



September 18, 2019

Dr. Michael D. Matthews
Superintendent of Schools
Manhattan Beach Unified School District
25 S. Peck Ave.
Manhattan Beach, CA 90266
mmatthews@mbusd.org

Dr. Ben Dale
Principal
Mira Costa High School
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Manhattan Beach, CA 90266
bdale@mbusd.org

Re: Free Speech Violation

Dear Superintendent Matthews and Dr. Dale,

A teacher at Mira Costa High School has contacted our office to request assistance regarding a serious constitutional violation that is occurring under the authority of your school and school district. The teacher reports that the Principal, Mr. Ben Dale, announced over the intercom on Wednesday, September 11, 2019, that he was “personally offended by any teacher or student who did not stand for the pledge.” Mr. Dale has been going to classes to determine who is standing and who is not. The teacher is concerned that their students’ rights are being violated. As you likely know, the right of students to opt out of Pledge participation was settled long ago by the United States Supreme Court in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).¹ Consequently, any actions by your school district or its agents infringing upon that right would be actionable as a serious constitutional violation.

The American Humanist Association (AHA) is a national nonprofit organization with over 34,000 members across the country, including many in California. The mission of AHA’s legal center is to protect the First Amendment rights to free speech and religious liberty. We have litigated constitutional cases in state and federal courts from coast to coast, including in

¹ Incidentally, the Principal’s actions violate the District’s own policy: “Individuals may choose not to participate in the patriotic exercises for personal reasons.” (AR 6115), <http://www.gamutonline.net/district/manhattanbeach/DisplayPolicy/465648/> (Sept. 12, 2019).

California.² We write to demand specific assurances that no student will be penalized, stigmatized, or otherwise singled-out in any fashion for choosing to exercise their First Amendment right to refuse to recite or stand for 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.” *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943). In *Barnette*, the Supreme Court held that public school officials are forbidden under the First Amendment from compelling students to salute the flag or recite the Pledge. 319 U.S. at 642. The Court was aware that the school district might demand other “gestures of acceptance or respect: . . . a bowed or bared head, a bended knee,” *id.* at 632, but reiterated that the government may not compel students to affirm their loyalty “by word or act.” *Id.* at 642 (emphasis added).

Since *Barnette*, the Supreme Court has consistently “prohibit[ed] the government from telling people what they must say.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006). See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252-53 (2015) (“[T]he First Amendment *stringently* limits a State’s authority to compel a private party to express a view with which the private party disagrees.”); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). For instance, in *Wooley*, the Court ruled that a “state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable” violates the First Amendment. *Id.* at 715.

In accordance with *Barnette* and its progeny, the lower federal courts have consistently recognized the First Amendment right of students to remain silent and seated during the Pledge. That “students have a constitutional right to remain seated during the Pledge is well established.” *Frazier v. Winn*, 535 F.3d 1279, 1282 (11th Cir. 2008) (per curiam), *cert. denied*, 558 U.S. 818 (2009) (finding that all public school students have the First Amendment right not to stand during the Pledge). See also *Newdow v. United States Cong.*, 328 F.3d 466, 489 (9th Cir. 2002) (noting that schools may not “coerce impressionable young schoolchildren to recite [the Pledge], or even to stand mute while it is being recited by their classmates.”); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274, 1278-79 (11th Cir. 2004) (noting that the right to remain seated and silent during the Pledge is “clearly established”); *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. 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); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 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.”) (citing *Barnette*, 319 U.S. 624; *Russo v. Cent. Sch. Dist. No. 1*, 469 F.2d 623 (2d Cir. 1972)); *c.f. Frudden v. Pilling*, 742 F.3d 1199, 1208 (9th Cir. 2014) (holding that forcing

² See *Am. Humanist Ass’n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180 (C.D. Cal. 2014).

students to wear a school motto, “Tomorrow's Leaders,” on school uniforms was unconstitutional compelled speech).

Indeed, the federal appellate courts have been unanimous in concluding that public school officials are prohibited from compelling students to stand during the Pledge. *See, e.g., Newdow*, 328 F.3d at 489; *Frazier*, 535 F.3d at 1282; *Holloman*, 370 at 1274-79; *Circle Sch. v. Pappert*, 381 F.3d 172, 178 (3d Cir. 2004); *Walker*, 325 F.3d at 417; *Lipp v. Morris*, 579 F.2d 834, 836 (3d Cir. 1978) (ruling that a state statute requiring students to stand during the Pledge was an unconstitutional compulsion of expression); *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 and cannot be compelled to leave the room if he chooses not to stand); *Banks v. Bd. of Public Instruction*, 314 F. Supp. 285, 294-96 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971) (concluding that a rule requiring students to stand during the Pledge was unconstitutional).

Federal district courts and state courts have also consistently ruled that students have a constitutional right to remain silent and seated during the Pledge. *See Rabideau*, 89 F. Supp. 2d at 267; *Frain v. Baron*, 307 F. Supp. 27, 33-34 (E.D.N.Y. 1969) (enjoining school 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.”); *State v. Lundquist*, 262 Md. 534, 554-55 (Md. 1971) (state statute requiring teachers and students to salute the flag during the Pledge violated the First Amendment freedom of speech clause). *Cf. Sheldon v. Fannin*, 221 F. Supp. 766, 768 (D. Ariz. 1963) (enjoining elementary school from suspending Jehovah’s Witness students solely because they silently refused to stand for the national anthem).

Importantly, not only do students have the right to silently sit during the Pledge, but they also have a right to outwardly *protest* the Pledge exercise. *See Holloman*, 370 F.3d at 1273-74 (raising fist during Pledge was protected speech even if fellow classmates found it objectionable and distracting). In *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, one of the seminal cases on free speech in school, the Supreme Court famously declared: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.” 393 U.S. 503, 506-07 (1969) (citing *Barnette*, among other cases). In *Banks Bd. of Public Instruction*, the court applied *Tinker* to the act of refusing to stand for the Pledge and held: “The conduct of Andrew Banks in refusing to stand during the pledge ceremony constituted an expression of his religious beliefs and political opinions ... He was exercising a right ‘akin to pure speech.’” 314 F. Supp 285, 295 (S.D. Fla. 1970) *aff'd*, 450 F.2d 1103 (5th Cir. 1971). Referring to *Banks*, the Eleventh Circuit observed in *Holloman* that “its ruling was not based on Banks's First Amendment right to remain silent, *but his First Amendment right to affirmatively express himself.*” 370 F.3d at 1273-74 (emphasis added).

Students at Manhattan Beach Unified School District schools do not deserve to be mistreated merely because they choose to exercise their constitutional rights. Based on the above, we demand the following written assurances: (1) That all students and teachers in your school district be advised that students may stay seated for any Pledge exercise at the school; (2) That teachers and administrators be instructed that under no circumstances should they attempt to

persuade students to refrain from exercising the right to nonparticipation, question students as to the reason for nonparticipation, or characterize opting out as misconduct or otherwise wrongful; and (3) That no disciplinary or other retaliatory measures of any kind will be directed toward any student or teacher for nonparticipation in the Pledge exercise.

We are hopeful that you will recognize the concerns raised by this letter and address them properly. **We demand a response within seven (7) days.** Thank you in advance for your attention to this matter.

Sincerely,
Monica L. Miller
Legal Director and Senior Counsel
American Humanist Association