IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

ZACHARY LANE, et al.,

Plaintiffs,

vs.

BILL OWENS, et al.,

Defendants.

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

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I. INTRODUCTION

Six decades ago, the Supreme Court held that no government -- state or federal -- had the power to compel individuals to say the Pledge of Allegiance. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, the Court held that a state law that forced schoolchildren to recite the Pledge of Allegiance against their will violated the First Amendment. *Id.* *Barnette* stands for the proposition that freedom of speech protects both the right to speak and the right not to speak; *id.,* at 645 (Murphy, J. concurring). It is therefore well-established that the government does not have the power to force an individual to utter words affirming beliefs and attitudes that he or she does not hold. *E.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

The Court explained its reasoning clearly and directly:

> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. the test of its substance is the right to differ as to things that touch the heart of the existing order. . . .

Barnette, 319 U.S. at 642. "[C]ompelling the flag salute and pledge transcends constitutional limitations" on the power of local authorities. *Id.* at 642. It "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

Thus, C.R.S. § 22-1-106(2) ("Colorado's Mandatory Pledge Law" or "the Pledge Law"), which requires students and teachers to recite an oath that expresses one view of patriotism, "invades the sphere of intellect and spirit" in precisely the manner *Barnette* prohibits. *See id.* at 642. While the Pledge Law does provide certain exemptions, these exemptions themselves create categories

that infringe on the free speech rights of Colorado's students and teachers. Plaintiffs challenge Colorado's Mandatory Pledge Law, C.R.S. § 22-1-106(2), attached at Appendix, because it violates their First Amendment and Fourteenth Amendment rights.

II. FACTS

A. Colorado's Mandatory Pledge Law

Colorado's Mandatory Pledge Law compels all public school students and all public school teachers to "recite aloud" the Pledge of Allegiance each school day. C.R.S. § 22-1-106(2)(a).[1] The law specifically mandates that teachers 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." *Id.* In public high schools, students and teachers must recite the Pledge of Allegiance during daily announcements, or if a school does not have daily announcements, in each classroom. *Id.* The law establishes no educational requirements or opportunities regarding history, civics, or any other subject. *Id.*

The Mandatory Pledge Law provides that U.S. citizen students and teachers who do not wish to be forced to say the Pledge of Allegiance may refrain only if they assert a religious objection. C.R.S. § 22-1-106(2)(b). Neither teachers nor students may refrain from reciting the Pledge by asserting their own political or other non-religious scruples or beliefs. *Id.* Parents may

[1] The Mandatory Pledge Law amended the existing statute entitled "Information as to honor and use of flag." Originally C.R.S. § 22-1-106, now C.R.S. § 22-1-106(1). The former statute was limited to requiring the Commissioner of Education to provide instruction and information so that teachers could instruct their students on how to show respect for the flag. *Id.*

exempt their children from being forced to recite the Pledge, but only if they disclose "in writing" that they object and "file the objection with the principal of the school." *Id.*

Colorado's Mandatory Pledge Law took effect on August 6, 2003.[2]

B. The Plaintiffs Are Threatened With Imminent Harm

Plaintiffs are a group of public school students and teachers from the defendant districts who do not wish to be compelled to recite the Pledge of Allegiance. The plaintiffs hold a range of political views, from what would commonly be characterized as "conservative" to "liberal." Despite these differences, all plaintiffs have convictions of conscience that conflict with the state-compelled recitation of the Pledge. Some also believe that their political and religious scruples are private matters that they should not be compelled to reveal in a public setting or to the government.

Plaintiffs Zachary Lane, Anne Rosenblatt, and Keaty Gross are students enrolled in public schools in Colorado. Lane and Rosenblatt attend Cherry Creek High School, in defendant Cherry Creek School District; Gross attends George Washington High School in the Denver Public School District ("DPS"). Exh. 1, Lane Decl., ¶ 1; Exh. 2, Rosenblatt Decl., ¶ 1; Exh. 3, Gross Decl., ¶ 1. Plaintiffs Sarah Bishop and Allen Potter are teachers at Rishel Middle School in DPS. Exh. 5, Bishop Decl., ¶ 1; Exh. 10, Potter Decl., ¶ 1. Plaintiff Rod Noel is a teacher at Hamilton Middle School in DPS. Exh. 9, Noel Decl., ¶ 1. Christian

[2] The effective date for a bill, such as the Pledge Law, enacted without a safety clause and without an effective date indicated in the bill, is the day following the expiration of the ninety-day period after final adjournment of the General Assembly. The General Assembly adjourned on May 7, 2003.

Eriksen is a teacher at Alameda Senior High School in defendant Jefferson County Public School District ("Jeffco"). Exh. 6, Erickson Decl., ¶ 1. Sean Guard is a sixth grade English teacher at Aurora Hills Middle School in defendant Adams-Arapahoe 28J (Aurora) Public School District ("Aurora"). Exh. 7, Guard Decl., ¶ 1. Plaintiff Jolie Hendricks is a teacher at Sunrise Elementary School in defendant Cherry Creek 5 Public School District. Exh. 8, Hendricks Decl., ¶ 1.

All plaintiffs are United States citizens and none of them is able to assert a religious objection under the provisions of the Mandatory Pledge Law. Exh. 1, Lane Decl., ¶¶ 4, 5; Exh. 3, Gross Decl., ¶¶ 4, 5; Exh. 5, Bishop Decl., ¶¶ 5, 6; Exh. 6, Eriksen Decl., ¶¶ 5, 6; Exh. 7, Guard Decl., ¶¶ 5, 6; Exh. 8, Hendricks Decl., ¶ 4; Exh. 9, Noel Decl., ¶¶ 5, 6; Exh. 10, Potter Decl., ¶¶ 5, 6. Plaintiffs Lane, Rosenblatt, and Gross will not request a parental note to excuse them from reciting the Pledge because they each believe that the right to decide whether to state these words belongs to them, and should not be subject to the control of their parents. Exh. 1, Lane Decl., ¶ 5; Exh. 2, Rosenblatt Decl., ¶ 6; Exh. 4, Supp. Gross Decl., ¶ 1.

Thus, because each of the plaintiffs' objections are derived from non-religious reasons of personal conscience, the Pledge Law compels them to recite words in which they do not believe or under a circumstance to which they object – i.e., by government mandate.

Plaintiffs Lane, Rosenblatt, Gross, Bishop, Eriksen, Guard, Hendricks, and Potter each believe that reciting the Pledge of Allegiance would be inconsistent with their personal rights of conscience. Exh. 1, Lane Decl., ¶¶ 3, 4;

Exh. 2, Rosenblatt Decl., ¶¶ 2, 3; Exh. 3, Gross Decl., ¶ 2; Exh. 5, Bishop Decl., ¶¶ 2, 3; Exh. 6, Eriksen Decl., ¶¶ 2, 3; Exh. 7, Guard Decl., ¶ 2; Exh. 8, Hendricks Decl., ¶ 3; Exh. 10, Potter Decl., ¶ 3. For example, Plaintiff Sean Guard believes that publicly reciting the Pledge would be "a lie." Exh. 7, ¶ 2. Zach Lane says that reciting the Pledge would be violating his own conscience. Exh. 1, Lane Decl., ¶ 3. Allen Potter states that reciting the Pledge would be doing something he does not believe in. Exh. 10, Potter Decl., ¶ 3. While Plaintiff Rod Noel does not disagree with the content of the Pledge, he strongly disagrees with reciting it under order of government mandate. Exh. 9, Noel Decl., ¶¶ 2, 3. Similarly, while Plaintiff Jolie Hendricks has proudly led her students in the Pledge for many years, her feelings changed once it became a matter of government mandate rather than choice. Exh. 8, Hendricks Decl., ¶¶ 2, 3.

None of the plaintiffs wishes to be faced with the dilemma imposed by Colorado's Mandatory Pledge Law, which is the choice between violating a state law and sacrificing his or her constitutional rights of conscience. Moreover, the plaintiffs are each subject to potential adverse consequences should they fail to comply with the Mandatory Pledge Law. Public school districts also have the authority to suspend or expel students from public school for continued willful disobedience or open and persistent defiance of proper authority. Under Colorado law, public school districts have the authority to dismiss teachers for neglect of duty, insubordination, or other good or just cause.

Because the law has now taken effect, plaintiffs are threatened by the imminent harm to their First Amendment rights and perhaps their jobs caused by

its enforcement and operation. This harm is imminent because Jeffco begins school today, August 13, 2003. Two districts, Aurora and DPS, begin next week – on August 18 and August 19, respectively. Cherry Creek begins the following week, on August 25.[3]

III. ARGUMENT

A. Plaintiffs Have A Particularly Strong Basis For Meeting The TRO and Preliminary Injunction Standard In A First Amendment Case

The Pledge Law burdens the freedom of speech of the plaintiffs, thus creating a strong presumption that a preliminary injunction should issue.

As in all cases, plaintiffs in a First Amendment case must meet four conditions to obtain a temporary restraining order or preliminary injunction: Plaintiffs must show that (1) they will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the Plaintiffs ultimately will prevail on the merits; (3) the threatened injury to the Plaintiffs outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999) (citing *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1171 (10th Cir.1998)).

In a First Amendment case, the second condition -- likelihood of success on the merits -- plays a decisive role. Once plaintiffs have shown that their freedom of speech is burdened, the other preliminary injunction conditions will typically be met. First, where First Amendment rights are burdened, there is a

[3] Plaintiff Hendricks, who teaches at a year-round school in defendant Cherry Creek 5 Public School District, is presently subject to the enforcement and operation of the law. Exh. 8, Hendricks Decl., ¶ 4.

presumption of irreparable harm. *See Cmty. Communications v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Johnson*, 194 F.3d at 1163. The reason for this presumption is self-evident. As the Supreme Court put it, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976); *see also Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (court assumes irreparable injury where deprivation of speech rights). Each day plaintiffs are forced to state the Pledge against their will, it will cause them irreparable harm.

The balance of harms test will also most often be met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to plaintiffs' constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what is in all likelihood an unconstitutional statute. *See Johnson*, 194 F.3d at 1163. Here, it is difficult to conceive of how the defendants could possibly be harmed if temporary injunctive relief is granted. Colorado has functioned without a Mandatory Pledge requirement until four days ago.

Similarly, plaintiffs can meet the public interest test because the law burdens their free speech rights. The Tenth Circuit has held that injunctions blocking laws that would otherwise interfere with First Amendment rights are consistent with the public interest. *E.g. Elam Constr. v. Reg. Transp. Dist.,* 129 F.3d 1343, 1347 (10th Cir.1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights."); *Utah Licensed Beverage Ass'n*, 256 F.3d at 1076 ("Because . . . Utah's challenged statutes also unconstitutionally

limit free speech, we conclude that enjoining their enforcement is an appropriate remedy not adverse to the public interest."); *Johnson,* 194 F.3d at 1163 (injunction that protects free expression for many is in the public interest); *Local Org. Comm., Denver Chap., Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996) ("[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone's best interest.").

B. Plaintiffs Have a Strong Likelihood of Success on the Merits Because the Colorado Mandatory Pledge Law Infringes on Plaintiffs' Core First Amendment Rights

1. The Law Unconstitutionally Compels Speech, Requiring Citizens to Declare Their Belief In A Government-Selected Political Orthodoxy

Barnette's powerful statement that people must be allowed to express disagreement about important issues, and cannot be compelled by the government to express beliefs or views that they do not hold, has become well-worn touchstones of our nation's First Amendment jurisprudence. The Supreme Court has many times reaffirmed and expanded its holding in *Barnette* decision.

Specifically, the Court has reiterated many times and in a variety of contexts that the First Amendment protects the right of individuals not to speak. *E.g., Wooley*, 430 U.S. at 714 ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *Riley v. National Fed'n of The Blind of North Carolina, Inc.,* 487 U.S. 781, 796-97 (1988) (freedom of speech necessarily includes "the decision of both what to say and what not to say."); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S.

557, 573 (1995) (First Amendment protects autonomy to choose content of own message.).

Similarly, the Court has not wavered in its conclusion that governments cannot impose a particular political orthodoxy on their citizens. For example, in *Wooley*, plaintiffs covered up the portion of their license plate that contained the New Hampshire state motto, "Live Free or Die," because being forced to convey that expression violated their "moral, religious, and political beliefs. . . ." *Wooley,* 403 U.S. at 706-07. A state statute, however, made the plaintiffs' actions a crime. The Court struck the law as unconstitutional because it compelled individuals to speak the State's ideology:

> [W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.

Id. at 717. The Supreme Court put this more eloquently in *Barnette*: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. at 642. Any government action, like Colorado's Mandatory Pledge Law, that "requires the utterance of a particular message favored by the Government" violates these First Amendment principles. *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 641 (1994).

The Supreme Court has said quite clearly that the Pledge of Allegiance is such a statement of political orthodoxy.

> Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.

Barnette, 319 U.S. at 633; *see* 4 U.S.C. § 4 (text of "Pledge of allegiance to the flag").

Further, the plaintiff teachers are correct in concluding that the compulsory recitation of the Pledge is not redeemed by any educational value. *See* Exh. 5, Bishop Decl., ¶ 7; Exh. 6, Eriksen Decl., ¶ 7; Exh. 7, Guard Decl., ¶ 7; Exh. 8, Hendricks Decl., ¶ 7; Exh. 9, Noel Decl., ¶ 7; Exh. 10, Potter Decl., ¶ 7.

The Supreme Court has specifically found that compulsory recitation of the Pledge is not the same as a program of instruction which might inspire patriotism but deals "with a compulsion of students to declare a belief." 319 U.S. at 631 (emphasis added). The Supreme Court has repeatedly emphasized that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner*, 512 U.S. at 641, citing *Leathers v. Medlock*, 499 U.S. 439, 449 (1991), citing *Cohen v. California*, 403 U.S. 15, 24 (1971) ("no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); *Barnette*, 319 U.S. at 638, 640-642. As the Court put it in *Turner*, "Our political system and cultural life rest upon this ideal." 512 U.S. at 641.

It is important to recognize that *Barnette* held that it is unconstitutional for the government to compel anyone to recite the Pledge, not only those who

object on religious grounds. Although the *Barnette* plaintiffs alleged that forcing them to recite the Pledge violated their religious beliefs, the Court specifically stated that its decision did not turn on this fact:

> [T]he issue as we see it [does not] turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual.

319 U.S. at 634-35.

Applying *Barnette*, multiple Courts have held that the First Amendment rights of teachers are also violated by forced Pledge Laws. *E.g. Russo v. Central Sch. Dist. No. 1*, 469 F.2d 623, 630-33 (2d Cir. 1972); *Hanover v. Northrup*, 325 F. Supp. 170, 172-73 (D. Conn. 1970); Opinions of the Justices to the Governor, 372 Mass. 874, 878-79, 363 N.E.2d 251, 254 (Mass. 1977); *State v. Lundquist*, 262 Md. 534, 553-55, 273 A.2d 263, 273-74 (1971); *see Cary v. Bd. of Educ. of Adams-Arapahoe Sch. Dist.*, 598 F.2d 535, 541 (10th Cir. 1979) recognizing that *Barnette* distinguished curriculum from forced Pledges).[4]

Later cases have protected not only those who object to being compelled to speak on religious or political grounds, but also those who object simply because they wish to remain anonymous. For example, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court struck down an Ohio statute that prohibited the distribution of political literature if the literature did not

[4].These cases thus reaffirm that state-compelled recitation of the Pledge violates all individuals' constitutionally-protected rights of conscience.

contain the name and address of the person issuing it. Similarly, in *Talley v. California*, 362 U.S. 60-61 (1960), the Court found a Los Angeles ordinance that required the name and address of the person who "printed, wrote, compiled, or manufactured" a handbill to appear on the handbill's face violate the First Amendment.

Moreover, *Barnette* did not just hold that a law compelling those who objected to saying the Pledge was unconstitutional, *Barnette* held that it was beyond the power of any government to enact a Mandatory Pledge Law. In other words, Mandatory Pledge Laws are unconstitutional regardless of whether those to whom the law applies object or not. *Barnette* overruled *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), on this basis. In *Barnette*, the Supreme Court specifically examined and rejected the critical assumption it had made in the *Gobitis* case: "that power exists in the State to impose the flag salute discipline upon school children in general." *Barnette*, 319 U.S. at 635-36. The Court in *Barnette* held that no "political organization under our Constitution" has the power to enact a Mandatory Pledge Law. *Barnette*, 319 U.S. at 635-36; *see Simon & Schuster v. N.Y. Crime Victims Bd.*, 502 U.S. 105, 116 (presumptively beyond power of government to discriminate based on content of speech); *see also Riley*, 487 U.S. at 797-98 (even where parties do not disagree with the content of speech, act of compelling the speech infringes on First Amendment rights); *School Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 252 (1963) (Brennan J., concurring) (since no government has the power to compel individuals to recite the Pledge, government "must make participation voluntary

for all students and not alone for those who [find] participation obnoxious on religious grounds").

Colorado's Mandatory Pledge Law clearly violates these principles and is therefore unconstitutional. The law forces plaintiffs to speak -- to affirm beliefs they may not hold. *E.g.* Exh. 1, Lane Decl. ¶ 3 (reciting Pledge would be "violating my own conscience"); Exh. 2, Rosenblatt Decl. ¶ 2 (Pledge does not reflect her beliefs); Exh. 3, Gross Decl. ¶ 2 (mandatory recitation of Pledge violates right to not speak); Exh. 5, Bishop Decl. ¶ 2 (reciting Pledge under mandate violates personal beliefs); Exh. 6, Eriksen Decl. ¶ 2 (law forces him to make statements he does not believe in); Exh. 7, Guard Decl. ¶ 2 (reciting the Pledge would be "a lie" for him); Exh. 8, Hendricks Decl. ¶ 3 (Pledge violates her right to not speak); Exh. 9, Noel Decl., ¶ 4 (mandatory recitation violates personal beliefs and freedom of speech); Exh. 10, Potter Decl. ¶ 3 (reciting Pledge would be "doing something I do not believe in.")

Moreover, the words the state would force plaintiffs to speak -- the Pledge of Allegiance to the flag and to the United States -- are unambiguously a state-selected political orthodoxy, and were held to be such in *Barnette*. Compelling individuals to utter a state-selected orthodoxy is unconstitutional. Colorado's law is an attempt to exercise a power that no government possesses under our Constitution.

2. The Law Unconstitutionally Discriminates on the Basis of Speakers' Viewpoints

An independent basis for invalidating the Colorado Mandatory Pledge Law is that, on its face, the statute impermissibly discriminates against both

students and teachers on the basis of their viewpoints regarding the Pledge. The Supreme Court applies "the most exacting scrutiny" to laws that impose different burdens upon speech based on the viewpoint of the speaker. *E.g. Turner*, 512 U.S. at 642; *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. 105, 118 (1991). By its terms, Colorado's Mandatory Pledge Law places different burdens on those who have no problem with being forced to say the Pledge, those whose religious beliefs make them object to being forced to say the Pledge, and those who object for other reasons. In short, the forced Pledge Law treats persons differently on the basis of their political or religious viewpoints. *See Texas v. Johnson*, 491 U.S. 397, 413 n.9 (1989) ("one's attitude toward the flag and its referents is a viewpoint").

It is undeniable that Colorado's Mandatory Pledge Law discriminates against those who do not share the government's viewpoint regarding the forced recitation of the Pledge. Those who agree with the political orthodoxy embodied in reciting the Pledge under government mandate are completely unburdened by the law. Indeed, they may be emboldened by it, as it provides them an express opportunity to publicly affirm their loyalty to the government's approved message. Those who agree with the government's message need not take any steps before expressing their beliefs. By contrast, those who object to mandatory recitation of the Pledge face the Hobson's choice of either saying the Pledge despite their beliefs or, if they qualify, taking affirmative steps to be excused from the requirement. *See* C.R.S. § 22-1-106(2)(b) (those with religious scruples must object; students who wish to refrain for other reasons must have parents file objection with principal).

Those who do not wish to say the Pledge must either "object" if they have religious grounds or, in the case of students, successfully obtain a note from their parents. *Id.* In either case, such individuals may have to affirmatively identify some aspect of their belief system to school authorities, and to identify themselves as dissenters from the political orthodoxy embodied in the forced recitation of the Pledge. This burden is compounded by the fact that those who do not share the government's viewpoint on the forced recitation of the Pledge will, if they successfully excuse themselves, single themselves out for public opprobrium and potentially accusations of disloyalty from their teachers and peers. Subjecting citizens to the possibility of harm or the fear of punishment undermines these citizens' First Amendment right to freedom of conscience. *Barnette* 319 U.S. at 642 (constitution guarantees "right to differ as to things that touch the heart of existing order"); *see, e.g., NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (invalidating state law requiring disclosure of membership list for civil rights organization on basis that such disclosure could subject members to private community pressures).

The law also discriminates by favoring those who hold religious objections over those, such as the Plaintiffs, who object on other grounds. This viewpoint-based burden also violates the Constitution. Those who have religious conflicts must only "object" before they are excused. C.R.S. § 22-1-106(2)(b). But teachers whose objections are non-religious are not excused at all; they must recite the Pledge whether they object or not. Students who have political or other non-religious objections are also not automatically excused. They must tell their parents that they object and ask their parents to file a written objection with

the school principal. *Id.* Only if their parents actually agree to file a written objection will students with non-religious objections may be excused. *Id.*

Plaintiffs can conceive of no plausible government justification for drawing these distinctions solely on the basis of teacher and student viewpoints about the Pledge. Indeed, this discriminatory treatment suggests that the government's purpose is to illicitly burden political dissenters. *See Turner*, 512 U.S. at 641 (noting that laws that require "the utterance of a particular message favored by the Government . . . pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

C. Plaintiffs Have a Strong Likelihood of Success on the Merits Because the Defendants Cannot Demonstrate That The Mandatory Pledge Law Meets Strict Scrutiny

For two distinct, but important, reasons, Colorado's Mandatory Pledge Law is subject to "the most exacting scrutiny." First, it compels individuals to involuntarily utter speech with a particular message. *Turner*, 512 U.S. at 643 citing *Riley,* 487 U.S. at 798 and *Barnette; Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 192 n.12 (1999); *see Simon & Schuster*, 502 U.S. at 118; *also Simon & Schuster*, 502 U.S. at 125-126 (Kennedy, J., concurring in judgment) (summarizing cases on standard and arguing for more rigorous review). In addition, laws such as the Colorado Mandatory Pledge Law that discriminate on the basis of the speaker's viewpoint are also subject to strict scrutiny. *E.g., Turner*, 512 U.S. at 641-42.

Once a law is shown to be subject to strict scrutiny, the burden shifts to the government to demonstrate that the law "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45; *Boos v. Barry*, 485 U.S. 312, 321 (1988). Colorado cannot meet this burden.

The state's most likely explanation for forcing all public students and teachers to recite the Pledge every day, regardless of whether they agree with the Pledge or such mandatory recitation of the Pledge is to somehow inculcate a sense of patriotism in the students. Such interests have already been found to be insufficiently compelling. To satisfy the strict scrutiny test, Colorado must also show that the law's viewpoint discrimination – most strikingly the difference in treatment between those who have religious as opposed to political objections – is necessary to meet a compelling state interest. In *Texas v. Johnson*, the Court rejected the state's assertion that it had a compelling interest in "preserving the flag as a symbol of nationhood and national unity." 491 U.S. 397, 410-20 (1989).

Further, in *Barnette* the Supreme Court rejected instilling patriotism as a governmental purpose sufficient to justify a Mandatory Pledge Law. *Barnette, passim*. Moreover the Court suggested a less restrictive way for which government to instill patriotism. A state may properly require study of civics, the history and structure of our government, and other subjects that tend to inspire patriotism and love of country. *Id.* In fact, Colorado's law may have the reverse effect -- without "scrupulous protection of Constitutional freedoms," the

state may "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.*

IV. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that this Court enter a preliminary injunction barring the enforcement of Colorado's Mandatory Pledge Law, C.R.S. § 22-1-106(2).

Dated this 13th day of August, 2003.

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