Supreme Court, U.S.
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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 A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state, consistent with this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), may condition a student's decision, based upon his personal beliefs and convictions, to decline to recite the pledge of allegiance upon the advance, written consent of a parent?

PARTIES TO THE PROCEEDING

Petitioner is Cameron Frazier, plaintiff-appellee below, who sues through his mother and next friend, Christine Frazier.

Respondents are the Commissioner, Florida Department of Education, and the individual members of the State Board of Education, named solely in their official capacities. The current individuals holding those positions are: Dr. Eric J. Smith, Commissioner, Florida Department of Education; T. Willard Fair, Chairman, State Board of Education; Peter Boulware, Dr. Akshay Desai, Roberto Martinez, Phoebe Raulerson, Kathleen Shanahan, and Linda Taylor, members, State Board of Education.[1] They are collectively referred to as "the State" or "State defendants."

Cynthia Alexandre, a teacher at Boynton Beach Community High School, Richard Poorman, an assistant principal at Boynton Beach Community High School, and the Palm Beach County, Florida, School Board were named defendants in the district court and were collectively referred to as the "School defendants." None of the School defendants appealed the district court's decision and hence were not

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[1] The Commissioner and several members of the State Board of Education have changed since the filing of this action in 2005. Pursuant to Fed.R.Civ.P. 25(d), the individuals currently holding those positions are automatically substituted as parties in their official capacities.

parties in the Eleventh Circuit and are not parties in this Court.[2]

[2] Counsel for Poorman and the Palm Beach County School Board entered a limited appearance at the Eleventh Circuit for the sole purpose of obtaining copies of all briefs, orders, and other pleadings. Consistent with that appearance, Petitioner serves them with a copy of this Petition.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 11

I. THE ELEVENTH CIRCUIT DECISION SQUARELY CONTRADICTS THIS COURT'S HOLDING IN *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE* 11

A. This Court And Lower Courts Have Consistently Understood The Holding In *Barnette* As A Constitutional Limitation Of The State's Power To Compel Students To Recite The Pledge Of Allegiance 13

B. The Panel's Treatment Of This Case As A Case About Parental Rights Is Fundamentally Misplaced 18

C. The Eleventh Circuit's Suggestion That The Obligation Of School Officials To Recognize The Rights Established By *Barnette* Depends Upon Case-By-Case Adjudication Is Both Inconsistent With *Barnette* And Impractical 22

D. The Decision Below Misapplied This Court's Rules On Substantial Overbreadth 23

II. THE ELEVENTH CIRCUIT DECISION CREATES A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED 25

CONCLUSION 30

APPENDIX 1a

Eleventh Circuit Denial of *En Banc* Review 1a

Decision of the Eleventh Circuit Panel 20a

District Court Final Judgment 33a

District Court Summary Judgment Against State Defendants 35a

District Court Summary Judgment Against School Defendants and Denial of State Defendants' Motion to Dismiss 38a

Consent Order 77a

TABLE OF AUTHORITIES

Cases

Banks v. Bd. of Public Instr., 314 F.Supp. 285 (S.D. Fla. 1970), *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff'd*, 450 F.2d 1103 (5th Cir.1971)................. 14

Bellotti v. Baird, 443 U.S. 622 (1979) 16

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 24

Circle School v. Phillips, 381 F.3d 172 (3rd Cir. 2004) 13, 26, 27

Croft v. Perry, --- F.Supp.2d ---, 2009 WL 804112 (N.D. Tex., March 26. 2009)................................. 25

Elk Grove v. Newdow, 542 U.S. 1 (2004)........... 13, 20

Frain v. Baron, 307 F.Supp. 27 (E.D. N.Y. 1969).... 14

Frazier v. Alexandre, 555 F.3d 1292 (11th Cir. 2009) 1

Frazier v. Alexandre, 434 F.Supp.2d 1350 (S.D. Fla. 2006), *aff'd in part, rev'd in part*, 535 F.3d 1279 (11th Cir. 2008), *rehearing en banc denied*, 555 F.3d 1292 (11th Cir. 2009) 1

Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *rehearing en banc denied*, 555 F.3d 1292 (11th Cir. 2009) 1

Goetz v. Ansell, 477 F.2d 636 (2d Cir. 1973)........... 14

Holden v. Board of Ed. of City of Elizabeth,
216 A.2d 387 (N.J. 1966) 14

Holloman v. Harland,
370 F.3d 1252 (11th Cir. 2004) 13

In Re Gault, 387 U.S. 1 (1967) 16

Lipp v. Morris, 579 F.2d 834 (3rd Cir. 1978) 14

Meyer v. State of Nebraska,
262 U.S. 390 (1923) 6, 18

Monell v. Department of Social Services,
436 U.S. 658 (1978) 5

Myers v. Loudon County Public Schools,
418 F.3d 395 (4th Cir. 2005) 13

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 6, 18, 21

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 16

Prince v. Massachusetts, 321 U.S. 158 (1944)............ 6

Rabideau v. Beekmantown Central School District,
89 F.Supp.2d 263 (N.D. N.Y. 2000) 14

Sheldon v. Fannin,
221 F.Supp. 766 (D. Ariz. 1963)........................... 15

Sherman v. Cmty. Consol. Sch. Dist. 21,
980 F.2d 437 (7th Cir. 1992) 14

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)........ 13, 16, 17, 19

Troxel v. Granville, 530 U.S. 57 (2000)...................... 6

Turner Broadcasting System, Inc. v. F.C.C.,
512 U.S. 622 (1994) 28

U.S. v. Rutherford, 442 U.S. 544 (1979) 24

Walker-Serrano ex rel. Walker v. Leonard,
325 F.3d 412 (3rd Cir. 2003) 14

Washington v. Glucksberg, 521 U.S. 702 (1997) 18

West Virginia State Board of Education v. Barnette,
319 U.S. 624 (1943) .... *passim*

Wisconsin v. Yoder, 406 U.S. 205 (1972) 6, 18

Constitution and Statutes

28 U.S.C. § 1254(1) 1

First Amendment to the United States
Constitution .... *passim*

Fla. Stat. § 1003.44(1) .... *passim*

Fourteenth Amendment to the United States
Constitution 5, 7, 16

Tex. Education Code Ann. § 25.082 25

Utah Code Ann. § 53A-13.101.6 25

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the court of appeals denying *en banc* review, with dissent, reprinted in the Appendix to the Petition ("App.") at 1a-19a, is reported as *Frazier v. Alexandre*, 555 F.3d 1292 (11th Cir. 2009). The panel opinion (App. 20a-32a) is reported as *Frazier v. Winn*, 535 F.3d 1279 (11th Cir. 2008).

The district court's opinion granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss (App. 38a-76a) is reported as *Frazier v. Alexandre,* 434 F.Supp.2d 1350 (S.D. Fla. 2006).

The district court's consent order (App. 77a-86a), order granting summary judgment to Frazier against the State defendants (App. 35a-37a) and final judgment (App. 33a-34a) are unpublished.

JURISDICTION

The court of appeals issued its decision on July 23, 2008, and denied the petition for rehearing *en banc* on January 26, 2009. App. at 20a, 1a. This petition has been filed within 90 days of the denial of rehearing *en banc*.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Fla. Stat. § 1003.44(1) provides:

> 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. When the national anthem is played, students and all civilians shall stand at attention, men removing the headdress, except when such headdress is worn for religious purposes. 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 OF THE CASE

1. Cameron Frazier, then in 11th grade in a public high school, was singled out, humiliated in front of his classmates, and removed from class for remaining quietly seated during the pledge of allegiance because of his personal beliefs and convictions.[3] App. at 42a-44a. Palm Beach County

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[3] It is undisputed that Frazier's behavior in the classroom was non-disruptive. Nonetheless, after quietly expressing his principled decision to remain seated, he was publicly berated by his classroom teacher:

> "[O]h you wanna bet? See your desk? Now look at mine. Big desk, little desk. You obviously don't know your place in this classroom." Frazier responded: "I thought this was a classroom. Why must you insist on taking this so far?" Alexandre then said: "I will take this as far as I need to. I will fight this to the top." Frazier responded: "I'm sorry, I do not stand for the flag."
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> * * *
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> Alexandre then handed Frazier a document with the Palm Beach County School District's logo on it and told Frazier: "Read this. Florida state statutes say you may choose not to say the pledge ONLY by written request by your parent AND you still must stand!" ... [Frazier] reiterated that he did not stand for the pledge of allegiance. Alexandre then said: "You clearly have no respect! You are so ungrateful and so un-American. Do you know what's out there fighting our war? That flag you refuse to show

(continued ...)

School Board custom or practice, predicated on Fla. Stat. § 1003.44(1), required Frazier to have parental consent before he could be excused from reciting the pledge; even with consent, he would be required to stand during the pledge. App. at 48a.

2. Frazier sued claiming that those portions of Fla. Stat. § 1003.44(1), and the Palm Beach County School Board custom or practice implementing it, that require a student to obtain a parent's permission before being excused from reciting the pledge of allegiance, and further require a student to stand during the pledge even if excused from reciting it personally, are unconstitutional on their face and as applied to Frazier, in violation of his First and

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(... continued)

> respect to." Frazier replied "no, our soldiers are out fighting a war. The flag is an inanimate piece of cloth that doesn't move and surely can't hold a gun." Alexandre said "You are so ridiculous! I can't believe you are so disrespectful!" Frazier tried to respond, saying "I choose not to say the ..." but was interrupted by Alexandre who said "No! You're out of here. I'm so sick of you!" She called the principal's office and requested that Frazier be removed from the class. She then crossed her arms and stared at Frazier.

App. 42a-43a (emphasis in original). Frazier was then removed from the classroom by an assistant principal, another school administrator and a school police officer, taken to the principal's office and kept there for the rest of the class period. *Id.* at 43a-44a. The assistant principal instructed Frazier to have his mother sign a consent form to be excused from reciting the pledge and further instructed Frazier that he would still have to stand during the pledge. *Id.* at 44a.

Fourteenth Amendment rights. App. at 39a-42a, 45a-47a. "Frazier does not challenge the daily recital of the pledge in Florida's classrooms. Nor does he challenge the content of the pledge. He challenges only the authority of the State to override *his* conscience and compel *his* participation in such exercise." *Id.* at 63a (emphasis in original).

Frazier and the School defendants quickly agreed that there was no dispute of fact and that the claims could be resolved as a matter of law. A consent order (App. 77a-86a) was entered by the district court stating that "the School Defendants stipulate to the facts plead in the First Amended Complaint and agree that the case may be resolved by a motion for judgment on the pleadings pursuant to Rule 12(c), ... without the need for an answer to be filed."[4] App. at 48a. They further agreed "that the constitutionality of Fla. Stat. § 1003.44(1) is dispositive of Frazier's

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[4] The motion was ultimately treated as a Fed.R.Civ.P. 56 motion for summary judgment. *Id.*

In addition to stipulating to the facts plead in the First Amended Complaint, the School defendants stipulated, in the consent order, that it was their custom or practice to require parental consent prior to students being excused from reciting the pledge and that even if students were excused, they would be required to stand at attention during the pledge. They further stipulated that their customs or practices are sufficient to subject the School Board to liability under *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978). App. at 48a. Although all of the stipulations were filed separately (Doc. 33), the district court set them out in its order granting summary judgment to Frazier against the School defendants and denying the State's motion to dismiss, App. at 39a-48a.

claims: if the statute is unconstitutional, the District's customs and practices based thereon are unconstitutional as well." App. at 48a.

The State defendants, who were not parties to the consent order, moved to dismiss Frazier's claims against them. *Id.* Their motion acknowledged this Court's holding in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that the state may not compel students to recite the pledge in violation of their conscience. But, they contended, this right belongs to the parents, not the students, and that *Barnette* was silent on that matter because the parental interests were aligned with the students' interests, despite *Barnette*'s emphasis upon the right of individual conscience.[5]

The district court considered, and rejected, the State's argument. App. at 61a-73a. It recognized "that parents have a fundamental right to control the upbringing of their children." *Id.* at 72a-73a (citing *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *Meyer v. State of Nebraska*, 262 U.S. 390, 400 (1923), *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972)). But the existence of that right, the court held, did not support the State's position:

> [T]his right does not translate into

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[5] School defendants Poorman and School Board did not file a brief. Alexandre adopted "the State's arguments in favor of dismissal as her own." App. at 39a.

> a requirement that a parent must give prior approval of a child's exercise of First Amendment rights in a school setting. Were such the case, all the previously cited pledge cases would have so held, as the recognition of parental rights in the educational sphere predated *Barnette* by decades. "Pledge autonomy" has been the state of the law for over 60 years; it is the State Defendants who attempt to create a new rule of constitutional law by requiring prior parental approval of the exercise of First Amendment rights in a school setting.

App. at 73a. Hence, the district court held that Florida's statute "to the extent that it requires a student to obtain a parent's permission to be excused from reciting the pledge of allegiance and requires a student to stand during the pledge of allegiance, is unconstitutional on its face and as applied to Frazier in violation of his First and Fourteenth Amendment rights." *Id.* It awarded Frazier relief against the School defendants.[6] *Id.* at 74a-75a.

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[6] The relief awarded by the district court against the School defendants had been agreed to in the consent order and included injunctive relief, a change in School District policies, communication of the change to District employees, disciplinary action against the teacher, and the payment of attorneys' fees, costs and damages in the amount of $32,500. App. at 82a-84a. Because the agreed upon relief was contingent upon a determination that Florida's statute is unconstitutional on it

(continued ...)

With the State's motion to dismiss being denied, and summary judgment entered against the School defendants, Frazier and the State defendants agreed that the remainder of the case could similarly be resolved by summary judgment without further briefing. The district court subsequently granted summary judgment for Frazier on his claims against the State defendants,[7] App. at 35a-37a, and entered a final judgment, *id.* at 33a-34a.

3. The State defendants appealed to the Eleventh Circuit, which issued its decision on July 23, 2008, affirming in part and reversing in part the district court's judgment.[8] App. 20a-32a.

(... continued)

face and as applied to Frazier, *id.* at 82a, and because the district court's finding of facial invalidity was set aside by the Eleventh Circuit, Frazier has not obtained the relief outlined in the consent order.

[7] Like the School defendants, the State defendants negotiated the relief to be afforded Frazier should he finally prevail on his claims. *See* summary judgment order, App. at 36a-37a.

[8] The panel's assertion that "[t]he as-applied claims did not involve the State and were resolved by consent order" is incorrect. App. at 22a, n. 1. Those claims were opposed by the State defendants in the district court and adjudicated by that court's combined summary judgment order against the School defendants and denial of the State defendants' motion to dismiss. *Id.* at 54a, 61a, 73a. The State defendants only challenged the finding of facial invalidity of the statute upon appeal to the Eleventh Circuit.

Because the consent order required both a finding of unconstitutionality as-applied to Frazier and facial invalidity, App. at 82a, the Eleventh Circuit's reversal as to the facial

(continued ...)

The panel first rejected the State's assertion that students who are excused by their parents from reciting the pledge are not required to remain standing, declared that the requirement was facially unconstitutional, determined that the requirement was severable from the remainder of the statute, and affirmed the district court on this facial challenge.[9] App. at 24a-27a.

However, the panel accepted the State's claim that Florida's statute vindicates parental rights and was not facially unconstitutional to the extent that it required parental consent before a student could be excused from reciting the pledge. App. at 27a-32a. The panel thus rejected Frazier's claim that the Florida statute was facially invalid as to the parental consent requirement. *Id.* at 32a. The panel left application of the statute "to a specific student or a specific division of students" to be decided on an as-applied, case-by-case basis. *Id.*

4. Frazier then filed a petition for rehearing *en banc*, which was denied. App. at 2a. Judge Barkett dissented from the denial, stating:

> An en banc rehearing is warranted because the panel's holding that the State of Florida can compel students to recite the Pledge of

(... continued)
validity of the statute eliminated the precondition upon which the consent order was based and thus the School defendants are no longer bound by its terms.

[9] Frazier does not challenge this portion of the panel's decision.

> Allegiance in violation of their personal beliefs directly contravenes precedent that has been firmly entrenched for over 65 years, since *Barnette* held that the State does not have the power to compel minor students to recite the Pledge to the flag.

App. at 3a. As she further explained, "[t]he Florida statute at issue would compel the very same students in *Barnette* to first obtain permission to do that which the Supreme Court has already explicitly ruled they have a constitutional right to do." *Id.* at 7a.

Judge Barkette rejected the notion that there was an independent parental right that was in conflict with the student's established First Amendment right not to recite the pledge of allegiance and criticized the panel for not applying a strict scrutiny standard to the statute's infringement upon an established, fundamental Constitutional right. App. at 3a. Moreover, she noted, even if an overbreadth analysis was appropriate under the circumstances presented by this case, "the statute is *still facially unconstitutional.* A statute that compels speech violative of an individual's conscience and that reaches millions of Florida public school students (including 798,091 Florida high-schoolers) surely infringes on a 'substantial amount of protected speech.'" *Id.* at 11a, n. 9 (emphasis in original).

In response to the panel's interpretation of Florida's statute as a parental rights case, she wrote: "[t]he right to exercise one's conscience in not reciting the Pledge lies solely with the individual student, not

with the parents of that student and certainly not with the State. This is no less true today than it was in 1943 ... ." App. at 18a. That is because "[t]he parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights but a negative right that provides for protection of that right *against the State.*" *Id.* at 16a (emphasis in original). Finally, she concluded, "this statute in its operation delegates a right to the parent that the State constitutionally cannot itself possess. The State cannot give what it does not have." *Id.* at 13a.

The decision below leaves Frazier, and every other student within the Eleventh Circuit, with the prospect of litigating, on a case by case basis, "the balance of parental, student, and school rights," App. at 31a, to determine whether *any* individual student may exercise an established Constitutional right without the express written consent of his or her parent.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT DECISION SQUARELY CONTRADICTS THIS COURT'S HOLDING IN *WEST VIRGINIA STATE BOARD OF EDUCATION V. BARNETTE.*

It has long been clearly established law that public school students cannot be compelled to recite the pledge of allegiance:

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. If there are any circumstances which permit an exception, they do not now occur to us.

Barnette, 319 U.S. 624, 640-42 (1943) (footnote and citations omitted).

By enacting Fla. Stat. § 1003.44(1), the Florida legislature has created an exception to *Barnette*'s rule: no Florida student may be excused from standing and reciting the pledge of allegiance each day without written permission from his or her parent. Even if a student is excused from reciting the pledge, the statute requires the student to remain standing.[10] The Florida statute thus undermines the right of individual conscience that *Barnette* enshrined as a bedrock principle of First Amendment law.

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[10] The parties, district court, and Eleventh Circuit all agreed that the statute requires parental consent before a student can be excused from reciting the pledge of allegiance. App. at 22a-24a. Both the district court and the Eleventh Circuit rejected the State's assertion that the standing requirement is waived if a student has been excused. *Id.* at 24a-25a. Thus, the lower courts read Florida's statutory requirement in this manner.

The Eleventh Circuit affirmed the district court's determination that the requirement that students stand at attention during the pledge, even if excused from reciting the pledge, was facially unconstitutional. App. at 24a-27a. Thus, only the parental consent requirement is before this Court.

A. This Court And Lower Courts Have Consistently Understood The Holding In *Barnette* As A Constitutional Limitation Of The State's Power To Compel Students To Recite The Pledge Of Allegiance.

Until the panel's decision, it was clearly established law that students could not be punished for sitting quietly during the pledge of allegiance. This Court and lower courts had consistently held that the state may not constitutionally compel students to recite the pledge of allegiance against their conscience. *See Barnette*, 319 U.S. 624 (1943). *See also*: *Elk Grove v. Newdow*, 542 U.S. 1, 8 (2004) ("Consistent with our case law, the school district permits students who object on religious grounds to abstain from the recitation.") (citing *Barnette*, 319 U.S. at 624); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Myers v. Loudon County Public Schools*, 418 F.3d 395 (4th Cir. 2005) (statute that clearly exempts students from reciting the pledge of allegiance and does not compel students to stand during the pledge is constitutional); *Circle School v. Phillips*, 381 F.3d 172 (3rd Cir. 2004) (striking down state statute that required parental notification when a student refused to recite the pledge of allegiance or to salute the flag); *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (clearly established law that a student may not be punished for his refusal to recite the pledge nor for engaging in protest during the pledge by silently raising his fist in

the air); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3rd Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag. Punishing a child for non-disruptively expressing her opposition to recitation of the pledge would seem to be as offensive to the First Amendment as requiring its oration.") (citation omitted); *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (holding that a school may have its classes recite the pledge so long as it does not compel pupils to espouse its content); *Lipp v. Morris*, 579 F.2d 834 (3rd Cir. 1978) (declaring a New Jersey statute requiring students "to show full respect to the flag while the pledge is being given merely by standing at attention" unconstitutional); *Goetz v. Ansell*, 477 F.2d 636, 637-38 (2d Cir. 1973) (holding that a student has the right to remain quietly seated during the pledge); *Banks v. Bd. of Public Instr.*, 314 F.Supp. 285 (S.D. Fla.1970), *vacated by* 401 U.S. 988 (1971), *reinstated without published opinion by dist. ct. and aff'd*, 450 F.2d 1103 (5th Cir. 1971) (same); *Rabideau v. Beekmantown Central School District*, 89 F.Supp.2d 263, 267 (N.D. N.Y. 2000) ("It is well established that a school may not require its students to stand for or recite the Pledge of Allegiance or punish any student for his/her failure to do so."); *Frain v. Baron*, 307 F.Supp. 27 (E.D. N.Y. 1969)(school enjoined from "excluding [students] from their classrooms during the Pledge of Allegiance, or from treating any student who refuses for reasons of conscience to participate in the Pledge in any different way from those who participate."); *Holden v.*

Board of Ed. of City of Elizabeth, 216 A.2d 387 (N.J. 1966)(Black Muslim children could not be punished for refusing to pledge allegiance to the flag); *Sheldon v. Fannin*, 221 F.Supp. 766 (D. Ariz. 1963)(students cannot be punished for refusing to stand during the National Anthem).

Written in the midst of World War II, *Barnette* powerfully recognized the constitutional right of individual conscience and the threat to that right created by compelled political speech. In *Barnette*, and here, it is the student who is being compelled to speak. Thus, in *Barnette*, as here, it is inescapably the student's right of individual conscience that is centrally imperiled by a mandatory requirement to recite the pledge of allegiance. Consistent with that view, the Court's description of the challenged regulation in *Barnette* focused exclusively on the student: "It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning." 319 U.S. at 633. Likewise, the *Barnette* Court focused on the rights of the student when explaining why the discretionary authority of school officials did not include the right to compel students to recite the pledge. As Justice Jackson explained:

> [School officials] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits

> of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

319 U.S. at 637.

In the decades since *Barnette*, this Court has frequently reaffirmed, in a variety of settings, that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In Re Gault*, 387 U.S. 1, 13 (1967). *See also*: *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors ... are protected by the Constitution."); *Bellotti v. Baird*, 443 U.S. 622, 633 (1979) (plurality) ("A child, merely on account of his minority, is not beyond the protection of the Constitution.").

In *Tinker*, for example, the Court emphasized that students have independent rights of expression and conscience:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights

> which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

393 U.S. at 511. At no point in *Tinker* did the Court suggest that Mary Beth Tinker's right to wear a black armband to school depended on whether her parents approved of her silent protest against the Vietnam War.

By contrast, the Eleventh Circuit's decision sweeps aside decades of established law by viewing Florida's requirement that a student must first obtain parental permission before declining to participate in the pledge "as largely a parental-rights statute." App. at 29a. Reading Florida's pledge statute as a "parental rights" statute strips students of established constitutional rights, transforms them into a mere vessel of parental will, and makes them constitutional bystanders. This should not be the law, and indeed has not been the law for decades.

B. The Panel's Treatment Of This Case As A Case About Parental Rights Is Fundamentally Misplaced.

The Eleventh Circuit's citation to *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997), for the proposition that there is a parental interest at stake in a student's decision whether to participate in the pledge is seriously misplaced. *See* App. at 29a-30a.

Glucksberg held constitutional a state statute banning assisted suicide; it had nothing to do with parental rights. The panel extracted its quotation of the right "to direct the education and upbringing of one's children" from a string of cases identifying various liberty interests protected by the Due Process Clause. 521 U.S. at 719-20. *Glucksberg* notes that among those interests, the Due Process Clause limits the power of the state to interfere with parental rights, citing two cases: *Meyer v. Nebraska*, 262 U.S. 390 (1923) (statute prohibiting foreign language instruction to children unreasonably infringed upon the liberty interests of the teacher and parents), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (criminal penalties for a parent to fail to send child to a public school unconstitutionally interferes with parental right to control upbringing). The Eleventh Circuit also cites *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which, relying on *Meyer* and *Pierce*, held that criminal penalties applied to Amish parents who only sent their children to school through the eighth grade violated the parents' right to determine the upbringing of their children.

These cases do no more than establish the

liberty interests of parents with regard to their children's education where state laws collided with and directly obstructed their constitutionally protected interests. None of these cases involving education empowered the state to act for parents in overriding their children's fundamental constitutional rights. And, these principles were well established at the time *Barnette* and *Tinker* were decided. *See, e.g.*, *Tinker*, 393 U.S. at 506 (that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate ... has been the unmistakable holding of this Court for almost 50 years."). As pointed out by Judge Barkett in her dissent:

> The panel asserts that the State's "vindication" of the parental "right of upbringing" can serve as a justification for the State's passage of this statute. This claim seriously misunderstands the nature of that right. The parental right of upbringing is not a positive right that gives parents the power to *invoke* the aid of the State against a minor's exercise of constitutional rights, but a negative right that provides for protection of the right *against the State*.
>
> * * *
>
> Every case that has ever discussed the issue of "parental upbringing" dealt with the conflict between a parent's right and *a State's* attempted curtailment of that right, not

> a conflict between parent and child.

App. at 16a (footnote omitted) (emphasis in original). Indeed, where the parent's view may collide with the student's choice regarding the pledge, it is the student's constitutional interest that is protected. *See, e.g., Elk Grove v. Newdow*:

> [T]he interests of this parent and this child are not parallel and, indeed, are potentially in conflict.[FN7]
>
> > [FN7] ... [The mother] tells us that her daughter has no objection to the Pledge, and we are mindful in cases such as this that "children themselves have constitutionally protectible interests." In a fundamental respect, "[i]t is the future of the student, not the future of the parents," that is at stake.

542 U.S. at 15 & n. 7 (citations omitted).

Parents, of course, have a right to instruct their children in matters of patriotism just as they have a right to instruct their children in matters of religion and conscience. And parents have a variety of means available to them to convey their belief system to their children – in positive as well as negative ways: modeling the values that parents want to inculcate, instructing, cajoling, enticing, punishing, granting or withholding privileges, etc. Parents also

have the well established right to choose a private or public school that offers a course of instruction which most parallels the parents' desires. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

But, until the Eleventh Circuit's decision in this case, parents could not direct the state to compel children to pledge allegiance, or refrain from pledging allegiance, in conformance with the parents' wishes.[11]

Barnette makes it clear that the state cannot compel students to recite the pledge of allegiance. Requiring students to do so under a claim of vindicating parental rights does not cure the unconstitutional nature of the requirement. In short, the state cannot do indirectly (under the guise of parental rights) what it cannot do itself directly.

As this Court said sixty-five years ago, the First Amendment bars the state from prescribing for students, as well as adults, "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." *Barnette*, 319 U.S. at 642. The Eleventh Circuit ignores decades of decisions

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[11] Florida's statute burdens the exercise of an established First Amendment right in three distinct ways. First, it requires a student with a consenting parent to obtain written consent before the student may exercise his or her constitutional right. Second, it cedes power to the State to compel a student to express a belief that the student does not hold when the student's parent does not consent. Third, it requires the State to prevent a student from pledging allegiance when a parent has requested that the student be excused.

outlining the parameters of students' Constitutional rights and directly conflicts with this Court's established precedent.

C. The Eleventh Circuit's Suggestion That The Obligation Of School Officials To Recognize The Rights Established By *Barnette* Depends Upon Case-By-Case Adjudication Is Both Inconsistent With *Barnette* And Impractical.

Not only does the Eleventh Circuit contradict well-settled law, it leaves many unanswered questions about how Fla. Stat. § 1003.44(1) will be applied in the future. In particular, after upholding the parental consent requirement as facially constitutional despite *Barnette*, the decision below concludes with the caveat that it "decide[s] and hint[s] at nothing about the Pledge Statute's constitutionality as applied to a specific student or a specific division of students." App. at 32a. This reservation presumably leaves it to the district courts, in this and subsequent cases, to determine the statute's constitutionality on an as-applied, case-by-case basis.

The Eleventh Circuit's decision, however, provides no guidance to the district courts as to what criteria should be applied to determine the "balance of parental, student, and school rights" in applying the statute's parental consent requirement. App. at 31a. Can it be that two students, sitting side by side in a classroom, can sit quietly during the pledge of allegiance (without parental permission) and that it would be unconstitutional to punish one because she is "a mature high school student" while the other

could be constitutionally punished because he is immature? Would it require an inquiry into the sincerity of the student's or the parent's beliefs? An evaluation of the student's level of maturity? What criteria are to be applied? What is sufficient maturity for a student to be able to decide for himself?[12]

The panel's decision invites litigation every time a teacher in Florida attempts to apply the statute to a student. *Barnette* foreclosed this case-by-case approach: "It is not necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty." 319 U.S. at 634-35. Simply put, *Barnette* held that the State cannot make the pledge a legal duty. *Id.* at 642.

D. The Decision Below Misapplied This Court's Rules On Substantial Overbreadth.

Although Florida's statute is unconstitutional in every conceivable application,[13] even if Fla. Stat. § 1003.44(1) is only unconstitutional as applied to high

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[12] By specifically holding that its decision says nothing about Frazier's constitutional rights (App. at 23a, n. 2), the Eleventh Circuit holds open the prospect that even his rights may not have been violated. There is scant evidence in the record to conduct a "balance of parental, student, and school rights" in this case. *Id.* at 31a. Unless this Court provides the guidance that the Eleventh Circuit did not, these unresolved issues will have to be sorted out by the district court in the first instance upon remand.

[13] *See Barnette*, 319 U.S. at 642: "If there are any circumstances which permit an exception, they do not now occur to us."

school students, like Petitioner, the Eleventh Circuit erred in holding that the statute was not substantially overbroad and thus facially invalid on those grounds alone.

Assuming, *arguendo*, that the Florida legislature *could* enact a statute that can be constitutionally applied to *some* students, the current statute is substantially overbroad "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). The statute reaches millions of Florida public school students, including 798,091 high school students. *See* App. at 11a, n. 9. As Judge Barkett noted, those numbers are clearly "substantial," whether judged in absolute terms or as a percentage of Florida's public school population – high school students represent thirty percent of the total number of students.[14]

Even if Florida's parental consent requirement could be applied to children below a certain age, Florida's legislature has made no attempt to narrow the statute's application – it applies to every "public elementary, middle, and high school in the state." Fla. Stat. § 1003.44(1). An Eleventh Circuit panel cannot sit as a council of revision to rewrite the statute to achieve that end. *U.S. v. Rutherford*, 442 U.S. 544, 555 (1979).

Florida's pledge statute, if not unconstitutional in every conceivable application, is substantially

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[14] *See* http://www.fldoe.org/eias/eiaspubs/pdf/pk-12mbrship.pdf (last visited April 20, 2009).

overbroad and thus facially invalid to the extent that it requires parental consent to be excused from reciting the pledge.

II. THE ELEVENTH CIRCUIT DECISION CREATES A CONFLICT BETWEEN THE CIRCUITS ON THE QUESTION PRESENTED.

The Eleventh Circuit has created a conflict among the circuits where none previously existed.[15]

[15] Texas and Utah have similar statutory requirements regarding a student's participation in the pledge of allegiance. *See*: Tex. Education Code Ann. § 25.082(c) ("On written request from a student's parent or guardian, a school district shall excuse the student from reciting a pledge of allegiance [to either the United States flag or the Texas flag]"); Utah Code Ann. § 53A-13.101.6(3)(b) ("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.") and (3)(c) ("A student shall be excused from reciting the pledge upon written request from the student's parent or legal guardian."). There is no reported state or federal decision regarding Utah's statutory requirements.

A Texas district court appears, without analysis, to have accepted a parental consent requirement to be excused from reciting the pledge (U.S. or Texas) as being permitted by *Barnette*. *See Croft v. Perry*, --- F.Supp.2d ----, 2009 WL 804112 at *8 (N.D. Tex., March 26, 2009) (commenting that the "opt-out" provision – parental consent – eliminated any coercion, "and the state legislature appears to have considered and followed Supreme Court precedent on this point."). The challenge in *Croft* did not involve the parental consent requirement. Rather, the challenge was an Establishment Clause claim based upon the recent inclusion of "under God" to the Texas pledge.

The panel's opinion directly conflicts with a Third Circuit case and deviates from every other reported circuit decision regarding students and the pledge of allegiance.

In *Circle School v. Phillips*, the court considered a Pennsylvania statute that required, *inter alia*, "the recitation of the Pledge of Allegiance or the national anthem at the beginning of each school day." 381 F.3d at 174. While the statute gave "students the option of refraining from participating in the recitation and saluting the national flag on religious or personal grounds," it required "school supervising officials to notify, in writing, parents or guardians of those students who have declined to join in the recitation or salute the flag." *Id.* The Third Circuit squarely held "that the parental notification provision of the Act violates the school students' First Amendment right to free speech and is therefore unconstitutional." *Id. A fortiori*, a parental consent requirement would be held unconstitutional by the Third Circuit.

There (as here), the state argued that the statute represented "a proper balance between the students' right to freedom of speech and the Commonwealth's (and some parents') interest in the proper instruction of patriotic and civic values in all schools ... ." *Id.* at 178. Relying on *Barnette*, the Third Circuit firmly rejected Pennsylvania's approach. 381 F.3d at 179-80.

In striking down Pennsylvania's statute as facially unconstitutional, the Third Circuit concluded that the parental notification requirement was

viewpoint discriminatory and subject to a strict scrutiny analysis:

> Pennsylvania's parental notification clause clearly discriminates among students based on the viewpoints they express; it is "only triggered when a student exercises his or her First Amendment right not to speak." A student's decision to recite the Pledge of Allegiance or the national anthem, and thereby adopt the specific expressive messages symbolized by such an act, does not trigger parental notification. On the other hand, a student's refusal to engage in the required recitation leads to a written notice to his or her parents or guardian, and possibly parental sanctions.

Circle Schools v. Pappert, 381 F.3d at 180 (citation omitted). The court concluded that Pennsylvania did not have a compelling state interest to justify the significant interference with students' First Amendment rights and held that the statute "unconstitutionally treads on students' First Amendment rights." *Id.* at 181.

Florida's statute operates in the same manner. Parental consent is only triggered when a student seeks to exercise his or her First Amendment right not to speak. The panel recognized that the statute was not viewpoint neutral but dismissed the concern:

> We suppose that the statute is not

> entirely neutral; the statute seems to start with the proposition that parents generally do not object to their student children reciting the Pledge. We accept (and no one in this case has contended otherwise) that the elected Florida legislature probably does know about what parents in the state of Florida generally would prefer.

App. at 30a, n. 6. This deference to a presumed legislative decision as to what the majority of parents would want runs afoul of established law on two counts. First, it cedes the exercise of a First Amendment right to the majority. *Barnette* rejected that notion with regard to the pledge:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. at 638. Second, it gives credence to what the panel presumes to be motivation on the legislature's part to enact the preference of Florida's parents. This too has been rejected by this Court. *See Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 677

(1994) ("[B]enign motivation, we have consistently held, is not enough to avoid the need for strict scrutiny of content-based justifications.").

Florida's statute, like Pennsylvania's statute, discriminates on the basis of viewpoint and cannot withstand a strict scrutiny analysis. No other circuit, when looking at pledge statutes, has engaged in a balancing of students' versus parents' interests. *See* pledge cases cited *supra* at pp. 13-14. The panel's failure to even begin to identify and evaluate the interests at stake in this litigation, much less apply a strict scrutiny analysis, falls far afield from established jurisprudence and warrants review by this Court. The panel's decision takes parental rights, traditionally utilized as a shield against state interference, and transforms it into a state sponsored sword to be wielded by a parent to compel a student's adherence to parental beliefs.

The Third Circuit reached the opposite conclusion on the same question. This Court should grant certiorari to resolve that conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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