No. 08-1351

# In The
# Supreme Court of the United States

CAMERON FRAZIER,

*Petitioner,*

v.

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 OF PUBLIC GOOD AND THE CENTER FOR CONSTITUTIONAL RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

SETH E. MERMIN
*Counsel of Record*
THOMAS BENNIGSON
PUBLIC GOOD
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
*Counsel for Amici Curiae*

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## INTEREST OF AMICI

Public Good and the Center for Constitutional Rights submit this brief as amici curiae in support of the Petition for Certiorari.[1]

Public Good is a public interest organization dedicated to the proposition that all people are equal before the law. Through amicus participation in cases of particular significance for freedom of speech, consumer protection and civil rights, Public Good seeks to ensure that the protections of the law remain available to all. The exercise of conscience that lies at the heart of this case exemplifies the rights that Public Good seeks to defend.

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

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[1] Pursuant to Rule 37.6 of this Court, amici state that no counsel for a party authored this brief in whole or in part, and that no person, other than amici, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file the brief under Rule 37.2(a), and granted consent. Pursuant to Rule 37.3, letters of consent to the filing of this brief have been filed with Clerk of Court.

## SUMMARY OF ARGUMENT

The petition for writ of certiorari should be granted. The court of appeals' opinion departs sharply from a long and unbroken line of decisions of this Court and the lower courts – decisions that have unfailingly recognized the right of students not to be compelled to recite the Pledge of Allegiance against their will. The opinion also creates a direct and specific split with the Third Circuit on the question presented to this Court. *See Circle School v. Pappert*, 381 F.3d 172 (3d Cir. 2004).

In upholding a Florida statute that limits students' clearly established right to abstain from reciting the Pledge of Allegiance in school, the court of appeals created a new parental right to control the exercise of their children's conscience. The Eleventh Circuit's holding conflicts sharply with bedrock precedent of this Court, not only with respect to the right of students to be free from compelled professions of belief, but also by inventing a category of supposedly permissible regulation of student speech not recognized in this Court's jurisprudence, and by stretching beyond recognition this Court's precedents concerning parents' rights.

Moreover, the panel opinion ignores the settled law of this Court that restrictions on speech that discriminate according to viewpoint are almost invariably unconstitutional, and the opinion fails to apply the strict scrutiny that is required. Even if parents had the far-reaching rights attributed to them by the court of appeals, the statute could not pass strict scrutiny, among other reasons, because it

is not the least restrictive means of achieving those rights. The opinion also misapplies this Court's precedents on overbreadth. Such a direct derogation from core First Amendment principles cannot stand.

## ARGUMENT

### I. THE COURT OF APPEALS' OPINION DEPARTS FROM BEDROCK FIRST AMENDMENT PRINCIPLES CONCERNING STUDENTS' RIGHTS TO ABSTAIN FROM RECITING THE PLEDGE OF ALLEGIANCE.

If there is any fixed star in the constitutional jurisprudence of the last six decades, it is the holding of *West Virginia Board of Education v. Barnette*: The First Amendment, as applied to the states through the Fourteenth Amendment, protects schoolchildren's freedom of conscience to refrain from saluting or pledging allegiance to the flag. 319 U.S. 624 (1943). *See Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) ("For over fifty years, the law has protected elementary students' rights to refrain from reciting the pledge of allegiance to our flag"); *Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004) (student's right to decline to say Pledge was so clearly established that teacher and principal could not claim qualified immunity for violating that right: "Under *Barnette*, any reasonable person would have known that disciplining … for refusing to recite the pledge impermissibly chills … First Amendment rights"). To tamper with or weaken the holding of *Barnette* is to tarnish an icon that stands for the freedom of all

Americans to resist demands for political orthodoxy, however veiled.

In the absence of "grave and immediate danger to interests which the State may lawfully protect," 319 U.S. at 639, the First Amendment forbids the sort of conditions on liberty imposed by the Florida law at issue. Until the Eleventh Circuit here departed from this bedrock precedent, both federal and state courts had without exception affirmed students' right to abstain from Pledge recitation, striking down various attempts to narrow its application or to encumber its exercise.[2]

Courts have consistently refused to uphold preconditions or consequences placed on students' right to abstain from reciting the Pledge. *See Circle School*, 381 F.3d 172 (striking down statutory parental notification requirement when students abstained from reciting Pledge); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978) (striking down requirement that abstaining students stand for Pledge); *Banks v. Bd. of Public Instruction*, 314 F. Supp. 285, 295 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971) (same); *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973) (striking down requirement that abstaining student either stand or leave room); *Frain v. Baron*, 307 F. Supp. 27, 33 (E.D.N.Y. 1969) (finding requirement that abstaining student leave room unconstitutional, regardless of whether it constituted punishment).

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[2] In the wake of the Eleventh Circuit's opinion, a district court has now suggested that a parental opt-out provision like Florida's is constitutional. *Croft v. Perry*, 604 F. Supp. 2d 932, 941 (N.D. Tex. 2009). If this Court does not correct the Eleventh Circuit's misstep, others may follow.

Similarly, courts have consistently rejected limiting constructions of *Barnette* that restrict the right to abstain from Pledge recitation to only those students whose motivations were deemed acceptable. *See State v. Lundquist*, 278 A.2d 263 (Md. 1971) (invalidating statute that allowed only those objecting for religious reasons to abstain from Pledge); *Holden v. Board of Education*, 216 A.2d 387, 389 (N.J. 1966) (rejecting argument that exception to statutory Pledge requirement for students with "conscientious scruples" "was never intended to be so broadly construed as to include" beliefs of Black Muslim students); *Sheldon v. Fannin*, 221 F. Supp. 766, 775 (D. Ariz. 1963) (upholding students' right to express beliefs by refusing to stand for national anthem, "no matter how unfounded or even ludicrous the professed belief may seem to others").

Despite the abundance and uniformity of this precedent, the court of appeals in this case accepted the state's arguments that placing an explicit condition on students' right to abstain from reciting the Pledge could be justified by waving the banner of "parents' rights" – as if none of the dozens of previously decided cases had involved parents with an interest in their children's upbringing, or the possibility of a parent wishing her child to honor the flag had failed to occur to any previous court.

If the student Pledge requirements at issue in *Barnette* and subsequent cases had been struck down on the basis that they violated the rights of *parents* who did not wish their children to be compelled to recite the Pledge, then the constitutional defect could perhaps have been

remedied by the parental opt-out provision at issue here. But the courts said no such thing. *See Barnette*, 319 U.S. at 630 ("The sole conflict is between authority and rights of *the individual*") (emphasis added); *id*. at 637 (noting the importance with respect to young students of "scrupulous protection of Constitutional freedoms of *the individual*") (emphasis added).

## II. THE OPINION DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER COURT OF APPEALS ON THE SAME IMPORTANT MATTER.

In addition to departing from the long line of cases refusing to narrow or encumber students' right to abstain from Pledge recitation, the panel's decision in this case creates a direct split of authority between courts of appeals on the question presented to this Court. In 2004 the Third Circuit struck down a Pennsylvania statutory provision requiring schools to notify parents when students declined to recite the Pledge.[3] *Circle School*, 381 F.3d 172. The court found the provision viewpoint discriminatory (there was no notification to parents whose children did recite the Pledge) and therefore subject to strict scrutiny. *Id.* at 180. The statute could not withstand such scrutiny because the provision furthered no compelling state interest. *Id.*

[3] The provision was part of a 2002 Pennsylvania statute that required schools to hold daily recitations of the Pledge (or national anthem). The statute explicitly gave students the option of refraining from recitation, but called for parental notification of parents of refraining students. *Circle School*, 381 F.3d at 174.

at 180-81. The court also noted that the provision "may have been purposefully drafted to chill speech by providing a disincentive to opting out of [the] Act." *Id.* at 180.

The decision in the instant case is clearly at odds with *Circle School*. If the chilling effect of parental notification unconstitutionally burdens students' speech, then *a fortiori* requiring parental consent is an unconstitutional encumbrance, as the district court recognized in the present case: "While the Court disagrees as to the constitutionality of the statute in *Circle School*, the statute at issue here is far more restrictive." *Frazier v. Alexandre*, 434 F. Supp. 2d 1350, 1365 (S.D. Fla.). Further, the Florida statute is equally viewpoint discriminatory: It allows parents through inaction to require their children to recite the Pledge, while not making it possible for parents to require their children to refrain.

## III. THE PUTATIVE PARENTAL RIGHTS EXCEPTION REPRESENTS A RADICAL DEPARTURE FROM THIS COURT'S PRECEDENTS CONCERNING THE FREE SPEECH RIGHTS OF STUDENTS.

In suggesting that the state may limit students' freedom of expression on the basis of their parents' (presumed) preferences, the court of appeals invented an entirely novel – and broad – exception to the principles enunciated by this Court governing student speech rights.

While this Court has acknowledged that "the constitutional rights of students in public school are

not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), it has narrowly delimited the respects in which their free speech rights differ. A student's right to free expression may be more circumscribed than that of an adult when the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969) (citation omitted); when it would expose children to "vulgar speech [or] lewd conduct . . . wholly inconsistent with the 'fundamental values' of public school education," *Fraser*, 478 U.S. at 684-86; when it "might reasonably [be] perceive[d] to bear the imprimatur of the school," *Kuhlmeier v. Hazelwood School Dist.*, 484 U.S. 260, 271 (1988); or when it is "reasonably viewed as promoting illegal drug use." *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 2625 (2007). The infrequency and narrowness with which this Court has recognized exceptions to the rule of *Tinker* suggest that lower courts are not free to devise their own additions to this list.

Thus, before this Court's recent decision in *Morse*, it was widely held that the first three distinctions were exhaustive. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.) (student "[s]peech falling outside these categories [of "lewd, vulgar or profane language" or "speech that a reasonable observer would view as the school's own speech"] is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or

interfere with the right of others"); *accord Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 441-442 (5th Cir. 2001); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 540 (6th Cir. 2001).

While this Court in *Morse* identified a further narrow area in which "*Tinker*'s general rule" does not apply, there is no precedent for allowing lower courts to discover new categories of exceptions. Yet the Eleventh Circuit has here in effect purported to do just that, adding a novel category of permissible infringements on student speech – restrictions in furtherance of parental rights – that runs directly counter to the principles set forth in *Tinker* (to say nothing of *Barnette*). There is no precedent, and no reasonable basis, for this venture.

## IV. THE PANEL OPINION CONFLICTS WITH SETTLED LAW REGARDING THE RELATIONSHIP BETWEEN STUDENT RIGHTS, PARENTAL RIGHTS, AND THE PREROGATIVES OF THE STATE.

The panel opinion was premised on an unprecedented and implausible conception of the scope of parents' due process rights to direct their children's upbringing and education. The court accepted the state's argument that those rights could justify the state's infringement of students' freedom of conscience. But the state could permissibly override students' freedom in this way only if parents' due process rights extended so far as a right

to enlist the state in imposing parents' preferences on unwilling schoolchildren, without regard for the minors' own fundamental rights.

If parents do not have such a right against the state, then the state cannot voluntarily offer to impose *actual* (still less, as in this case, *presumed*) parental preferences, when doing so violates students' fundamental rights against the state. As Judge Barkett pointed out, the state cannot delegate a right "that the State constitutionally cannot itself possess. The State cannot give what it does not have." *Frazier v. Alexandre*, 555 F.3d 1292, 1297 (11th Cir. 2009) (Barkett, J., dissenting from denial of rehearing *en banc*) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)).

On the other hand, the panel's assumption that parents do have such a right against the state represents a sharp departure from established law concerning the relation between the public school system and parents' due process rights.

### A. This Court's Precedents Concerning Parents' Right to Direct the Education and Upbringing of Their Children Do Not Support the Sort of Positive Right Against the State Assumed in the Panel Opinion.

The cases relied on by the panel do not support the existence of a parental right to enlist state compulsion: "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 that right *against the State*." 555 F.3d at 1298 (Barkett, J., dissenting) (emphases in original). As this Court has held with respect to the free exercise clause, the Bill of Rights is "written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

Decisions of this Court vindicating parental rights in the context of laws regulating the schooling of children have concerned the rights of parents who wanted their children free from state compulsion, not the rights of parents who sought to impose state compulsion on their children. *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish parents from subjecting their children to state-required school attendance past eighth grade); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (striking down requirement that parents send children to public school); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating ban on teaching foreign languages to students before they completed eighth grade). *Pierce* and *Yoder* "have contributed to a line of decisions suggesting the existence of a constitutional parental right against undue, adverse interference *by the State*." *Bellotti v. Baird*, 443 U.S. 622, 639 n.18 (1979) (emphasis added). This Court in *Yoder* explicitly stipulated that it was not considering a situation in which the children's desires concerning school attendance were contrary to those of their parents. 406 U.S. at 231.

Nothing in these cases supports the thesis that the state may violate students' fundamental

rights of free expression on behalf of parents' rights to direct their children's upbringing, or that parents have a right that the state do so. To the contrary, there is ample precedent making clear that parents have little, if any, right to direct public schools' education of their children, even when doing so would *not* violate students' fundamental rights.

### B. The Decision Conflicts With Settled Law That Parents Lack a Right to Enlist Schools in Enforcing Their Personal Morality.

Parents do not have a constitutional right to insist that public schools teach their children in accordance with the parents' beliefs, no matter how fervently and sincerely held. When parents have brought legal challenges to school policies or curricula on the basis of their due process right to direct their children's education and upbringing, courts have consistently held that parents have no fundamental right to dictate what or how public schools teach their children. *See Leebaert v. Harrington*, 332 F.3d 134, 141 (2d Cir. 2003) ("*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught"; *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 396 (6th Cir. 2005) ("While parents may have a fundamental right to decide whether to send their child to a public school, they do not have a fundamental right generally to direct how a public school teaches their child"); *accord Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 534 (1st Cir. 1995); *Swanson v. Guthrie Indep.*

*Sch. Dist.*, 135 F.3d 694, 699 (10th Cir. 1998); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001).

In all of these cases, courts have held that parents do not have a right to direct how schools educate their children, even though deference to parental wishes in these cases would not have infringed on students' constitutional rights. *A fortiori*, parents do not have a right to direct how schools educate their children when, as with parents' (presumed) wishes that their children be compelled to recite the Pledge, deference to parents' wishes *would* infringe on students' rights. Therefore, when Florida schools compel students to recite the Pledge, they *cannot* be doing so on the basis of parents' rights, because parents have no right that their children be made to recite the Pledge in school (or even that the Pledge be said in school at all).

Of course, schools may *choose* to accede to some parental wishes about curriculum, *Brown*, 68 F.3d 525, or dress codes, *Blau*, 401 F.3d 381, just as they may choose to hold a Pledge recitation. It does not follow, however, that schools can choose to *require* students to recite the Pledge in deference to parents' wishes. Whereas schools have wide latitude to determine curricula or dress codes, or to hold patriotic ceremonies with voluntary participation, they have no right themselves to impose a Pledge requirement.

In short, parents have no right to mandate that schools require their children to recite the Pledge. And if parents have no such right, then

schools – which may not of their own accord require Pledge recitation – can have no right to require it on parents' behalf.

### C. The Decision Conflicts With Precedent That Minors' First Amendment Rights Are Not Subject to Parental Consent.

Minors' free speech rights may not constitutionally be conditioned on parental consent. As the Seventh Circuit has found in a case outside the school context, "the right of parents to enlist the aid of the state to shield their children from ideas of which the parents disapprove cannot be plenary." *Am. Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577 (7th Cir. 2001) (Posner, J.). The court there enjoined enforcement of a city ordinance limiting minors' access to violent video games unless accompanied by a parent, because of its infringement on minors' free speech rights. The court rejected the city's argument that a child's free speech rights in this context were "secured by the right of the parent … to permit his or her child … to play these games." *Id.* at 578. To the contrary, the court found it "obvious that [children] must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen" so that they may "become well-functioning, independent-minded adults and responsible citizens…." *Id.* at 577.

The point applies equally in the present case. A student's freedom of conscience to refrain from speech that may be counter to her political beliefs is surely more central to the First Amendment than is

access to violent video games; further, parents have no greater interest in compelled recitations of patriotism than they do in protecting their children from exceptionally violent video games. If access to violent video games may not be conditioned on parental consent, surely the exercise of one's conscience cannot be, either.

## V. THE PANEL OPINION IGNORES ESTABLISHED LAW REQUIRING VIEWPOINT NEUTRALITY.

Even if the rights of parents to control their children's education were as robust as the panel opinion's analysis suggests, and even if students' First Amendment rights were as feeble as that opinion implies, Florida's Pledge statute still would violate the First Amendment because it discriminates according to viewpoint on a subject at the core of constitutional protections, and neither serves a compelling state interest nor constitutes the least restrictive means of achieving the state's interest.

### A. The Statute Is Not Viewpoint Neutral.

Not only does the statute provide for the state to enforce parents' wishes only with respect to certain patriotic content, but it does so solely with respect to the state-favored point of view.

Contrary to the panel opinion, the statute offers no provision for enforcing the wishes of "a parent [who] request[s] that his child not recite the Pledge – even where the child wishes to recite."

*Frazier v. Winn*, 535 F.3d 1279, 1285 (11th Cir. 2008). In an unavailing effort to show that the statute is viewpoint neutral, the court below cited the statute – "Upon written request by his or her parent, the student *must* be excused from reciting the pledge," *id.* (quoting Fla. Stat. § 1003.44(1)) (emphasis added by court) – but then gave it a meaning its words simply cannot bear. The plain meaning of excusing a student is simply that the student will not be required to say the Pledge, not that he will be prohibited from saying the Pledge if he wishes but his parents object. *See People v. Perkins*, 473 Mich. 626, 651 n.11 (2005) (to "'[e]xcuse' means 'to release from an obligation or duty,'" quoting dictionary); *Pollett v. Rinker Materials Corp.*, 477 F.3d 376, 378 (6th Cir. 2007) ("dictionary defines 'excuse' as 'to grant exemption or release"). Under section 1003.44, a written request from a parent releases a student from his obligation to recite the Pledge. It does not, however, *prohibit* him from reciting the Pledge. Objecting parents have no means for getting the school to compel a student to refrain from Pledge recitation. Thus it is not true that, as the court of appeals would have it, "the statute ultimately leaves it to the parent whether a schoolchild will pledge or not." 535 F.3d 1284.

The court of appeals imported into the statute a viewpoint-neutrality that is simply not there. *See Salinas v. United States*, 522 U.S. 52, 59-60 (U.S. 1997) ("[s]tatutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature").

The fact that the statute – as written – allows schools to compel favored patriotic speech at the behest of parents (or, more accurately, whenever parents don't actively object), but affords parents no opportunity to require schools to compel contrary speech or silence if the parents so wish, suggests that the state's invocation of parental rights may conceal precisely the sort of attempt to enforce orthodoxy that was so forcefully rejected in *Barnette*. In any event, it means that the statute is, plainly, not viewpoint-neutral.

### B. The Statute Should Be Invalidated Solely on the Basis of Viewpoint Discrimination.

This Court has suggested that a statute that – like section 1003.44 – is viewpoint discriminatory may be struck down without further inquiry. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (provision "which leaves Americans free to praise the war in Vietnam but can send persons … to prison for opposing it, cannot survive in a country which has the First Amendment"); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("some purported interests – such as a desire … to exclude the expression of certain points of view from the marketplace of ideas … are so plainly illegitimate that they would immediately invalidate the rule"); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) ("nor may [the state] discriminate against speech on the basis of its viewpoint").

"Government action . . . that requires the utterance of a particular message favored by the

Government" contravenes the First Amendment as much as action "that stifles speech on account of its message." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Therefore, it would be possible to find section 1003.44 unconstitutional, without further inquiry, simply because it requires utterance of only a particular government-favored message.

Even if it were constitutional for the state to compel student speech in service of parents' desires, it could not selectively enforce parental wishes only with respect to favored viewpoints, just as the state may not regulate speech so as to favor one viewpoint over others, even when regulating "unprotected" speech. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992). For example, a city council may proscribe obscene displays, but it cannot constitutionally "prohibit[…] only those legally obscene works that contain criticism of the city government." *Id.* at 384. While the issue here is not restrictions on speech, but compulsion of speech, the same principle applies. Even if parental wishes somehow stripped student speech of its protections, compulsion of student speech according to parental wishes could be constitutional, at best, only if it neutrally enforced all parental viewpoints.

C. The Statute Cannot Withstand Strict Scrutiny.

Even if a finding of viewpoint discrimination is not the end of the inquiry, it means at least that strict scrutiny is required. "Our precedents … apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content…. Laws

that compel speakers to utter or distribute speech bearing a particular message are subject to the same rigorous scrutiny." *Turner Broad.*, 512 U.S. at 642. A regulation of speech that discriminates among viewpoints is constitutional "only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980). To be precisely drawn, the regulation must be accomplished through the means least restrictive of protected speech. *United States v. Playboy Entm't Group*, 529 U.S. 803, 814 (2000).

Strict scrutiny leads to the same conclusion here as immediate invalidation, for section 1003.44 neither serves a compelling state interest nor constitutes the least restrictive means of achieving the state's goal.

1. The Statute Does Not Serve a Compelling State Interest.

Section 1003.44 does not serve a compelling state interest. Florida's stated interest is to protect the rights of parents to direct their children's education. Because parents have no fundamental right to direct what is taught in public schools, as explained *supra* at IV.B, parents' interest in directing school practices can be overridden when the state has a rational basis for doing so. *See*, e.*g.*, *Littlefield*, 268 F.3d at 291. If the state interest in enforcing parental wishes in schools were a compelling one, it could not be so readily overridden.

2. The Statute Does Not Employ the Least Restrictive Means to Achieve Its End.

The state has also failed to choose the least restrictive means of achieving its purported interest. The statute compels the speech of all students whose parents do not take the affirmative step of writing, signing, and submitting a request to excuse their children. A parent's failure to submit an opt-out request could reflect a desire that the child recite the Pledge, but it could equally well reflect the parent's indifference, fear of coming to the attention of authorities (perhaps because of immigration status), fear of making waves or angering authority, illiteracy or shame at poor writing skills, to name only a few possibilities. It could also indicate – as any parent of a school-aged child will recognize – a failure of communication between child and parent. A policy compelling Pledge recitation only upon parents' affirmative request would protect the school's stated interest in a manner that restricts significantly less protected speech than does the current policy.

D. Viewpoint Discrimination is No Less Illegitimate in Regulation of Student Speech.

Viewpoint discrimination is illegitimate in regulation of student speech as well. *See Tinker*, 393 U.S. at 510 (finding it relevant to unconstitutionality of school's ban on anti-war black armbands that "school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance"); *Fraser*, 478 U.S. at 685

(distinguishing impermissible sanctions in *Tinker* on ground that "the penalties imposed in this case were unrelated to any political viewpoint"). Given that a student's silence during an official school Pledge ceremony does not involve lewd language, cannot plausibly be taken to represent the official school position, and has no connection with advocating illegal drug use, it is governed by the "rule of *Tinker*" that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. The principle applies at least as forcefully to the compelled expression of one particular opinion. "It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence." *Barnette*, 319 U.S. at 633.

Under any applicable analysis, the statute at issue in this case constitutes unconstitutional viewpoint discrimination.

## VI. THE PANEL DECISION MISAPPLIES FIRST AMENDMENT OVERBREADTH DOCTRINE.

"[I]n the area of freedom of expression an overbroad regulation may be subject to facial review and invalidation … in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

Even if there were some constitutional applications of section 1003.44 – a dubious proposition – the statute must be judged void for overbreadth in at least two respects: in applying to students whose parents have no interest in their reciting the Pledge, and in applying to students of all ages.

### A. The Statute is Substantially Overbroad in Applying to Students Whose Parents Are Not Interested in Students' Pledge Recitation.

Section 1003.44 reaches not only students whose parents want them to recite the Pledge, but also students whose parents for other reasons fail to submit paperwork excusing them. *See supra* at V.C.2. A substantial proportion of students is bound to fall into this category. Anyone working in sales can attest to the large difference in effect between an 'opt-out' and an 'opt-in' policy. *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms,* 51 Vand. L. Rev. 1583 (1998) (observing that most people accept default terms). The fact that it is impracticable to determine how many students fall into this category does not prevent a finding that the number would be substantial. *Cf. Reno v. ACLU*, 521 U.S. 844, 880 (1997) (striking down statute seeking to protect minors from exposure to indecency on Internet, because it "unquestionably silences some speakers whose messages would be entitled to constitutional protection").

B. The Statute is Substantially Overbroad in Applying to Older Students.

The court of appeals tacitly admitted that the constitutionality of the statute was suspect as applied to high school students. *See* 535 F.3d at 1285 (noting the potential unconstitutionality of the statute as applied to "a mature high school student"). And rightly so: the idea that the exercise of fundamental rights of free expression by high school students outside the home should require parental consent is implausible, to say the least. That is enough to establish substantial overbreadth.

C. The Statute Has No "Plainly Legitimate Reach."

Furthermore, the application of section 1003.44 even to elementary and middle school students is constitutionally questionable. Whether the overbreadth of a statute is substantial is "judged in relation to the statute's plainly legitimate reach." *Broadrick v. Oklahoma*, 413 U.A. 601, 605 (1973). Because the statute here is at best constitutionally dubious even as applied to younger children, there is no need for a numerical comparison: there is no "plainly legitimate reach" with which to compare the statute's overbreadth.

The holding of *Barnette* was not limited to students of a certain age. To the contrary, the Court stated: "If there are any circumstances which permit an exception, they do not now occur to us." 319 U.S. at 642. *See also id.* at 644 (Black and Douglas, JJ., concurring) (warning against "compelling little

children to participate in a ceremony"). *Barnette* has been held binding with respect to younger students as much as to older ones. *See, e.g.*, *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263, 265 (N.D.N.Y. 2000) (nine-year-old special education student); *Sheldon*, 221 F. Supp. at 768 (elementary school students). *See also Walker-Serrano*, 325 F.3d at 417 (law protects "elementary students' rights to refrain from reciting the pledge"). The students whose right to quiet protest were upheld in *Tinker* included an eight-year-old second grader. 393 U.S. at 516 (Black, J., dissenting).

Indeed, any reasons for attributing less robust rights of free expression to younger students than to older ones fail to apply when children are compelled to pay lip service to orthodoxy. If a child is too young to understand the Pledge, that may be a reason to deny him a forum to discuss it, but it is not a reason to compel him to recite it. To the contrary, a student's youth makes compelled recitation all the more objectionable. "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." *Barnette*, 319 U.S. at 637. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example." *Fraser*, 478 U.S. at 683. "[S]tate-operated schools may not be enclaves of totalitarianism." *Tinker*, 393 U.S. at 511.

## CONCLUSION

Because the court of appeals decided important questions of law in ways that deviate from bedrock decisions of this Court, and because the opinion below directly conflicts with a decision of another court of appeals on the same important matter, certiorari should be granted.

Respectfully submitted,

SETH E. MERMIN
*Counsel of Record*
THOMAS BENNIGSON
PUBLIC GOOD
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 548-4064
*Counsel for Amici Curiae*

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