

1 Jackler v. Byrne, No. 10-0859-cv

2 Sack, Circuit Judge, concurring

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4 I fully concur in Judge Kearse's opinion for the panel.
5 I write separately only to offer an observation as to one aspect
6 of the panel opinion.

7 This case is about plaintiff Jason Jackler's refusal to
8 "make false statements in connection with an investigation into a
9 civilian complaint alleging use of excessive force by a
10 [Middletown Police] Department officer," ante at [2], and the
11 Town Board of Police Commissioners' subsequent decision not to
12 hire Jackler -- then a probationary police officer -- on a
13 permanent basis. The Board allegedly acted at the behest of the
14 defendant officials, who wished to punish Jackler for his refusal
15 to falsify his previously filed report about alleged police
16 misbehavior. In light of the fact that this litigation involves
17 a refusal to speak falsely as directed by a public official,
18 unlike the more common case, see id. at [18], where a public
19 employee is sanctioned because he or she spoke in a manner of
20 which government officials disapproved, see id., the panel
21 opinion makes clear that the difference between the two is, for
22 present purposes, immaterial. See id. at [19-20]. I agree.

23 In support of that proposition, however, the panel
24 quotes this statement by the United States Supreme Court in Riley
25 v. National Federation of the Blind of North Carolina, Inc., 487
26 U.S. 781 (1988):

1 There is certainly some difference between
2 compelled speech and compelled silence, but
3 in the context of protected speech, the
4 difference is without constitutional
5 significance, for the First Amendment
6 guarantees "freedom of speech," a term
7 necessarily comprising the decision of both
8 what to say and what not to say.

9 Id. at 796-97 (Brennan, J.) (first emphasis supplied); see ante
10 at [18]. The panel also quotes Wooley v. Maynard, 430 U.S. 705
11 (1977): "[T]he right of freedom of thought protected by the
12 First Amendment against state action includes both the right to
13 speak freely and the right to refrain from speaking at all." Id.
14 at 714; see ante at [18].

15 The Supreme Court made these statements, and the panel
16 invokes them, in response to the argument that compelled speech
17 may receive less protection under the First Amendment than does
18 compelled silence. The panel's conclusion otherwise does not,
19 however, imply the converse conclusion that compelled speech can
20 never receive more solicitude than compelled silence.

21 Justice Jackson, speaking for the Court, remarked some
22 time ago that "[i]t would seem that involuntary affirmation could
23 be commanded only on even more immediate and urgent grounds than
24 silence." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624,
25 633 (1943) (holding that state-compelled flag salute and pledge
26 violate the First Amendment); see also Hurley v. Irish-Am. Gay,
27 Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 573-74 (1995)
28 ("Outside the context [of commercial speech, the State] may not

1 compel affirmance of a belief with which the speaker
2 disagrees. . . . This general rule . . . applies not only to
3 expressions of value, opinion, or endorsement, but equally to
4 statements of fact the speaker would rather avoid").

5 I write only to note the possibility that despite the
6 notion of equivalence reflected in the panel opinion and the
7 Supreme Court opinions from which it quotes, it is possible that
8 in some circumstances not before us today, government compulsion
9 to speak (or indeed to act) may well be more strictly limited
10 than government compulsion not to speak (or act¹).

11 The Soviet purge trials of the 1930's remain notorious
12 in large measure because they were marked by "confessions . . .
13 made under pressure of intensive torture and intimidation," 9 New
14 Encyclopaedia Britannica Micropaedia 808 (15th ed. 2002),
15 available at [http://www.britannica.com/EBchecked/](http://www.britannica.com/EBchecked/topic/483936/purge-trials)
16 [topic/483936/purge-trials](http://www.britannica.com/EBchecked/topic/483936/purge-trials) (latest visit July 11, 2011). And it
17 seems unlikely that Galileo's dispute with Church authorities

¹ Cf., e.g., Cacchillo v. Insmad, Inc., 638 F.3d 401, 405-06 (2d Cir. 2011) ("The burden [for obtaining an injunction] is even higher on a party like [the appellant] that seeks 'a mandatory preliminary injunction that alters the status quo by commanding some positive act, as opposed to a prohibitory injunction seeking only to maintain the status quo.'" (citation omitted)); Doninger v. Niehoff, 527 F.3d 41, 47 (2d Cir. 2008) (characterizing the standard for mandatory injunctions as "more rigorous" than that for prohibitory injunctions); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2942 (2d ed. 1995) ("It has been said that courts are more reluctant to grant a mandatory, or affirmative, injunction than a prohibitory, or negative, one.").

1 about Copernican theory, see Dava Sobel, Galileo's Daughter 231-
2 81 (1999); Jerome J. Langford, Galileo, Science and the Church
3 152-54 (3d ed. 1992), would be as infamous had he been forbidden
4 to assert -- as he apparently believed -- that the earth moves
5 about the sun, rather than forced to state publicly and contrary
6 to his conviction that the sun revolves around the earth.²

² See Recantation of Galileo (June 22, 1633),
[http://law2.umkc.edu/faculty/projects/ftrials/
galileo/recantation.html](http://law2.umkc.edu/faculty/projects/ftrials/galileo/recantation.html) (latest visit July 19, 2011)
(reproducing Galileo's attestation from Giorgio de Santillana,
The Crime of Galileo 312-13 (1955)).