ACLJ
American Center
for Law & Justice

MEMORANDUM

TO: **Jay Alan Sekulow**

FROM: **ACLJ Law Clerks**

RE: **Elk Grove Unified School District v. Michael A. Newdow**

DATE: **Tuesday, June 15, 2004**

In our amicus brief, the American Center for Law and Justice argued two points: (1) Michael Newdow lacked standing and should not prevail in Federal Court and (2) the phrase "under God" in the Pledge of Allegiance does not violate the Establishment Clause. Five Justices adopted our view on the issue of standing; three Justices adopted our view on the constitutionality of the Pledge of Allegiance. All eight Justices concluded that the Ninth Circuit Court of Appeals should be reversed. Justice Scalia did not participate in the decision.

MAJORITY OPINION

Justice Stevens's majority opinion was joined by Justice Ginsburg, Justice Breyer, Justice Souter, and Justice Kennedy.

Holding

"We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision."[1]

History of the Pledge

The Court's opinion begins by outlining the history of the flag and the Pledge. "[T]he Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles."[2] The

[1] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. __ (2004) (Majority Opinion at 1).
[2] Majority opinion at 2.

Pledge was first approved by Congress in 1942, although the initial version did not contain "under God." The enactment of the Pledge "confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty."[3] In 1954, Congress amended the Pledge by adding the words "under God." The House Report accompanying that amendment said, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God."[4]

Procedural History

The Elk Grove Unified School District requires all classes to recite the Pledge of Allegiance on a daily basis.[5] Michael Newdow, an atheist whose daughter attended kindergarten in Elk Grove, sued the school district seeking to enjoin it from requiring the Pledge to be recited and seeking a declaration that the act of Congress adding the words "under God" violated the Establishment Clause. A Ninth Circuit panel held that both Elk Grove's policy and the 1954 Act amending the Pledge are unconstitutional. The panel held that Newdow had standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter."[6] The student's mother then filed a motion for leave to intervene because a California court had issued an order awarding her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education."[7] The Ninth Circuit then issued a second opinion stating that the custody order did not deprive Newdow "as a noncustodial parent, of Article III standing to object to unconstitutional governmental action affecting his child."[8] The Ninth Circuit then denied en banc review.

Standing

In the majority opinion, authored by Justice Stevens, the Court began its analysis of the standing issue by quoting Judge Robert Bork,

> The standing requirement is born partly of "an idea, which is more than an intuition but less than a rigorous and explicit theory, about the

[3] *Id.* at 3.
[4] *Id.* (quoting H.R. Rep. No. 1693, 83rd Cong., 2nd Sess., p. 2 (1954)).
[5] *Id.* at 3-4.
[6] *Id.* (quoting *Newdow v. U.S. Congress*, 292 F.3d 597. 602 (9th Cir. 2002)).
[7] *Id.* at 5-6.
[8] *Id.* at 6 (quoting *Newdow v. U.S. Congress*, 313 F.3d 500, 502-03 (9th Cir. 2002)).

> constitutional and prudential limits to the powers of an *unelected, unrepresentative judiciary* in our kind of government."[9]

The Court distinguished between "Article III standing, which enforces the Constitution's case or controversy requirement . . . and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'"[10] In speaking of prudential standing, the Court stated, "[o]ne of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations."[11] Although the mother in this case was awarded "sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of" the child, Newdow claims that he still holds "an unrestricted right to inculcate in his daughter – free from governmental interference – the atheistic beliefs he finds persuasive."[12] The Court said that "Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. . . . [T]he interests of this parent and this child are not parallel and, indeed, are potentially in conflict."[13] Although the Ninth Circuit held that "state law vests in Newdow a cognizable right to influence his daughter's religious upbringing, . . . [n]othing that either Banning or the School Board has done . . . impairs Newdow's right to instruct his daughter in his religious views."[14] Newdow does not have "a right to dictate to others what they may and may not say to his child respecting religion."[15]

The Court added "[t]he cases speak not at all to the problems of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party."[16]

The Court's opinion concluded with this statement:

> In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to

[9] *Allen v. Wright*, 468 U.S. 737, 750 (1984) (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring)) (emphasis added).
[10] Majority Opinion at 8 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).
[11] *Id.* at 8-9.
[12] *Id.* at 10-11.
[13] *Id.* at 12.
[14] *Id.* at 12-13.
[15] *Id.*
[16] *Id.* at 13-14.

resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child – which both California law and the First Amendment recognize – and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, Newdow lacks prudential standing to bring this suit in federal court.[17]

[17] *Id*. at 14.

CONCURRING OPINION OF CHIEF JUSTICE REHNQUIST
(JOINED BY JUSTICE O'CONNOR - AND JUSTICE THOMAS AS TO PART I)

Standing

The Chief Justice disagrees with what he calls "the Court's new prudential standing principle."[18] This new principle is that "it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing."[19] He states that this new principle is loosely based on three legal grounds: "the domestic relations exception to diversity-of-citizenship jurisdiction . . . , the abstention doctrine, and criticisms of the Court of Appeals' construction of California state law, coupled with the prudential standing prohibition on a litigant's raising another person's legal rights."[20]

First, the Chief Justice notes that the majority "relies heavily on *Ankenbrandt v. Richards*"[21] in concluding that the Court should decline to hear the case because it involves domestic relations. But *Ankenbrandt* addressed the domestic relations exception to the federal courts' jurisdiction to hear diversity-of-citizenship cases.[22] Since this case is brought based on the federal courts' jurisdiction to hear cases involving federal questions, the Chief Justice argues that the domestic relations exception discussed in *Ankenbrandt* does not apply.

> This case does not involve diversity jurisdiction, and [Newdow] does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's conducting the pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.[23]

Second, the Chief Justice disagrees with what he sees as the majority's reliance on the

[18] Rehnquist, C.J., concurrence at 2.
[19] Majority Opinion at 13.
[20] Rehnquist, C.J., concurrence at 2.
[21] 504 U.S. 689 (1992). In that case, the mother of two children sued her former spouse and his female companion on behalf of the children, alleging physical and sexual abuse of the children. The lower courts declined jurisdiction based on the domestic relations exception to diversity jurisdiction and abstention under *Younger* v. *Harris*, 401 U. S. 37 (1971). [The Supreme Court] reversed, concluding that the domestic relations exception only applies when a party seeks to have a district court issue a "divorce, alimony, and child custody decree," *Ankenbrandt*, 504 U. S., at 704. Chief Justice Rehnquist Concurrence at 3.
[22] 28 U.S.C. § 1332.

abstention doctrine in holding that Newdow does not have standing. He argues that the Court's discussion of abstention in *Ankenbrandt* does not support the majority's holding in this case that federal courts may only hear the cases that involve "a substantial federal question that transcends or exists apart from the family law issue."[24] In *Ankenbrandt*, the Chief Justice notes, the Court stated "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[25] The domestic relations issue in this case has no bearing on the underlying federal question, and thus "[a]bstention forms no basis for denying [Newdow] standing."[26]

Third, the Chief Justice differs from the majority on its interpretation of state law coupled with its use of "the prudential principle prohibiting third-party standing."[27] He argues, first, that the majority was wrong not to have deferred to the Court of Appeals' interpretation of state law. "The Court of Appeals . . . unanimously concluded that [Newdow] satisfied Article III standing . . . because he retained sufficient parental rights under California law."[28] In the Chief Justice's view, the Court should have followed its "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law."[29] In contrast to the majority, the Chief Justice states, "I would defer to the Court of Appeals' interpretation of California law because it is our settled policy to do so, and because I think that the Court of Appeals has the better reading of [California precedent]."[30]

But, even in addressing the state law question *de novo*, the Chief Justice states that the majority mischaracterizes Newdow's interest in the case. The majority asserts that Newdow is seeking to interfere with Banning's decision on how to instruct their daughter on religion. According to the majority, Newdow "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree."[31] Furthermore, the majority asserts "California cases 'do not stand for the proposition that [Newdow] has a right to dictate

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[23] Chief Justice Rehnquist Concurrence at 3-4.
[24] Majority Opinion at 9.
[25] *Ankenbrandt*, 504 U.S. 689 (1992) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).
[26] Chief Justice Rehnquist Concurrence at 4.
[27] *Id.* at 5.
[28] *Id.* at 5.
[29] *Id.* at 6 (quoting *Bowen v. Massachusetts*, 487 U.S. 879, 908 (1988).
[30] *Id.* at 6.
[31] Majority Opinion at 13.

to others what they may or may not say to his child respecting religion.'"[32]

But the Chief Justice argues that Newdow is not trying to control what Banning says to their daughter about religion, nor is he trying to bring a suit in the daughter's name (against Banning's wishes). Rather he is seeking to enjoin the School District by vindicating his own right to instruct his daughter on religion. "While she is intimately associated with the source of [Newdow's] standing (the father-daughter relationship and [Newdow's] rights thereunder), the daughter *is not the source* of [Newdow's] standing; instead it is their relationship that provides [Newdow] his standing . . . ."[33] Thus, the majority's interpretation of California state law "and the prudential prohibition on third-party standing provide no basis for denying [Newdow] standing."[34]

> Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only—our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.[35]

The Constitutionality of the Pledge

The Chief Justice begins his discussion of the constitutionality of the Pledge by briefly recounting the history of the insertion of the phrase "under God." He takes note of the original reasoning for amendment of the Pledge, which was to highlight the contrast between "this country's belief in God [and] the Soviet Union's embrace of atheism."[36] The Chief Justice also takes note of the recent Congressional legislation "that made extensive findings about the historic role of religion in the political development of the Nation and reaffirmed the text of the Pledge."[37]

The Chief Justice then recounts various public references to God by Presidents throughout American history. Among others, he mentions President Washington's inaugural address, President Lincoln's Gettysburg Address, and President Wilson's statement to Congress requesting a Declaration of War on Germany. Aside from Presidential references to God, the Chief Justice mentions the insertion of "In God We Trust" on American currency, and a similar phrase in the last verse of the national anthem. These examples, the Chief Justice argues, illustrate that "our national culture allows

[32] Rehnquist, C.J. at 7 (quoting the Majority Opinion at 13).
[33] *Id*. at 7.
[34] *Id*. at 7-8.
[35] *Id*. at 8.
[36] *Id*. at 8-9.

public recognition of our Nation's religious history and character."[38]

With regard to the specific issue in this case, California law requires elementary schools to recite some patriotic expression. The code states that the Pledge of Allegiance satisfies this requirement.[39] In order to comply with the law, the Elk Grove Unified School District has instructed all elementary schools to recite the Pledge each day; those students who object are free to abstain. The Chief Justice asserts that unlike the graduation prayer declared unconstitutional in *Lee v. Weisman,*[40] the Pledge is not a religious exercise. "I do not believe that the phrase 'under God' in the Pledge converts its recital into a 'religious exercise' of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase 'under God' is in no sense a prayer, nor an endorsement of any religion . . . ."[41]

The Chief Justice concludes that:

> The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.[42]

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[37] *Id.* at 9.
[38] *Id.* at 13.
[39] Cal. Educ. Code Ann. § 52720 (West 1989).
[40] 505 U.S. 577 (1992).
[41] Rehnquist, C.J., at 14.
[42] *Id.* at 16.

CONCURRING OPINION OF JUSTICE O'CONNOR

Summary

Justice O'Connor agrees with Chief Justice Rehnquist and Justice Thomas that the Court should defer to the Ninth Circuit's assessment that Newdow has standing, and that the Court should reach the merits of the case. Justice O'Connor further states that a decision on the merits should result in a finding that "petitioner school district's policy of having its teachers lead students in voluntary recitations of the Pledge of Allegiance does not offend the Establishment Clause."[43]

Endorsement Test

Justice O'Connor bases her decision that the pledge is permissible on the "endorsement test" which is "namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'"[44] Justice O'Connor formulates this test on two key principles: (1) examination of the practice must come from "the viewpoint of a reasonable observer" who (2) "must embody a community ideal of social judgment" and be "deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape."[45] Justice O'Connor believes that part of the historical backdrop is the understanding that "although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes."[46] Justice O'Connor further states that "[o]ne such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins."[47]

Ceremonial Deism

Justice O'Connor examines four factors in deciding that the Pledge falls under the category of what Justice O'Connor calls "ceremonial deism," or ways that that the government can "acknowledge or refer to the divine without offending the Constitution."[48] These factors are (1) "history and ubiquity," (2) "Absence of worship or prayer," (3) "Absence of reference to a particular religion," and

[43] O'Connor's, J., concurrence at 1.
[44] *Id.* at 1-2 (quoting *Wallace v. Jaffree*, 472 U. S. 38, 70 (1985) (O'Connor, J., concurring)).
[45] *Id.* at 4.
[46] *Id.* at 3.
[47] *Id.*

(4) "Minimal religious content."[49] On the basis of these factors, if references fall under the ceremonial deism category, this will "prevent them from being constitutional violations at all."[50]

As to the first factor, if a "practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous," then it will qualify as having a "legitimate nonreligious purpose."[51] Because the Pledge has had "under God" in it for 50 years and has been used almost exclusively in a patriotic and non-religious context, it satisfies this element. Justice O'Connor also finds "telling" the fact that the Pledge has only been challenged in court three times in its history. [52] The second factor is pretty straightforward, simply requiring that the action or reference not "place[] the speaker or listener in a penitent state of mind," and Justice O'Connor decides that the reasonable observer would not get the impression that the Pledge has this effect.[53] The third factor is also fairly easy, simply requiring that "no religious acknowledgement [can] claim to be an instance of ceremonial deism if it explicitly favor[s] one particular religious belief system over another."[54] Justice O'Connor also finds that the Pledge meets this test.[55] Finally, the minimal content factor is met because of the brevity of the reference to God and because any offended person can choose to "opt-out."[56]

On the basis of these factors Justice O'Connor concludes that "[t]he reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over non- religion."[57]

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[48] *Id*. at 5.
[49] *Id*. at 5, 8, 10, and 11.
[50] *Id*. at 5.
[51] *Id*.
[52] *Id*. at 7.
[53] *Id*. at 8.
[54] *Id*. at 10.
[55] *Id*.
[56] *Id*. at 11.
[57] *Id*. at 4-5.

Coercion Test

Justice O'Connor also concludes that the Pledge would be upheld under the "coercion" test. "[C]oercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character."[58] In Justice O'Connor's view, "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory."[59]

Justice O'Connor aptly summarizes the case:

> Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it.[60]

[58] *Id*. at 12.
[59] *Id*.
[60] *Id*. at 13.

CONCURRING OPINION OF JUSTICE THOMAS

Standing

Justice Thomas agrees with the Chief Justice that Mr. Newdow has standing.[61]

Constitutionality of the Pledge

Justice Thomas asserts that if the Court follows the reasoning of *Lee v. Weisman,*[62] then the Pledge policy of the Elk Grove Unified School District must be found unconstitutional. However, Justice Thomas said *Lee* was wrongly decided because the "coercion" standard was wrong.[63] Thus he would find the Pledge policy constitutional.

Prior to the Court's decision in *Lee*, the definition of "coercion" was based on "legal compulsion" accompanied by "force of law and threat of penalty.[64]" *Lee* adopted an expanded definition of "coercion" which Justice Thomas maintains cannot be defended.[65] That definition now includes "peer pressure" which "has no basis in law or reason."[66] In *Lee*, the Court found that peer pressure to attend graduation where a benediction would be given could have "a reasonable perception that [the student] is being forced by the State to pray. . . ."[67]

Justice Thomas cited the Supreme Court decision *West Virginia Bd. of Ed. v. Barnette,*[68] where the Court held that requiring students to say the Pledge was a "compulsion to declare a belief."[69] Since *Barnette,* the Pledge has had the words "under God" added. Reciting the Pledge is therefore an affirmation in the belief that God exists. Using the *Lee* analysis, "sitting in respectful silence could be mistaken for assent to or participation . . . result[ing] in unwilling children actually pledging their allegiance."[70]

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[61] Thomas, J., concurrence at 2.
[62] 505 U.S. 577 (1992).
[63] Thomas, J., concurrence at 5.
[64] 505 U.S. at 640 (Scalia, J., dissenting).
[65] Thomas, J., concurrence at 1.
[66] *Id*. at 5.
[67] 505 U.S. at 593
[68] 319 U.S. 624 (1943).
[69] *Id.* at 631.
[70] 542 U.S. at 4.

Establishment Clause reasoning

Justice Thomas noted that since a state action is at issue, "the question becomes whether the Pledge policy implicates a religious liberty protected by the Fourteenth Amendment."[71] He asserts that the Establishment Clause is a federalism provision, which for that reason resists incorporation.[72] The Clause was intended to prevent Congress from interfering with state establishments and it does not protect any individual right.[73] It is the Free Exercise Clause that protects individuals from congressional interference with the right to exercise their religion.[74] Justice Thomas does agree that the Establishment Clause "bar[s] governmental preferences for particular religious faiths."[75] But, "[l]egal compulsion is an inherent component of 'preferences' in this context."[76]

Conclusion

The State's Pledge policy does not expose anyone to the legal coercion associated with an established religion and does not violate the Constitution.[77]

[71] *Id.*
[72] *Id.* at 1.
[73] *Id.* at 6.
[74] *Id.* at 7.
[75] *Id.* at 10, (quoting, *Rosenberger v. Rector*, 515 U.S. 819, 856 (1995) (Thomas, J., concurring)).
[76] *Id.*
[77] *Id.* at 11.