



MEMORANDUM

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Pledge of Allegiance

The First Amendment to the United States Constitution does not forbid voluntary recitation of the Pledge of Allegiance, regardless of whether it is by a student, government employee, or private citizen. While no person may be forced to recite the Pledge or other statements against his or her will, freely allowing such recitations to occur voluntarily does not raise any First Amendment concerns.

The Supreme Court has unequivocally recognized that “the 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.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 6 (2004). Congress first approved the Pledge in 1942, and in 1954 it amended the Pledge to its current version by adding the words “under God.”

As the Ninth Circuit Court of Appeals recently noted, in upholding the constitutionality of the Pledge:

The Pledge of Allegiance serves to unite our vast nation through the proud recitation of some of the ideals upon which our Republic was founded and for which we continue to strive: *one Nation under God*—the Founding Fathers’ belief that the people of this nation are endowed by their Creator with certain inalienable rights; *indivisible*—although we have individual states, they are united in one Republic; *with liberty*—the government cannot take away the people’s inalienable rights; and *justice for all*—everyone in America is entitled to “equal justice under the law” (as is inscribed above the main entrance to our Supreme Court).

Newdow v. Rio Linda Union Sch. Dist., 597 F.3d 1007, 1012 (9th Cir. 2010). As a first principle, the First Amendment does not impose an amorphous “separation of church and state” standard but rather prohibits the establishment of an official church and similar coercive action. The

Supreme Court has repeatedly held that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.” *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *see also Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). Moreover, the Court has cautioned against “preferring those who believe in no religion over those who do believe.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

While the Supreme Court has not directly ruled on the constitutionality of the Pledge of Allegiance, it has recognized that public expressions of patriotism, including the phrase “under God” in the Pledge of Allegiance, pose no Establishment Clause concerns. *Allegheny County v. ACLU*, 492 U.S. 573, 602–03 (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.”). In *Lynch v. Donnelly*, the Court recognized the “unbroken history of official acknowledgment by all three branches of government of the role of religion in American life.” 465 U.S. at 674. The Court listed many examples of our “government’s acknowledgment of our religious heritage,” and included among those examples Congress’ addition of the words “under God” in the Pledge of Allegiance in 1954. *Id.* at 676–77.

While the most recent Supreme Court case to address the Pledge, *Elk Grove Unified School District v. Newdow*, was decided on standing grounds (finding that the individual who challenged the Pledge did not have standing to sue), three Justices wrote at length to expressly acknowledge the constitutionality of public Pledge recitation. 542 U.S. 1 (2004).

Chief Justice Rehnquist wrote that “‘under God’ in the Pledge seems, as a historical matter, to sum up the attitude of the Nation’s leaders, and to manifest itself in many of our public observances. Examples of patriotic invocations of God and official acknowledgments of religion’s role in our Nation’s history abound.” *Id.* at 26 (Rehnquist, C.J., concurring). Justice O’Connor has repeatedly supported the constitutionality of the Pledge because it “commemorate[s] the role of religion in our history” and “some references to religion in public life and government are the inevitable consequence of our Nation’s origins.” *Id.* at 36 (O’Connor, J., concurring); *see also Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O’Connor, J., concurring).

In addition to the Supreme Court’s pronouncements, several federal appellate courts have held that teacher-led recitation of the Pledge of Allegiance in public school is constitutional. *See Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010); *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005); *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). The Ninth Circuit Court of Appeals, in a case in which the ACLJ submitted a key *amicus curia* brief, ruled directly that “the Pledge is constitutional.” *Rio Linda*, 597 F.3d at 1012.

In sum, while no one may be required to recite the Pledge if he or she objects to doing so, students have a right to recite the Pledge in public settings, including teacher-led recitations in public schools. Such displays of patriotism do not raise First Amendment concerns. The Pledge is a constitutionally permissible reference to this nation’s rich religious heritage. The First

Amendment affords atheists complete freedom to disbelieve; it does not compel the government to censor the phrase “under God” from the Pledge of Allegiance in order to suit atheistic tastes. The ACLJ will continue to vigorously defend challenges to the Pledge of Allegiance and our nation’s religious heritage.