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## The Constitutionality of Including the Phrase “Under God” in the Pledge of Allegiance

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### Summary

On June 26, 2002, a three-judge panel of the Ninth Circuit had held both the 1954 federal statute adding the words “under God” to the Pledge of Allegiance and a California school district policy requiring teachers to lead willing school children in reciting the Pledge each school day to violate the Establishment Clause of the First Amendment. The modification issued on February 28, 2003, eliminated the holding regarding the federal statute but retained the ruling holding that the California statute coerces children into participating in a religious exercise. The court also denied requests for a rehearing and a rehearing *en banc* of the original decision. The Ninth Circuit stayed the implementation of its revised ruling pending Supreme Court review. On October 14, 2003, the Supreme Court granted *certiorari* in the appeal regarding the California statute, and on June 14, 2004, the Court reversed the Ninth Circuit’s decision finding that Newdow lacked standing to challenge the school district’s policy in federal court. This report summarizes the facts of the case, the opinions that have been rendered, congressional action, and the appeal to the Supreme Court. It will be updated as circumstances warrant.

**Background.** On June 22, 1942, Congress codified the Pledge of Allegiance with no reference to “God.”<sup>1</sup> On June 14, 1954, Congress amended the Pledge by adding the words “under God.”<sup>2</sup> Subsequently, California enacted a statute requiring “appropriate patriotic exercises” to be conducted in every public elementary school each day and providing that recitation of the Pledge would satisfy this requirement.<sup>3</sup> After the Elk Grove Unified School District implemented a policy requiring its elementary school classes to recite the Pledge every morning, an atheist father of a second-grade student objected. Although his daughter was not required to participate, he contended that she

<sup>1</sup> See P.L. 623, Ch. 435, § 7, 56 Stat. 380 (1942).

<sup>2</sup> See P.L. 396, Ch. 297, 68 Stat. 249 (1954). The Pledge is currently codified as “I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.” 4 U.S.C. § 4.

<sup>3</sup> See Cal. Educ. Code § 52720 (1989).

was compelled to listen to her teacher and classmates recite the “under God” phrase each morning and that both the federal and state statutes violated the Establishment Clause of the First Amendment.<sup>4</sup>

**The Trial Court Decision.** On July 21, 2000, the federal district court for the eastern district of California held the inclusion of the phrase “under God” in the Pledge not to violate the establishment clause on the grounds the phrase “does not convey endorsement of particular religious beliefs.”<sup>5</sup> The court noted that the Supreme Court has not ruled on the issue but found “persuasive” a decision by the U.S. Court of Appeals for the Seventh Circuit in *Sherman v. Community Consolidated School District*<sup>6</sup> upholding a state statute mandating the daily recitation of the Pledge in the public schools. The court stated that under both the tripartite test set forth in *Lemon v. Kurtzman*<sup>7</sup> and the “endorsement” test,<sup>8</sup> “the Pledge does not violate the Establishment Clause of the First Amendment.”

**The Ninth Circuit’s Initial Decision (*Newdow I*).** On June 26, 2002, a panel of the U.S. Court of Appeals for the Ninth Circuit reversed, 2-1.<sup>9</sup> The majority (Judges Goodwin and Reinhardt) held both the 1954 federal statute and the school district policy to violate not only the *Lemon* and endorsement tests but also a third criterion sometimes used in establishment clause cases — coercion.<sup>10</sup> “[T]he statement that the United States is a nation ‘under God,’” the appellate court ruled, “is an endorsement of religion.” “The text of the official Pledge ...,” it stated,

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<sup>4</sup> The establishment clause provides that “Congress shall make no law respecting an establishment of religion ....” It has been held to apply to the states as well as part of the liberty protected from undue state interference by the due process clause of the Fourteenth Amendment. *Everson v. Board of Education*, 330 U.S. 1 (1947).

<sup>5</sup> *Newdow v. Congress of the United States*, 2000 U.S. Dist. LEXIS 22366 (E.D. Cal. 2000).

<sup>6</sup> 980 F.2d 437 (7<sup>th</sup> Cir. 1992), *cert. den.*, 508 U.S. 950 (1993). The Seventh Circuit noted that under the Supreme Court’s decision in *West Virginia Board of Education v. Barnette*, 319 U.S. 642 (1943), student participation in recitation of the Pledge must be voluntary.

<sup>7</sup> 403 U.S. 672 (1971). *Lemon* set forth a tripartite test for evaluating the constitutionality of government action under the establishment clause, requiring that government action serve a secular purpose, not have a primary effect of advancing religion, and not precipitate excessive government entanglement with religion.

<sup>8</sup> The endorsement test, first articulated by Justice O’Connor, reformulates the first two prongs of the *Lemon* test and asks whether “government’s actual purpose is to endorse or disapprove of religion” and whether “irrespective of purpose, the practice under review in fact conveys a message of endorsement or disapproval.” *See Lynch v. Donnelly*, 465 U.S. 668, 687-88 (1984) (O’Connor, J., concurring).

<sup>9</sup> *Newdow v. U.S. Congress*, 292 F.3d 597 (9<sup>th</sup> Cir. 2002).

<sup>10</sup> In *Lee v. Weisman*, 505 U.S. 577, 587 (1992), the Court stated that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which establishes a state religion or religious faith, or tends to do so.” The Court decided *Weisman* on the basis of that test and subsequently used it in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

impermissibly takes a position with respect to the purely religious question of the existence and identity of God. A profession that we are a nation “under God” is identical, for Establishment Clause purposes,” to a profession that we are a nation “under Jesus,” a nation “under Vishnu,” a nation “under Zeus,” or a nation “under no god,” because none of these professions can be neutral with respect to religion.<sup>11</sup>

Similarly, it held, the school district’s practice of teacher-led recitation “convey[s] a message of state endorsement of a religious belief” because it “aims to inculcate in students a respect for the ideals set forth in the Pledge.”<sup>12</sup>

The act and the policy also violate the coercion test, the majority stated. Both, it stated, “place students in the untenable position of choosing between participating in an exercise with religious content or protesting”; and that, it held, is constitutionally impermissible. The coercive effect was exacerbated, it said, “given the age and impressionability of [elementary] schoolchildren and their understanding that they are required to adhere to the norms set by their school, their teacher, and their fellow students.”<sup>13</sup>

Finally, the court found the federal statute to violate the secular purpose criterion and the school policy to violate the primary effect criterion of the *Lemon* test. The legislative history of the federal statute, the majority asserted, “reveals that the Act’s sole purpose was to advance religion, in order to differentiate the United States from nations under communist rule.” The act was intended, the court stated, “to take a position on the question of theism, namely, to support the existence and moral authority of God, while ‘denying ... atheistic and materialistic concepts.’” Such a religious purpose, the court concluded, runs counter to the Establishment Clause.<sup>14</sup> The school policy regarding recitation of the pledge, in contrast, the court found to have been adopted “for the secular purpose of fostering patriotism.” But it failed the *Lemon* test’s prohibition on governmental advancement of religion, the court stated, because it was “highly likely to convey an impermissible message of endorsement to some and disapproval to others of their beliefs regarding the existence of a monotheistic God.”<sup>15</sup>

Judge Fernandez, in dissent, contended that “the danger that ‘under God’ in our Pledge of Allegiance will tend to bring about a theocracy or suppress somebody’s beliefs is so minuscule as to be de minimis.” Religious affirmations such as “under God” or “In God We Trust,” he said, “have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise of religion ... [and] have not caused any real harm of that sort over the years since 1791 ....” The religion clauses of the First Amendment, he asserted, “are, in effect, an early kind of equal protection provision and assure that government will neither discriminate for nor discriminate against a religion or religions.” Thus, while “some people may not feel good about hearing the phrases recited in their presence,” he stated, “others might not feel good if they are omitted.” The

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<sup>11</sup> *Newdow v. U.S. Congress*, *supra* n. 9, at 607.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 608.

<sup>14</sup> *Id.* at 609-610.

<sup>15</sup> *Id.* at 610.

Constitution, he said, must strive for balance. Although noting that the Supreme Court has not ruled on the issue, Judge Fernandez stated that a number of Justices have spoken approvingly of such expressions in *dicta*; and the lower courts ought to rule accordingly.<sup>16</sup> On June 27, 2002, the Ninth Circuit stayed the implementation of its ruling pending disposition of petitions for rehearing and rehearing en banc.<sup>17</sup>

**Congressional Reaction.** The Ninth Circuit’s decision precipitated a political firestorm and led to several legislative actions by Congress. First, on June 26, 2002 — the same day the decision came down — the Senate, by a vote of 99-0, adopted a resolution “strongly disapprov[ing]” of the Ninth Circuit’s decision and authorizing the Senate Legal Counsel to intervene and defend the constitutionality of the 1954 Act.<sup>18</sup> On June 27, 2002, the House, by a vote of 416-3, adopted a resolution affirming that “the Pledge of Allegiance and similar expressions are not unconstitutional expressions of religious belief” and calling on the Ninth Circuit “to rehear this ruling en banc in order to reverse this constitutionally infirm and historically incorrect ruling.”<sup>19</sup> Also on June 27, the Senate adopted a bill (S. 2690) by a margin of 99-0 which elaborated its critique of the Ninth Circuit’s ruling and also reenacted into law both the Pledge of Allegiance (including the phrase “under God”) and the provision designating “In God We Trust” as the national motto.<sup>20</sup> The measure was subsequently reported favorably by the House Judiciary Committee,<sup>21</sup> adopted by the House on a vote of 401-5,<sup>22</sup> and signed into law by President Bush.<sup>23</sup>

**Rejection of Petitions for Rehearing.** On February 28, 2003, the Ninth Circuit rejected the school district’s petitions for rehearing and rehearing *en banc*.<sup>24</sup> On the latter

<sup>16</sup> *Id.* at 611-15 (Fernandez, J., dissenting).

<sup>17</sup> *Newdow v. U.S. Congress*, 2002 U.S. App. LEXIS 12826 (9<sup>th</sup> Cir. 2002).

<sup>18</sup> 148 CONG. REC. S6105 (daily ed. June 26, 2002) (adopting S. Res. 292).

<sup>19</sup> *Id.* at H4135 (daily ed. June 27, 2002) (adopting H.Res. 459).

<sup>20</sup> *Id.* at S6226.

<sup>21</sup> *See* H.Rept. 107-659, 107<sup>th</sup> Cong., 2d Sess. (Sept. 17, 2002).

<sup>22</sup> 148 CONG. REC. H7186 (daily ed. Oct. 8, 2002).

<sup>23</sup> P.L. 107-293 (Nov. 13, 2002).

<sup>24</sup> *Newdow v. U.S. Congress*, 321 F.3d 772 (9<sup>th</sup> Cir. 2003). On December 4, 2002, the court issued two rulings on procedural issues. First, the three-judge panel unanimously rejected a request that the Senate be allowed to intervene as a party to defend the constitutionality of the 1954 statute, stating that the Senate lacked constitutional standing to do so because it had not suffered a “concrete and particularized harm ... beyond frustration of a general desire to see the law enforced as written ...” *See Newdow v. U.S. Congress*, 313 F.3d 495 (9<sup>th</sup> Cir. 2002) (order denying intervention by United States Senate). Second, the panel unanimously rejected the mother’s petition for leave to intervene in order to challenge the father’s standing to bring the suit on his daughter’s behalf. The petition alleged that the mother had sole legal custody of the daughter and that the father, therefore, had no basis to file suit on her behalf with respect to the Pledge. But the court found that the father retained rights regarding the education and general welfare of his daughter under the custody order which were sufficient to allow him to file suit on her behalf, notwithstanding the mother’s objections. *See Newdow v. U.S. Congress*, 313 F.3d

petition, ten of the court's twenty-four judges voted to rehear the decision, but that fell three short of the necessary majority. However, these ten joined in two separate dissents setting forth their arguments in support of rehearing. Judge O'Scannlain, joined by five other judges, termed the panel's decision in *Newdow I* "an exercise in judicial legerdemain" and said it was "wrong, very wrong — wrong because reciting the Pledge of Allegiance is simply not 'a religious act' as the two-judge majority asserts, wrong as a matter of Supreme Court precedent properly understood, wrong because it set up a direct conflict with the law of another circuit, and wrong as a matter of common sense." "Public and political reaction ... have made clear," he asserted, that recitation of the Pledge is not a religious act. It is essentially a patriotic act, he stated; and inclusion of a religious reference "does not change the nature of the act itself." For that reason, he said, it is different from the formal religious exercises that the Supreme Court has struck down as unconstitutional. In addition, he claimed, the panel's decision "contradicts our 200-year history and tradition of patriotic references to God" and belies as well numerous statements by Supreme Court Justices that the Pledge is constitutional. Moreover, he stated, the panel's "expansive application of the coercion test is ill-suited to a society as diverse as ours, since almost every cultural practice is bound to offend someone's sensibilities." Although admitting that the panel's reasoning "does have some plausible basis in the case law of the Supreme Court," he charged that its decision "adopts a stilted indifference to our past and present realities as a predominantly religious people." Indeed, he asserted, it "confers a favored status on atheism in our public life."

**Revision of the Original Decision (*Newdow II*).** Notwithstanding the rejection of the petitions for rehearing, the three-judge panel on February 28, 2003, revised its original decision.<sup>25</sup> The revision deleted the part which had held the 1954 statute adding "under God" to the Pledge to be unconstitutional and retained only the part holding the school district policy mandating daily teacher-led recitation of the Pledge to violate the establishment clause. The revision also based that holding exclusively on the coercion test and eliminated the earlier decision's reliance on the *Lemon* and endorsement tests. The revision also asserted that the ruling "is not inconsistent" with Supreme Court *dicta* on the matter and that recitation of the Pledge is different from reciting the Declaration of Independence or singing the National Anthem, both of which contain religious references. The Pledge, the revision contended, "is not merely a reflection of the author's profession of faith [but] by design, an affirmation of the person reciting it." The revision also argued that the contrary ruling by the Seventh Circuit in *Sherman v. Community Consolidated School District 21*, *supra*, is flawed because it applied neither the *Lemon* test nor the coercion test. The revision concluded that "the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause." Judge Fernandez refiled his original dissent. On March 4, 2003, the Ninth Circuit stayed the effect of its revised decision pending appeal of the case to the U.S. Supreme Court.

**Further Congressional Reaction.** On March 4, 2003, the Senate, by a vote of 94-6, adopted S. Res. 71 "strongly disapprov[ing]" the revised decision and authorizing the Senate Legal Counsel to seek to intervene in the case or, if rebuffed, to file an *amicus*

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<sup>24</sup> (...continued)  
500 (9<sup>th</sup> Cir. 2002) (order denying mother's petition to intervene).

<sup>25</sup> *Newdow v. U.S. Congress*, 321 F.3d 772 (9<sup>th</sup> Cir. 2003).

*curiae* brief defending the constitutionality of the Pledge.<sup>26</sup> The House, in turn, on March 20, 2003, adopted H.Res. 132, 400-7, which critiqued the revised decision, stated that the recitation of the Pledge is a “patriotic” act rather than a religious one, and urged the Supreme Court “to correct this constitutionally infirm and historically incorrect holding.”<sup>27</sup> In addition, the House on July 22, 2003, adopted an amendment by Representative Hostettler (R.-IN) to the fiscal 2004 appropriations bill for the Departments of Justice, Commerce, and State (H.R. 2799) which bars use of any of the funds appropriated by the bill to “enforce the judgment” in *Newdow*. The vote was 307-119.<sup>28</sup>

**Appeal to the Supreme Court.** On April 30, 2003, both the school district and the United States filed petitions for *certiorari* in the Supreme Court.<sup>29</sup> On October 14, 2003, the Court granted *certiorari* in the school district’s appeal. The questions presented in *Elk Grove Unified School District v. Newdow* are as follows: 1) whether *Newdow* has standing to bring the constitutional challenge; and 2) whether a public school policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words “under God,” violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.<sup>30</sup>

**Supreme Court’s Decision.** On June 14, 2004, the Supreme Court issued an opinion reversing the Ninth Circuit’s revised decision.<sup>31</sup> The Court did not reverse based on the merits of the case, rather a majority of the justices found that *Newdow* lacked standing to challenge the school district’s policy in federal court. The Court found that because *Newdow* lacked the ability to sue as his daughter’s next friend under state law, his ability to claim standing in this case based upon his parental status was questionable. The Court determined that it was “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.”<sup>32</sup> Three justices concurred in the judgment reversing the Ninth Circuit’s decision, but did so based upon findings that the phrase “under God” did not violate the Establishment Clause of the First Amendment.

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<sup>26</sup> 149 CONG. REC. S3076 (daily ed. March 4, 2003).

<sup>27</sup> *Id.* at H2137 (daily ed. March 20, 2003). The measure had previously been reported by the House Judiciary Committee. See H.Rept. 108-41, 108<sup>th</sup> Cong., 1<sup>st</sup> Sess. (March 18, 2003).

<sup>28</sup> 149 CONG. REC. H7277-78 and H7298 (daily ed. July 22, 2003).

<sup>29</sup> *Newdow v. U.S. Congress*, 321 F.3d 772 (9<sup>th</sup> Cir. 2003), *pet. for cert. filed sub nom.* United States v. *Newdow*, 71 U.S.L.W. 3708 (April 30, 2003 (No. 02-1574) and *Id.*, *pet. for cert. filed sub nom.* Elk Grove Unified School District v. *Newdow*, 71 U.S.L.W. 3724 (April 30, 2003) (No. 02-1624).

<sup>30</sup> 123 S. Ct. 384 (2003). The Court denied *certiorari* in the other two appeals by the United States and *Newdow*. See 124 S. Ct. 383, 124 S. Ct. 386 (2003).

<sup>31</sup> *Elk Grove Unified School District v. Newdow*, 2004 U.S. LEXIS 4178 (2004).

<sup>32</sup> *Id.* at 26.