

LEGALITY

Compulsory Speech: The Silent Side of the First Amendment

by Cindy Ellen Hill, Esq.

The First Amendment to the United States Constitution states that "Congress shall make no law... abridging the freedom of speech, or of the press...." Most commonly the First Amendment is invoked to support the unfettered expression of ideas, such as voicing political opinion, or creating artistic and literary works. However, First Amendment law also holds that "free speech" means that the government cannot compel you to say things that you do not wish to say. The freedom of speech includes the freedom to be silent.

The issue of compulsory speech has recently arisen in Vermont in regard to the new vaccination exemption law. Last winter, the Vermont Legislature amended the state's long-standing statutory process for enrolling unvaccinated children in school. The law previously required parents to submit to the school a statement "in writing... that the person, parent or guardian... has religious beliefs or philosophical convictions opposed to immunization."

The amended law, Act 157, requires

parents to annually complete a form created by the Vermont Department of Health that not only attests to a religious or philosophical opposition to immunizations, but also attests that the parent or guardian:

- has reviewed and understands evidence-based educational material provided by the Department of Health regarding immunizations, including information about the risks of adverse reactions;
- understands that failure to complete the required vaccination schedule increases risk to the person and others of contracting or carrying a vaccine-preventable infectious disease;
- and understands that there are persons with special health needs attending schools and child care facilities who are unable to be vaccinated, or who are at heightened risk of contracting a vaccine-preventable communicable disease, and for whom such a disease could be life-threatening.

Swear Here

A number of parents—through attorney Mitch Pearl of Langrock, Sperry and Wool in Middlebury—have objected to the Vermont Department of Health form, asserting that it compris-

es compulsory speech in violation of their First Amendment rights. The latter two provisions of the form require parents to swear or affirm that they hold certain beliefs about the nature, cause and transmission of disease and the role and effect of vaccinations.

As attorney Pearl masterfully argued in his letter to the Health Department, the issue is not a question of the state of scientific, empirical study on vaccinations and disease. In other words, it does not matter whether or not the two paragraphs in question are true. The constitutional issue is whether the state can compel individuals to attest to something they may not personally believe, as a prerequisite for participating in a governmental program—in this case, their children's schooling.

School Matters

Compulsory speech issues relative to schooling are not new. In 1943, the U.S. Supreme Court ruled in *West Virginia State Board of Education v. Barnette* that under the First Amendment, public school students cannot

“The constitutional issue is whether the state can compel individuals to attest to something they may not personally believe, as a prerequisite for... their children's schooling.”

be forced to salute the flag or say the Pledge of Allegiance. An interesting facet of that case is that the Supreme Court did not hinge its decision on protection of the students' rights of religious expression, even though the students' families had brought the lawsuit on the grounds that, as Jehovah's Witnesses, their religion precluded them from saluting icons or partaking in oaths.

Had the Supreme Court ruled on grounds of religious exemption, all students asserting their right to abstain from reciting the pledge would need to demonstrate adherence to a religion that has tenets precluding such an action. By basing their decision on grounds of compulsory speech, the Supreme Court acknowledged a broad-based constitutional protection that applies, regardless of the content of the statement or the nature of the religion of the person asserting the right.

This author was unaware of the 1943 Supreme Court ruling when she refused to say the Pledge of Allegiance in kindergarten in 1969, out of her belief that it seemed inappropriate to engage in such acts of nationalism while so many of our young were dying in the Vietnam war. The teacher's invectives suggest that she, too, was not up to date on the Supreme Court decision. The school principal, however—a military veteran—was familiar with the case, and quickly negotiated a compromise: Said kindergarten student would stand respectfully silent, while others who chose to do so, recited the pledge. It

was, as they say, a teaching moment.

Free to Abstain, or Not

School is not the only venue for compulsory speech conflicts. For example, in 1977, the U.S. Supreme Court ruled in *Wooley v. Maynard* that the state of New Hampshire could not compel its citizens to display the "Live Free or Die" logo on their license plates. Regardless of the popularity, or popu-

list sentiment, of the expression, the government cannot force citizens to vocalize or display a message that they do not care to express.

The Supreme Court has been less impressed by First Amendment arguments asserting that citizens cannot be compelled to contribute funds that pay for a government-sponsored message with which the citizen may disagree. In 2005, the Supreme Court determined that the First Amendment rights of grass-fed beef growers were not violated by the terms of the 1985 Beef Act, which requires all cattle raisers to pay \$1 per head into a fund supporting the generic eat-more-beef advertising campaign.

Specialty beef ranchers did not want to participate in generic marketing, because it undercut their efforts to portray grass-fed beef as better than other categories of beef. The Supreme Court ruled that much as citizens' tax dollars can be used to buy library books, or fund wars with which the taxpayer may not agree, the government may compel payments into a government ad campaign with which the contributor may disagree.

Speech and Conscience

The constitutional issue raised by Vermont parents concerned about the Vermont Department of Health vaccine form, however, lies squarely within the realm of the type of compelled personal statement addressed in cases such as those regarding the Pledge of Allegiance.

A simple change in the form could resolve the issue—but in politics, nothing is simple. Either the Vermont Legislature or the federal courts may well be re-examining the exhaustively fought vaccine exemptions statute, this time with an eye toward the First Amendment rights of all Vermonters.

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