No. 08-1351

In the Supreme Court of the United States

CAMERON FRAZIER,

Petitioner,

v.

DR. ERIC J. SMITH, COMMISSIONER, FLORIDA DEPARTMENT OF EDUCATION, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR STATE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

(Restated)

Whether a state statute requiring parental consent for minor students in public elementary, middle and high schools to be excused from a classroom Pledge of Allegiance recitation is facially unconstitutional?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

MISCELLANEOUS

RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, *Frazier v. Winn,* is reproduced in the Petitioner's Appendix ("Pet. App.") at 20a and is reported at 535 F.3d 1279 (11th Cir. 2008). The order of that court denying *en banc* review is reported at *Frazier v. Winn,* 555 F.3d 1292 (11th Cir. 2009). *See* Pet. App. at 1a. The district court's order granting summary judgment for Petitioner Frazier and denying State Defendants' (now Respondents') motion to dismiss is reported at *Frazier v. Alexandre*, 434 F.Supp.2d 1350 (S.D. Fla. 2006). *See* Pet. App. at 38a.

JURISDICTION

The court of appeals issued its opinion on July 23, 2008, and denied the petition for rehearing en banc on January 26, 2009. Pet App. at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which this Court has ruled to be incorporated as to the states through the Fourteenth Amendment, provides, in relevant part: "Congress shall make no law * * * abridging the freedom of speech."

Section 1003.44(1), Florida Statutes, is reproduced as follows:

> (1) Each district school board may adopt rules to require, in all of the schools of the district,

programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. ... The pledge of allegiance to the flag, "I pledge allegiance to the flag of the United States of America and to the republic for which it stands, one nation under God, indivisible, with liberty and justice for all," shall be rendered by students standing with the right hand over the heart. The pledge of allegiance to the flag shall be recited at the beginning of the day in each public elementary, middle, and high school in the state. Each student shall be informed by posting a notice in a conspicuous place that the student has the right not to participate in reciting the pledge. Upon written request by his or her parent, the student must be excused from reciting the pledge. When the pledge is given, civilians must show full respect to the flag by standing at attention, men removing the headdress, except when such headdress is worn for religious purposes, as provided by Pub. L. ch. 77-435, s. 7, approved June 22, 1942, 56 Stat. 377, as amended by Pub. L. ch. 77-806, 56 Stat. 1074, approved December 22, 1942.

STATEMENT

This case involves solely the facial constitutionality of section 1003.44(1), Florida Statutes, which provides that the Pledge of Allegiance shall be recited at the start of each day in all public elementary, middle and high schools. Each public school student, from kindergarten to twelfth grade, is required to recite the Pledge, but is informed via a posted notice of the right not to participate, provided a parent provides a written request excusing the student.

On December 8, 2005, a Florida high school applied the statute to the Petitioner, Cameron Frazier ("Frazier"), an eleventh grader, in an unacceptable manner. Ordinarily, the Pledge of Allegiance is recited at Frazier's high school early in the day. Pet. App. at 42a. On this day, however, the Pledge was to be recited during the fourth period when Frazier was in math class. *Id.* As a result, this was the "first time the recitation" was to occur when Frazier was in his math teacher's class. *Id.* When Frazier explained he did not participate in the Pledge, the teacher berated him, belittled his viewpoint, questioned his patriotism, generally humiliated him in front of his class, and ordered him to the principal's office where he remained for the remainder of the class period. *Id.* at 43-44a. The vice principal gave Frazier a copy of the school policy and a consent form, and spoke to Frazier's mother. *Id.* at 44a. He was told he would be required to stand during the Pledge even if his mother excused him from its recitation. *Id.*

Frazier sued. Through his mother, his complaint challenged the constitutionality of the school's action as applied to him as well as the facial validity of the statute generally. *Id.* at 45a. His as-applied claims were quickly resolved by a consent order to which the school defendants had agreed.[1] *Id.* at 77a. Despite prevailing on his as-applied claims, Frazier continued to press a facial challenge to the statute against state education officials. *Id.* at 47-48a. He challenged on its face the statute's requirement that a student obtain parental consent before being excused from participation as well as the clause requiring "civilians" to stand during the Pledge. *Id.*

State education officials defended the facial validity of the statute's parental consent provision, an issue that threatened its systemic philosophy to leave substantive curricular decisions to parents or schools, generally not leaving school children to act alone.[2] *Id.* at 61a.

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[1] The *school* defendants did not contest the matter and jointly moved with Frazier for a consent order on the as-applied claims against them, which the district court entered. *See* Pet. App. 77a. The *state* defendants, however, were not party to the consent order, which encompassed only the as-applied claims against the local school defendants. *Id.*

[2] The state also argued that the statute's "civilians" standing provision (last sentence of the statute) should not be disturbed because it does not clearly apply to "students" in view of various legislative alterations through the years that distinguished the statute's references to "students" from "civilians" (*see Clark v. Martinez*, 453 U.S. 371, 380-81 (2005) (noting that non-problematic interpretations should be preferred)) and because the statute itself directs schools to conform their requirements to "existing pertinent (Continued ...)

The district court ruled for Frazier, holding that the Pledge statute's parental consent requirement "robs the student of the right to make an independent decision whether to say the pledge." *Id.* at 67a. The district court, citing *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943), concluded that "'Pledge autonomy' [of minor school children] has been the state of the law for over 60 years." *Id.* at 73a. Having concluded that parental consent plays no role and is constitutionally impermissible in the context of the Pledge of Allegiance, the district court invalidated the statute on its face.

The State appealed, arguing that the district court erred in facially striking down the statute. The State did not contest that the statute was applied unconstitutionally to Frazier.[3] *Id.* at 20a *et seq.* Instead, it disputed the district court's conclusion that minor students have a constitutional right – regardless of their age or grade level – to decide autonomously whether to

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laws of the United States." Fla. Stat. § 1003.44(1). The state conceded that courts had long settled that excused students need not stand for the Pledge (contrary to the local school's action in forcing Frazier to stand after his mother consented to his excusal). Both the district and circuit courts, however, decided to invalidate and sever the civilians standing portion of the statute, believing its application to students to be "the most probable, accurate interpretation." Pet. App. at 25a. Frazier has not challenged that portion of the circuit court's opinion.

[3] The Eleventh Circuit's opinion noted that Frazier's as-applied case was not before it. Pet. App. at 23a n.2.; *see also, supra,* note 1 (discussing the consent order entered on Frazier's as-applied claims).

recite the Pledge, a right that is always superior to their parents' fundamental right to guide their upbringing and education. *Id.*

The Eleventh Circuit reversed, upholding the facial constitutionality of the parental consent provision. *Id.* at 20a. The circuit court viewed Frazier's challenge to be materially different from all previous Pledge cases (such as *Barnette*), which did not involve the constitutional rights of parents or a parental consent provision like the one at issue. *Id.* at 29a. The court recognized that, unlike *Barnette*, which involved *governmental* compulsion of student participation, Florida's statute is neutral by deferring to *parental* wishes. *Id.* at 30a. The statute recognizes and balances the rights of minor students and their parents by requiring that students receive notice at school of their right to be excused from Pledge participation via a simple parental consent form. *Id.* at 29a. Because the statute permits only a *parent* (rather than the *government*) to override its child's preference, it is a permissible restriction in light of the constitutional right of parents to govern their children's education. *Id.* at 29-31a (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); & *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

Finally, the circuit court's opinion left open the possibility that a mature high school student could be treated differently in a context where the balance of parental, student, and school rights favors him in a specific situation. Pet. App. at 31a. It declined to facially invalidate Florida's statute on substantial overbreadth grounds, however, given the "number of instances –

particularly those instances involving elementary and middle school students – relative to the total number of students covered by the statute." *Id.* at 31-32a.

Frazier sought rehearing en banc, which was denied. *Id.* at 1a. Judge Rosemary Barkett issued a lengthy dissent from this denial, joined by no other judge, which largely tracked the district court's rationale and view that *Barnette* governed the outcome of this case. *Id.* at 3a.

ARGUMENT

The Eleventh Circuit's opinion does not warrant review because it does not contradict a precedent of this Court, create a conflict with decisions of other circuit courts, or raise an issue of national importance that justifies this Court's review.

I. The Eleventh Circuit's Decision Does Not Conflict With a Precedent of this Court.

The primary theme underlying Frazier's petition is that Florida's Pledge statute conflicts with this Court's decision in *Barnette,* which Frazier claims established an independent constitutional right for public school students – from kindergarten to twelfth grade – to refuse to participate in the Pledge even over parents' objections. In Frazier's view, *Barnette* established this broad right for minors of all ages, and wholly insulated and divorced it from the established constitutional right of parents to control their children's upbringing.

This position overstates *Barnette*, as the Eleventh Circuit recognized, and would effectively overrule or undermine this Court's precedents that recognize the constitutional rights of parents to control the upbringing of their children. *See, e.g., Vernonia Sch. Dist. 47J*, 515 U.S. at 654-55; *Yoder*, 406 U.S. at 231-32; *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). Indeed, the interplay of parental and children's rights continues to be litigated in many contexts where parental rights repeatedly have been vindicated.[4]

Frazier claims that the State refuses to acknowledge that students have constitutional rights. The State, of course, recognizes that minors have constitutional rights, albeit more limited ones than adults, especially in the area of education. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). The

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[4] *See, e.g., Winkelmen v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007) (parents possess a "recognized legal interest in the education and upbringing of their child"); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 326 (2006) ("States unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy, because of their strong and legitimate interest in the welfare of their young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely."); *Parham v. J.R.*, 442 U.S. 584, 604 (1979) (parents "retain a substantial, if not the dominant, role in the decision [whether child is committed to state mental hospital], absent a finding of neglect or abuse" despite minors' "substantial" liberty interests); *see also Arnold v. Bd. of Educ. of Escambia County, Ala.*, 880 F.2d 305, 313 (11th Cir. 1989) ("the parental right to structure the education ... of one's children" is constitutionally protected).

State's clear legal position is simply that minors' rights must be balanced against those of their parents and the interests of the government in the education context. Contrary to Frazier's assertions, the State is not claiming that students' constitutional rights are subordinate to those of their parents or the interests of the State in all cases. Instead, the State's position is that the *facial* invalidation of the parental consent statute would improperly fail to account for all three stakeholders: parents, children, and the school system. Frazier provides no explanation why each of these interests should not be recognized as legitimate, and balanced as in other constitutional litigation. He simply claims that students of all ages and grade levels have an independent, autonomous constitutional right to refrain from the Pledge that is superior to and that always trumps a parent's fundamental constitutional right to guide their upbringing, which this Court has never recognized.

Notably, the cases upon which Frazier relies involved solely *governmental* compulsion of the Pledge with no discussion of the *parental* interest involved in this appeal. This Court has distinguished governmental compulsion from the separate issue of parental control in the education context. *Yoder*, 406 U.S. at 230-31 (refusing to address Justice Douglas's dissenting view that children should have authority to decide their own educational fate even if contrary to parental wishes), & 243 (Douglas, J., dissenting) (noting that the issue of parental versus children's rights in the education context "has never been squarely presented before today ... we have in the past

analyzed similar conflicts between parent and State with little regard for the views of the child").

Barnette, for instance, involved a statute that provided no opt out from the Pledge and recognized no parental involvement or deference. Rather, West Virginia unconditionally required every student to recite the Pledge on pain of school discipline and possible criminal prosecution as well as jail time for their parents. 319 U.S. at 629. This Court repudiated the state's use of governmental power to compel civic orthodoxy among dissenting families in this manner.

Florida's law is very different and does not compel Pledge participation in this way. The "right" of students to opt out of the Pledge is explicit in the statute and must be "conspicuous[ly]" communicated by school officials to students. Fla. Stat. § 1003.44(1). A student needs only to provide a written request from a parent to be excused -- a simple and familiar process in the school context. *See Croft v. Perry*, 604 F. Supp. 2d 932, 941 (E.D. Tex. 2009) (ruling that Texas had "followed Supreme Court precedent" in *Barnette* by providing that a student could opt out of the Pledge via a parent's request).

The student speech rights recognized in *Tinker* also have little bearing here. Florida's Pledge statute does not affect *Tinker*-like displays and extra-curricular speech; instead, it applies in one narrow aspect of the student's core educational experience.[5]

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[5] This Court has noted the Pledge's educational value. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6-7 (2004) (Pledge (Continued ...)

Furthermore, it functions no differently than other portions of Florida's education code that require parental input where a minor would opt out of curricular exercises. *See* Fla. Stat. § 1002.20(2)(a) (consent required to terminate school enrollment at age 16); Fla. Stat. § 1002.20(2)(c) (consent required for excusal for religious instruction and holidays); Fla. Stat. § 1003.42(3) (parental consent required to opt out of health/sex education classes); Fla. Stat. § 1003.421(4) (consent required to excuse a student from reciting the Declaration of Independence); Fla. Stat. § 1003.47(1)(c) (consent required to opt out of certain science classes).[6]

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is "a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles. ... [and, together with the flag, stands] as a symbol of our Nation's indivisibility and commitment to the concept of liberty"); *Ambach v. Norwick*, 441 U.S. 68, 78 n.8 (1979) ("Flag and other patriotic exercises [promote] loyalty, ... a characteristic of citizenship essential to the preservation of a country."); *Barnette,* 319 U.S. at 631 (recognizing Pledge's role in the mission to "educat[e] the young for citizenship" and that "the State may require teaching by instruction and study of ... the guaranties of civil liberty which tend to inspire patriotism and love of country"); *see also* Fla. Stat. § 1003.42(2)(a)-(e) (detailing more broadly Florida's commitment to nation and patriotism-related instruction, including "flag education").

[6] Other Florida laws demonstrate the same policy of requiring parental involvement in the substantial decisions of minors, even where constitutional rights may be implicated. *See, e.g.*, Fla. Stat. § 390.01114(3) (parental notice required prior to a minor's abortion); Fla. Stat. § 741.04(1) (consent required to marry); Fla. Stat. § 800.04 (consent required to have sexual intercourse with an adult); Fla. Stat. § 1002.20(3)(e) (consent required to receive school contraceptive services); *see also* Fla. Stat. § 322.09 (consent (Continued ...)

Frazier also cites this Court's decision in *Newdow*, 542 U.S. 1 (Pet. 13), which actually weighs in Florida's favor. There, a non-custodial father brought an Establishment Clause challenge to the "under God" language of the Pledge. The minor student herself professed no objection to the Pledge language or to participating in the Pledge. 542 U.S. at 9. Nevertheless, the minor's own conviction had no apparent bearing on the outcome in which this Court focused on which *parent* had authority over the child's welfare. *Id.* at 15 n.7. Under Frazier's theory, the parental standing issue would have been irrelevant in view of the child's independent, autonomous right to make her own Pledge decision.

Finally, given the special relationship between parents and schools, schools may carry out parental decisions involving children, even where the state might be powerless to act on its own. *Cf. Parham*, 442 U.S. at 605 (affirming a state's *parens patriae* authority even though infringing "substantial" liberty interests of children). Thus, the Eleventh Circuit's opinion comports with this Court's previous decisions.

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required to obtain a driver's license); Fla. Stat. § 381.0041 (consent required to donate body parts); Fla. Stat. § 381.89(7) (consent required to use a tanning facility); Fla. Stat. ch. 743 (consent required to enter contracts); Fla. Stat. § 877.04 (consent required to get a tattoo); Fla. Stat. § 877.22 (consent required to be in public places during certain hours).

II. The Eleventh Circuit's Decision Creates No Conflict With Other Circuit Courts.

The Eleventh Circuit's opinion does not conflict with decisions of other circuit courts, including *The Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004). Both cases involve state Pledge of Allegiance statutes, but the substantive terms of the statutes and the grounds for the circuit courts' respective decisions are markedly different.

Unlike Florida's Pledge statute, the Pennsylvania statute in *Circle School* left complete discretion to minor students to make their own Pledge decision. Parents had no say in the decision. The statute, however, required schools to notify parents if their child chose not to say the Pledge. The Third Circuit invalidated the notification requirement, holding it was impermissible viewpoint discrimination because it was triggered only when a student made a decision not to participate. *Id.* at 181. No such notification requirement or viewpoint discrimination is at issue here.

Notably, the district court below viewed *Circle School* as fundamentally different from the instant matter. While disapproving Florida's parental consent statute, the district court opined that Pennsylvania's statute passed constitutional muster. Pet. App. at 67a. The Eleventh Circuit did not even mention the Third Circuit opinion, perhaps because Frazier's answer brief did not discuss or rely upon any comparison between its case and *Circle School*. *See* Pet. App. at 20a *et seq.* In short, the Eleventh Circuit decided a different substantive legal question than that considered in *Circle School* such that no conflict exists.

III. The Eleventh Circuit's Decision Is Not One of Nationwide Importance that Justifies This Court's Review.

Finally, the Eleventh Circuit's decision does not address an issue of nationwide importance that justifies this Court's review. The decision merely allows the statute to remain operative while allowing for case-by-case adjudication of as-applied challenges where justified, as in Frazier's case against the school defendants.

Two states have statutes similar to Florida's that provide, as a general matter, for parental consent in the Pledge context.[7] No indication exists that the narrow parameters of the issue presented (facial validity of Florida's statute) involves a widespread concern in Florida or these other states, much less an issue of national importance.

Notably, each state has parental consent requirements related to many questions that arise in a child's school experience. These questions span the gamut from important curricular decisions about what classes parents allow their children to take (or to not take) to whether parents consent to the school infirmary dispensing an aspirin tablet to an ill child. As this Court has repeatedly noted, consistent with the Eleventh Circuit's conclusion, parental consent in the education context plays a well-accepted and critical role in effectuating the constitutionally protected right of

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[7] *See* Tex. Educ. Code § 25.082(b)-(c); Utah Code Ann. § 53A-13-101.6(3).

parents in the upbringing of their children. *See Vernonia Sch. Dist. 47J*, 515 U.S. 646; *Yoder*, 406 U.S. 205; *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390. The decision below simply recognizes the constitutional rights of parents, preserving the statute's facial constitutionality, yet leaving open the possibility of individual adjudication of as-applied claims. Under these circumstances, the issue presented does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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