No. 03-10249

In the
Supreme Court of the United States

FRANK WONSCHIK, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE
IN
SUPPORT OF PETITIONER IN FORMA PAUPERIS

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QUESTION PRESENTED

I. Whether a government-led Pledge of Allegiance is unconstitutional, and violated the petitioner's right to a fair trial herein, and did so by violating the Establishment Clause and the Free Exercise Clause.

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BRIEF IN SUPPORT OF PETITIONER
IN FORMA PAUPERIS

INTEREST OF AMICUS CURIAE

Rex Curry is a leading expert on the Pledge of Allegiance and its history.

As a child, Rex Curry attended government schools where the teachers were required by law to lead youngsters in a collective robotic chanting of the Pledge daily on cue from the government. As an adult, Rex Curry practices law and represents criminal defendants and other clients in some courts where similar behavior still happens, similar to the facts described in the Petition addressed here. The decision of this Honorable Court in the Wonschik case will have a direct and significant impact on Rex Curry and his clients.

Rex Curry is a member of the National Association of Criminal Defense Lawyers (NACDL). The NACDL has previously filed an amicus brief in support of the Petition of Wonschik and Counsel wishes to join in voicing those arguments, and adopt and expand them.[1]

As a Libertarian, Rex Curry believes that the First Amendment would have been improved if it had stated that "Congress shall make no law respecting an establishment of religion or education, or prohibiting the free exercise thereof." The separation of school and state is as important as the separation of church and state. Socialized schools (government schools) are unconstitutional or should be, and for the same ideological reasons as would be socialized churches (government churches).

This brief and the NACDL brief address one of the most fundamental rights essential to the credibility of our

[1] No counsel for any party has authored this brief in whole or in part, and no person or entity, other than Rex Curry, has made any monetary contribution to its preparation or submission. *See* Rule 37.6, Sup. Ct. Rules. The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of Court. Rule 37.3(a). Although Counsel borrowed from the NACDL amicus brief, the NACDL did not participate in writing this brief and was not involved nor informed until afterward. This brief is filed by Rex Curry as a private citizen.

criminal justice system, a defendant's Sixth Amendment right to a fair and impartial jury.

NACDL is a nonprofit corporation founded more than 40 years ago, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. The NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice. The NACDL is committed to preserving justice, fairness, and due process within America's criminal justice system.

Rex Curry's expertise in the criminal law field and regarding the Pledge of Allegiance may assist the Court in this case. The NACDL and its undersigned member have strong interests in seeing that criminal trials provide a fair and unbiased forum for the triers of fact to adjudicate the issues before them. Therefore, the undersigned counsel respectfully urges the Court to grant the Petition for Certiorari.

SUMMARY OF THE ARGUMENT

I. Due to the vital importance our judicial system places on obtaining fair and impartial judgments, this Court has been jealous in protecting the entire trial process from bias. These protections include the protection of impaneled jurors from bias and improper influence. *Remmer v. United States*, 347 U.S. 227, 229 (1954). This case directly implicates this Court's protection of the trial process from bias, specifically the right to fair and unbiased jury selection.

By requiring jurors to recite the Pledge of Allegiance in a criminal case in which the United States is a party, the trial court created an atmosphere of unacceptable bias that tainted the entire jury panel in the instant case. Requiring the jury panel to swear allegiance to one party violates this Court's long-standing goals of protecting the entire trial process, from jury selection to judgment, from bias. In order to ensure that the Sixth Amendment rights of criminal defendants continue to be protected from all

forms of bias before and during a trial, this Court should accept the instant case for review.

From the founding of the Constitution, this Court has protected the impressionable minds of jury members from possible bias in and outside the courtroom. Notably, this Court has shielded jury members from potential bias and partisan remarks from judges and prosecutors that may taint a criminal defendant's right to a fair and impartial trial.

ARGUMENT

I.

THE TRIAL JUDGE'S REQUIREMENT THAT ALL POTENTIAL JURORS RECITE THE PLEDGE OF ALLEGIANCE WAS UNCONSTITUTIONAL, AND VIOLATED THE PETITIONER'S RIGHT TO A FAIR TRIAL HEREIN, AND DID SO BY VIOLATING THE ESTABLISHMENT CLAUSE AND THE FREE EXERCISE CLAUSE.

A hallmark of our country's judicial system has always been that a fair and impartial jury trial is one of the fundamental rights guaranteed a criminal defendant. The language in Article III of the Constitution, requiring that "[t]he trial of all crimes, except in Cases of Impeachment, shall be by Jury," is one of the rare instances in which individual rights were explicitly recognized in the Constitution prior to the adoption of the Bill of Rights.

In this case, the selection process was impermissibly tainted by the trial judge's request that the all potential jurors stand and recite the Pledge of Allegiance prior to jury selection. Furthermore, that bias also transgressed the Establishment Clause and the Free Exercise Clause of the First Amendment to the U.S. Constitution.

The instant case implicates this fundamental right to an impartial jury in a criminal case. The conduct of the

trial judge in requiring potential jurors to recite the Pledge of Allegiance in a case where the United States is a party violates a defendant's right to a fair and impartial jury. By requiring jurors to, in essence, swear allegiance to one party in the case at the very beginning of the trial process, the trial court created an unacceptable atmosphere in the courtroom that biased the jury against the Petitioner. This requirement, to swear allegiance to one party in the case, violated the long established rule that courts must protect the entire trial from bias, from the jury selection process until the judgment.

Requiring jurors to recite the Pledge of Allegiance in a criminal case in which the United States is a party goes against this Court's long standing goals of protecting jurors from improper bias. While the Tenth Circuit believed that the recitation of the Pledge of Allegiance might have invoked a "more enlightened patriotism," thus imbuing the chosen jurors with the desire to sit as "impartial finders of fact," *United States v. Wonschik,* 353 F.3d 1192, 1199 (10th Cir. 2004), such a belief runs counter to the decisions of this Court and the fundamental guarantees of the Constitution. And although the Tenth Circuit ultimately rejected the contention that "jurors inferred from the Pledge of Allegiance a patriotic obligation to serve as a rubber stamp for the prosecution," *id.* at 1198, that conclusion underestimates the potential for bias in such circumstances.

Bias does not need to rise to the level of unabashed support for one party to violate the Sixth Amendment. While a jury acting as a rubber stamp for the prosecution would surely evince bias, lesser prejudice against a defendant is no less damaging to Sixth Amendment rights. By creating an atmosphere of bias through the recitation of the Pledge of Allegiance, the trial court tainted the jury. Once the jurors recited the Pledge as required, the court created jurors who were no longer indifferent.

This Court's decision in *West Virginia State Board of Education v. Barnette* is instructive as to the impermissible coercive effect that compulsory recitation of the Pledge of Allegiance can have. 319 U.S. 624, 640 (1943). While the facts in *Barnette* dealt with the coercive effect on an

individual who is required to recite the Pledge of Allegiance, the same coercive effect can improperly pressure a jury panel and give rise to bias. *Barnette* was decided at a time when, much as today, many Americans believed that "patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine." *Barnette*, 319 U.S. at 641. In *Barnette*, this sentiment led a school district to compel its students to recite the Pledge of Allegiance. In the instant case, it led a judge to compel all the potential jurors present in a courtroom to recite the Pledge of Allegiance. In both cases, "compelling the flag salute and pledge transcends constitutional limitations." *Barnette*, 319 U.S. at 642.

Elk Grove Unified School District v. Newdow, No. 02-1624, http://laws.findlaw.com/us/000/02-1624.html, (U.S. June 14, 2004) was decided after the filing of Wonschik's Petition for a writ of certiorari (May 3 2004) and after the filing of the Brief amicus curiae of National Association of Criminal Defense Lawyers (Jun 9 2004) and so those documents do not address the *Newdow* decision.

The *Newdow* decision is a blessing in disguise, by providing a temporary delay. It widens the time to expose the entire Pledge, not just two words.

"Pledge II" should be a blockbuster sequel. Wonschik's case can be the sequel. *Wonschik* is more important than *Newdow* because *Wonschik* has standing and *Wonschik* involves the entire Pledge, not just two words. *Wonschik* can change the entire pledge debate from a limited debate about two words, to a liberating debate about government, totalitarianism and government schools. And at this time, the *Wonschik* case is virtually unkown.

Newdow perpetuates rampant public ignorance about the Pledge of Allegiance and the biases it inculcates in the public and in jurors. *Wonschik* provides the Court with the opportunity to correct that bias and ignorance. *Newdow* states at page 2:

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Chapter 435, 56 Stat. 377. Section 7 of this codification provided in full:

"That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute." Id., at 380.

This resolution marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "under God." Act of June 14, 1954, ch. 297, 68 Stat. 249. And see H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 2 (1954). The resulting text is the present Pledge: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U. S. C. §4.

Newdow fails to mention that although the salute originated the straight-arm salute and with the palm upward, the widespread practice was with the palm straight out, not palm up. The U.S. Pledge of Allegiance was the origin of the salute of the monstrous National Socialist German Workers' Party (Nazis). It is a myth that

the Pledge's original straight-arm salute is an ancient Roman salute.

Newdow fails to mention that the author of the Pledge, Francis Bellamy, was a self-proclaimed National Socialist in the U.S. and belonged to a group known for "Nationalism," published the "Nationalist" magazine and created "Nationalist Clubs" worldwide, whose members wanted the federal government to nationalize most of the American economy. Bellamy saw socialist schools (government schools) as a means to that end. Bellamy also belonged to a religious socialist movement known as the "Society of Christian Socialists."

Newdow fails to mention that the original salute did not begin with the hand over the heart but began with a military salute that was in keeping with the goal of the Pledge's author, Francis Bellamy, to create an "industrial army" (a Bellamy phrase) modeled after the military, via a government takeover of education, eliminating all of the better alternatives, to achieve the authoritarian vision portrayed in his cousin Edward Bellamy's book "Looking Backward."

The Bellamy cousins promoted national socialism worldwide for decades. Because of the Bellamys, government-schools spread and they mandated robotic chanting, and racism and segregation by law and did so through WWII and into the 1960's created massive problems for the Court and for everyone.

Rampant ignorance of the pledge's history exists because the history of the Pledge is so un-libertarian that it is suppressed. It is sad that the Pledge, and the ideas of U.S. socialists, created the straight-armed "Roman salute" and helped to cause WWII, the Holocaust, and the bigger "Wholecaust" under the industrial armies of the socialist trio of atrocities: The Union of Soviet Socialist Republics slaughtered 62 million; the People's Republic of China slaughtered 35 million; and the National Socialist German Workers' Party slaughtered 21 million (numbers from Professor R. J. Rummel's article in the Encyclopedia of Genocide (1999)). Socialists are nuclear bombs. Socialism is nuclear war.

The Bellamy cousins succeeded in many ways, in that most schools in the U.S. are government schools, where the socialist's pledge is still robotically chanted, and where children and their parents have been taught to accept the government school monopoly, a leviathan government that keeps growing, a growing police state, social security, and socialist slave numbers that are given to infants to track their employment, movements, residences, finances, purchases, etc, and to tax them, for their entire lives.

Most jurors today are from government schools, and that means that not only have they been robotically chanting the pledge en masse and on cue from the government daily for their entire education, worse still, they were educated by the government (and that was not originally the case in this country, and education/schools are no where mentioned in the constitution, and in fact government was taking over education at the same time that the Pledge was created, and that was one of the purposes of the original Pledge of Allegiance celebration. Therefore, all of the arguments against the Pledge in court are even more compelling for objecting to government schools and to jurors from government schools.

Jurors were taught by government in government schools that they are required to render verdicts of guilty based on evidence in cases where they should always render verdicts of acquittal (drugs, medical marijuana, vices, prostitution, gambling, gun possession, and all non-violent consensual activity that is criminalized) - cases that should not involve criminal charges at all. A Pledge of Allegiance in a courtroom reaffirms the non-libertarian bias and indoctrination that most jurors have received all of their lives in government schools.

The criminal charge in *Wonschik* has no allegation of violence and is a classic example of how the federal government is taking over criminal prosecutions from states and doing so by manufacturing jurisdiction with charges that do not address any actual act(s) of violence, nor any acts that are the actual origin of the case, but do so by criminalizing non-violent aspects in ways that arguably

violate the 2nd amendment and the right to keep and bear arms, instead of leaving the state to pursue the intelligent charges involving any actual violence. The federal criminal charge in *Wonschik* involves the non-violent act of possession of gun parts.

If the government's antidisestablishmentarianism does not end, then we will be living in an even bigger police state.

It is hard to imagine a better issue begging for the correct arguments to be made. *Wonschik* transforms the Pledge of Allegiance debate should be a meaningful debate about liberty.

There is instructive history in the case of *Minersville School Board v. Gobitas,* 310 U.S. 586 (1940) (1940) and *West Virginia Board of Education v. Barnette* 319 U.S. 624 (1943). In the 1930s, the National Socialist German Workers' Party (Nazis) passed laws that required everyone to pledge allegiance, similar to many U.S. laws that have tried to require school children to recite the pledge. Jehovah's Witnesses believed that people who enjoy reciting government pledges are people who worship government. Jehovah's Witnesses were officially banned for refusing to join the raised palm salute of the National Socialist German Workers' Party in schools and at public events. Many of the German Witnesses were imprisoned in concentration camps.

In the 1940's, before the phrase "under God" was added to the U.S. pledge of allegiance, Jehovah's Witnesses refused to recite the pledge of allegiance in school on the grounds that it constituted worship of government. They hoped for a different response than they had met from the National Socialist German Workers' Party. In 1940, in *Gobitas*, the Supreme Court ruled that a government school could expel those children for refusing to salute the flag.

In 1940, U.S. Supreme Court Justice Felix Frankfurter was freaking about France falling to the National Socialist German Workers' Party when Frankfurter wrote the *Gobitas* decision that allowed schools to expel students who refused to say the pledge of

allegiance. Frankfurter was very concerned about the progress of the National Socialist German Workers' Party in the war and Frankfurter believed it was important for the country to come together and for everyone to be loyal.

Yet, Frankfurter's decision allowed compelled collective pledges by the government in government schools that were using a straight-arm salute similar to the National Socialist German Workers' Party salute, for a pledge of allegiance that was written by a National Socialist in the U.S. who was a member of the "Nationalism" movement and a vice president of its socialist auxiliary group, and shared the views of the National Socialist German Workers' Party as its members wanted the federal government to nationalize most of the American economy.

It is fortunate that the U.S. Supreme Court reversed the Gobitas decision 3 years later. In *Barnette* the Supreme Court reversed itself and decided that school children may not be forced to stand and salute the flag.

Despite the reversal, the U.S. retained government schools that robotically chanted the socialist's pledge, some still used the straight-arm salute, and they imposed racist and segregated classes well into the 1960's and beyond.

One admirable result of the *Gobitas* case and every Supreme Court case regarding government schools is that many people remove their children from government schools. And that is the real solution to the pledge debate and all other issues: reduce government and remove government from education. As Libertarians say: The separation of school and state is as important as the separation of church and state.

The Gobitas kids were right: The Pledge of Allegiance is worship of the government. The original single right arm salute was no less worshipful idolatry then if the left arm had been extended also. That is the mentality that led to its adoption by the National Socialist German Workers' Party. The right hand over the heart is no less worshipful idolatry then if the left hand were

crossed over the right, in another clearer position of prayer.

The Pledge arose from the belief in an omnipotent, omniscient government with God-like qualities with no limits on its size or power. And that lesson is still being taught in government schools today, and the government's size and power grows and grows.

Jurors should not deify the government. Jurors should defy the Pledge. They should finish what the heroic Gobitis kids started and the Court should too. The Pledge of Allegiance is desecration of the flag.

Libertarians like to say they oppose "the cult of the omnipotent state." There are many parallels between the legal arguments made by Jehovah's Witnesses and the libertarian catchphrase.

Wonschik raises the concerns that were raised by the *Gobitas* children (the correct spelling of their name was Gobitis).

The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amdt. 1.

The First Amendment would have been improved if it had stated that "Congress shall make no law respecting an establishment of religion or education, or prohibiting the free exercise thereof." The separation of school and state is as important as the separation of church and state. Socialized schools (government schools) are unconstitutional or should be, and for the same ideological reasons as would be socialized churches (government churches).

The pledge is usually recited because it is required by state laws for government schools, and done collectively as a robotic chant daily on cue from the government.

There is rampant ignorance of the Pledge's history. A recent internet search for "historic photographs of the original pledge of allegiance" all led to yours truly as the

only source on the internet that collects and displays the photographs. Another recent search of the internet indicated that undersigned counsel is the only source on the internet for the scary original speech "The Meaning of the Four Centuries" given by Francis Bellamy for the debut of his Pledge of Allegiance. Bellamy's original Youth's Companion article is replete with religious references. A search of Google News at http://news.google.com shows that undersigned counsel is the only source listed for exposing the monstrous "National Socialist German Workers' Party" by its actual name and that a search for that quoted phrase leads to articles exposing the history of the Pledge of Allegiance. Similar results obtain for a search for "the Roman salute myth."

Given the uncertain times this country is facing, patriotism, socialism and nationalism are a stronger force today than they have been in recent decades. This Court was concerned in *Barnette* with such expressions of nationalism, and this Court should be concerned in the instant case as well. While "[n]ationalism [was] a relatively recent phenomenon" at the time that *Barnette* was decided, this Court prophetically noted that "at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls." *Barnette*, 319 U.S. at 640.

The likelihood that at least one juror, and possibly several, being influenced to support the federal government by the recitation of the Pledge of Allegiance in the current environment is not far fetched. It is a certainty. The decisions of the Court reflect a broad concern against any bias and taint to the trial process, and the undersigned counsel believes that concern needs to be extended to this issue as well.

Forcing members of the jury pool to express a certain belief in a court of law is no different from forcing a child in a school to participate in the Pledge against their beliefs; however, the consequences are potentially more severe. As this Court stated in *Barnette*, "[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a

permissible means for its achievement." *Id.* at 640. This question is analogous to what occurred in the courtroom in the instant case.

In *Barnette,* this Court determined the First Amendment prohibited this type of coercion. In the instant case, the undersigned counsel believes that the Sixth Amendment also prohibits this type of coercion in the courtroom. Requiring the jurors, as well as the participants, to swear allegiance to one party in the case prior to any evidence being presented improperly pressures the jury, taints an impartial jury selection process, and potentially biases at least some members of the jury against a defendant.

CONCLUSION

In order to prevent future defendants from facing the same situation that the Petitioner faces in this case, and in order to ensure that the Sixth Amendment's guarantee to a fair and impartial jury remains the "barrier to tyranny" that the Framers intended, this Court should grant the petition for a Writ of Certiorari and review the instant case. Should this Court decline to review this case, it would send the message to courts across the nation that they are free to compel individuals in a criminal courtroom to recite the Pledge of Allegiance. This message is particularly damaging in instances where the federal government is a party in a case and the jurors would, in essence, be swearing allegiance to a party in the case prior to trial.

For all of the foregoing reasons, Rex Curry respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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