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NOTES

Mama Knows Best: *Frazier v. Winn* Says Do as You're Told!

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I. INTRODUCTION

On December 8, 2005, Cameron Frazier, a high-school student at a

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Palm Beach County School, refused to stand and recite the Pledge of Allegiance.[1] Upon his refusal to stand and recite, a verbal altercation arose between Frazier and his teacher, Cynthia Alexandre,[2] where Alexandre "subjected him to ridicule and humiliation, and punished him [for] his refusal to recite, or stand during, the pledge of allegiance."[3] Frazier explained that he had not stood and taken part in the Pledge since the sixth grade and that he intended it to remain that way.[4] Alexandre replied, "See your desk? Now look at mine. Big desk, little desk. You obviously don't know your place in this classroom."[5] Frazier again asserted that he did not stand for the flag, but his continued resistance was countered by the teacher's disgusting remark, "I'm sorry, did you say you don't stand for the fuckin' flag!"[6] "Alexandre then handed Cameron a document with the Palm Beach County School District's logo on it and told Cameron: '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!'"[7] The statute also requires that each student be informed, through conspicuous postings, of the right not to participate in the Pledge if that individual obtains written consent from his or her parent or guardian.[8] The teacher told Frazier that, because no written exemption had been provided by Frazier's parent, he was required to say the Pledge.[9] Alexandre continued her disparagement of Frazier's assertion of his right and proceeded to call Frazier a number of insulting names, including "disrespectful," "ungrateful," and "un-American."[10] Frazier was then sent to the principal's office where Frazier's mother was called.[11] The principal told Frazier that his mother had excused him from the Pledge, but that he would still have to stand.[12] Frazier "was then made to sit in the office until the class period was over and was not allowed to return to the classroom that day."[13]

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1. Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1353–54 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

2. *Id.* at 1354.

3. First Amended Complaint para. 1, *Alexandre*, 434 F. Supp. 2d 1350 (No. 05-81142).

4. *Id.* para. 13.

5. *Id.* para. 14.

6. *Id.* para. 17.

7. *Id.* para. 18.

8. FLA. STAT. § 1003.44(1) (2007).

9. Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1354 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

10. First Amended Complaint, *supra* note 3, paras. 20–21.

11. *Id.* para. 26.

12. *Id.*

13. *Id.* para. 27.

As a result of the incident, Frazier, through his mother and next friend, brought an action under 42 U.S.C. § 1983 alleging that section 1003.44 of the Florida Statutes violated the First and Fourteenth Amendments to the United States Constitution.[14] Frazier sought declaratory and injunctive relief based on his belief that "he has been, and will continue to be, irreparably harmed by his continued punishment and denial of his constitutional right."[15]

In an effort to understand the Eleventh Circuit Court of Appeals' panel decision in *Frazier v. Winn*,[16] this Note will critically analyze the opinion's use and abuse of the longstanding precedent with regard to the Pledge, the parental right to control the upbringing of one's child, and the court's invocation of the overbreadth doctrine.

Part II.A discusses the legislative history of the Florida Pledge statute at issue in *Winn*, and Part II.B of this Note discusses the procedural history of the *Winn* decision, including the precedent and reasoning used by the Southern District of Florida and the Eleventh Circuit Court of Appeals in reaching their respective opinions. Part III will critically analyze the Eleventh Circuit's decision, with Part III.A focusing on the court's interpretation of the statutory language, as well as the constructions advanced by the parties during the litigation. Additionally, Part III.B challenges the court's decision to distinguish the Supreme Court case of *West Virginia State Board of Education v. Barnette*,[17] as well as the court's abuse of precedent with regard to the parental right to control upbringing of one's own child, and the interaction of the parental right with the child's right to freedom of speech. The Eleventh Circuit's decision is somewhat rectified by Part III.C's discussion of *Winn* as an overbreadth challenge; however, the applicability of that doctrine to the *Winn* case will be questioned and examined. Part III.D explores the potential for a circuit split on this issue. Lastly, Part IV concludes that, because of the Eleventh Circuit opinion's lack of clarity, more cases are sure to follow in an effort to fully develop this area of the law.

II. First Period: A History Lesson

A. *Knowing Where We Come from To Know Where We Are Going: The Statute's Language*

In 1942, Florida imposed the Pledge of Allegiance upon students.[18]

14. *Alexandre*, 434 F. Supp. 2d at 1353.

15. *Id.* at 1355.

16. 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

17. 319 U.S. 624 (1943).

18. Scott Travis, *Judge: Law Making Pupils Stand for Pledge Is Illegal*, Orlando Sentinel, June 2, 2006, at A1.

In 2002, the Florida governor signed the form of this statute that Frazier would combat in court.[19] This form of the Pledge statute resided in section 1003.44(1) of the Florida Statutes and had the title "Patriotic Programs."[20] Frazier attacked subsection (1) of the statute, which in pertinent part states the following.

> Each district school board may adopt rules to require, in all of the schools of the district, programs of a patriotic nature to encourage greater respect for the government of the United States and its national anthem and flag, subject always to other existing pertinent laws of the United States or of the state. . . . The pledge of allegiance to the flag . . . 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 . . . .[21]

With these words thrusting the conflict forward, litigation began.

B. *Learning To Avoid Mistakes from Our History: Procedural History*

1. THE DISTRICT COURT'S DECISION: THE FIRST CRACK AT THE LESSON

Frazier contended that the Pledge requirements were unconstitutional both on their face and as applied to him. He stated that refusal to recite the Pledge was due to "*his personal* political beliefs and convictions."[22] The court heard the case on Florida's motion to dismiss and Frazier's motion for summary judgment.[23] The State's first defense was that Frazier lacked standing as to the facial challenge. Specifically, the State argued that the statute was never applied to him because he never sought the required parental permission.[24] The court quickly dismissed this argument because the State's argument assumed that the parental-

19. *See* Act of May 16, 2002, § 137, 2002 Fla. Law ch. 387, 207–08 (codified at FLA. STAT. § 1003.44 (2007)).

20. FLA. STAT. § 1003.44.

21. *Id.*

22. Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1352 (S.D. Fla. 2006) (emphasis added), *aff'd in part, rev'd in part sub nom.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

23. *Id.* at 1357.

24. *Id.* at 1358.

consent provision is constitutional. Furthermore, the court focused on the fact that Frazier was challenging that *his* constitutional rights were violated.[25] The court determined that "Frazier suffered injury in fact: he was removed from the classroom, subjected to verbal castigation by Alexandre, and was personally subjected to the statute's requirement that even if he did not recite the pledge, he would have to remain standing."[26] Furthermore, the court concluded that Frazier would be "redressed by a favorable decision," so he therefore had standing to bring a facial challenge.[27]

Next, the State argued that Frazier did not have an as-applied challenge because the statute allows those students excused from the pledge from having to stand. The State's argument was that the statute's language requiring all "civilians" to stand did not require students excused from the pledge to still stand, but instead made reference to non-military personnel present to stand.[28] Its argument was that civilians were forced to stand, but that "civilians" did not include students. The court, after looking to the plain language of the statute, as well as other forms of statutory construction, concluded that the State's argument would lead to an absurd result and be in direct conflict with *ejusdem generis*.[29] After denying the State's standing arguments, the court then analyzed Frazier's First Amendment arguments.

The court noted that Frazier was not challenging the authority of the state to permit the recital of the Pledge in the classrooms or the substance of the Pledge itself.[30] Instead, he "challenges only the authority of the state to override *his* conscience and compel *his* participation in such an exercise."[31] The court took the stance that the right involved in refusing to recite the Pledge belonged to the students. The court inter-

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25. *Id.*

26. *Id.* at 1359.

27. *Id.*

28. *Id.* at 1359–60.

29. *Id.* at 1360. The court stated,

> If the statute only applies to schools, "civilians" would include instructional staff, administrators, support personnel, cafeteria workers, custodial staff, or school visitors. Were such the case, the State of Florida would be commanding those individuals, but not its students, to stand at attention for the pledge recitation. Students would then possess greater rights than these other individuals. Not only does that interpretation bring about an absurd result, it also runs afoul of the *ejusdem generis* canon of construction . . . .

Id. Ejusdem generis means that, if an enumeration is followed by a general term, the only limitation that can be imposed on the general term is some characteristic common to all of the items mentioned in the enumeration. Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980).

30. *Alexandre*, 434 F. Supp. 2d at 1363.

31. *Id.*

preted *West Virginia State Board of Education v. Barnette*[32] as the first case to recognize a "*student's right* to refrain from pledge participation."[33] Furthermore, the court relied heavily on the decision in *Circle School v. Pappert*.[34] In *Pappert*, the school followed a state statute requiring notification to the parent of any child who refused to pledge allegiance or salute the flag.[35] The Third Circuit struck down the state statute, stating that the provision would unduly "chill" the rights of the students.[36] The Third Circuit was afraid that the students would not exercise their right and beliefs because of fear of their parents being notified.[37] Relying heavily on these two cases, the court recognized the right as belonging to the student, not the parent.[38] The State attempted to persuade the court that the right to refuse to recite the Pledge belonged to the custodial parent and not the child.[39] The State argued that the Supreme Court in *Elk Grove Unified School District v. Newdow*[40] held such a result. The court disagreed with the State's interpretation of *Newdow*, and stated that the case "explicitly recognizes that ability of a *student* to assert constitutional rights against a third party through an action filed by the appropriate next friend."[41]

The court went on to recognize that the parents have a fundamental right to control the upbringing of their children; however, the court determined that the right does not mean that a parent has to consent to the exercise of the child's First Amendment right.[42] The court acknowledged the parents' right concerning custody, care, nurturing of the child, as well as the right to direct their education. Ultimately, the court held that "this right [did] not translate into a requirement that a parent must

32. 319 U.S. 624 (1943).

33. *Alexandre*, 434 F. Supp. 2d at 1363 (emphasis added).

34. 381 F.3d 172 (3d Cir. 2004).

35. *Id.* at 174.

36. *Id.* at 181.

37. *Id.*

38. *See Alexandre*, 434 F. Supp. 2d at 1365 ("*Circle School* students were still allowed to make their own decision whether to recite the pledge, whereas the statute here is more restrictive in that it robs the student of the right to make an independent decision whether to say the pledge. Since *Barnette*, federal courts have established a body of caselaw that irrefutably recognizes the right of students to remain silent and seated during the pledge."). It is also worth reiterating that the court already found that the reason Frazier refused to say the Pledge was in response to "*his personal* political beliefs and convictions." *Id.* at 1352 (emphasis added).

39. *Id.* at 1365–66.

40. 542 U.S. 1 (2004). *Newdow* involved a case where the non-custodial parent, an atheist, attempted to challenge the "under god" language of the Pledge, as his child's next friend. *Id.* at 5. The court dismissed the case because the father lacked standing as a non-custodial parent because the mother was granted entitlement to make legal decisions on the daughter's behalf. *Id.* at 17–18.

41. *Alexandre*, 434 F. Supp. 2d at 1366. Quoting *Newdow*, the district court noted that a potential conflict between parent's rights and student's rights may exist. *Id.*

42. *Id.* at 1367–68.

give prior approval of a child's exercise of First Amendment rights in a school setting."[43] The court held that "Pledge autonomy" has been established for over sixty years and that the State of Florida could not "create a new rule of constitutional law by requiring" parental consent before a child exercises her First Amendment right.[44] The court therefore found for Frazier on both the as-applied challenge and the facial challenge.[45] The court held that the requirement to stand during pledging and the parental-consent requirement were unconstitutional and thereby granted summary judgment in favor of Frazier.[46]

2. THE ELEVENTH CIRCUIT'S RESPONSE: DID ITS DOG EAT ITS HOMEWORK?

After the district court's decision in favor of Frazier, the State of Florida timely appealed to the Eleventh Circuit, which subsequently heard the case as *Frazier v. Winn*.[47] On appeal, the court focused solely on the facial challenge and did not speak to the merits of the as-applied challenge.[48] In addressing the facial challenge, the court looked at two separate issues. First, the court focused on the statute's requirements that "civilians" stand at attention during the Pledge and asked whether this requirement was unconstitutional.[49] Second, the court addressed whether the statute's requirement that a student obtain a written request from a parent and submit it to the school administrator to be excused from recitation was constitutional.[50]

First addressing the requirement that the excused students must stand during the Pledge regardless of parental consent, the court agreed with both Frazier and the district court by affirming the decision that the standing requirement shouldn't be enforced.[51] The State argued that the standing requirement only applied to the students who had not been excused from reciting the Pledge, but the court found that the State's interpretation was improbable due to the plain language of the statute, requiring all civilians to stand.[52] After concluding the standing requirement to be unenforceable, the court still refused to declare the statute as a whole unconstitutional. Following one of the many canons of statutory construction, the court held "that this portion of the statute [the standing

43. *Id.* at 1368.
44. *Id.*
45. *Id.* at 1368–69.
46. *Id.* at 1369.
47. 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).
48. *Id.* at 1282 n.2.
49. *Id.* at 1282.
50. *Id.*
51. *Id.*
52. *Id.*

requirement] may be severed, leaving the statute otherwise enforceable."[53] The court considered whether the legislature would have enacted these provisions independently. Not wanting to invalidate the work of the elected representatives of Florida, the court concluded that the legislature would have enacted these provisions independently of each other, and therefore the court severed the standing requirement of the statute, thereby leaving the rest of the statute intact.[54]

After severing the standing requirement, the court then briefly focused on the more controversial aspect of the statute, the parental-consent requirement. Frazier challenged the parental-consent requirement, arguing that the statute deters free speech too broadly and is therefore facially invalid as overbroad.[55] The court stated that an overbreadth challenge "is based on a statute's possible direct and indirect burdens on speech. The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial."[56] After presenting the framework for overbreadth challenges, the court then quickly concluded, without much analysis, that this statute was primarily a parental-rights statute. In switching gears, the court, during its brief analysis of the parental-consent requirement, failed to explain why Frazier's overbreadth challenge was not substantial. In coming to its conclusion that the statute was overly broad, the court concluded that the trumping right present in this case was the right of the parent, reasoning the right of the student was outweighed by a parents' right to "control their children's upbringing."[57] Therefore, the court primarily reached its conclusion through a balancing test.

The court determined that they did not need to rely heavily on previous Pledge precedent, such as *West Virginia State Board of Education v. Barnette*,[58] because the court determined that those cases were easily differentiated from Frazier's situation—the previous cases involved no conflict between the child and the custodial parent.[59] The court held that the parent's right trumps the rights of everyone else in this case. "Although we accept that the government ordinarily may not compel students to participate in the Pledge, we also recognize that a parent's

53. *Id.*
54. *Id.* at 1283.
55. *Id.*
56. *Id.* at 1283–84.
57. *Id.* at 1284.
58. 319 U.S. 624 (1943).
59. *See Winn*, 535 F.3d at 1284 n.5 ("None of the decisions relied upon by Plaintiff and the district court decide the rights of custodial parents in opposition to the rights of their children because, in those cases, the custodial parent was not opposing the child's choice in exercising the child's speech.").

right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest."[60]

The court reached this conclusion by focusing on the fact that other courts have recognized a parent's right to take a substantial role in the decisions regarding his child's "education on civic values."[61] Moreover, the court acknowledged that the Supreme Court, in *Wisconsin v. Yoder*,[62] extended this parental right to religious upbringing. The issue still remains, and the court failed to comment on, whether the recitation of the Pledge actually falls within the parental right to control education, civic values, or religious future. In the end, the court determined that the interests of the parent outweighed any other competing interests, and, thus, the court reversed the district court's decision and upheld the remaining portion of the statute.

After holding that the parent's right outweighed the student's, the court could have ended its opinion, but instead it included further statements that must be examined. First, the court stated that, even if the rights in conflict were to favor a "mature high school student," Frazier still would not have been able to prevail because he failed to articulate that a *substantial* number of constitutional violations would rise to the level needed in order to successfully win an overbreadth challenge.[63] In making this statement, the court seemed to acknowledge that age is a factor, and there will be times when a mature student could challenge the statute as applied to him. Also, the court seemed to imply, without expressly stating, that the number of instances where a parent and student will disagree over the recitation of the Pledge will be extremely small, and hence an overbreadth challenge that would declare the statute unconstitutional is unwarranted. Lastly, the court, in a brief footnote and without further clarification, stated that courts in other circumstances, such as abortion and condom distribution, have recognized limited constitutional rights for minors.

While this statement is true, the court failed to acknowledge abortion cases that create procedures allowing a minor to bypass her parents in order to exercise limited constitutional rights—a procedure that is not in place here. Ultimately, the court declined to accept Frazier's facial challenge and reversed the district court's decision concerning the parental-consent requirement, but it did uphold its decision declaring the standing requirement unconstitutional.

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60. *Id.* at 1285 (citation omitted).

61. *Id.*

62. 406 U.S. 205 (1972).

63. *Winn*, 535 F.3d at 1285.

3. REHEARING EN BANC DENIED: BARKETT GRADES THE ELEVENTH CIRCUIT'S DECISION—SO MUCH RED INK!

After the Eleventh Circuit reversed the district court's decision concerning the constitutionality of the parental-consent requirement, Frazier filed a petition for rehearing en banc. The petition was denied, but Judge Rosemary Barkett dissented, pointing out all the flaws and concerns created by the Eleventh Circuit's panel decision.[64] Her dissent began by arguing her belief that the Eleventh Circuit's decision directly contravened precedent, originating with *Barnette*, entrenched in our legal system for over sixty-five years.[65] She stated that the court incorrectly failed to apply strict-scrutiny analysis to the infringement upon the student's fundamental right to free speech.[66] Through the court's failure to provide strict-scrutiny analysis and its complete disregard of precedent, she believes that the court upheld a "patently unconstitutional" permission requirement.[67] Just as the district court noted, Judge Barkett acknowledged that *Barnette* provided the student a right to choose not to recite the Pledge.[68] Furthermore, she highlighted that the *Barnette* Court recognized that the "Pledge requires affirmation of a belief and an attitude of mind."[69]

Also, there is nothing in the *Barnette* decision, or any other case law, that allows student's free speech to depend on parental consent. The *Barnette* Court explained that the right belonged to the student. Rather than focusing on the student's right, the court in *Frazier* created an effective parental veto of that right. Although she believes that the parents do not have a right under the facts of *Frazier*, Judge Barkett proclaimed that the court must weigh any conflict of these rights, instead of sidestepping the right of the student as articulated in *Barnette*.[70] Therefore one needs to balance "the students' free speech right guaranteed by *Barnette* against whatever purported rights (and their sources) parents may have to compel their children to violate their conscience."[71]

Next, Judge Barkett criticized the panel's usage of the overbreadth doctrine. She argued that the overbreadth doctrine is not the proper doctrine for handling this case. "The overbreadth doctrine is applied to laws

64. Frazier v. Alexandre, 555 F.3d 1292, 1292–1300 (11th Cir. 2009) (Barkett, J., dissenting).

65. *Id.* at 1293.

66. *Id.*

67. *Id.*

68. *See id.* at 1294 ("The Supreme Court recognized that this compulsion infringed on the *students'* rights of conscience, and thus, found the law unconstitutional. There is no distinction between the rights of students in West Virginia schools and the rights of students in Florida schools.").

69. *Id.* (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943)).

70. *Id.* at 1295 & n.7.

71. *Id.*

that *curtail* or *prohibit* speech, not laws where the State *compels* individuals to say things that might contravene their most deeply-held beliefs."[72] She reasoned that this statute does not prohibit speech, but instead compelled the student to speak against his conscience.[73] Applying strict scrutiny, she concluded that the Pledge statute failed.[74] In doing so, she enunciated that "[the State's interest in disseminating an ideology] cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[75]

Failure to apply strict scrutiny was just one of the constitutional mistakes the panel made. Judge Barkett pointed out that the panel failed to acknowledge, never mind weigh, the constitutional rights that minors possess.[76] It is her belief that the court allowed the State to delegate to the parents a right to compel speech; but, the problem, she argued, is that the states cannot delegate such a power because states do not possess a power to compel speech.[77] Simply put, a state cannot delegate something it cannot do on its own. She wrote:

> This case is not about whether parents, *on their own*, can require their children to recite the Pledge of Allegiance, but whether *the State* can burden a clear First Amendment right either by requiring consenting parents to give permission before their children may exercise their constitutional rights or by using non-consenting parents to compel the expression of beliefs that students do not hold.[78]

Barkett's next argument was that the court never acknowledged the rights of the minor. According to her, the panel's opinion merely "[gave] lip service to the principle that minors possess constitutional rights, but asserts that those rights are trumped by the parents' wishes."[79] She, once again, claimed that the court misapplied and misstated Supreme Court precedent. She pointed out that in *Planned Parenthood of Central Missouri v. Danforth*[80] the Court made it clear that parents cannot infringe on a minor's constitutional right to privacy concerning an abortion.[81] According to Judge Barkett, the fundamental right present in that case equaled the fundamental right in this case. "A minor's right to express an act of conscience is just as worthy of protection as a minor's constitu-

72. *Id.* at 1295 n.8.
73. *Id.* at 1295.
74. *Id.* at 1296.
75. *Id.* (alteration in original).
76. *Id.*
77. *Id.* at 1297.
78. *Id.*
79. *Id.*
80. 428 U.S. 52 (1976).
81. *Alexandre*, 555 F.3d at 1297 (Barkett, J., dissenting).

tional right of privacy to obtain an abortion."[82]

A question remains. Is the *Winn* decision correct? Part III explores and answers this question.

III. On to English Class: To Pledge or Not To Pledge?

A. *Florida Copies the United States' Homework: Question of Straightforward Statutory Interpretation?*

The courts easily answered one of the two questions presented—the question of statutory interpretation. With this issue, we begin.

The Eleventh Circuit Court of Appeals first attacked the statute's standing requirement. In pertinent part, the Florida Statute stated, "Upon written request by [the student's] 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."[83] Frazier attacked the standing-at-attention requirement, for he believed that the statute's language forced students to stand even when their parents excused them from reciting the pledge.[84] In *Frazier v. Alexandre*, Judge Ryskamp, in the district court, held that the statute required students to stand, regardless of parental waiver.[85] By forcing students to stand at attention, the statute violated students' First Amendment rights.[86] The Eleventh Circuit Court of Appeals affirmed this decision by the district court in *Frazier v. Winn*.[87] This surprises not. In contrast, Florida's interpretation of the standing requirement amazes. With logic and statutory-interpretation tools,[88] the courts unraveled the bizarre arguments Florida made to the courts.

The statute first mentions students and excuses them from reciting the pledge. Noticeably, the next sentence forces civilians to stand. The switch from the noun "student" to the noun "civilians" indicates a difference between "students" and "civilians." Despite this clear-cut distinction, Florida attempted to clean this cogent distinction with a good legal sanitizer.

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82. *Id.* at 1298.

83. Fla. Stat. § 1003.44(1) (2007).

84. *See* Frazier v. Winn, 535 F.3d 1279, 1281 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292.

85. 434 F. Supp. 2d 1350, 1359–62 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom. Winn*, 535 F.3d 1279, *reh'g en banc denied*, 555 F.3d 1292.

86. *Id.*

87. *Winn*, 535 F.3d at 1283.

88. For discussions on statutory interpretation see, for example, William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 Nw. U. L. Rev. 629 (2001); William N. Eskridge, Jr., *"Fetch Some Soupmeat,"* 16 Cardozo L. Rev. 2209 (1995); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1 (2006).

On appeal, Florida used three legal arguments to mask the statute's discordant use of the word "student" in one sentence and "civilians" in the next sentence.

First, Florida argued that courts should construe the statute to preserve its constitutionality.[89] Florida read the statute as describing "pledging" as (1) oral recitation of the Pledge, (2) standing to pledge, and (3) holding one's hand over her heart. The statute, Florida argued, excused students from "pledging." If a student had the proper excuse from "pledging," she had an excuse from oral recitation, holding her hand over her heart, and standing.[90] Therefore, a student excused from the Pledge had an excuse from all three required actions, including standing.

Florida's second argument consisted of two sentences in its initial brief to the Eleventh Circuit. "[T]he Florida legislature in 1987 enacted the portion of the statute excusing students from Pledge participation. This legislative addition, enacted [forty-five] years after the civilian portion, is a specific and recent enactment that readily distinguishes the prior 'civilian' language."[91] In other words, Florida began excusing students from the Pledge in 1987. The "civilian" language predated this amendment to the law. For the State, this sufficiently indicated that the Florida Legislature meant to excuse students regardless of the "civilian" language.

Third, Florida argued that the statute consistently distinguished between civilians and students. "[T]he legislature meant to treat students and civilians separately."[92] This distinction meant that students need not stand if their parents excused them from pledging, for the "civilians" category excluded all students. Two different Pledge-participation standards existed, one for civilians and the other for students.[93]

All three arguments fail. The third reason—that the statute consistently distinguished civilians and students—leads to bizarre conclusions. "Upon written request by [a student's] 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 . . . ."[94] If the word "civilian" excluded students, then only students could refuse to stand at attention. For the language in the statute is mandatory. Civilians must stand at attention. Following this interpretation, one ends up in Wonderland. A student, with parental permission, can refuse to stand at

89. *See* State Defendants/Appellants' Initial Brief at 27, *Winn*, 535 F.3d 1279 (No. 06-14462-FF).

90. *Id.* at 28.

91. *Id.* at 29 (citation omitted).

92. *Id.*

93. State Defendants/Appellants' Reply Brief at 10, *Winn*, 535 F.3d 1279 (No. 06-14462-FF).

94. FLA. STAT. § 1003.44(1) (2007).

attention. In contrast, a visiting adult, regardless of his conscientious beliefs, must stand at attention if the Pledge begins during his visit. Thus, despite students' required school attendance, a minor child of seven who lacks any desire to forego standing at attention and who has parental permission can refuse to stand at attention. Notwithstanding any parental permission or beliefs, an adult lacks any such right. As Alice from *Alice's Adventure in Wonderland* stated, "Oh dear, what nonsense I'm talking!"[95]

Both courts quickly uncovered the nonsense in this argument. The United States District Court for the Southern District of Florida responded to Florida's argument with disbelief. "Were such the case, the State of Florida would be commanding those individuals, but not its students, to stand at attention for the pledge recitation. Students would possess greater rights than [adults]."[96] The court of appeals agreed with the district court's construction.[97]

Florida's second argument raises other problems. Initially, Florida relies on the Florida Legislature's intent at the time of the amendment. Because courts will not look at a legislature's intent if the statute's language lacks ambiguities, Florida assumes that the statute contains ambiguities.[98] But no apparent ambiguities exist. People use the words "civilian" and "student" in common parlance, and the words lack any technical aspect that may raise concern. For most people, a student is a civilian.

Nevertheless, assume arguendo that the statute contains some ambiguity. Then, problems still exist. Florida argued that the Florida Legislature meant to exclude students from the "civilian" category. "[B]ecause the specific word 'student' is referenced in the first part of the challenged statute and is followed by the broader term 'civilian,' . . . 'civilian' excludes 'students.'"[99] But, an equal, opposite argument exists. Under the canon of *ejusdem generis*, if a general phrase, here "civilian," follows a specific thing, here "student," courts read the general phrase to be of the same nature as the specific.[100] Indeed, the clear meaning of the word "civilian" engulfs the word "student." No reason exists to apply one reading over the other.

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95. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING-GLASS 17 (Penguin Books 2003) (1872).

96. Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1360 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom. Winn*, 535 F.3d 1279, *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

97. *Winn*, 535 F.3d at 1283.

98. *See, e.g.*, John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 U. PA. L. REV. 1373, 1374 (1992).

99. *Alexandre*, 434 F. Supp. 2d at 1359–60.

100. *See, e.g., id.* at 1360.

Next, someone in Florida's position can argue that the Florida Legislature sloppily amended the existing law. Because of the Florida Legislature's renegade amendment, maybe courts shouldn't apply *ejusdem generis* but instead look at intent.

Regarding legislative history, the legislative history harmed Florida's argument. The original version of the Florida statute photocopies the federal version of the statute.[101] And the federal version of the statute discussed two categories: "civilians" and "military personnel."[102] Thus, far from highlighting the Florida Legislature's desire to distinguish between students and nonstudent civilians, the legislative history underscores the plain meaning of the word "civilian." Civilian indicates anyone not a member of the military. Noting this history, Judge Ryskamp wrote, "The inclusion of the term 'civilian' is hardly a choice by the Florida legislature to distinguish between 'students' and 'non-student civilians' as suggested by the State Defendants."[103] Instead, the word distinguished between military personnel and those not in the military. The court of appeals agreed that the civilian-military distinction created the correct interpretation of the statute.[104]

This legislative history creates a murky legislative intent. If the Florida Legislature amended the law to excuse students from pledging after the word "civilian" existed in the statute, the Florida Legislature could have distinguished students from civilians. It could have done so explicitly, clearly, and precisely. But the Florida Legislature didn't, which raises concerns about the legislature's intent.

Finally, Florida's first argument misconstrues the canon that courts should interpret statutes to preserve a statute's constitutionality. This argument fails for the same reason as Florida's second argument. Again, nothing indicates that the statute has ambiguities. If a statute lacks ambiguities, courts cannot interpret the statute so as to preserve it.[105] Indeed, because the statute lacks ambiguities, only one interpretation exists, the correct interpretation. Courts must interpret unambiguous statutes as written.[106] But, even assuming some ambiguity, the legislative history shows, at best, a Florida Legislature that could but never did distinguish between students and civilians and, at worst, a Florida Legislature that intended to create a distinction between civilians and military personnel.

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101. *Id.*

102. *Id.* at 1361.

103. *Id.*

104. Frazier v. Winn, 535 F.3d 1279, 1283 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

105. *E.g.*, INS v. St. Cyr, 533 U.S. 289, 336 (2001) (Scalia, J., dissenting); Miller v. French, 530 U.S. 327, 340–41 (2000).

106. *E.g.*, Davis v. Mich. Dep't of the Treasury, 489 U.S. 803, 809 n.3 (1989).

Essentially, Florida asked the courts here to rewrite the statute in likely contravention of legislative intent. The absurdity of this request causes astonishment. A state asked a federal court to interpret a statute, seemingly unambiguous on its face, in a manner in disaccord with a state legislature's intent. Florida overlooked the implications of its request on a federalist system. By requesting the courts to rewrite the statute, it also overlooked the underlying purpose of the canon it invoked. Courts read statutes to avoid constitutional issues because they hope to not infringe upon the legislature's role.[107] Here, where the legislative intent highlighted the civilian-military distinction, having a court replace the civilian-military distinction with a civilian-student distinction would let courts legislate. Luckily, the district court and court of appeals overlooked neither federalism nor the canon's underlying purpose.

B. *More Involvement than Your Average PTA: Reconciling Parents' and Children's Rights*

Part III.B.1 focuses on the use and abuse of Pledge jurisprudence, with emphasis on the Eleventh Circuit's decision to distinguish the Supreme Court case of *West Virginia State Board of Education v. Barnette*.[108] Additionally, Part III.B.2 explores precedent that firmly establishes that minors possess constitutional rights, especially the right to freedom of speech. Part III.B.3 examines the parental right to control the upbringing of one's child, and an analysis as to whether that right is implicated in the situation presented in *Winn*. Lastly, Part III.B.4 compares parental-notification requirements in cases where minors seek abortions to the parental-consent requirement in the pledging statute at issue here.

1. IS THE COURT BOUND BY *BARNETTE*?

In *Barnette*, a group of Jehovah's Witnesses brought suit in the district court for injunctive relief to prevent the enforcement of resolutions adopted by the board of education, which required the daily recitation of the Pledge of Allegiance.[109] The board of education's regulations provided that the refusal to salute was an act of insubordination, was punishable with expulsion, and was proper cause to deny readmission

107. *See generally* Gilbert Lee, Comment, *How Many Avoidance Cannons Are There After* Clark v. Martinez*?*, 10 U. PA. J. CONST. L. 193 (2007) (discussing the tension between the courts' constitutional-avoidance canon, which makes all efforts to avoid striking down legislative laws, and courts' attempts to follow a legislature's intent in passing a law).

108. 319 U.S. 624 (1943).

109. *Id.* at 629.

until the child complied with the daily-recitation requirement.[110] Pursuant to the resolution, the children of the Jehovah faith had been expelled from school, and their parents had been prosecuted.[111] Declaring the resolution's requirements unconstitutional, the Court proclaimed that "the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind" and that *any* "censorship or suppression of expression of opinion is tolerated by our Constitution *only* when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."[112] Reasoning that uniformity and nationalism could not justify such state action, the Court firmly held that state action compelling recitation "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[113]

Although the Supreme Court's hallmark 1943 decision in *Barnette* appeared to enunciate a clear rule that it was unconstitutional to compel recitation of the Pledge of Allegiance, the Eleventh Circuit's decision in *Winn* not only backpedals from *Barnette*'s clear mandate, but also violates American jurisprudence with regard to the Court's treatment of the rights of minors. *Winn* takes a clear divergence from unwavering and longstanding precedent, as no case has ever conditioned a minor's freedom against compelled recitation of the Pledge to depend on whether the child's parent agreed with them.[114]

The Eleventh Circuit in *Winn* justified much of its holding on its belief that the outcome was *not controlled* by *Barnette*.[115] *Winn* placed emphasis on the *Barnette* opinion's statement that "[t]he freedom asserted by [the Plaintiffs] does not bring them into collision with rights asserted by any other individual."[116] Attempting to skirt *Barnette*'s holding, the *Winn* court reasoned that *Barnette* was distinguishable because the student's refusal to participate in the Pledge *did* interfere with the rights of another individual—"their *parents'* fundamental right to control their children's upbringing."[117] Essentially, in *Barnette* the parents and child were in agreement that the child should not be required to say the pledge,[118] and as a result the *Winn* court reasoned that the parent's right to control the upbringing of her child wasn't interfered with.

110. *Id.*
111. *Id.* at 630.
112. *Id.* at 633 (emphasis added).
113. *Id.* at 642.
114. Frazier v. Alexandre, 555 F.3d 1292, 1294–95 (11th Cir. 2009) (Barkett, J., dissenting).
115. Frazier v. Winn, 535 F.3d 1279, 1284 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292.
116. *Barnette*, 319 U.S. at 630.
117. *Winn*, 535 F.3d at 1284 (emphasis added).
118. *See Barnette*, 319 U.S. at 629.

Although the court's choice to distinguish *Barnette* on this point implies that parent and child in *Winn* did not agree on the issue, Judge Barkett's dissent from the denial of rehearing en banc correctly points out that in fact there *was no conflict* between parent and child in this case.[119] In fact, Cameron Frazier and his mother, Christine, agreed that Cameron should not have to say the Pledge if he does not want to.[120] Hence, an attempt to distinguish Supreme Court precedent on such grounds is erroneous.

Furthermore, it would be a futile exercise for a parent to cite her right to control her child's upbringing as being violated by her child's exercise of his freedom of speech in choosing not to pledge. That parental right had been established more than twenty years prior to *Barnette* in *Myers v. Nebraska*,[121] and that opinion clearly stated that the child's decision to not say the Pledge did not infringe on anyone else's rights—which must include the parental right to control the child's upbringing. Thus, where there existed no conflict between parent and child in either *Barnette* or *Winn*, the *Winn* court's attempt to distinguish *Barnette* on this point must be flawed.[122]

By distinguishing *Barnette*, the *Winn* court effectively ignores *Barnette*'s vesting of the right against compelled recitation completely in the student. Again, *Barnette* did not hold that students have the right against compelled recitation of the Pledge *only* when their parents agree. The *Winn* opinion completely ignores the fact that "[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*."[123] The *Winn* court appears to strategically read the case out of *Barnette*'s purview, and hence the court doesn't give any weight to the fact that minors possess such rights, by themselves.

If *Barnette* had been applied in *Winn*, the court would have been required to apply strict scrutiny, because the student's fundamental right to free speech is infringed. Thus, the court would need to determine whether the restriction was necessary "to prevent grave and immediate

119. *Alexandre*, 555 F.3d at 1295 (Barkett, J., dissenting).

120. *See id.*

121. 262 U.S. 390 (1923).

122. The fact that Cameron and his mother, Christine, agreed on Cameron's decision against recitation didn't matter, for the court saw that the overbreadth challenge to the statute was only implicated when the parent and child *disagree* over whether the child should pledge. Ergo, the court must have classified *Barnette* as a case where parent and child were in agreement, and *Winn*'s overbreadth challenge as one where a parent and his child disagreed. *See* discussion *infra* Part III.C.

123. *Alexandre*, 555 F.3d at 1294–95 (Barkett, J., dissenting) (emphasis added).

danger to interests which the State may lawfully protect."[124] The statute would have failed strict scrutiny, as a state's interest in requiring students to pledge was already deemed an insufficient state interest to so burden the fundamental right of freedom of speech in *Barnette*.[125] However, the "lawful state interest" urged by the *Winn* court is the state's interest in protecting the parents' fundamental right to control the upbringing of their children.[126] Despite the questionable merits of this state interest, which will be discussed at length below, the court fails to abide by *Barnette* and apply strict scrutiny.

The Eleventh Circuit Court of Appeals recently issued an opinion on a similar issue. In *Holloman v. Harland*, high-school student Michael Holloman brought a § 1983 action against his teacher, principal, and school board based on his claim that they violated his free-speech rights when they punished him for silently raising his fist during the Pledge of Allegiance.[127] Holloman claimed that he did so as a form of protest of the administration's actions, where the administration had punished one of his classmates for abstaining from the Pledge.[128] The Eleventh Circuit accurately stated that "[t]he Speech Clause of the First Amendment protects at least two separate, yet related, rights: (1) the right to freedom of expression, and (2) the right to be free from compelled expression. These rights unquestionably exist in public schools."[129] The court found that Holloman's First Amendment rights had been violated, because when he resisted the compelled recitation requirement he was chastised and ultimately received a paddling as punishment for the exercise of constitutional rights.[130]

The Eleventh Circuit's panel decision in *Winn* is especially puzzling in light of *Holloman*, a case with markedly similar facts and a case where the court appeared a defender of student First Amendment rights. Applying *Holloman* to the case at hand would indicate that Frazier's rights were also violated, as he was cursed at, belittled, and called names by his teacher when he refused to say the Pledge. However, the fact that *Holloman* was an as-applied challenge, and *Winn* was only heard by the Eleventh Circuit facially, can explain this discrepancy.

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124. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

125. *See id.* at 642.

126. Frazier v. Winn, 535 F.3d 1279, 1284 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292.

127. 370 F.3d 1252, 1259 (11th Cir. 2004).

128. *Id.* at 1261.

129. *Id.* at 1264 (citation omitted).

130. *Id.* at 1268–69. Note that, rather than serving the detentions that he was given as punishment, due to the end of the school year rapidly approaching, Holloman was paddled by the principal for his refusal to recite the Pledge properly. *Id.* at 1261.

2. DO MINORS HAVE CONSTITUTIONAL RIGHTS?

Although the *Winn* court avoids *Barnette*'s mandate by incorrectly distinguishing it, the court here utterly makes no mention, and gives no deference, to the constitutional rights possessed by the students. *In re Gault* famously proclaimed in 1967 that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[131] Similarly, in *Tinker v. Des Moines Independent Community School District*, the Court struck down a school's policy that required removal of armbands utilized by students as a means of peaceful protest against the Vietnam War.[132] There, the Court reasoned that the wearing of an armband as a means of protest was encompassed by the Free Speech Clause, and that because "[s]tudents in school as well as out of school are 'persons' under our Constitution . . . [t]hey are possessed of fundamental rights which the State must respect."[133] The Supreme Court has also said that constitutional freedoms must be attentively protected within American classrooms.[134] Despite the numerous recitations and reaffirmations throughout Supreme Court jurisprudence that minors possess constitutional rights, "[n]oticeably absent . . . is any reference to a requirement that a parent or guardian *approve* of a student's decision to exercise First Amendment rights."[135] Rather, "*Tinker* cedes the exercise of conscience, and constitutional rights, to the individual student, not the parent."[136]

Moreover, freedom of speech is so revered and necessary to a free people that it is given a status almost superior to other fundamental rights. In fact, Justice Benjamin Cardozo boldly declared in *Palko v. Connecticut* that the freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom."[137] As the foundation for all the other rights Americans hold dear, freedom of speech deserves only the most critical review. The almost superior status of freedom of speech should not be encumbered when students use speech in a way that doesn't harm others or encourage other social ills.

Despite the clear voice of precedent, the only consideration of the rights possessed by minors is the court's conclusory statement that "the State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some

131. 387 U.S. 1, 13 (1967).

132. 393 U.S. 503, 514 (1969).

133. *Id.* at 511.

134. *See id.* at 512.

135. Answer Brief of Appellee at 21, Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008) (No. 06-14462-FF), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

136. *Id.* at 22.

137. 302 U.S. 319, 327 (1937).

students' freedom of speech."[138] The fundamental right to freedom of speech deserves more than this summary dismissal. Even without applying *Barnette*, the court should have applied strict scrutiny, as the fundamental rights of minors are infringed on by the statute.

3. DOES THE PARENTAL RIGHT TO CONTROL UPBRINGING EXTEND TO COMPEL SPEECH?

The panel decision's contention that the student's abstention from the Pledge infringes on the parent's right to control her child's upbringing severely mischaracterizes precedent on this issue. That right does not stretch as far as the court extends it.

In 1923, the Court in *Meyer v. Nebraska* first encountered the issues of whether a parent possessed a right to control the upbringing of his child and whether the parent's right was impermissibly infringed upon by a statute that prohibited the teaching of foreign languages in the elementary-classroom setting.[139] There, the Court reasoned that such a statute interfered with parent's power to control his children's education.[140] This right was addressed again a few years later, in *Pierce v. Society of Sisters*.[141] The Court faced the issue of whether a statutory requirement that all children attend public elementary school was constitutional.[142] There, the Court also held that the liberty of the parents to control the upbringing of their children was unconstitutionally compromised by the statute, as the statute would not permit parents to send their children to parochial schools.[143] The Court in *Pierce* extended *Meyer*'s holding to encompass a parent's right to control the upbringing of his children not only with regard to education, but with regard to religion as well.

In *Wisconsin v. Yoder*, several Amish students and their parents challenged an Oregon statute that mandated school attendance until the age of sixteen.[144] The challengers contended that such a requirement interfered with their religious beliefs insofar as the ideals taught in high school are in opposition to Amish values.[145] The Court held that the challengers' interests in the free exercise of their religious beliefs outweighed the state's interest in compulsory education beyond the eighth

138. *Winn*, 535 F.3d at 1285.
139. 262 U.S. 390, 400 (1923).
140. *Id.* at 401–03.
141. 268 U.S. 510 (1925).
142. *Id.* at 530.
143. *Id.* at 534–35.
144. 406 U.S. 205, 207 (1972).
145. *Id.* at 215.

grade.[146]

The *Winn* court used these cases to establish that a parent has a fundamental right to control the educational upbringing of his children, and that such a parental interest was sufficient to limit the students' freedom of speech.[147]

a. Positive Versus Negative Right

Judge Barkett's dissent from denial of rehearing en banc argued that the panel decision mischaracterized the nature of this parental right of control. This right has been interpreted throughout precedent as granting a "custodial parent [the] constitutional right to determine, *without undue interference by the State*, how best to raise, nurture, and educate the child."[148] Judge Barkett contended that cases invoking this parental right have done so only in the context of *protecting* the parent and child from the state's infringement. As a result, she asserted that this right cannot be positively invoked to permit a parent and state to work in cahoots to marginalize the child's fundamental right to free speech.[149] Thus, since the parental right to control upbringing is inapplicable to this situation, the court's holding that the parental right trumps the child's free-speech right would be fatally flawed. Although Judge Barkett's summarization of precedent with regard to the parental right to control upbringing is generally correct, the Supreme Court's decision in *Parham v. J.R.*[150] throws her assertion for a loop.

In *Parham*, the Court upheld a Georgia statute that gave parents the ability to voluntarily commit their children to state mental institutions.[151] In upholding the statute, the Court reasoned that, although minors have a "substantial liberty interest in not being confined" against their will,[152] the right of the parent to control the health and welfare of her children ensured that the parent maintained the dominant role in the commitment decision.[153] *Parham* appears to be a case that allows the parental right to control upbringing to be invoked by the parent when a parent and his child disagree over a fundamental right of the child—here the child's right against confinement. This upsets Judge Barkett's classification of

146. *See id.*

147. Frazier v. Winn, 535 F.3d 1279, 1285 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

148. Troxel v. Granville, 530 U.S. 57, 95 (2000) (Kennedy, J., dissenting) (emphasis added).

149. *Alexandre*, 555 F.3d at 1298 (Barkett, J., dissenting).

150. 442 U.S. 584 (1979).

151. *Id.* at 620–21.

152. *Id.* at 600.

153. *Id.* at 604.

the parental right as a negative one. Moreover, the *Parham* Court enunciates some disturbing dicta:

> We cannot assume that the result in *Meyer v. Nebraska* and *Pierce v. Society of Sisters* would have been different if the children there had announced a preference to learn only English or a preference to go to a public, rather than a church, school. The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child.[154]

Nonetheless, *Parham* does not automatically upset the remaining analysis, as the Court emphasized the fact that the commitment statute did not give parents "an absolute right to commit their children to state mental hospitals," because the hospitals must make their own, independent assessment of the child's mental health.[155] Therefore, while Judge Barkett's positive-and-negative-right analysis is questioned after reviewing *Parham*, *Parham* weighs the two competing rights—something that the *Winn* court still got wrong.

b. Limited Scope of Parental Upbringing Right

Additionally, even if the parental-upbringing right allowed for a positive invocation, the scope of the right has only been extended to allow a parent to control *certain aspects* of the child's upbringing. As mentioned above, parents have been granted the ability to direct their children's education and religious upbringing.[156] But parents have never been granted the right to control all aspects of their child's life, nor to direct or veto their child's usage of their freedom of speech.

Though many would likely argue that pledging allegiance is part of a child's school education, this argument is flawed as a child doesn't "learn" United States history or civics from reciting those words. The Southern District Court of Florida reiterated this point by stating that pledging doesn't merely acquaint students with what the Pledge is, or what it means—compulsory recitation requires "students to *declare a belief*."[157] Few could contend with teaching students about history, patriotism, and the flag; but mandating students to make a positive affirmation against their will can hardly be lumped under the heading of

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154. *Id.* at 603–04 (citations omitted).

155. *Id.* at 604. For an excellent discussion of *Parham* and its application to disputes between parents and children, see Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 388–401 (1997).

156. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

157. Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1364 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

"education." If a student has decided that she does not wish to say the Pledge, what would she *learn* from being required to do so? The only possible lesson would be that our First Amendment has been reduced to a mockery.

Lastly, scholars have debated the scope of the parental right to control upbringing and whether it constitutes a fundamental right. There clearly exists confusion as to what level of scrutiny the parental right to upbringing deserves, because, although the *Winn* court states that the parent's right is *fundamental*,[158] other courts have generally refused to apply strict scrutiny to legislation that affects this right.[159] It is clear that the parental right to control upbringing has limits on it, and its exact boundaries have not been fleshed out.[160] Moreover, Justice Kennedy's dissent in *Troxel v. Granville* warns against an expansive and careless view of the parental right to control the upbringing of one's own children by stating that "courts must use considerable restraint . . . as they seek to give further and more precise definition to the right."[161] As a result, where the scope of the right is unclear, and its fundamental nature has been questioned by circuit courts of appeal, surely such a right should not outweigh the "matrix, the indispensable condition, of nearly every other form of freedom"[162]: the right to free speech.

4. HOW DO MINORS' RIGHTS STACK UP IN OTHER CONTEXTS?

Both the panel opinion and Judge Barkett's dissent from denial of rehearing en banc cite abortion jurisprudence to highlight how courts

158. *See Winn*, 535 F.3d at 1284–85. Although the *Winn* court relies on *Yoder* for the proposition that the parental right to guide their child's educational and religious future is a fundamental right, *Yoder*'s application is more limited in scope. In fact, the Court stated that the Amish's "convincing showing" was "one that probably few other religious groups or sects could make." Wisconsin v. Yoder, 406 U.S. 205, 235–36 (1972). For a thorough and thoughtful discussion of the more limited rule announced in *Yoder*, see Dolgin, *supra* note 155, at 385–87.

159. William G. Ross, *The Contemporary Significance of* Meyer *and* Pierce *for Parental Rights Issues Involving Education*, 34 AKRON L. REV. 177, 186 (2000).

160. *Id.* at 184. For example, the Court in *Pierce* stated that, despite a parental preference to the contrary, no one seriously questioned the power of the state to require some school attendance, that certain subjects be taught, "and that nothing be taught which is manifestly inimical to the public welfare." *Pierce*, 268 U.S. at 534. Also, some more examples of encumbrances that federal courts have placed on the parental right to control upbringing are

> that parents of public school children had no constitutional basis for objecting to the administration of psychological counseling to a third grader; the imposition of corporal punishment on a sixth grader; a mandatory sex education program; a compulsory community service program; mandatory academic achievement testing; and a period for silent meditation or prayer not exceeding one minute.

Ross, *supra* note 159, at 188.

161. 530 U.S. 57, 95–96 (2000) (Kennedy, J. dissenting). For a wonderful discussion of the debate associated with the scope of the parental right to control upbringing see Ross, *supra* note 159.

162. Palko v. Connecticut, 302 U.S. 319, 327 (1937).

have handled situations where parents' and minors' rights conflict.[163] "Although the Court has held that parents may not exercise 'an absolute, and possibly arbitrary, veto' over [the decision to have an abortion]," the State may impose a requirement that the minor must notify the parent of her decision.[164] Where the Supreme Court has held that a parent cannot impose an "absolute veto" on the minor's decision to have an abortion, why may the state impose such a veto on the minor's ability to exercise his right to free speech? This discrepancy is more apparent given precedent that establishes the somewhat "supreme" nature of the freedom of speech and the more limited nature of the privacy right to have an abortion. Though not intended to downplay the intensely important, personal, and emotional decision to have an abortion, when abortion precedent is applied here, one cannot understand why minors are given more discretion in their decision to have an abortion.

Additionally, Florida law requires parental *notification* of a minor's decision to have an abortion,[165] whereas it requires parental *consent* if a minor wishes to refrain from pledging.[166] Obviously, a consent requirement infringes more on the minor's right. Although parental-notification requirements involve a burden of minor's rights, notification does not effectively assign a portion of those rights to the parents, whereas a consent requirement does.[167]

But, even in abortion cases, the Supreme Court has upheld parental-involvement statutes, those that require either parental consent or notification of a minor's intent to have an abortion, only where the statutes create some sort of judicial-bypass mechanism.[168] Specifically, the Court has approved bypass procedures provided that they enable a young woman to petition a court to determine whether she is mature

163. Frazier v. Alexandre, 555 F.3d 1292, 1297 (11th Cir. 2009) (Barkett, J., dissenting); *Winn*, 535 F.3d at 1285 n.7.

164. Hodgson v. Minnesota, 497 U.S. 417, 445 (1990) (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)). For good discussions of abortion jurisprudence, see Randy Beck, Gonzales, Casey, *and the Viability Rule*, 103 Nw. U. L. REV. 249 (2009); Peter M. Ladwein, Note, *Discerning the Meaning of* Gonzales v. Carhart*: The End of the Physician Veto and the Resulting Change in Abortion Jurisprudence*, 83 NOTRE DAME L. REV. 1847 (2008); Laura J. Tepich, Note, Gonzales v. Carhart*: The Partial Termination of the Right To Choose*, 63 U. MIAMI L. REV. 339 (2008).

165. FLA. STAT. § 390.01114 (2008).

166. FLA. STAT. § 1003.44(1) (2007).

167. *See* State v. Planned Parenthood, 171 P.3d 577, 583–84 (Alaska 2007).

168. *E.g.*, Lambert v. Wicklund, 520 U.S. 292, 295 (1997) (per curiam) ("[A] constitutional parental consent statute must contain a bypass provision that meets four criteria: (i) allow the minor to bypass the consent requirement if she establishes that she is mature enough and well enough informed to make the abortion decision independently; (ii) allow the minor to bypass the consent requirement if she establishes that the abortion would be in her best interests; (iii) ensure the minor's anonymity; and (iv) provide for expeditious bypass procedures." (citing Bellotti v. Baird, 443 U.S. 622, 647 (1979) (plurality opinion))).

enough to make the decision about whether to have an abortion.[169] Yet, there is no such judicial-bypass mechanism embodied in the Florida Pledge statute.[170] Judicial-bypass mechanisms protect the minor's constitutional rights, and, while parental notification may be bypassed with regard to abortions, no similar mechanism exists for freedom of speech; the constitutional rights of minors are given less protection when it is their free-speech right than when it's their abortion, privacy right.[171]

As a policy, it also does not make sense for the Florida Legislature to enunciate a rule that says, "You *don't* need your parent's permission to have an abortion, *but* you *do* need her permission if you don't want to recite the Pledge." This discrepancy is illogical because the right to freedom of speech is considered the most fundamental rights guaranteed to Americans and thus should logically be encumbered *less* than other rights.

C. *The Age of Enlightenment: Coherency Under the Overbreadth Doctrine*

Under neither the pledge-cases nor parental-right-to-raise-a-child rubric does *Winn* make sense. The *Winn* opinion cannot lack all coherence, as this Note so far suggests. Can it? No, it can't. How then do we explain the per curiam opinion? The answer exists within the First Amendment's overbreadth doctrine. For the most part, this Note has shown the inadequacy of the *Winn* decision. Nevertheless, the *Winn* opinion has merit, and this subsection of the Note explores this merit.

The proper view of *Winn* defies the notion that the Eleventh Circuit Court of Appeals proclaimed that a parent's right to raise her child trumps the child's First Amendment rights. Nor does *Winn* attempt a coup against *Barnette*. Instead, the court in *Winn* acknowledged the student's inability to overcome the overbreadth doctrine's threshold to facially invalidate a law. This view demolishes the radical and bizarre dicta in *Winn* and preserves students' rights throughout Florida, Alabama, and Georgia.

1. THE OVERBREADTH DOCTRINE AND THE SUPREME COURT

The overbreadth doctrine allows a party to challenge as facially unconstitutional a law that regulates speech if that law threatens pro-

169. *Bellotti*, 443 U.S. at 643–44; *see also* Katheryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALB. L. REV. 1119 (1999) (examining the constitutional boundaries of a minor's right to an abortion).

170. *See* FLA. STAT. § 1003.44(1).

171. *See* Circle Sch. v. Phillips, 270 F. Supp. 2d 616, 625 (E.D. Pa. 2003), *aff'd sub nom.* Circle Sch. v. Pappert, 381 F.3d 172 (3d Cir. 2004).

tected speech.[172] Normally, the litigant bringing the overbreadth challenge argues that the law applies to other, extraneous parties in an unconstitutional manner.[173]

Imagine Brandon. Brandon gets into a shouting match with a stranger in the street. Eventually, Brandon flings some hurtful, ruthless words at the stranger. The police arrest Brandon under a local ordinance. The ordinance restricts "all speech that might disturb" an ordinary individual on the street. Now, Brandon clearly committed an offense. Brandon's speech, filled with obscenity, lacks constitutional protection. Yet, this ordinance also prohibits constitutionally protected speech. For example, an orderly protest might disturb an ordinary individual. The overbreadth doctrine lets Brandon challenge this statute as overbroad, for the statute possibly infringes on protected speech as well as unprotected speech. And the person charged for committing unprotected speech can attack the statute in the name of protected speech.

A long list of Supreme Court cases governs the overbreadth doctrine. Justice Scalia, in *Virginia v. Hicks*,[174] described the strength of the doctrine. The Supreme Court has "insisted that a law's application to protected speech be 'substantial,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications."[175] In *Broadrick v. Oklahoma*, the Court indicated that the "substantial" requirement played a role where the statute governed "conduct and not merely speech."[176] Originally, the Court asked whether a statute's illegitimate applications *substantially* outweigh its legitimate applications only when a statute governed conduct. A more-lenient overbreadth rule applied to laws controlling "mere speech." But, this distinction between conduct and speech has evaporated, and the "substantial" requirement now plays a role regardless of whether the statute governs conduct or speech.[177]

Broadrick concerned a statute preventing civil servants from soliciting funds for political candidates or sitting on a committee of a political party.[178] The Court noted, "[A] person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to

172. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1084 (2d ed. 2005).

173. *See* Marc. E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 366 (1998).

174. 539 U.S. 113 (2003).

175. *Id.* at 119–20.

176. 413 U.S. 601, 615 (1973).

177. *See* CHEMERINSKY, *supra* note 172, at 1088 ("[T]he Court made it clear that the requirement for substantial overbreadth applies in all cases, whether the law regulates conduct that communicates or pure speech." (internal quotation marks omitted)).

178. 413 U.S. at 605–06.

others."[179] But, for the First Amendment, the Court takes special requests. In First Amendment cases, "the Court has altered its traditional rules of standing to permit . . . 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' "[180] Therefore, the Supreme Court allowed the overbreadth challenge.

Nonetheless, bringing an overbreadth challenge never guarantees victory. The statute in *Broadrick* survived because the statute applied only to partisan political activity—an activity the states can legitimately regulate. The statute regulated a large set of impermissible conduct, while it rarely infringed on constitutionally protected speech.[181] Similarly, in *Virginia v. Hicks*, the Court refused to invalidate a governmental agency's trespass policy.[182] The policy allowed the police to warn a trespasser to leave a low-income housing development and, eventually, to arrest the trespasser.[183] How did the Court decide whether the policy's application to protected speech substantially outweighed the policy's legitimate sweep? Apparently, the Court counted.

In applying the overbreadth test, the Court listed all the unprotected activity that the policy prevented. "The rules apply to strollers, loiterers, drug dealers, roller skaters, bird watchers, soccer players, and others not engaged in constitutionally protected conduct—a group that would seemingly far outnumber First Amendment speakers."[184] The Court's analysis hints at a pure aggregate balance. One counts a law's valid uses against the law's invalid uses. If the invalid uses substantially outnumber the valid uses, the Court strikes the law.

Two cases illustrate when the invalid uses of a statute substantially outnumber the valid uses.

City of Houston v. Hill questioned the constitutionality of an ordinance making it unlawful to interrupt a police officer while the police officer performed her duties.[185] Delivering the Court's opinion, Justice Brennan noted that the statute encapsulated all speech, so long as the speech interrupted the officer and that the police had full discretion to select what speech interrupted them.[186] Because the statute encapsulated all speech, the Court struck down the law, finding it "substantially

179. *Id.* at 610.
180. *Id.* at 612 (quoting Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)).
181. *Id.* at 616–17.
182. 539 U.S. 113, 115, 124 (2003).
183. *Id.* at 115–16.
184. *Id.* at 123.
185. 482 U.S. 451, 453 (1987).
186. *Id.* at 466–67.

overbroad."[187]

Similarly, in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, the Supreme Court upheld an overbreadth challenge against an airport resolution that outlawed all First Amendment speech in the airport.[188] The resolution so substantially limited valid free speech that the Supreme Court didn't mention its legitimate sweep.[189] "[T]he resolution at issue . . . reaches the universe of expressive activity, and, by prohibiting *all* protected expression, purports to create a virtual 'First Amendment Free Zone' . . . ."[190] Because the resolution affected every individual to enter the airport, the overbreadth doctrine killed the resolution.

Notice that, in the example above, the Constitution didn't protect Brandon's speech. *Members of the City Council v. Taxpayers for Vincent*[191] explains this fact's import and highlights a distinction between as-applied and facial challenges. A city ordinance barred the posting of signs on public property.[192] Despite the existence of an overbreadth challenge, *Taxpayers for Vincent* never relied on the *Broadrick* standard, as the Court refused to consider the overbreadth challenge.[193] The parties suing the city had constitutionally protected speech barred by the ordinance. Therefore, the case did not merit an overbreadth challenge. Instead, the parties attacked the statute as applied to them.[194] This outcome matters. For, like in *Taxpayers for Vincent*, the student in *Frazier* also had an as-applied challenge. Indeed, the student won his as-applied challenge.[195] As discussed below, although the Eleventh Circuit barely mentioned the student's as-applied challenge, the student's as-applied-challenge victory likely alleviated some of the Eleventh Circuit Court's concerns.

2. WHY USE OVERBREADTH IN FIRST AMENDMENT CASES?

An understanding of why the overbreadth doctrine exists is important in deciphering *Winn*. The First Amendment has always received special consideration and attention in our system.[196] The fear of "chil-

187. *Id.* at 467.
188. 482 U.S. 569, 570–72 (1987).
189. *See id.* at 574–75.
190. *Id.* at 574.
191. 466 U.S. 789 (1984).
192. *Id.* at 791.
193. *Id.* at 803.
194. *Id.*
195. *See* Frazier v. Alexandre, 434 F. Supp. 2d 1350, 1368 (S.D. Fla. 2006), *aff'd in part, rev'd in part sub nom.* Frazier v. Winn, 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).
196. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969)

ling effects" sits near the apex of these considerations.[197] The overbreadth doctrine reflects the consideration of chilling effects.[198] When commentators use the term "chilling effects," they mean the possibility that a law will stifle protected speech because speakers will fear punishment under the law.[199] "First Amendment overbreadth is largely a prophylactic doctrine, aimed at preventing a 'chilling effect.'"[200]

In theory, the overbreadth doctrine remedies the following. Take, for example, Kelly, a law-abiding citizen. Kelly worries that a statute might punish her protected speech. In response, she stops her protected speech. By giving a person punished for breaking the statute the ability to attack the statute, courts mitigate the chilling effects on Kelly. While Kelly stops her protected speech, a violator of the statute can attack and overrule the statute. Any chilling effect lasts only ephemerally, and the overbreadth challenge promises that a flagrant chilling effect will eventually end. Once a court's overbreadth mace batters the overbroad statute, Kelly resumes her protected speech.

3. PLACING *WINN* IN THE OVERBREADTH CONTEXT

Although the *Winn* opinion lacks clarity, under the overbreadth doctrine, the *Winn* decision becomes coherent. For instance, the entire debate between parents' fundamental right to raise their children and a child's freedom of speech vaporizes. Instead of implying that a parent's right to raise his children trumps an individual child's freedom of speech, the panel merely highlights the legitimate sweep of the statute. Nor does the court withhold strict scrutiny because children lack a right

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(upholding students' right to wear black armbands as protest); David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1342–47 (2005) (discussing why courts so readily apply overbreadth doctrine in First Amendment cases); Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 549–63 (2005) (exploring affirmative-action case through a First Amendment prism); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 151–65 (2007) (outlining how the First Amendment should influence gathering of information by government); Bruce J. Winick, *The Right To Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 33–41 (1989) (arguing First Amendment protects individuals from forced psychological treatment); Aileen M. Ugalde, Comment, *The Right To Arm Bears: Activists' Protests Against Hunting*, 45 U. MIAMI L. REV. 1109, 1117–32 (1991) (arguing hunter-harassment statutes violate protestors' First Amendment rights).

197. *See, e.g.*, Anthony Ciolli, *Chilling Effects: The Communications Decency Act and the Online Marketplace of Ideas*, 63 U. MIAMI L. REV. 137, 156–65 (2008) (discussing defamation law's chilling effects, especially on the Internet); Laura Barandes, Note, *A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of the Press*, 29 CARDOZO L. REV. 371, 401–02 (2007) (discussing Espionage Act's possible chilling effects).

198. *See, e.g.*, Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

199. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring in the result); Ciolli, *supra* note 197, at 148.

200. Fallon, *supra* note 198, at 855.

to withhold from pledging. Simply stated, the panel ignored strict scrutiny because the minor here brought an overbreadth challenge. In fact, the panel refused to study the as-applied challenge,[201] and the panel never decided whether strict scrutiny applied to that challenge. But, for the overbreadth challenge, the *Broadrick* standard applies; strict scrutiny does not.

A quick reading of *Winn* implies that a parent's fundamental right to raise his child trumps the child's First Amendment speech. Part II.B of this Note underscores the nonsensical nature of this argument. In her dissent from the Eleventh Circuit's denial of rehearing en banc, Judge Rosemary Barkett criticized the panel's decision on this point. But, the panel's analysis functions if viewed as an overbreadth challenge.

The Eleventh Circuit Court of Appeals panel's decision in *Frazier v. Winn*[202] is cryptic. This per curiam decision makes broad claims. For example, the opinion states, "[A] parent's right to interfere with the wishes of his child is stronger than a public school official's right to interfere on behalf of the school's own interest."[203] And the opinion concludes, "[T]he State's interest in recognizing and protecting the rights of parents on some educational issues is sufficient to justify the restriction of some student's freedom of speech."[204] So, it seems like the panel's opinion allows states to grant parents the right to compel their children's speech. This Note argues that this is an improper interpretation of the *Winn* opinion.

When the panel discusses the parents' rights, the panel outlines the statute's legitimate sweep. Remember, courts will uphold an overbreadth challenge only if a statute's overbreadth substantially outweighs the statute's legitimate sweep.[205] Hence, the panel never declared that a parent's right to raise his child outweighs a child's freedom of speech; the panel declared that a legislature may decide the default rule that generally governs. Here, the state has created a mechanism (pledging) that might put a child's right (the right to conscientiously not pledge) against the right of the child's parent (to make the child pledge if the child cannot make conscientious decisions about pledging). For efficiency reasons, the legislature can pick a default rule.

Some language in the panel's decision bolsters this interpretation. "The rights of students and the rights of parents—two different sets of persons whose opinions can often clash—are the subject of a legislative

201. *Id.*

202. 535 F.3d 1279 (11th Cir. 2008), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

203. *Id.* at 1285.

204. *Id.*

205. *E.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

balance in the statute before us."[206] Importantly, a student and his parents may agree on whether to pledge allegiance. Here, the panel found the statute legitimate, declaring, "The State, in restricting the student's freedom of speech, advances the protection of the constitutional rights of parents: *an interest which the State may lawfully protect.*"[207] Parents do not have a right that trumps their children's rights. Still, when two rights generally supplement each other and only occasionally conflict, the legislature may assume the supplementation as the default rule.

The Eleventh Circuit's precedent undermines any view that the court disregards children's First Amendment rights. Indeed, the Eleventh Circuit has protected students' freedom of speech. The court has even protected students who refused to pledge. For example, in *Holloman v. Harland*, the Eleventh Circuit Court of Appeals stated, "*Barnette* clearly and specifically established that schoolchildren have the right to refuse to say the Pledge of Allegiance."[208] And the court held that a student whom a school punished for refusing to recite the Pledge of Allegiance "articulated a violation of his First Amendment right to freedom of expression."[209]

Despite *Holloman*'s assurance that the Eleventh Circuit respects students' rights, *Winn* appears to backtrack. But this backtracking reflects a lack of clarity in the *Winn* opinion, not a rejection of *Holloman*. The panel barely mentions the overbreadth standard,[210] and the panel simply concludes that the student did not persuade the panel "that the balance favors students in a *substantial* number of instances."[211]

But this lack of clarity does not mean the panel erred. The panel just failed to explicate its decision. As explained above, the panel held that the statute legitimately defended parents' fundamental right to raise children. For the panel, this "legitimate sweep" greatly outweighed any overbreadth. Only one sentence in the opinion depicts this overbreadth balance, but this sentence exists.

This important sentence states,

> Even if the balance of parental, student, and school rights might favor the rights of a mature high school student in a specific instance, Plaintiff has not persuaded us that the balance favors students in a *substantial* number of instances—particularly those instances involving elementary and middle school students—relative to the total

206. *Winn*, 535 F.3d at 1284.
207. *Id.* (emphasis added).
208. 370 F.3d 1252, 1269 (11th Cir. 2004) (citation omitted).
209. *Id.* at 1277.
210. *Winn*, 535 F.3d at 1283–84.
211. *Id.* at 1285.

number of students covered by the statute.[212]

This sentence contains the entire overbreadth analysis. First, the panel recognizes that the statute possibly infringes the rights of mature high-school students. Second, the panel implies that middle-school and elementary-school students lack the maturity to conscientiously reject pledging. The panel makes numerous assumptions here.

The panel assumes that certain children have no First Amendment rights. Some truth underlies this assumption. No one would argue that an average eight-year-old student could overrule her parents' decision that she recite the Pledge of Allegiance. For an average eight-year-old would not refuse to pledge for conscientious reasons. Instead, the average eight-year-old is likely acting rowdy for other reasons. And, although the panel agrees that high-school students have the maturity to protest the Pledge, the panel also assumes that only a handful of high-school students would both refuse to recite the Pledge and have parents that refuse to waive the recitation. For the panel, the small number of high-school students who must recite the Pledge against their wills doesn't substantially outnumber the instances where parents have the right to tell an unruly minor child to pledge allegiance or where parents and student agree on whether to recite the Pledge.

As a matter of common sense, the panel's sum and balance seems correct. Few minors would refuse to recite the Pledge and have their parents force them to. This number of these students is likely no greater than the number of children who refuse to recite the Pledge because they want to disobey their parents or authorities. In the vast majority of cases, both parents and child agree on whether to pledge. Still, the panel could have explicated and expanded its analysis. That would have alleviated the confusion the opinion creates.

While this explanation of the panel's opinion creates harmony, the panel's opinion ignored some major issues. For example, the panel never decided when students have the maturity to claim this First Amendment right. The panel implied that, generally, high-school students have the maturity to conscientiously refuse to pledge, but the panel never tackled the issue. This issue seems critical. If the court erred and even eight-year-olds can conscientiously object, then the chilling effect influences a larger number of students.[213] Thus, the law's chilling effect might substantially outweigh the law's legitimate sweep.

Yet, an easy explanation to the panel's avoidance exists. The panel

212. *Id.*

213. And, indeed, some courts have found First Amendment violations of even young children. *See, e.g.*, Rabideau v. Beekmantown Cent. Sch. Dist., 89 F. Supp. 2d 263, 264, 267 (N.D.N.Y. 2000) (nine-year-old).

believes that parents and children almost always agree, regardless of when students have First Amendment rights. Under this view, the outliers cannot substantially outweigh the legitimate norm.

Judge Barkett highlighted another issue ignored by the panel in her dissent from denial of rehearing en banc. For Judge Barkett, the panel erred in applying the overbreadth doctrine instead of strict scrutiny because "[t]his statute is not prohibiting speech; it is compelling speech against one's conscience."[214] The panel never mentioned this distinction or its result on the "chilling effect" purpose of the overbreadth doctrine.

Here, the statute compels speech—the pledging of allegiance. Since the government compels speech, the "chilling effect" becomes more powerful than in most other cases. Because the statute compels speech, someone who disagrees has two options: They must speak or remain silent. In choosing to remain silent, the individual's abstention becomes obvious. In contrast, a law that prohibits speech broadly does not guarantee that the government will punish the protected speech. Instead, the "chill" only implies that some citizens might stop their protected speech for fear of retribution. When the government compels speech, the citizen knows that her noncompliance demands punishment. Moreover, the compelled speech here occurs in front of governmental officials. This expands the chilling effect. Thus, Judge Barkett validly criticized the panel's use of overbreadth.

Yet, never did the panel acknowledge this distinction. Why? One suggestion exists. On appeal, Frazier never argued that the compelled-speech doctrine made this law unconstitutional. Certainly, Frazier argued that Florida granted parents a power it lacked—to compel students' speech[215]—but Frazier didn't rely on the compelled-speech doctrine to overturn the law. The issue not being before the court, the panel ignored the issue. Nonetheless, the statute clearly compels speech, and the opinion never clarified the reason for ignoring this fact. Of all of the panel's assumptions, this assumption causes the most concern.

The panel in *Winn*, while implicating some strange views, never did anything extraordinary. It applied the *Broadrick* overbreadth test. This analysis, at least without any data, follows common sense. Nevertheless, the panel wrote a murky opinion, under which only one sentence actually accomplishes the *Broadrick* analysis. Indeed, by failing to cement its analysis to the overbreadth doctrine, the opinion shockingly implies that parents can overrule their children's First Amendment rights, so long as the state allows it. More importantly, the panel never explained

214. Frazier v. Alexandre, 555 F.3d 1292, 1295 (11th Cir. 2009) (Barkett, J., dissenting).

215. *See* Answer Brief of Appellee, *supra* note 135, at 15.

the relevancy of the statute's compulsion of speech. Thus, while *Winn* is not as bizarre as it first seems, it is no champion of clarity.

D. *School-Yard Brawl?: A Possible Circuit Split*

While the Third Circuit's decision in *Circle School v. Pappert*[216] cannot be classified as creating a circuit split with *Winn*, since the statutes in question are not identical, the decisions arguably conflict. As previously stated in Part II.B of this Note, both the district court and Judge Barkett in her dissent for rehearing en banc acknowledged and relied on the Third Circuit's decision. In *Circle School*, the court found unconstitutional a Pennsylvania statute requiring supervising officers of the school system to send written notification home to the parents of any student who declined to recite the Pledge of Allegiance or refused not to salute the flag.[217] The relevant part of this statute states:

> Students may decline to recite the Pledge of Allegiance and may refrain from saluting the flag on the basis of religious conviction or personal belief. The supervising officer of a school subject to the requirements of this subsection shall provide written notification to the parents or guardian of any student who declines to recite the Pledge of Allegiance or who refrains from saluting the flag.[218]

A public-school student brought a suit alleging that the parental-notification requirement deterred the exercise of his free-expression rights.[219]

The district court ruled that the parental-notification clause was a viewpoint-based regulation that operated to chill students' speech.[220] Applying strict scrutiny to the clause, the court determined that the statute was not narrowly tailored. Furthermore, the court stated that the state lacked a sufficiently compelling reason for the clause, held the clause to be unconstitutional, and issued a permanent injunction prohibiting defendants from enforcing the act.[221] It came to this conclusion noting that the Commonwealth's stated purpose, that the clause "simply serves an administrative function, designed to efficiently inform all parents of an aspect of their children's education,"[222] did not suffice as a compelling state interest. The Third Circuit, when reviewing the district court's opinion, acknowledged that there is a "careful balance between the First Amendment rights of students and the special needs of the state in ensur-

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216. 381 F.3d 172 (3d Cir. 2004).

217. 24 PA. STAT. ANN. § 7-771(c) (West 2003).

218. *Id.*

219. *Circle Sch.*, 381 F.3d at 176.

220. Circle Sch.v. Phillips, 270 F. Supp. 2d 616, 623–26 (E.D. Pa. 2003), *aff'd sub nom. Circle Sch.*, 381 F.3d 172.

221. *Id.* at 624, 632–34.

222. *Circle Sch.*, 381 F.3d at 179.

ing proper educational standards and curriculum."[223] In doing so, it obviously recognized that the student, individually, had a First Amendment right. The Commonwealth argued that the ability of the student to opt out of the Pledge coupled with the parental-notification requirement together met the balance required by law between the student's right to freedom of speech and the Commonwealth's and parents' rights.[224] Also, the Commonwealth argued that similar provisions have been used regarding minors' access to abortions.[225] The court dismissed this argument, stating that the cases involving a parental notification of a minor's abortion were decided on due-process grounds and not the First Amendment.[226]

The Third Circuit agreed with the district court's opinion that strict scrutiny must be applied to the clause because it found that the parental-notification requirement "clearly discriminate[d] among students based on the viewpoints they express; it [was] only triggered when a student exercises his or her First Amendment right not to speak."[227] Applying strict scrutiny, the court held that the Commonwealth's parental-notification clause failed to establish a convincing governmental interest.[228] The court therefore found the parental-notification clause unconstitutional.

While the Pennsylvania and Florida statutes are not identical, they both similarly involve the notification or the consent of a parent when a child attempts to exercise his or her First Amendment right by refusing to recite the Pledge. The decisions of the courts in *Circle School*, as well as Judge Barkett's dissent in the denial of a rehearing en banc and the district court's decision, are at an opposite end of the spectrum from the Eleventh Circuit's decision in *Winn*. There are strong arguments that can be made that these two decisions cannot be distinguished in a way to reconcile the apparent conflicts. Therefore, a strong need for the Supreme Court to step in and determine the constitutionality of including parents in their child's decision not to recite the Pledge exists.

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223. *Id.* at 178.

224. *Id.*

225. *Id.* at 179.

226. *Id.* The court also underscored that recent cases have only allowed parental-notification requirements involving a minor's ability to obtain an abortion if a judicial-bypass mechanism is in place—that is, where a minor can go to a judge without having to get parental consent. *See id.* This is an essential requirement that the Eleventh Circuit failed to acknowledge when citing the abortion cases, extremely briefly, in a footnote in their *Winn* decision. *See* Frazier v. Winn, 535 F.3d 1279, 1285 n.7 (11th Cir. 2008) (per curiam), *reh'g en banc denied*, 555 F.3d 1292 (11th Cir. 2009).

227. *Circle Sch.*, 381 F.3d at 180 (internal quotation marks omitted).

228. *Id.* at 181.

IV. CONCLUSION

Winn lacks clarity. This lack of clarity creates a riddle, as two interpretations of the court's parental-consent holding form. On one hand, the court might be saying what its words tell us. Maybe a parent's right to raise her child as she wants does trump her child's free speech. Maybe when the court told us that it ignored the as-applied challenge, the court meant that the district court decided the as-applied challenge incorrectly. This Note, however, underscores this interpretation's incoherency. Children do have rights, and the Eleventh Circuit Court of Appeals, in *Holloman*, told us so. Hence, this first interpretation seems an improper interpretation.

Winn contains a second interpretation. Depending on an overbreadth-challenge standpoint, this interpretation leaves less to be resolved.

From an overbreadth-challenge standpoint, *Winn* has merit. In the real world, the Pledge statute gives us four outcomes. To begin, a parent and his child might agree on the merits of pledging. In this scenario, the child happily pledges. Next, a parent and his child might agree on the meritless nature of pledging. Here, while he sits down, the child nods his head in disapproval as his classmates pledge. Or, despite his parent's command, a child might refuse to pledge; but the child refuses for no conscientious reason. He merely refuses for spite. Finally, a child might conscientiously disagree with his parent's command. Only this final scenario raises First Amendment issues. Under the second interpretation of *Winn*, the court refuses to believe that this last, unconstitutional scenario substantially outweighs the first three scenarios.

Nevertheless, the court never says this and therefore muddles its precedence. If all the Eleventh Circuit sought to do was dismiss Frazier's overbreadth claim, and reserve an as-applied challenge for mature, conscientiously-objecting minors, such an opinion could have been unambiguous. As a result, district courts may struggle to decipher *Winn*. They may take it at face value, and interpret its troublesome language to essentially leave minors' constitutional rights at the mercy of their parents' decisions.

Additionally, because Frazier's facial challenge was unsuccessful, every conscientiously objecting minor whose parents disagree with his abstention will have to bring an independent as-applied challenge to avoid pledging. It is conceded that these suits surely will not fling open the floodgates of litigation. However, this places a large administrative hurdle in front of Florida's minors. Because the Pledge statute provides for no specific judicial-bypass mechanism similar to that established by the Parental Notice of Abortion Act, conscientiously objecting minors

must find an attorney to take their case and pay whatever associated fees. Surely it's impossible to stretch a weekly allowance that far.

Worse, the court ignores grave details. Critically, the court ignores that this statute compels speech. The statute's chilling effect cannot compare to the chilling effect of statutes that prohibit certain speech. By ignoring this, the Eleventh Circuit forged a tension with the Third Circuit. *Winn* and *Circle School* talk past each other. Will the Supreme Court scurry to resolve this dispute? Until it does, the lower courts, practitioners, and students must clear the dust and decipher the message.