and
5 implement curricula as they have before the passage and
6 effective date of this statute.
7 So in view of these findings and conclusions, it will
8 be ordered that the defendants are prohibited from in any way
9 enforcing the terms of C.R.S. Section 22-1-106(2), period. No
10 bond will be required.