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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 591

THE WEST VIRGINIA STATE BOARD OF EDUCATION, etc., et al.,

Appellants,

vs.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE,

Appellees.

BRIEF FOR APPELLANTS

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OPINIONS BELOW

The opinions of the court below are reported in 47 Fed. Supp. (Adv.), page 251.

JURISDICTION

A statement as to jurisdiction has been filed and separately printed, pursuant to Rule 12, Paragraph 1 of this Court. Jurisdiction is invoked under Section 380, Title

28, U. S. C. A. Probable jurisdiction was noted January 4, 1943 (R. 62).

STATEMENT OF THE CASE

This is an appeal from the judgment of the United States District Court for the Southern District of West Virginia rendered by a three-judge court convened under the provisions of Section 266, amended, of the Judicial Code (28 U. S. C. A. 380). The suit involves the constitutionality of a regulation or order promulgated by the West Virginia State Board of Education under the provisions of Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931 (Appendix A), and subject to the provisions of Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as last amended (Appendix A-1), and Section 9, Article 2, Chapter 18 of the Code of West Virginia, as amended by Chapter 38, Acts of the Legislature, 1941 (Appendix A-2). The regulation of the Board (Appendix B) requires children and teachers in the public schools to salute the American flag and provides that such salute become a regular part of the program of activities in the public schools, with the further provision that refusal to salute the flag be regarded as an act of insubordination to "be dealt with accordingly." Section 5-a, Article 8, Chapter 18 of the Code of West Virginia, as amended (Appendix A-1), provides, among other things, that failure of a child to comply with the established regulations of the State Board of Education shall result in refusal of further admission of the child to school until such regulations are complied with.

Suit was instituted August 19, 1942, in the District Court of the United States for the Southern District of West Virginia by three persons belonging to the sect known as "Jehovah's Witnesses," the parents of chil-

dren attending the public schools of West Virginia, against the Board of Education of the State of West Virginia; claiming Federal jurisdiction because the regulation or order of the Board was a denial of religious liberty and was violative of rights which the First Amendment to the Federal Constitution protected against impairment by the Federal Government, and which the Fourteenth Amendment thereof protected against impairment by the states (R. 16); and further claiming jurisdiction in equity because of the absence of an adequate remedy at law (R. 15). The suit was brought by plaintiffs (appellees) in behalf of themselves, their children and all other persons in the State of West Virginia in like situation. The purpose of the suit was to secure an injunction restraining the West Virginia Board of Education (appellants) from enforcing against them an order or regulation requiring children in the public schools to salute the American flag (R. 1-16). The case was heard on application of appellees for an interlocutory injunction, but the parties to the suit agreed that it be submitted for a final decree on the bill of complaint and the motion of appellants to dismiss the bill.

Appellants moved to dismiss the bill on the grounds that the regulation of the Board was a proper exercise of power vested in it by the Legislature of the State of West Virginia; that under the doctrine of the case of *Minersville School District* v. *Gobitis,* 310 U. S 586, the salute of the flag required by it could not be held to be a violation of religious rights of plaintiffs; and that the bill presented no substantial Federal question arising under the Constitution of the United States and involved no substantial Federal question because of the decision of this Court in the case of *Minersville School District* v. *Gobitis,* which decision had not been modified or overruled, and because there was no act of the Congress of the United

States which undertook or purported to legislate with respect to the nature of the allegations contained in the complaint (R. 43-45).

It was and is the contention of appellees that to salute the flag, as required by the regulation of the Board, would do violence to the commands of Almighty God, according to Chapter 20 of the Book of Exodus (R. 3).

Disposition of Case by Trial Court

The court below determined that the regulation of the Board of Education, insofar as it required a salute to the flag from school children who have conscientious religious scruples against giving such salute, is violative of the rights of religious liberty guaranteed by the Fourteenth Amendment against infringement by the state; that plaintiffs were entitled to an injunction restraining the Board of Education, its agents and employees and all teachers in the schools of the state from requiring plaintiffs' children, or the children of other persons for whom the suit was brought and having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give the salute (R. 47-48).

Findings of Fact

Inasmuch as the case was submitted for decision upon the allegations of the bill of complaint and the averments of the motion to dismiss the same, the District Court summarized certain facts appearing therefrom. The court

> 1. That this is a suit to protect rights and privileges guaranteed by the 14th Amendment to the Constitution of the United States and the matter in controversy exceeds the sum of value of $3,000.00.

2. That plaintiffs are citizens of West Virginia and have children who attend the public schools of that state.

3. That plaintiffs and their children are members of a sect known as "Jehovah's Witnesses" and, as such, have conscientious scruples based on religious grounds against saluting the flag of the United States or any other national flag.

4. That the defendant, the West Virginia State Board of Education, has adopted a regulation requiring children in the public schools of the state to salute the flag of the United States and providing for their expulsion from school upon failure to give such salute.

5. That because of their conscientious scruples based on religious belief, plaintiffs and their children will not comply with the regulation of the Board of Education requiring the flag salute, and that the Board of Education unless restrained will expel plaintiffs' children from school for failure to comply therewith.

6. That, upon the expulsion of plaintiffs' children from school, they will be deprived of the benefit of education in the public schools to which they are entitled under the laws of West Virginia, and plaintiffs will have to pay to have them educated in private schools or be subject to prosecution under the compulsory education law of West Virginia for failure to send them to schools.

7. That this suit is brought by plaintiffs in behalf of themselves and all other persons similarly situated with respect to the enforcement of the regulation of the Board of Education.

Final Judgment

The court below in its final decree of October 6, 1942, awarded a permanent injunction restraining and inhibit-

ing appellants from requiring the children of appellees, or any other children having religious scruples against such action, to salute the flag of the United States or any other flag, or from expelling such children from the public schools of the state for failure to salute it, as prayed for in plaintiffs' bill of complaint (R. 45-46).

SPECIFICATION OF ERRORS RELIED UPON

Appellants will rely upon the assignment of errors filed with the petition for appeal (R. 57) as constituting also the points stated to be relied upon (R. 60):

1. The Court erred in overruling defendants' motion to dismiss plaintiffs' complaint for want of jurisdiction.

2. The Court erred in holding, as a conclusion of law, that the regulation of the West Virginia State Board of Education, in so far as it requires a flag salute from school children who have conscientious scruples based on grounds of religion against giving such salute, is violative of the rights of religious liberty guaranteed by the 14th Amendment against infringement by the states.

3. The Court erred in holding, as a conclusion of law, that plaintiffs are entitled to an injunction restraining the State Board of Education, its agents and employees, and all teachers in the schools of the state from requiring plaintiffs' children or the children of other persons for whom the suit is brought, having religious scruples against giving the flag salute, to give such salute or from expelling them from school for failure to give same.

4. The Court erred in awarding the permanent injunction prayed for in the plaintiffs' bill.

5. The decision of the Court is counter to a decision of the Supreme Court of the United States handed down on June 3, 1940, in the case of *Minersville School District,*

Board of Education of Minersville School District, et al., Petitioners, v. *Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend,* reported in 310 U. S. 586, 84 Law. ed. 1375, which said decision has in no manner been overruled or modified.

SUMMARY OF ARGUMENT

I

Appellants' motion to dismiss the bill of complaint should have been sustained.

(a) No substantial Federal question is involved. A Federal question may be plainly unsubstantial either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of the Court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.

Utley v. *City of St. Petersburg, Florida,* 292 U. S. 106;

Ex parte Poresky, 290 U. S. 30;

McGilvra v. *Ross,* 215 U. S. 70;

Zucht v. *King,* 260 U. S. 174.

(b) The Federal questions alleged are:

(1) The order or regulation promulgated by the State Board of Education as applied to appellees violates the First Amendment and the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

(c) The contention that the order or regulation of appellants is unconstitutional as applied to appellees has been resolved by this Court adversely to the contention of appellees.

Minersville School District et al. v. *Gobitis,* 310 U. S. 586.

II

Neither Section 5, Article 2, Chapter 18; Section 5-a, Article 8, Chapter 18; Section 9, Article 2, Chapter 18 of the Code of West Virginia 1931, as amended, nor the regulation or order promulgated thereunder and pursuant thereto by appellants is in conflict with or superseded by any act of the Congress of the United States.

(a) House Joint Resolution 303, Public Law 623, 77th Congress (second session), passed and approved June 22, 1942, is not an act of the Congress of the United States.

ARGUMENT

I

The Motion to Dismiss Because of Want of a Substantial Federal Question Should Have Been Sustained

It is well established by decisions of this Court that the existence of a substantial question of constitutionality must be determined from a consideration of the allegations of the bill of complaint. *Ex parte Poresky,* 290 U. S. 30; *Mosher* v. *Phoenix,* 287 U. S. 29.

The bill of complaint alleges that the regulation promulgated by appellants requiring a salute to the flag, and the statutes of West Virginia, pursuant to which the regula-

tion was adopted, violate the First and Fourteenth Amendments of the Constitution of the United States. Under decisions of this Court a Federal question must be a substantial one, otherwise the jurisdiction fails. *Louisville & Nashville Railroad Company* v. *Garrett,* 231 U. S. 298. When a question has been foreclosed by prior decision of the Court, such question may no longer be substantial. *Utley* v. *City of St. Petersburg, Florida,* 292 U. S. 106.

> "* * * The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.' * * *"
>
> *Ex parte Poresky,* 290 U. S. 30, 32.

In the case of *Utely* v. *St. Petersburg, Florida,* 292 U. S. 106, it is expressly held also that no substantial Federal question forming a basis for review by this Court is presented by a contention of invasion of a constitutional right where such question has been settled by a previous decision of the Court. It is believed that the constitutional questions raised in the bill of complaint have been so foreclosed by the decisions of this Court in the case of *Minersville School District* v. *Gobitis,* 310 U. S. 586, as to cause such questions now to be so frivolous and unsubstantial as not to sustain the Federal jurisdiction alleged. That case has not been modified or reversed and the contentions of appellees herein are but reiterations of the contentions made and overruled by this Court therein. The facts and principles involved and considered by the Court in that case cannot, it would seem, in any wise be distinguished from those present in

the case at bar. They are similar in each and every respect. We are so impressed with the thorough consideration and sound disposition by this Court, in that case, of the principles applicable to the controversy herein that appellants feel that it is imperative that they rest the case at bar upon that decision. That case, as we have said, substantially covers all the points herein involved and this Court therein expressly holds that the requirement of participation, by pupils in public schools, in the ceremony of saluting a national flag does not infringe the due process of law clause of the Constitution of the United States in its guarantee of religious liberties under the Fourteenth Amendment. We quote from the opinion:

> "* * * The religious liberty which the Constitution protects has never excluded legislation of general scope not directed against doctrinal loyalties of particular sects. Judicial nullification of legislation cannot be justified by attributing to the framers of the Bill of Rights views for which there is no historic warrant. Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities. The necessity for this adjustment has again and again been recognized. In a number of situations the exertion of political authority has been sustained, while basic considerations of religious freedom have been left inviolate. Reynolds v. United States, 98 U. S. 145, 25 L. ed. 244; Davis v. Beason, 133 U. S. 333, 33 L. ed. 637, 10 S. Ct. 299; Selective Draft Law Cases (Arver v. United States) 245 U. S. 366, 62 L. ed. 349, 38 S. Ct. 159, L. R. A. 1918C 361, Ann. Cas. 1918B 856;

> Hamilton v. University of California, 293 U. S. 245, 79 L. ed. 343, 55 S. Ct. 197. In all these cases the general laws in question, upheld in their application to those who refused obedience from religious conviction, were manifestations of specific powers of government deemed by the legislature essential to secure and maintain that orderly, tranquil, and free society without which religious toleration itself is unattainable. * * *''
>
> *Minersville School District* v. *Gobitis,* 310 U. S. 586, 594-595.

In short, the question for determination by this Court is the validity of an educational policy requiring a salute to the flag designed to evoke in children of school age patriotic impulses as affecting those who admittedly entertain conscientious scruples and beliefs that such a policy does violence to their religious rights and scruples safeguarded by the Constitution of the United States. However, as hereinbefore pointed out, this question has been judicially determined by this Court adversely to appellees. We submit that it cannot be denied that honesty and sincerity of purpose, resulting from conscientious scruples, must be conceded appellants in promulgating the regulation of which appellees complain. Recognition has been given to such concession by this Court. ''What the school authorities are really asserting is the right to awaken in the child mind considerations as to the significance of the flag contrary to those implanted by the parents.'' *Minersville School District* v. *Gobitis,* 310 U. S. 586, 590. It is therefore our opinion that patient and thorough consideration has been duly given by this Court to all of the conflicting rights, interests and principles here existing.

II

The Regulation of Appellants Is Not Inimical to Public Safety and Good Order

It is respectfully submitted that this Court has previously determined that the order or regulation of appellants is not inimical to the public safety and good order.

> "The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presuppose the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties. * * *"
>
> *Minersville School District* v. *Gobitis,* 310 U. S. 586, 600.

We therefore perceive of no valid objection, within well-established principles enunciated by this Court, which could be now taken to a regulation or order such as that of appellants here considered. *Davis* v. *Beason,* 133 U. S. 333.

III

House Joint Resolution 303 Does Not Supersede The Flag Salute Regulation Promulgated by Appellants

It is earnestly insisted that the Congress of the United States has not yet entered the field of legislation of the character here considered. The Federal law is now precisely as it was at the time of the decision in the case of

Minersville School District v. *Gobitis*. Appellees contend that by the passage of House Joint Resolution 303, Public Law 623, 77th Congress of June 22, 1942, the West Virginia statutes and the regulation promulgated thereunder by appellants, requiring the flag salute ceremony, "have been superseded by an act of Congress" (R. 11-12).

The Congressional Resolution erroneously designated in the bill of complaint as an act of Congress, does not purport to be applicable to the educational policies of a state. It purports to be only a "Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America" (Appendix C). It is to be observed that appellees call attention to the fact that this resolution is "merely advisory, not mandatory, and provides no penalty" (R. 12-13). They allege that this joint resolution "does not require a civilian, adult or child, to give any salute whatsoever to the national flag, * * * " (R. 13). Appellees do not admit that they are bound by the provisions of the House Joint Resolution and they do not say that they are willing to comply with the provisions thereof. They fail to call attention to the provisions of Section 5 of the resolution, which is as follows: (Appendix C.)

> "That during the ceremony of hoisting or lowering the flag, or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and *salute*. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column

> should be rendered at the moment the flag passes." (Italics ours.)

We doubt seriously that House Joint Resolution is congressional legislation, but, even if it be legislation, the West Virginia statutes complained of and the regulations promulgated thereunder are in no manner and in no degree in conflict with that legislation.

Attention is directed to the fact that the House Joint Resolution does not undertake to make any *new* laws, rules, regulations or customs. We quote from the first paragraph of the resolutions: (Appendix C.)

> "The following codification of *existing* rules and customs pertaining to the display and use of the flag of the United States of America be, and *it is* hereby, *established* * * *" (Italics ours.)

The pronoun "it" is the subject of the verb "is established." The antecedent of the pronoun "it" is the noun "codification." A *codication* was *established* by the joint resolution. No rules and customs were established. *Existing* rules and customs were merely codified.

It is thought that a resolution of such character is nothing more than a recommendation or a declaration of policy on the part of the Congress of the United States and was not intended to possess the force of efficacy of law.

CONCLUSION

It is respectfully submitted:

(1) That appellants' motion to dismiss the bill of complaint should be sustained.

(2) That the flag salute regulation promulgated by appellants and the statutes of West Virginia affording a basis in law therefor, does not violate any of the provisions of the Constitution of the United States.

(3) That this Court by its decision in the case of *Minersville School District* v. *Gobitis*, 310 U. S. 586, has decided all questions raised in this case adversely to the contentions of appellees.

(4) That neither the West Virginia statutes nor the regulation of appellants complained of by appellees has been superseded by any act of the Congress of the United States.

(5) That the judgment appealed from should be reversed.

Respectfully submitted,

IRA J. PARTLOW,
Acting Attorney General of West Virginia,

W. HOLT WOODDELL,
Assistant Attorney General,
Counsel for Appellants.

APPENDIX A

Section 5, Article 2, Chapter 18, Code of West Virginia, 1931:

General Powers and Duties.—Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia university, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to the physical welfare of pupils, the education of feeble-minded and physically disabled or crippled children of school age, retirement fund for teachers, school attendance, evening and continuation or part-time day schools, school extension work, the classification of schools, the issuing of certificates upon credentials, the purchase, distribution and care of free textbooks by the district boards of education, the general powers and duties of county and district boards of education, and of school trustees, teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the board to be necessary and expedient.

APPENDIX A-1

Section 5-a, Article 8, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 32, Acts of the Legislature, Reg. Sess., 1941:

Child Dismissed, Suspended, or Expelled from School for Failure to comply with Requirements and Regulations Treated as Unlawfully Absent.—If a child be dismissed, suspended, or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from the school during the time he refuses to comply with such requirements and regulations, and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school.

APPENDIX A-2

Section 9, Article 2, Chapter 18, Code of West Virginia, 1931, as amended by Chapter 38, Acts of the Legislature, Reg. Sess., 1941:

Courses of Instruction in History, Civics, Constitutions, Alcoholic Drinks, Narcotics; Textbooks on Health, Biology and Social Sciences to Contain Appropriate Materials on Effects of Alcoholic Drinks and Narcotics; Violations; Penalties.—In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. The state board of education shall, with the advice of the state superintendent of schools, prescribe the courses of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.

* * *

Any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not exceeding ten dollars for each

violation, and each week during which there is a violation shall constitute a separate offense. If the person so convicted occupy a position in connection with the public schools, he shall also automatically be removed from such position, and shall be ineligible for reappointment to that or a similar position for the period of one year.

APPENDIX B

Regulation of the West Virginia State Board of Education, adopted June 9, 1942:

WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it is placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or

restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant converns of political society does not relieve the citizen from the discharge of political responsibility, and

WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; the emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

Therefore, be it RESOLVED, That the West Virginia Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: "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"—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers

as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly.

APPENDIX C

House Joint Resolution 303, Public Law 623—77th Congress (second session), passed and approved June 22, 1942:

Joint Resolution to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following codification of existing rules and customs pertaining to the display and use of the flag of the United States of America be, and it is hereby, established for the use of such civilians or civilian groups or organizations as may not be required to conform with regulations promulgated by one or more executive departments of the Government of the United States.

* * *

Sec. 5. That during the ceremony of hoisting or lowering the flag or when the flag is passing in a parade or in a review, all persons present should face the flag, stand at attention, and salute. Those present in uniform should render the right-hand salute. When not in uniform, men should remove the headdress with the right hand holding it at the left shoulder, the hand being over the heart. Men without hats merely stand at attention. Women should salute by placing the right hand over the heart. The salute to the flag in the moving column should be rendered at the moment the flag passes.