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MEMORANDUM

DATE: September 15, 2005

Summary

On September 14, 2005, in *Newdow v. The Congress of the United States*,[1] U.S. District Judge Lawrence K. Karlton of the Eastern District of California held that a California public school district policy allowing the recitation of the Pledge of Allegiance in classrooms violated the Establishment Clause. The Court denied the defendants' motion to dismiss with respect to the school districts' policies but granted the motion with respect to several other causes of action. The Court also held that Michael Newdow lacked standing to bring any claim.

A. Facts and Procedural History

The only named Plaintiff in the case was Michael Newdow; "[a]s is known by most everyone, [Newdow] is an atheist whose daughter attends school in the Elk Grove Unified School District."[2] The other plaintiffs were two anonymous sets of parents and their minor children, referred to by the Court as the Doe[3] and Roe[4] families.[5] The plaintiffs challenged the

[1] *Newdow v. The Congress of the United States*, No. S-05-17, unpublished version of order at 30 (E.D. Cal. Sept. 14, 2005), *available at* http://legalaffairs.org/howappealing/Newdow2EDCA.pdf.
[2] *Id.* at 1.
[3] The Doe parents were citizens of Sacramento County, property owners and taxpayers in the Elk Grove school district, and parents of a seventh grade student enrolled at an Elk Grove school. *Id.* at 9. They claimed that they are atheists that have stopped attending school board meetings because the Pledge is recited there, and that their daughter "has suffered harassment by other students due to [her] refusal to participate in the Pledge." *Id.* at 10.
[4] Roe is a citizen of Sacramento County, property owner and taxpayer in the Elverta Joint school district, and father with "full joint legal custody" of kindergarten and third grade students enrolled at California public schools. *Id.* at 10-11. He is an atheist who objects to the recitation of the Pledge in his children's classrooms. *Id.* at 11.
[5] *Id.* at 1-2, n.1. The defendants were the United States, the United States Congress, Peter LeFebre (a congressional officer), the State of California, the Governor of California, California's Education Secretary, and four California public school districts and their superintendents. *Id.* at 2.

constitutionality of the federal statute that contains the Pledge of Allegiance[6] as well as the policies of various California public school districts which allow students to recite the Pledge.[7] Newdow complained that "his child is forced to experience teacher-led recitation of the Pledge of Allegiance every morning, even though he has requested the principal of his child's school . . . that the practice be discontinued."[8] The plaintiffs alleged that the government's use of the Pledge makes them feel like political outsiders and interferes with their ability to "fit in" among other concerned parents, which in turn hampers their ability to effectively advocate in the community on their children's behalf; they also claimed that the Pledge somehow contributes to their inability to be elected to public office as atheists.[9]

Before going to the merits of the case, the District Court discussed in detail the litigation of Newdow's prior challenge to the Pledge which began in March 2000.[10] In 2002, the U.S. Court of Appeals for the Ninth Circuit held that Newdow had standing as a parent to challenge his daughter's public school's use of the Pledge and that the school's policy violated the Establishment Clause.[11] A California state court later enjoined Newdow from including his daughter in the suit since her mother had sole legal custody of her, but the Ninth Circuit held that this did not deprive Newdow of standing to sue on his own behalf.[12] In June 2004, the Supreme Court held that Newdow lacked standing to bring suit in federal court.[13]

B. Standing Analysis

[6] 4 U.S.C. § 4.
[7] *Newdow*, No. S-05-17, unpublished version of order at 2.
[8] *Id.* at 9.
[9] *Id.* at 11-12, 19, n.5.
[10] *Id.* at 5.
[11] *Id.* at 6.
[12] *Id.*
[13] *Id.* at 8.

The defendants did not challenge the standing of the Doe parents, and the Court stated that they had standing because there were no custody issues and their child was enrolled at a public school.[14] The defendants challenged the standing of both Newdow and Roe.

1. Newdow's Lack of Standing

Newdow alleged standing as next friend of his daughter as well as on his own behalf as a citizen and taxpayer, but the District Court held that he lacked any form of standing to sue the state and school defendants.[15] After noting that the Supreme Court had held that "Newdow lacked prudential standing to bring suit in federal court"[16] as next friend of his daughter, the District Court held that he still lacked such standing since custody had not changed.[17] The Court also rejected Newdow's claim to have standing because he has attended school board meetings where the Pledge was recited, noting that the Supreme Court had rejected that claim.[18]

As to Newdow's claim to have taxpayer standing, the Court noted that a key fact had changed since the previous litigation. In the prior case, Newdow lacked taxpayer standing because he paid no taxes to the school district and his payment of child support to the mother of his daughter did not give him standing through her payment of taxes.[19] In the present case, Newdow alleged that he owned land in Sacramento and Elk Grove and paid property taxes there.[20] The Court rejected taxpayer standing on this basis, relying on *Doremus v. Board of Educ. of Borough of Hawthorne*[21] in which the Supreme Court held that a taxpayer lacked standing to challenge a state law providing for a daily Bible reading in public schools.[22] To have

[14] *Id.* at 14.
[15] *Id.* at 19. The Court later held that all claims against the federal defendants were moot. *Id.* at 26.
[16] *Id.* at 8.
[17] *Id.* at 15.
[18] *Id.* at 16.
[19] *Id.*
[20] *Id.*
[21] 342 U.S. 429 (1952).
[22] *Newdow*, No. S-05-17, unpublished version of order at 17, n.13.

taxpayer standing, the plaintiff must show that some measurable amount of money is expended to carry out the allegedly unconstitutional act.[23] The Court rejected Newdow's "ingenious" argument that saying "under God" adds 1.25 seconds to the Pledge recitation, which would equate to $5,000 worth of teacher time over the course of a year in the school district.[24]

2. Roe's Standing

Although Roe alleged that he had "full legal custody" of his children, the defendants challenged his standing because they believed he might not have the requisite "final decision-making authority regarding [their] educational upbringing," and it was clear that custody issues were still being resolved.[25] The Court concluded that Roe had sufficiently pled standing under the standards applicable to a motion to dismiss.[26]

C. The Pledge is Unconstitutional Because the Ninth Circuit's Prior *Newdow* Decision Controls this Case

In considering the merits of the Establishment Clause claims, the Court stated it was "bound by the Ninth Circuit's previous determination that the school district's policy with regard to the pledge is an unconstitutional violation of the children's right to be free from a coercive requirement to affirm God."[27] In the Ninth Circuit's amended opinion, it declined to rule on the federal statute at issue but held that the school district's policy was unconstitutional.[28]

The District Court addressed the question of "what effect the [Supreme Court's] reversal on [standing] grounds . . . has upon this court's freedom to consider anew plaintiffs' [Establishment Clause] claims and defendants' oppositions." The Court noted that there are distinctions between a case that was vacated and a case that was "reversed on other grounds,"

[23] *Id.* at 18.
[24] *Id.* at 18-19. The Court's conclusion was based in part on the fact that teachers are not paid on an hourly basis.
[25] *Id.* at 19.
[26] *Id.* at 20.
[27] *Id.* at 20-21.
[28] *Id.* at 21.

and that there is a difference between a plaintiff lacking "prudential" standing and one lacking Article III standing.[29] In 2004, the Supreme Court held that Newdow lacked prudential standing but had Article III standing to bring his claims.[30] Thus, the District Court concluded:

> because a court may reach the merits despite a lack of prudential standing, it follows that where an opinion is reversed on prudential standing grounds, the remaining portion of the circuit court's decision binds the district courts below. . . . [T]his court remains bound by the Ninth Circuit's holding . . . .[31]

The Court briefly reviewed the Establishment Clause analysis of the Ninth Circuit and stated "[b]ecause this court is bound by the Ninth Circuit's holding . . . it follows that the school districts' policies violate the Establishment Clause."[32]

D. Mootness of the Claims Against the Federal Defendants

After considering the validity of the school district policies, the Court held that "the plaintiffs' federal claims are rendered moot."[33] The Court stated that it would issue an injunction against the school district policy upon request, and that the plaintiffs would no longer suffer an injury-in-fact from the existence or application of the federal statute once this occurred.[34]

E. The Pledge is Constitutional When Recited at School Board Meetings

The adult plaintiffs also claimed that they had cognizable claims as individuals because they attended school board meetings where the Pledge was recited, and the Pledge somehow unconstitutionally impeded their ability to influence PTA and school board decisions because they were atheists.[35] The Court rejected these claims, relying on the distinction between adults and children illustrated by the cases of *Marsh v. Chambers* and *Lee v. Weisman*.[36] The Court felt

[29] *Id.* at 22.
[30] *Id.* at 23.
[31] *Id.* at 24.
[32] *Id.* at 26.
[33] *Id.*
[34] *Id.* at 26-27.
[35] *Id.* at 27-28.
[36] *Id.* at 28-29.

compelled to criticize the Supreme Court's "cramped view" in these cases, stating that the distinction drawn in *Lee* "ignores a primary function of the First Amendment; namely, to act as a bulwark barring the introduction of sectarian division into the body politic, and thus advancing the ideal of national unity."[37] The Court concluded by criticizing the Supreme Court's recent Ten Commandments decisions as drawing an "utterly standardless" distinction and leaving the door open to the insertion of "under Jesus" in the Pledge.[38]

[37] *Id.* at 29, n.21.
[38] *Id.* at 30, n.22.