ACLJ
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MEMORANDUM

TO: **Jay Alan Sekulow**

FROM: **ACLJ Law Clerks**

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

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

On June 14, 2004 the Supreme Court of the United States overturned the ruling of the 9th Circuit Court of Appeals. All eight Justices concluded the 9th Circuit Court of Appeal's holding was wrong. Five justices held Michael Newdow lacked standing. Three Justices concluded that Newdow had standing, but that the phrase "under God" in the Pledge of Allegiance does not violate the Establishment Clause.

The Majority Opinion: Justices Stevens (delivering the opinion of the Court), Justice Ginsberg, Justice Breyer, Justice Souter and Justice Kennedy overturned the 9th Circuit Court's ruling, finding Newdow had no standing to sue because he was neither the child's legal guardian, nor had any authority to make educational or legal decisions for her. In the majority opinion Justice Stevens quotes 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 constitutional and prudential limits to the powers of an *unelected, unrepresentative judiciary* in our kind of government."[1]

Chief Justice Rehnquist, Justice O'Connor and Justice Thomas concurred in judgment, but addressed the issue of the constitutionality of the Pledge under the Establishment Clause. They adopted the 9th Circuit Court's reasoning that Newdow had standing to sue, but ruled in our favor on the merits, finding the use of the words "under God" in the Pledge of Allegiance did not violate the Establishment Clause. Justice O'Connor stated in her concurrence that:

> 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.[2]

[1] *Elk Grove United Sch. Dist. v. Newdow*, 542 U.S. __ (2004) (Majority, Stevens opinion at 7) (quoting *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).

[2] *Id*. at 13.

Summary of Opinions

Justice Stevens's Opinion of the Court Held the Following:

1. In the majority opinion Justice Stevens quotes 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 constitutional and prudential limits to the powers of an *unelected, unrepresentative judiciary* in our kind of government."[3]

2. "As its history illustrates, 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."[4]

3. Newdow claimed "an unrestricted right to inculcate in his daughter – free from governmental interference – the atheistic beliefs he finds persuasive,"[5] the Court said that Newdow "lacks the right to litigate as [his daughter's] next friend [since] . . . the interests of this parent and this child are not parallel and, indeed, are potentially in conflict."[6]

4. 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."[7] Newdow does not have "a right to dictate to others what they may and may not say to his child respecting religion."[8]

5. "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 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."[9]

In his Concurrence Chief Justice Rehnquist ruled:

1. "We have, in the past, judicially self-imposed clear limits on the exercise of federal jurisdiction. . . . In contrast, here is the Court's new prudential standing principle: '[I]t 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

[3] *Id.* at 7 (quoting *Allen*, 468 U.S. at 750 (quoting *Vander Jagt*, 699 F.2d at 1178-79) (Bork, J., concurring)) (emphasis added).
[4] Majority, Stevens opinion at 2.
[5] *Id.* at 10-11.
[6] *Id.* at 12.
[7] *Id.* at 12-13.
[8] *Id.*
[9] *Id.* at 14.

adverse effect on the person who is the source of the plaintiff's claimed standing.' . . ."[10]

2. "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."[11]

3. "The phrase '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... All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character."[12]

4. "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."[13]

In her Concurrence Justice O'Connor ruled:

1. "Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a 'heckler's veto' sufficed to show that its message was one of endorsement."[14]

2. "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today."[15]

3. "For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The 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."[16]

4. "These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all."[17]

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[10] Rehnquist concurrence at 2.
[11] *Id.* at 8.
[12] *Id.* at 9, 13.
[13] *Id.* at 16.
[14] O'Connor concurrence at 1.
[15] *Id.* at 3-4.
[16] *Id.* at 4-5.
[17] *Id.* at 5.

5. "As a result, the Pledge and the context in which it is employed are familiar and nearly inseparable in the public mind."[18]

6. "Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to 'one Nation under God' in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost."[19]

7. Justice O'Connor stated in her concurrence that:

> 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.[20]

In his Concurrence Justice Thomas ruled:

1. Justice Thomas said, "the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause..."[21]

2. *Lee* expanded the definition of coercion to include "peer pressure" which Justice Thomas says "has no basis in law or reason"[22] and no matter how unpleasant "peer pressure" may be, it is not coercion.[23]

3. Justice Thomas claims that "[a]dherence to *Lee*, would require us to strike down the Pledge policy."[24]

4. Since *Barnette*, the Pledge has had the words "under God" added. Therefore, "[i]t is difficult to see how this does not entail an affirmation that God exists."[25]

5. As to whether the Pledge policy pertains to an "establishment of religion," Justice Thomas said "[i]t is difficult to see how government practices that have nothing to do with creating or maintaining [a] coercive state establishment . . . implicate the sort of liberty interest of being free from coercive state establishments."

[18] *Id*. at 6.
[19] *Id*. at 9-10.
[20] *Id*. at 13.
[21] *Id*.
[22] 542 U.S. at 5 (Thomas, J., dissenting).
[23] *Id*.
[24] 542 U.S. at 3 (Thomas, J., concurring).
[25] 542 U.S. at 4 (Thomas, J., concurring).