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OFFICE OF THE
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Opinion No. 03-129

Pledge of Allegiance in Public Schools: Constitutionality of Tenn. Code Ann. § 49-6-1001.

QUESTION

Is Tennessee's law requiring recitation of the Pledge of Allegiance in public schools constitutional?

OPINION

Yes. Because Tenn. Code Ann. § 49-6-1001 allows students and teachers to choose not to recite the Pledge of Allegiance, the law is constitutional.

ANALYSIS

Since this Office's 2002 opinion concluding that the House and Senate bills which became Tenn. Code Ann. § 49-6-1001 were constitutional,¹ a Colorado law requiring the recitation of the Pledge of Allegiance was found unconstitutional by the United States District Court for the District of Colorado.² Because the Tennessee statute does not contain the limitations that rendered the Colorado law unconstitutional, it continues to be the opinion of this Office that Tenn. Code Ann. § 49-6-1001 would survive a constitutional challenge.³

Tennessee's law requiring recitation of the Pledge of Allegiance is constitutional because it does not compel students or teachers participate if they, or a student's parent or guardian, object for

¹Op. Tenn. Atty. Gen. 02-038 (April 2, 2002) (copy attached).

²*Lane v. Owens*, Civil Action No. 03-B-1544, Order, Transcript (D. Co. Aug. 15, 2003) (Docket Nos. 14, 15).

³This Opinion does not address whether the voluntary recitation of the Pledge of Allegiance by students and teachers violates the Establishment Clause of the United States Constitution because the Pledge includes the words "under God". Op. Tenn. Atty. Gen. 02-038 (April 2, 2002) outlines the Supreme Court's indications in dicta that recitation of the Pledge does not constitute establishment of religion. A recent decision by the United States Court of Appeals for the Ninth Circuit held that a California school district's policy of daily recitation of the Pledge in elementary and secondary schools was an unconstitutional establishment of religion. *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 2003). Tennessee is not bound by decisions of the Ninth Circuit. It is anticipated that the United States Supreme Court will decide whether to review *Newdow* within the next few weeks.

any reason. The statute states, in pertinent part:

Each board of education shall require the daily recitation of the Pledge of Allegiance in each classroom in the school system in which a flag is displayed. . . . [N]o student shall be compelled to recite the pledge of allegiance if the student or the student's parent or legal guardian objects on religious, philosophical or other grounds to the student participating in such exercise. Students who are thus exempt from reciting the pledge of allegiance shall remain quietly standing or sitting at their desks while others recite the pledge of allegiance and shall make no display that disrupts or distracts others who are reciting the pledge of allegiance. Teachers or other school staff who have religious, philosophical, or other grounds for objecting are likewise exempt from leading or participating in the exercise.⁴

If a teacher objects to leading the Pledge, someone else may be designated to do so in his or her place.⁵

Because the Tennessee statute allows students and teachers to refuse to participate, for any reason, the law is constitutional. The United States Supreme Court, in *West Virginia Board of Education v. Barnette*, declared that the government cannot compel students to recite the Pledge.⁶ In 1992, the United States District Court for the Seventh Circuit, relying on *Barnette*, determined that schools could require recitation of the Pledge of Allegiance “so long as the school does not compel pupils to espouse the content of the Pledge as their own belief”⁷

The Colorado statute allows students or teachers to opt out of participation if they are not United States citizens or if they object for religious reasons.⁸ But the district court found the law

⁴Tenn. Code Ann. § 49-6-1001(c)(1).

⁵*Id.*

⁶319 U.S. 624, 631-32 (1943).

⁷*Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 445 (1992). The Illinois law simply says: “The Pledge of Allegiance shall be recited each school day by pupils in elementary and secondary educational institutions” Ill. Stat. Ch. 122 ¶ 27-3. The circuit court interpreted the phrase “by pupils” to mean “by willing pupils.” *Sherman*, 980 F.2d at 442 (emphasis added). “This makes sense of the statute without imputing a flagrantly unconstitutional act to the State of Illinois.” *Id.*

⁸Co. St. § 22-1-106(2)(b): “Nothing in this subsection (2) shall be construed to require a teacher or a student to recite the pledge of allegiance . . . if the teacher or student objects to the recitation of the pledge on religious grounds.”

Co. St. § 22-1-106(2)(c): “Nothing in this subsection (2) shall be construed to require students and teachers who are not United States citizens and are attending or teaching school in the State of Colorado to recite the pledge of allegiance”

unconstitutional because the it does not allow teachers to object for any non-religious reason,⁹ and the law requires students objecting for non-religious reasons to provide a note from their parents or guardians to the principal.¹⁰ United States District Court Judge Lewis T. Babcock found that the Colorado statute violated the Supreme Court’s ruling in *Barnette*.¹¹ In his ruling from the bench — which was incorporated in the Order granting injunctive relief — Judge Babcock said: “It doesn’t matter whether you’re a teacher, a student, a citizen, an administrator, or anyone else, it is beyond the power of the authority of government to compel the recitation of the Pledge of Allegiance.”¹²

Tenn. Code Ann. § 49-6-1001, on the other hand, is constitutional because it does not compel participation. It also does not punish non-participation¹³ or require students or teachers at private schools to recite the Pledge.¹⁴

The Tennessee statute’s requirement that non-participants not “make [any] display that disrupts or distracts others who are reciting the pledge of allegiance” does not make the law unconstitutional. Students or teachers who do not participate do not have a right to disrupt those who do want to recite the Pledge of Allegiance. “Objection by the few does not reduce to silence the many who *want* to pledge allegiance to the flag ‘and to the Republic for which it stands.’”¹⁵

⁹Co. St. § 22-1-106(2)(b).

¹⁰Co. St. § 22-1-106(2)(b): “A student shall be exempt from reciting the pledge of allegiance if a parent or guardian of the student objects in writing to the recitation of the pledge on any grounds and files the objection with the principal of the school.”

¹¹319 U.S. 624 (1943).

¹²*Lane v. Owens*, Civil Action No. 03-B-1544, Order, Transcript p. 5 (D. Co. Aug. 15, 2003) (Docket Nos. 14, 15).

¹³*The Circle School v. Phillips*, 2003 WL 21649639, *5-6 (E.D. Pa. July 15, 2003) (requiring schools to notify parents of students choosing not to participate in Pledge or singing national anthem unconstitutional); *Lipp v. Morris*, 579 F.2d 834 (3d Cir. 1978) (requiring non-participating students to stand at attention or leave the classroom unconstitutionally compels student speech); *Goetz v. Ansell*, 477 F.2d 636, 638 (2d Cir. 1973) (requiring non-participants to leave the room punishes non-participation).

¹⁴Tenn. Code Ann. § 49-6-1001(a): “All boards of education shall direct and all teachers employed by *the public schools* shall give instructions”; *see also Circle School*, 2003 WL 21649639 at *11 (holding that Pennsylvania state law requiring private schools to lead students in the Pledge did not survive strict scrutiny).

¹⁵*Sherman*, 980 F.2d at 445.

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