

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION

David Wallace Croft	§
and	§
Shannon Kristine Croft,	§
As Parents and Next	§
Friend of their minor	§
Children;	§ Civil Action No. 3:07-CV-1362-K
John Doe	§ ECF
and	§
Jane Doe	§
As Parents and Next	§
Friend of their minor	§
Children,	§
Plaintiffs	§
	§
v.	§
	§
Rick Perry, Governor of	§
the State of Texas	§
	§

Plaintiff’s Reply to Defendant’s Response To Plaintiff’s Motion for Summary Judgment

Plaintiffs only want to note one other issue in this reply brief. That is the issue of the status of dictum regarding the “under god language” found in the national pledge of allegiance, especially in cases like Lynch v. Donnelly¹ and County of Allegheny v. ACLU².

Defendant notes in his Brief in Opposition to Plaintiff’s Motion for Summary Judgment that the “...Supreme Court has never ruled directly on the constitutionality of the words ‘under God’ in the national pledge, but the Court and individual justices have indicated that the pledge...would not violate the Establishment Clause.” ...” (See “Defendant’s Opposition To Plaintiff’s Motion for Summary Judgment and Cross-Motion For Summary Judgment” at 10,

¹ Lynch v. Donnelly, 465 U.S. 668, 676 (1984)

² County of Allegheny v. ACLU, 492 U.S. 573, 602-603 (1989)

(ECF Doc 31).) Defendant then cites dictum in various decisions over the years that suggests that “under god language” in the national pledge may be Constitutional. (See “Defendant’s Opposition To Plaintiff’s Motion for Summary Judgment and Cross-Motion For Summary Judgment” at 11-15.)

The courts typically distinguish between different types of dictum:

“...the most common of which are obiter dictum and judicial dictum. ‘Obiter dictum’ is an observation or ‘judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential’ ...”(Kaye v. Hughes & Luce, LLP, 2007 U.S. Dist. LEXIS 50929 (ND Texas 2007).)

Orbiter Dictum is stated only 'by the way' to the holding of a case and does not constitute an essential or integral part of the legal reasoning behind a decision. (See Id.) “Judicial Dictum”, on the other hand:

“... ‘refers to an opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.’ BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 275 (2nd ed. 1995) (citing Cerro Metal Products v. Marshall, 620 F.2d 964, 978 n. 39 (3d Cir. 1980))...” (See Kaye v. Hughes & Luce, LLP, 2007 U.S. Dist. LEXIS 50929 (ND Texas 2007).)

Furthermore, while “...neither form of dictum is binding on a lower court, of the two, judicial dictum is generally entitled to greater weight.” (See Kaye v. Hughes & Luce, LLP, 2007 U.S. Dist. LEXIS 50929 (ND Texas 2007).)

Defendant cites dictum in Lynch v. Donnelly, 465 U.S. 668, 676 (1984), which involved a city’s display comprising many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, and a crèche, which Plaintiffs in that case objected to. During the course of its opinion, the court noted that:

“Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U. S. C. § 186, which Congress and the President mandated for our currency, see 31 U. S. C. § 5112(d)(1) (1982 ed.), and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children -- and adults -- every year.” (See Lynch v. Donnelly, 465 U.S. 668, 676 (1984).)

The question to ask here is whether this comment regarding the national pledge in Lynch should be considered “orbiter dictum” or “judicial dictum”?³ There is no evidence from the opinion in Lynch that the constitutionality of the national pledge was “...briefed, and argued by counsel...” (See Kaye v. Hughes & Luce, LLP, 2007 U.S. Dist. LEXIS 50929 (ND Texas 2007).) The constitutionality of the national pledge, at least in the public school context, was not “...a question that is directly involved...” (See *Id.*) in Lynch because the case involved a display on city property and did not involve impressionable public school children, subject to compulsory school attendance laws. The court in Lynch implicitly noted that public schools are different:

“This case differs significantly from *Larkin v. Grendel's Den, Inc.*, *supra*, and *McCollum*, where religion was substantially aided. In *Grendel's Den*, important governmental power -- a licensing veto authority -- had been vested in churches. In *McCollum*, government had made religious instruction available in public school classrooms; the State had not only used the public school buildings for the teaching of religion, it had “[afforded] sectarian groups an invaluable aid . . . [by] [providing] pupils for their religious classes **through use of the State's compulsory public school machinery.**” 333 U.S., at 212. No comparable benefit to religion is discernible here.” (See Lynch v. Donnelly, 465 U.S. 668, 682-683 (1984), emphasis added.)

After reading the entire opinion in Lynch, it would also seem that the court’s dictum regarding the constitutionality of the national pledge is “...not essential to the decision...” (See Kaye v. Hughes & Luce, LLP, 2007 U.S. Dist. LEXIS 50929 (ND Texas 2007) .) The section of

³ Although, as discussed above, it should be remembered that neither judicial nor orbiter dictum is binding on lower courts.

the Lynch opinion quoted by Defendant comes prior to the court applying the Lemon test⁴. The actual analysis of the issue in Lynch, including an inquiry using the Lemon test, begins after the Court mentioned the national pledge. (See Lynch v. Donnelly, 465 U.S. 668, 678-687 (1984).) Based on all of this, the proper conclusion to draw is that the Court's mention of the national pledge in Lynch is mere "orbiter dictum" that is unnecessary to the decision in Lynch and therefore not precedential.

Defendant also cites⁵ to dicta in another US Supreme Court case, County of Allegheny v. ACLU, 492 U.S. 573, 602-603 (1989):

"Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring); *id.*, at 716-717 (Brennan, J., dissenting). We need not return to the subject of "ceremonial deism," see n. 46, *supra*, because there is an obvious distinction between creche displays and references to God in the motto and the pledge. However history may affect the constitutionality of nonsectarian references to religion by the government,⁵² history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."

Since the Court in Allegheny was merely referencing the dictum from Lynch, which was already discussed, this is, in effect, dictum about dictum, and has even less precedential value than the orbiter dictum found in Lynch.

When it is remembered that this is a challenge of the "under god" language found in the Texas State Pledge of allegiance, which has a different origin from the origin of the much longer-standing national pledge, the fact that the above-cited cases mentioned the national pledge

⁴ See Lemon v. Kurtzman, 403 US 602 (1971) for this test. See also "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry Against Defendant Rick Perry" (ECF Doc. 26.)

⁵ See "Defendant's Opposition To Plaintiff's Motion for Summary Judgment and Cross-Motion For Summary Judgment" at 13.

in orbiter dictum leads to the conclusion that they have almost no precedential value in this case. For this reason, this case should be decided using the standard tests developed by the courts over the years for assessing the constitutionality of a statute, as outlined in Plaintiffs motion for summary judgment⁶.

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⁶ See "Plaintiff's Brief Setting Forth Their Contentions of Fact and Law, Argument, and Authorities on their Motion for Summary Judgment Against Defendant Rick Perry Against Defendant Rick Perry" (ECF Doc. 26.)

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Court's Electronic Filing Procedures, a true and correct copy of the foregoing document will be sent via Notice of Electronic Filing ("NEF") generated by the court's electronic filing system on

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