Civil No. A083451

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

FIRST LIEUTENANT ANDREW HOLMES,
individually and on behalf of all others similarly
situated,
Plaintiff and Respondent,

v.

CALIFORNIA NATIONAL GUARD, STATE OF CALIFORNIA; MAJOR GENERAL TANDY K. BOZEMAN, in his official capacity; GOVERNOR PETE WILSON, in his official capacity; DOES 1-XXV,
Defendants and Appellants.

Appeal From
San Francisco County Superior Court No. 987009
The Honorable David A. Garcia, Judge

AMICUS CURIAE BRIEF OF BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF) IN SUPPORT OF PLAINTIFF AND RESPONDENT

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INTRODUCTION

Bay Area Lawyers for Individual Freedom ("BALIF") respectfully submits this brief in support of the judgment entered by the trial court for Plaintiff and Respondent First Lieutenant Andrew Holmes and the class he represents. That judgment enjoined enforcement of California Army National Guard Regulation 600-1 6(d), which prohibits service members "released from federal or state active duty for cause" from obtaining purely state positions that have no relation to the United States National Guard. The trial court correctly held that the regulation -- to the extent it applies to those who had been discharged from their federal positions because they had acknowledged their homosexuality -- violates the equal protection and free speech rights guaranteed by the California Constitution as well as California law.

The arguments the State presents on appeal are wrong for many reasons. This amicus brief focuses on one of the State's principal arguments -- that "defendants' actions were preempted by federal law" -- because it not only is wrong but also threatens to erode the fundamental sovereign authority of the State of California to formulate and enforce its own civil rights laws.

BALIF respectfully urges the Court to reject the State's illegal effort to import a discriminatory federal policy into the state legal system despite the prohibition under the California Constitution and other California law against such discrimination. The State's improper attempt to smuggle the discriminatory federal "Don't Ask, Don't Tell" policy into California law rests on three manifest misinterpretations: (1) of the meaning of the trial court's judgment; (2) of the scope of the purportedly "preemptive" federal statute; and (3) of the basic preemptive effect of the relevant statutory scheme.

In particular, the State's so-called "preemption" argument fails for three reasons. First, federal "preemption" cannot apply to the conduct at issue in this case because the State's "preemption" claim, even on its own terms, extends only to federally recognized positions in California's National Guard, whereas the trial court's order concerns only non-federally recognized positions. Second, the plain text of the purportedly "preemptive" statute, 32 U.S.C. §324(a), demonstrates that it applies only to federally recognized positions and, thus, cannot have any preemptive effect in this case. Finally, the text of Title 32, which includes §324(a), makes clear that the federal National Guard statutory scheme does not preempt state law. Rather, as required by the U.S. Constitution, Congress expressly limited the power to compel state compliance under the statute to a discretionary grant of authority to the President to withhold funds from noncompliant states.

II. STATEMENT OF THE CASE

A. First Lieutenant Andrew Holmes And His Discharge

Plaintiff and Respondent First Lieutenant Andrew Holmes enrolled in the California National Guard in 1986 and subsequently became an officer in both the California National Guard and the United States National Guard. Court Transcript ("CT") at 958. Before he was discharged for acknowledging his sexual orientation, Holmes had been promoted to First Lieutenant and received the Army Achievement Medal, the Army Reserve Components Achievement Medal, and the National Defense Service Ribbon. *Id.* His performance ratings were consistently outstanding, and a reviewer characterized his unit as a "shining example of cohesion." *Id.*

On June 3, 1993, Lt. Holmes sent his commanding officer a memorandum that stated: "[A]s a matter of conscience, honesty and pride, I am compelled to inform you that I am gay." *Id.* at 1152. On that basis, the Federal Recognition Review Board withdrew his federal recognition, and California's Office of the Adjutant General discharged him from the California National Guard. *Id.* at 1061.

B. Procedural History

Lt. Holmes commenced this litigation, a class action against the State of California and certain officials, on May 27, 1997. Id. at 1. After discovery and a number of motions by the State, the trial court granted summary judgment in favor of Lt. Holmes and the class he represents on their First and Second Causes of Action. The trial court held unconstitutional and enjoined enforcement of California Army National Guard Regulation 600-1 6(d), which prohibits anyone who has "been released from federal or state active duty for cause" from holding a "State Active Duty position." In particular, the trial court held that the regulation violated the equal protection and free speech guarantees of the California Constitution, as well as California Military and Veterans Code Section 101, "to the extent that it prohibits individuals who have been discharged or released from federal service under the 'Don't Ask, Don't Tell' policy based on sexual orientation from obtaining State Active Duty employment." CT at 1173.

The Military Framework: Two National Guards

"The National Guard" is in reality a system of National Guard units over which the states and the federal government exercise partially overlapping control. As a constitutional and historical matter,

the National Guard is the modern day equivalent of the "militia." Maryland v. United States, 381 U.S. 41, vacated on other grounds, 382 U.S. 159 (1965). The Constitution grants Congress the power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States." U.S. Const., art. I, 8, cl. 16. On the other hand, it expressly "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by the Congress." Id.

Earlier in this century, Congress passed a series of acts and amendments which established the National Guard system. Recognizing that the U.S. Constitution reserved significant militia-related powers to the states, Congress established a system that consists of "'two overlapping but distinct organizations'. . . the National Guard of the various States and the National Guard of the United States." Perpich v. Department of Defense, 496 U.S. 334, 345 (1990). As the Supreme Court explained in Perpich, "[s]ince 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in the National Guard of the United States." Id. Thus, members of the National Guards "now must keep three hats in their closets -- a civilian hat, a state militia hat, and an army hat -- only one of which is worn at any particular time." Id. at 348.

The commissioning process for officers also reflects this constitutionally shared responsibility for the National Guard. Officers are first commissioned in a state National Guard because "selection and appointment of (state) Army National Guard officers is solely a state responsibility." MacFarlane v. Grasso, 696 F.2d 217, 226 n.4 (2d Cir. 1982). As the court explained in United States v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934), "[t]he United States has not appointed, and constitutionally cannot appoint or remove (except after being called into federal service), officers of the National Guard, for there must be a State National Guard before there can be a National Guard of the United States, and the primary duty of appointing officers is one of the powers reserved to the states."

An officer commissioned into a state National Guard may become an officer in the U.S. National Guard upon a grant of so-called "federal recognition." See 32 U.S.C. 307(d); Dehne v. United States, 970 F.2d 890, 891 (Fed. Cir. 1992). Federal recognition is the acknowledgment by the federal government that an officer is eligible to serve in the National Guard when it is federalized. Frey v. State of Cal., 982 F.2d 399, 400 n.3 (9th Cir.), cert. denied, 509 U.S. 906 (1993). The Federal Recognition Review Board can also withdraw federal recognition on a number of grounds. 32 U.S.C. 323(b). One of those grounds, set forth under the U.S. military's so-called "Don't Ask, Don't Tell" policy, is a guard member's acknowledgment of his or her sexual orientation as gay, lesbian or bisexual. 10 U.S.C. 654; Department of Defense Directive 1332.30.

The constitutionally shared authority over the National Guard system extends to other aspects of the federal-state relationship as well. For example, state National Guards receive federal funding by maintaining federally recognized units. 32 U.S.C. 106-108. In contrast, "[s]tates that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip and arm state Guards." Charles v. Rice, 28 F.3d 1312, 1315-16 (1st Cir. 1994); see also 32 U.S.C. 108. When not in the active service of the United States, "officers of the National Guard continue to be officers of the state and not officers of the United States or of the Military Establishment of the United States." Dern, 74 F.2d at 487. Therefore, when not acting as members of the U.S. National Guard, officers of the California National Guard are part of the state's militia, which also includes the State Military Reserve, the Naval Militia and the unorganized militia. Cal. Mil. & Vet. Code 120.

This appeal concerns only California's National Guard when serving solely in a state capacity.

III. ARGUMENT

A. The State's So-Called "Preemption" Argument Is Incorrect Because The Purportedly "Preemptive" Federal Statute Does Not Apply On Its Face To The Narrow Judgment On Appeal, And The Text And Statutory Scheme Of The Federal Law Make Clear That, As

A General Matter, They Have No Preemptive Effect On State Law

The State contends, obliquely and with little articulated support, that the trial court's judgment limiting the enforcement of California Army National Guard Regulation 600-1 6(d) must be overturned on appeal because "defendants' actions were preempted by federal law." Appellants' Opening Brief ("App. Br.") at 1. This assertion is incorrect on several grounds.

1. ***Federal "Preemption" Cannot Apply To The Conduct at Issue in This Case Because The State's "Preemption" Claim, Even On Its Own Terms, Extends Only To Federally Recognized Positions In California's National Guard And The Trial Court's Order Concerns Only Non-Federally Recognized Positions***

The doctrine of preemption has no conceivable application to the relief that the trial court granted in this case. Under the preemption doctrine, federal law trumps inconsistent state law through the Supremacy Clause of the U.S. Constitution only when a party claiming preemption can show it was the "clear and manifest purpose of Congress" to do so. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 515-16 (1992); Steele v. Collagen Corp., 54 Cal. App. 4th 1474, 1479 (1997). Courts must analyze preemption claims "in light of the presumption against pre-emption of state police power regulations." Cipollone, 505 U.S. at 518.

The doctrine is irrelevant here, regardless of congressional intent. Even taking the State's invocation of the preemption doctrine as correct (which, as shown below, it is not), the State claims only that it had to discharge Lt. Holmes from his federally recognized position in California's National Guard. The trial court's judgment, on the other hand, concerns only non-federally recognized positions in the California National Guard.

The State has consistently maintained throughout this litigation that 32 U.S.C. 324(a) "preempted" its actions, effectively requiring it to discharge Holmes from his federal recognized position in the California National Guard. For example, in support of its motion for summary judgment, the State asserted that "Congress has mandated that an officer of the National Guard shall be discharged from his federally recognized position when his federal recognition is withdrawn. (32 U.S.C. 324)." Reply To Plaintiff's Opposition To Defendants' Motion For Summary Judgment at 8 (emphasis added). In fact, the State expressed its indignation about any suggestion that

> 32 U.S.C. 324(a) requires the discharge for a state-appointed officer in state service merely for losing federal recognition. This is completely untrue and is not unsubstantiated [sic]. Defendants have jurisdiction and control over state appointed officers in state service.

Id. at 7 (emphasis added, internal citation omitted). "Indeed," the State insisted, "defendants have always maintained that 32 U.S.C. 324 requires discharge from the federally recognized commission. Plaintiff's state commission has never been affected by his statement of homosexuality." Id. (emphasis added).

On appeal, the State repeats this refrain. It asserts that "[w]ithout federal recognition, plaintiff was no longer eligible to occupy a position in a federally recognized unit. So, pursuant to 32 U.S.C.A. sections 101(4) and 324, defendants honorably discharged plaintiff from his federally recognized position in the CA ARNG [California National Guard]." App. Br. at 2 (emphases added). The State further explains that a member of the California National Guard "honorably discharged plaintiff from his federally recognized position based on the loss of his federal recognition, effective September 12, 1994, as mandated by 10 U.S.C.A. section 324(a)(2)." Id. at 7 (emphasis added).

But this persistent argument (aside from being incorrect as shown below) has no application to the relief granted in this case, which expressly concerns only "State Active Duty" positions that do not require federal recognition. In granting specific, narrow relief to Holmes and the class he represents, the trial court declared "California National Guard Regulation 600-1 6(d) to be facially unconstitutional and invalid to the extent it prohibits individuals who have been discharged or released from federal service under the 'Don't Ask, Don't Tell' policy based on sexual orientation from obtaining State Active Duty employment." CT at 1173. On this basis, the trial court enjoined the State from enforcing the regulation "in a manner that prohibits individuals who have been discharged or released from federal service under the 'Don't Ask, Don't Tell' policy from obtaining State Active Duty employment." Id.

As the law makes clear, and as the State chooses to admit when useful and to ignore when not, "State Active Duty" positions as referenced in the trial court's judgment do not require federal recognition. See Cal. Mil. & Vet. Code 550-551; CT at 880-883, 902-904, 915-916, 919, 929-930, 973, 1055. The California Military and Veterans Code explicitly recognizes that the California National Guard may include persons who lack federal recognition: "Persons to be commissioned in the National Guard shall be selected from those eligible for federal recognition . . . . and from former commissioned officers of the United States Army, United States Air Force, United States Navy, or any reserve component thereof, who were honorably separated therefrom but are no longer eligible for federal recognition." Cal. Mil. & Vet. Code 222 (emphases added). In fact, the State has admitted that at least 28 individuals who lack federal recognition currently hold State Active Duty positions. CT at 880-883, 902-904, 915-916, 919, 929-930, 973.

Indeed, one of the principal cases on which the State purports to rely, Frey v. State of Cal., 982 F.2d 399 (9th Cir. 1993), arises out of the service of a member of the California National Guard who lacked federal recognition. In that case, "because he had attained 30 years of commissioned service, Frey lost federal recognition, the effect being that he ceased to be a member of the National Guard of the United States (Army National Guard)." Id. at 400. As a result, the court explained, "[f]rom 1985 until his mandatory retirement, Frey served only as a military officer in the California National Guard." Id. "Frey's loss of federal recognition meant that he could no longer be called into active federal service [but] as a member of the California National Guard on state active duty, Frey was subject" to a number of state requirements, including that "he was required to meet the same physical standards as prescribed for federally recognized National Guard members." Id. (emphasis added).

The State attempts to salvage its "preemption" argument by making the fall-back assertion, again without supporting authority, that "[s]ome state active duty positions require federal recognition." App. Br. at 14. According to the State, "the trial court essentially held that an individual with no federal recognition can hold a state active duty position which requires federal recognition. This holding is erroneous on federal preemption grounds." Id. But the trial court "essentially" held no such thing. The trial court's judgment simply prohibits the state from denying Holmes and the members of the certified class in this case from obtaining any State Active Duty position on the ground that they have lost their federal recognition because of their sexual orientation. The very reason that the trial court fashioned the relief in the manner it did -- limiting its order to State Active Duty under Regulation 600-1 6(d) -- was to avoid conflict with the provisions for federal recognition. Otherwise, the order would logically have extended to all positions in the California (as opposed to the federal) National Guard. And the trial court's order does not purport to address any federal recognition requirement that may exist apart from the enjoined regulation.
Thus, the State's "preemption" argument has no application to this case. Even on its own terms, the argument extends only to Lt. Holmes' dismissal from his federally recognized position, while the

relief granted by the trial court was carefully crafted to extend only to "State Active Duty" positions which do not require federal recognition.

The Plain Text Of The Purportedly "Preemptive" Statute, 32 U.S.C. 324(a), Demonstrates That It Could Have No Preemptive Effect In This Case

The plain text of 32 U.S.C. 324(a) -- the statute that the State contends is "preemptive" of state law here -- confirms the conclusion that the provision has no "preemptive" effect with regard to the judgment entered by the trial court. Section 324 reads as follows:

> (a) An officer of the National Guard shall be discharged when --
> (1) he becomes 64 years of age; or
> (2) his federal recognition is withdrawn.
> The official who would be authorized to appoint him shall give him a discharge certificate.

32 U.S.C. 324(a).

Invoking this provision, the State claims that it was required to discharge Lt. Holmes from any membership in the California National Guard, as a matter of supreme federal law, because the statute directs the discharge of an officer losing federal recognition from "the National Guard." But this assertion simply begs the question: what is "the National Guard" referred to in the statute? This term is defined in 32 U.S.C. 101(3) as "the Army National Guard and the Air National Guard." The relevant branch here, the "Army National Guard," is in turn defined as:

> that part of the organized militia of the Several States and Territories, Puerto Rico, and the District of Columbia, active and inactive,
> that --
> (A) is a land force;
> (B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I of the Constitution;
> (C) is organized, armed, and equipped wholly or partly at Federal expense; and
> (D) is federally recognized.

32 U.S.C. 101(4) (emphasis added).

According to the terms of the statute itself, therefore, the purportedly "preemptive" federal requirement applies only to "that part" of a state's organized militia, i.e., its National Guard, that satisfies the characteristics of (A) through (D), including federal recognition. Title 32 acknowledges, as it must, that states have their own National Guards that are distinct from the federal National Guard. See, e.g., 32 U.S.C. 104(a) ("Each State or Territory and Puerto Rico may fix the location of the units and headquarters of its National Guard") (emphasis added). In fact, 324 itself recognizes the fundamental constitutional authority that states retain over their own National Guards in the form of the sole power of appointing and discharging officers. See 32 U.S.C. 324(b) ("Subject to subsection (a), the appointment of an officer of the National Guard may be terminated or vacated as provided by the laws of the State or Territory of whose National Guard he is a member, or by the laws of Puerto Rico or the District of Columbia, if he is a member of its National Guard").

In sum, 324(a) on its face extends only to federally recognized positions. The judgment on appeal, in contrast, is limited to "State Active Duty" positions that do not require federal recognition. Thus, the State's "preemption" argument has no conceivable application to this case.

The Text Of Title 32, Which Includes 324(a), Makes Clear That The Federal National Guard Statutory Scheme Does Not Preempt State Law But Rather, As Required By The U.S. Constitution, Depends On Congress's "Power Of The Purse" For Its Authority And Enforcement

Yet another fatal flaw in the State's "preemption" argument is that the requirements of Title 32, including 324(a) on which the State relies, do not have preemptive effect as a threshold matter. To prevail on its "preemption" argument, the State bears the burden of proving, despite the presumption against preemption, that it was the "clear and manifest purpose of Congress" that 324(a) preempt state law. Cipollone, 505 U.S. at 515- 16; Steele, 54 Cal. App. 4th at 1479. Not only has the State failed to do so, but an examination of the supposedly "preemptive" statutory scheme and its constitutional underpinnings demonstrates a contrary intent.

Although the U.S. Constitution grants power to the federal government for a number of militia functions, it expressly reserves to the states "the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const., art. I, 8, cl. 16. Recognizing that the U.S. Constitution reserves this important sphere of plenary power to the states, Congress passed Title 32 and asserted control in these particular areas through the only constitutionally permissible manner: its power to subject the receipt of federal funds to certain conditions under its Spending Clause authority. See 32 U.S.C. 106 (providing for federal funding of state National Guards), 107 (apportioning appropriations among the states), 108 (providing for enforcement of Title 32 requirements through withholding of federal funding).

An examination of Title 32's provisions quickly reveals that it has no preemptive effect. Title 32 contains no preemption clause. And the Title's sole enforcement provision is contained in 108, which provides: "If, within a time to be fixed by the President, a State fails to comply with a requirement of this title, or regulation prescribed under this title, the National Guard of that State is barred, in whole or in part, as the President may prescribe, from receiving money or any other aid, benefit, or privilege authorized by law." 32 U.S.C. 108. Thus, Congress clearly intended any enforcement of Title 32's requirements to be through its "power of the purse" pursuant to 108 (subject to the discretion of the Executive branch) rather than through preemption of state law. Accordingly, state compliance is neither mandatory nor enforceable in court; state non-compliance may be redressed, if at all and at the discretion of the President, solely by the withholding of funds. See MacFarlane, 696 F.2d at 226 n.3.

Many federal cases considering the federal-state National Guard system have recognized this constitutionally mandated distinction. As these authorities have explained, "[t]he only effective control exercised by the federal government and the regular armed forces relative to organizing, equipping, training and policies of the National Guard of any of the states comes from the control of funds which may be granted to or withheld from the National Guard units pursuant to granting or withdrawing federal recognition." Don't Ruin Our Park v. Stone, 749 F. Supp. 1386, 1387 (M.D. Pa. 1990); accord Charles v. Rice, 28 F.3d at 1315-16 ("States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip, and arm state Guards"); Knutson v. Wisconsin Air Nat'l. Guard, 995 F.2d 765, 767 (7th Cir.) ("If a state National Guard elects, for some reason, not to comply with federal regulations, that state risks forfeiture of federal monies and other privileges"), cert. denied, 510 U.S. 933 (1933); MacFarlane, 696 F.2d at 226 n.4 (noting that "most, if not all, states voluntarily have chosen to appoint Army National Guard officers according to the standards of [federal regulations] in order to qualify their units for federal recognition and funding").

Even the State's counsel has acknowledged that the State has voluntarily consented to Congress's conditions in exchange for the receipt of federal funds. On March 28, 1998, in oral argument on its motion for summary judgment, Major Matthew Dana made the following statement to the trial court:

And with regard to the distinction here, the power of the sovereigns, the Constitution recognizes two powers. The appointment of officers, and the right to train militia. Okay?

The way it's set up in Title 32 is a political compromise, all right? 97 percent of the budget for the

California National Guard comes from the Federal Government. We have to follow their rules, or we don't get the money.
Now, California as a sovereign, does not have to have a National Guard. It doesn't have to participate in this Federal/State scheme that's been set up by Congress. It could choose to walk away. Okay?

Transcript of hearing on Defendants' Motion for Summary Judgment ("HT") (April 28, 1998, Morning Session) at 11-12 (emphases added).
In other words, the State effectively admits that 324(a) does not have "preemptive" force. Rather, the requirements of 324(a) and the rest of Title 32 are conditions that the State is free to accept or reject. See, e.g., Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981) ("Unlike legislation enacted under 5 [of the 14th Amendment] . . . legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions"). The State "doesn't have to participate in this Federal/State scheme that's been set up by Congress." HT at 12. And if it accepts federal funding and then fails to follow all federal requirements, then it runs the risk, under 108, of losing its federal funding. As Major Dana argued to the trial court, the State "has to follow their rules, or we don't get the money." HT at 12. But the State has no authority to violate its own Constitution or other laws in order to "get the money" made available by the federal government. It can agree to the contract with the federal government only if its own Constitution and laws permit it to do so. Because the requirements of 324(a) are optional in order to respect the states' plenary power granted by the U.S. Constitution, and enforceable only through Congress's power of the purse under 108, they do not have preemptive effect.

IV. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the brief of Lt. Holmes, the judgment of the trial court should be affirmed. BALIF respectfully urges the Court to reject the State's illegal effort to import the discriminatory federal "Don't Ask, Don't Tell" policy into the state legal system despite the prohibition under the California Constitution and other California law against such discrimination. The State's improper effort is based on basic misinterpretations of the meaning of the trial court's judgment, the scope of the purportedly "preemptive" statute, and the preemptive effect of the entire federal statutory scheme. The State should not be permitted to erode the fundamental sovereign authority of the State of California to formulate and enforce its own civil rights laws.
Dated: March 1, 1999 MUNGER, TOLLES & OLSON LLP

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