

***ELK GROVE UNIFIED SCHOOL
DISTRICT V. NEWDOW***

124 S. CT. 2301 (2004)

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INTRODUCTION

Every morning millions of children in public school begin their day by reciting the Pledge of Allegiance (“Pledge”).¹ Michael Newdow, a

1. See *Newdow v. United States Cong.*, 328 F.3d 466, 472 (9th Cir. 2002) (O’Scannlain, J., dissenting), *rev’d sub nom.*, *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004) (noting that the decision of the Ninth Circuit prohibiting recitation of the Pledge in public schools in nine states affected over 9.6

proclaimed atheist and father of a young girl attending public school in California, challenged the constitutionality of having public school teachers lead students in the recitation of the Pledge.² After prevailing in the Ninth Circuit, the Supreme Court dismissed Newdow's case on prudential standing grounds and never reached the merits of the constitutional challenge.³

Newdow was not the first to challenge the daily recitation of the Pledge in public school.⁴ In 1992, the Seventh Circuit upheld an Illinois law mandating recitation of the Pledge in public school, holding that it is permissible for a law to require public school teachers to lead the Pledge every day, so long as students have the option not to participate.⁵ The Ninth Circuit, however, concluded in 2003 that a public school policy requiring teachers to lead students in the recitation of the Pledge was unconstitutional.⁶ In 2004, the Supreme Court dismissed the case for lack of prudential standing.⁷

I. FACTUAL BACKGROUND

A national youth magazine first introduced the Pledge in 1892 as part of the United States' 400th anniversary of Columbus's discovery of America.⁸ The first version of the Pledge was: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with liberty and Justice for all."⁹ In the 1920s, the National Flag Conferences amended the Pledge, changing "my Flag" to "the

million students).

2. See *Newdow v. United States Cong.*, No. CIV S-00-0495 MLS PAN PS, 2000 U.S. Dist. LEXIS 22367, at *1, 3 (E.D. Cal. May 25, 2000), *rev'd*, 328 F.3d 466 (9th Cir. 2002), *rev'd sub nom.*, *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004) (recommending dismissal of the case because the Pledge does not violate the Establishment Clause of the First Amendment).

3. *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004).

4. See, e.g., *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (holding unconstitutional a rule where all public schoolchildren who failed to salute the United States flag and recite the Pledge faced school suspension). The plaintiffs brought the constitutional challenge in *Barnette* before Congress added the words "under God" to the Pledge. *Id.* at 624.

5. See *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Township*, 980 F.2d 437, 439 (11th Cir. 1992) (interpreting the Illinois law mandating recitation of the Pledge to mean that teachers are required to lead "willing students" in its recitation every day); see also *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989) (indicating in dicta that the Pledge is constitutional); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 303-04 (1963) (Brennan, J., concurring) (noting the constitutionality of the Pledge in dicta).

6. See *Newdow*, 328 F.3d at 487.

7. *Newdow*, 124 S. Ct. at 2312.

8. *Id.* at 2305 (citing J. BAER, *THE PLEDGE OF ALLEGIANCE: A CENTENNIAL HISTORY, 1892-1992*, 3 (1992)).

9. *Id.*

flag of the United States of America.”¹⁰ The Pledge was codified in a 1942 Joint Resolution, which included a description of how people should stand while reciting it.¹¹ In 1954, the United States Congress enacted an amendment to add the words “under God” to the language of the Pledge (“1954 Act”).¹² This amended version, still current today, reads: “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.”¹³

The legislative history of the 1954 Act, which added the words “under God” to the Pledge, demonstrates Congress’s objective to have millions of school children, on a daily basis, “proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty.”¹⁴ The House Report accompanying the 1954 Act stated that, “[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.”¹⁵

California state law requires that public schools start each school day with “appropriate patriotic exercises” and that the recitation of the Pledge satisfies the requirement.¹⁶ To carry out this state law, the Elk Grove Unified School District (“EGUSD”), the district in which Newdow’s daughter attends public school, implemented a policy requiring all elementary school classes to recite the Pledge each day.¹⁷

Newdow brought suit in federal court on his own behalf, as well as that of his daughter’s by suing as her “next friend.”¹⁸ He claimed that the 1954 Act, the California state law requiring schools to begin the day with patriotic exercises, and EGUSD’s policy of leading students in the Pledge every morning violated his and his daughter’s First

10. *Id.*

11. *See id.* at 2306 (citations omitted) (describing that the Pledge is to “be rendered by standing with the right hand over the heart; extending the right hand, palm upward, toward the flag” and men should remove headdress).

12. 4 U.S.C. § 4 (1954).

13. *Id.*

14. *Newdow v. United States Cong.*, 292 F.3d 597, 609 (9th Cir. 2002), *superseded by* 328 F.3d 466 (9th Cir. 2003) (quoting 100 CONG. REC. 8618 (1954) (statement of Senator Ferguson)) (incorporating the signing statement of President Eisenhower), *rev’d sub nom.*, *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301 (2004).

15. *Newdow*, 124 S. Ct. at 2306 (quoting H.R. REP. NO. 1693, 83d Cong., 2d Sess., at 2 (1954)).

16. CAL. EDUC. CODE § 52720 (2004).

17. *Newdow*, 328 F.3d at 482-83.

18. *See Newdow*, 292 F.3d at 602 (noting that, because the parties did not advance arguments regarding the constitutionality of the California state law, the court would not separately address that issue).

Amendment rights under the Establishment Clause.¹⁹ He argued that the practice of reciting the Pledge interfered with his right as a parent to direct his daughter's religious education.²⁰ He also identified injury to his daughter, who must "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's [sic] is 'one nation under God.'"²¹ While *Newdow* brought several challenges against multiple parties,²² the Supreme Court was presented only with his personal claim challenging EGUSD's Pledge recitation policy.²³

II. LEGAL BACKGROUND

Standing and the Establishment Clause of the First Amendment were the two primary legal issues the parties litigated.

A. *Standing*

A plaintiff must satisfy two types of standing to sue in federal court: Article III standing and prudential standing.²⁴ Article III standing requires a plaintiff to present to a court a "case or controversy" that his or her desired judgment will remedy.²⁵ Prudential standing, on the other hand, is a principle by which federal courts self-impose a limit to exercise jurisdiction in order to avoid deciding "generalized grievances [which are] more appropriately addressed in the representative branches."²⁶ In other words, courts require plaintiffs to have prudential standing so that a party does not raise the legal rights of another person.²⁷

19. *Newdow*, 328 F.3d at 483.

20. *See id.* at 485.

21. *Id.* at 483 (citations omitted); *see also id.* (noting that *Newdow* does not claim that his daughter is forced to recite the Pledge).

22. *See id.* at 484 (dismissing *Newdow*'s claim against the President because he is not the appropriate plaintiff in a suit challenging the validity of a federal statute). The court determined it lacked jurisdiction over Congress because, pursuant to the Speech and Debate Clause of the Constitution, the court cannot direct Congress to amend or enact legislation, which is what *Newdow* sought. *Id.* It also dismissed for lack of Article III standing *Newdow*'s claim against the Sacramento City Unified School District, the school district that his daughter planned on attending in the future, because that school district could not have caused *Newdow* or his daughter an actual or imminent injury since his daughter was not a student there at the time of suit. *Id.* at 485.

23. *Newdow*, 124 S. Ct. at 2305.

24. *Id.* at 2308-09.

25. *Id.* at 2308 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62 (1992)).

26. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

27. *See id.* at 751 (explaining that to satisfy prudential standing, a plaintiff's "complaint [must] fall within the zone of interests protected by the law invoked").

B. The Establishment Clause

The Establishment Clause states that “Congress shall make no law respecting an establishment of religion.”²⁸ In recent years, the Supreme Court has used three tests when considering First Amendment attacks in the context of public education: the endorsement, coercion, and *Lemon* tests.²⁹

The endorsement test forbids the government from “conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.”³⁰ The coercion test measures whether the government has coerced anyone “to support or participate in religion or its exercise” or acted “in a way which establishes a state religion or religious faith, or tends to do so.”³¹ Finally, to pass the *Lemon* test, a statute must first, have a “secular legislative purpose; second, its principal or primary effect must be one that neither advances nor prohibits religion,”³² and third, “the statute must not foster an excessive government entanglement with religion.”³³

III. PROCEDURAL HISTORY

A. District Court

United States Magistrate Judge Peter Nowinski first heard Newdow’s claims and, in a terse opinion, concluded that the Pledge did not violate the Establishment Clause.³⁴ United States District Court Judge Edward Schwartz affirmed the magistrate’s recommendation and dismissed Newdow’s case.³⁵

B. Appellate Court

The Ninth Circuit published three opinions in *Newdow v. U.S. Congress*. The court’s initial opinion (“*Newdow I*”) provides a

28. U.S. CONST. amend. I.

29. *Newdow*, 292 F.3d at 605-11.

30. *County of Allegheny*, 492 U.S. at 593 (emphasis omitted) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O’Connor, J., concurring)); *see also id.* at 594 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O’Connor, J., concurring)) (noting that to refrain from endorsing religion means that the government may not make “adherence to a religion relevant” to an individual’s “standing in the political community”).

31. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch*, 465 U.S. at 678).

32. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Bd. of Ed. v. Allen*, 392 U.S. 236, 243 (1968)).

33. *Id.* at 613 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

34. *See Newdow*, 2000 U.S. Dist. LEXIS 22367, at *3 (finding that the Pledge satisfies both the *Lemon* and endorsement tests).

35. *See Newdow*, 328 F.3d at 483 (summarizing the procedural history of the case).

thorough Establishment Clause analysis,³⁶ however, it was later superceded by a less substantive amended decision (“*Newdow III*”).³⁷ In between these two cases, the Ninth Circuit issued its second opinion (“*Newdow II*”) in response to the motion for leave to intervene that the mother of Newdow’s daughter filed with the court.³⁸

1. *Newdow I*

The Ninth Circuit reversed the district court’s dismissal of Newdow’s claim and found that EGUSD’s policy and the 1954 Act of Congress violated the Establishment Clause.³⁹

a. *Standing*

While the Ninth Circuit did conduct a standing analysis, it only addressed Article III standing.⁴⁰ The court did not explore prudential standing, the basis on which the Supreme Court ultimately dismissed the suit.⁴¹ In its first encounter with Newdow’s challenge, the Ninth Circuit was not presented with any information regarding the custody status of Newdow’s daughter, and thus did not consider the effect that such status could have on the outcome of the case.

The court first found that Newdow had standing to challenge EGUSD’s policy of requiring teachers to begin the day with a recitation of the Pledge, stating it was “a practice that interferes with his right to direct the religious education of his daughter.”⁴² Furthermore, the Ninth Circuit concluded that any parent of a child attending public school, including Newdow, has standing to challenge the constitutionality of the 1954 Act.⁴³

In deciding that Newdow had standing to challenge the 1954 Act, the court relied in part on *Wallace v. Jaffree*, a case involving an

36. See *Newdow*, 292 F.3d at 605-11 (applying the endorsement, coercion and *Lemon* tests to Newdow’s Establishment Clause challenge).

37. See *Newdow*, 328 F.3d at 487 (finding a violation of the coercion test, and thus not applying the endorsement or *Lemon* tests).

38. See *Newdow v. United States Congress*, 313 F.3d 500, 501 (9th Cir. 2002) (holding that Newdow retained his Article III standing to challenge the Pledge even though the mother of Newdow’s daughter had legal custody of their daughter and opposed his suit).

39. *Newdow*, 292 F.3d at 612.

40. See *id.* at 602-06.

41. See *Newdow*, 124 S. Ct. at 2312.

42. *Newdow*, 292 F.3d at 602; see *id.* (quoting *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (en banc)) (“Parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right.”).

43. See *Newdow*, 292 F.3d at 604-05.

amendment to an Alabama statute.⁴⁴ The Alabama legislature amended a statute that initially permitted a one-minute period of silence for “meditation” in all public schools to instead authorize silence for “meditation or voluntary prayer.”⁴⁵ Just as the public schoolchildren’s parents in *Wallace* presumably had standing to challenge the Alabama statute,⁴⁶ Newdow likewise had standing to challenge the 1954 Act.⁴⁷ Citing the legislative history of the 1954 amendment, the court concluded that the Act constituted “a religious recitation policy” that interfered with Newdow’s right to direct his daughter’s religious education.⁴⁸

b. Establishment Clause

Having determined that Newdow had standing to challenge EGUSD’s Pledge policy and the 1954 Act, the Ninth Circuit proceeded to review and apply all three tests the court uses when considering Establishment Clause attacks in the context of public education: the endorsement, coercion and *Lemon* tests.⁴⁹ Even though failing any one of the tests invalidates the challenged law, the Ninth Circuit applied all three for “purposes of completeness.”⁵⁰

The Ninth Circuit found an Establishment Clause violation under the endorsement test, which forbids the government from endorsing or promoting religion or a particular religious belief.⁵¹ The Ninth Circuit concluded that asserting that the United States is a nation “under God” is “a profession of a religious belief, namely, a belief in monotheism.”⁵² The text of the Pledge contains the stance that God exists, thereby rejecting atheism as well as all non-Judeo-Christian belief systems.⁵³ When the school district mandates daily recitation of

44. 472 U.S. 38 (1985).

45. *Id.* at 40-42.

46. *See Newdow*, 292 F.3d at 604 (noting that the Supreme Court in *Wallace* did not make an explicit determination that the plaintiffs, parents of the public schoolchildren, had standing). The Ninth Circuit inferred that the *Wallace* Court decided the plaintiffs had standing because standing is a “jurisdictional element” that a federal court must determine exists, even if not raised by any party. *Id.*

47. *See id.* at 603 (interpreting the holding in *Wallace*—that “the mere enactment of a statute may constitute an Establishment Clause violation”—to have broadened standing in cases where a plaintiff is challenging a public school policy under the Establishment Clause).

48. *See id.* at 605 (concluding that Newdow had standing even though the 1954 Act did not create a “typical” injury in fact, which occurs when a statute compels or prohibits a specific activity).

49. *See id.* at 605-11.

50. *Id.* at 607 (stating that the court had the option to apply any or all of the tests).

51. *See County of Allegheny*, 492 U.S. at 593.

52. *Newdow*, 292 F.3d at 607.

53. *Id.* at 607-08; *see also id.* at 608 (quoting *Lynch*, 465 U.S. at 688) (finding an

the Pledge, albeit on a voluntary basis, the school is impermissibly “conveying a message of state endorsement of a religious belief.”⁵⁴

The court also concluded that the school district’s policy and the 1954 Act violated the coercion test, a test ensuring that the Constitution “at a minimum, . . . 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.”⁵⁵ In *Lee v. Weisman*, the Supreme Court invalidated a policy allowing clergy to offer nonsectarian prayers at public middle and high school graduation ceremonies.⁵⁶ The Court in *Lee* held that the school’s control and supervision of the graduation ceremony impermissibly pressured students to either participate in or show respect for the prayer by standing or remaining silent.⁵⁷ A student who stood silently likely believed it signified his or her participation in the prayer, and the Court concluded that students cannot be put in the position of having to either participate in a religious ceremony or protest.⁵⁸

Analogizing this case to *Lee*, the Ninth Circuit concluded that both the 1954 Act and the EGUSD policy of daily recitation of the Pledge places students in the “untenable position” of having to choose between participating in or protesting against an exercise with religious content.⁵⁹ The court noted the particular impressionability of schoolchildren because of their age and perceived expectation to conform to the norms of their school, teachers, and classmates.⁶⁰

Lastly, the Ninth Circuit found that the 1954 Act failed the first prong of the *Lemon* test, which requires a statute to have a secular purpose.⁶¹ The court rejected the argument put forth by the defendants (which included the United States Congress, the United States, and the President of the United States) that the court should consider the Pledge in its entirety, because Newdow specifically

endorsement test violation because the Pledge “sends a message to unbelievers ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community’”).

54. *Id.* at 608.

55. *Id.* at 606 (quoting *Lee*, 505 U.S. at 587).

56. *See Lee*, 505 U.S. 507-09 (warning that any perceived state authority that endorses religion threatens the Establishment Clause).

57. *Id.* at 593.

58. *Id.*

59. *Newdow*, 292 F.3d at 608.

60. *See id.* at 609 (asserting that with younger individuals, merely being forced to listen to the Pledge has a coercive effect).

61. *See id.* at 609-10 (citing *Lemon*, 403 U.S. at 612-13).

challenged Congress's 1954 amendment.⁶² The purpose of that act, indeed its "sole purpose," was to advance religion and distinguish the United States from atheist communist countries.⁶³ An impermissible government endorsement of religion includes favoring one religion over others, as well as advancing religion in general over atheism.⁶⁴ The court likewise concluded that the EGUSD policy failed the *Lemon* test because it is probable that the schoolchildren perceived that the school, and thus the government, endorsed the beliefs of those who believe in monotheism and disapproved of atheist beliefs.⁶⁵

2. *Newdow II*

After the Ninth Circuit held that the 1954 Act and the EGUSD policy violated the Establishment Clause, the mother of Newdow's daughter, Sandra Banning, filed a motion for leave to intervene with the court, in which she challenged Newdow's standing.⁶⁶ In this motion, she informed the court that she believed that it was contrary to her daughter's best interests to be included in Newdow's suit, and asserted that she had sole legal custody of their daughter pursuant to a California Superior Court order.⁶⁷ The California court's custody order gave Newdow the right to consult with Banning on various aspects of their daughter's upbringing, including her psychological and educational needs, and conferred Banning with veto power over Newdow in the event they disagreed.⁶⁸

Approximately seven weeks after Banning filed her motion for leave to intervene, a California Superior Court entered an *in personam* order enjoining Newdow from representing his daughter as her next friend or pleading her as an unnamed party in the suit challenging

62. See *id.* at 610 (stating that the defendants argued that the Pledge, in its entirety, represents a solemnizing event, expressing confidence in the future and encouraging recognition in society).

63. *Id.* at 610.

64. *Id.*

65. See *id.* at 611 (noting that the impressionability of young children and the pressures existing in the classroom make it more likely that the schoolchildren will perceive a message of endorsement of monotheism).

66. See *Newdow*, 313 F.3d at 502.

67. *Id.* at 501-02.

68. See *id.* at 502 (detailing the California Superior Court's custody order).

The child's mother, Ms. Banning, to have *sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [the child]. Specifically, both parents shall consult with one another on substantial decisions relating to non-emergency major medical care, dental, optometry, psychological and educational needs of [the child]. If mutual agreement is not reached in the above, then Ms. Banning may exercise legal control of [the child] that is not specifically prohibited or inconsistent with the physical custody order. The father shall have access to all of [the child's] school and medical records.

Id.

the constitutionality of the Pledge.⁶⁹ The state court did not determine whether Newdow had standing in his own right to sue in federal court, reserving that question for the federal court.⁷⁰

After considering Banning's motion for leave to intervene and the state court's order that Newdow refrain from suing as his daughter's next friend, in a second published opinion, the Ninth Circuit denied Banning's motion⁷¹ and confirmed Newdow's Article III standing to challenge the constitutionality of government action affecting his daughter in public school.⁷² The court held that "a noncustodial parent, who retains some parental rights, may have standing to maintain a federal lawsuit to the extent that his assertion of retained parental rights under state law is not legally incompatible with the custodial parent's assertion of rights."⁷³

Having already decided that Newdow satisfied Article III standing in its initial decision,⁷⁴ the court went on to analyze whether Newdow retained standing even though Banning, the sole legal custodian of their daughter, opposed Newdow's execution of the lawsuit.⁷⁵ Despite Banning's status as sole custodian, the Ninth Circuit found that the California court's custody order granted Newdow "sufficient parental rights" to support Newdow's standing.⁷⁶ And because Newdow's suit was premised on a deprivation of "*his own*" rights, Banning's opposition to Newdow's suit could not affect his standing to challenge his alleged First Amendment injury.⁷⁷

3. *Newdow III*

The Ninth Circuit's third encounter with Newdow's case came in the form of a petition for rehearing *en banc*.⁷⁸ The majority denied the petition for rehearing amid a strong dissent,⁷⁹ and filed an

69. *Id.*

70. *Id.*

71. *See id.* at 505 (denying Banning's motion for leave to intervene because she did not have a "protectable interest at stake" in Newdow's suit).

72. *Id.* at 505 (concluding that Newdow retained "sufficient parental rights to support his standing").

73. *Id.* at 503-04; *see also id.* at 504 (assuming that the parent can demonstrate that a favorable decision will redress his or her alleged injury in fact).

74. *See id.* at 504 (articulating the Article III standing requirements: the plaintiff must "establish an injury in fact that is fairly traceable to the challenged action, and it is likely that the injury will be redressed by a favorable decision").

75. *Id.* at 503.

76. *Id.* at 505.

77. *Id.* at 505-06.

78. *See Newdow*, 328 F.3d at 466.

79. *See id.* at 472 (O'Scannlain, J., dissenting) (arguing the Ninth Circuit should rehear the case *en banc* because it was decided "wrong, very wrong" and that reciting the Pledge "cannot possibly be an 'establishment of religion'"); *see also id.* at 482

amended decision superceding its initial decision.⁸⁰ While its amended opinion mirrored its initial decision in some respects, it did not contain a discussion of the constitutionality of the 1954 Act.⁸¹ The amended opinion was limited to the narrower issues of whether Newdow had standing to challenge EGUSD's policy of daily Pledge recitation and whether that policy was constitutional.⁸²

a. Standing

The amended opinion's discussion of Newdow's standing to challenge the school policy was identical to that articulated in the court's first opinion. As a parent, Newdow had standing to challenge a policy that interfered with his right to instruct the religious education of his daughter.⁸³

b. Establishment Clause

The Ninth Circuit concluded that a daily, teacher-led recitation of the Pledge violated the Establishment Clause of the First Amendment because it "impermissibly coerces a religious act."⁸⁴ Finding a violation of the coercion test, the court omitted an application of the endorsement and *Lemon* tests.⁸⁵ The Ninth Circuit concluded that reciting the Pledge amounts to swearing allegiance to monotheism.⁸⁶ The court focused on schoolchildren's impressionability and perception that they must adhere to social norms, and again concluded that daily recitation of the Pledge impermissibly placed "students in the untenable position of choosing between participating in an exercise with religious content or protesting."⁸⁷

(McKeown, J., dissenting) (arguing that because the recitation of the Pledge in public schools "presents a constitutional question of exceptional importance," the Ninth Circuit should reconsider the case *en banc*). *But see id.* at 469 (Reinhardt, J., concurring) (interpreting the federal rule of procedure governing rehearing a case *en banc* to mean that the case must be "both of exceptional importance and the decision requires correction").

80. *Id.* at 468.

81. *See id.* at 472-73 (O'Scannlain, J., dissenting) (suggesting that the majority omitted its analysis of the constitutionality of the 1954 Act in this amended decision to avoid Supreme Court review, and claiming that voluntary recitation of the Pledge was not a "religious act").

82. *See id.* at 484-90.

83. *See id.* at 485; *see infra* notes 40-48 and accompanying text (detailing the Ninth Circuit's standing analysis).

84. *Id.* at 487.

85. *See id.*

86. *See id.*

87. *Id.* at 488.

c. Partial Dissent and Concurrence of Newdow III

Concurring in part and dissenting in part, Judge Fernandez agreed with the majority's decision that Newdow possessed standing to challenge the constitutionality of EGUSD's Pledge policy.⁸⁸ However, he determined that the policy withstood constitutional scrutiny because the words "under God" have "no tendency" to establish religion and present no danger to the First Amendment.⁸⁹

IV. U.S. SUPREME COURT

A. Majority Opinion

The Supreme Court granted *certiorari* to determine whether Newdow had standing to challenge the school district's policy and whether that policy ran afoul of the First Amendment.⁹⁰ A five-justice majority dismissed Newdow's case for lack of prudential standing, with four justices concurring in the judgment.⁹¹

In finding that Newdow lacked prudential standing to challenge EGUSD's policy, the Court focused on Newdow's interests and those of his daughter, who Banning contends is a Christian and does not object to the Pledge, and determined that they were likely in conflict.⁹² Writing for the majority, Justice Stevens stated that Newdow's daughter probably did not wish to assert the constitutional challenge.⁹³ This conflict of interests highlighted the precarious nature of examining the rights of a third person who was not before the Court to advocate on her own behalf.⁹⁴ The Court concluded 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."⁹⁵

Justice Stevens reasoned that the disputed family law rights are

88. *Id.* at 490 (Fernandez, J., concurring and dissenting).

89. *See id.* at 491 (Fernandez, J., dissenting) (focusing on the purpose of the First Amendment, which was to provide equal protection so the government does not discriminate for or against any religion, and highlighting dicta in previous cases that the Pledge does not violate the First Amendment).

90. *Newdow*, 124 S. Ct. at 2305.

91. *See id.*

92. *See id.* at 2310 (asserting that the interests of the affected persons in this case are "in many respects antagonistic").

93. *See id.* at 2310 n.7 ("Banning tells us that her daughter has no objection to the Pledge.").

94. *See id.*

95. *Id.* at 2312.

inextricably intertwined with the question of standing.⁹⁶ Citing to the “domestic relations exception” to courts’ exercise of jurisdiction, the majority concluded that generally it is better for federal courts “to leave delicate issues of domestic relations to the state courts.”⁹⁷

While California domestic relations laws vested in Newdow “a cognizable right to influence his daughter’s religious upbringing,” the Court stated that Newdow does not have the right to control what others can say to his child regarding religion.⁹⁸ Thus, Newdow’s right to communicate with his daughter, a protected First Amendment activity, is very different from his “claimed right to shield his daughter from influences to which she is exposed while in school despite the terms of the custody order.”⁹⁹ Such protection from third parties could be addressed through a suit as his daughter’s next friend, but the California Superior Court stripped Newdow of that right.¹⁰⁰

B. Concurring Opinions

In his concurrence, Justice Rehnquist accused the majority of “erecting a novel prudential standing principle” to avoid determining the merits of Newdow’s constitutional challenge.¹⁰¹ Unlike the majority, which applied the domestic relations exception as a limitation of federal courts’ exercise of jurisdiction, Justice Rehnquist asserted that the domestic relations exception is a limit on federal diversity jurisdiction.¹⁰² The Chief Justice discussed the merits of the constitutional attack, and concluded that recitation of the Pledge “cannot possibly lead to the establishment of a religion.”¹⁰³

Justice O’Connor similarly concluded that Newdow had standing to challenge the school policy, but found that the policy withstood an Establishment Clause challenge.¹⁰⁴ Justice O’Connor based her opinion on precedent that allows the government to “acknowledge or refer to the divine” without violating the Constitution.¹⁰⁵ She found

96. *See id.* at 2309 n.5.

97. *Id.* at 2309 (stating that the domestic relations exception applies to cases involving divorce, alimony, child custody and other state law issues).

98. *Id.* at 2311.

99. *Id.* at 2312.

100. *Id.*

101. *Id.* (Rehnquist, C.J., concurring).

102. *See id.* at 2314 (Rehnquist, C.J., concurring) (clarifying that the domestic relations exception divests federal courts from issuing divorce, child support, and alimony decrees).

103. *See id.* at 2320 (Rehnquist, C.J., concurring) (characterizing the recitation of the Pledge as a “patriotic exercise”).

104. *Id.* at 2321.

105. *Id.* at 2323 (O’Connor, J., concurring) (acknowledging that whether or not the Pledge is a form of “ceremonial deism” is a “close question”).

such “ceremonial deism” implicated here.¹⁰⁶ Likewise, concluding that Newdow had standing, Justice Thomas asserted that recitation of the Pledge is not an Establishment Clause violation because the Clause was meant to protect “state establishments from federal interference” and not individual rights.¹⁰⁷

V. IMPLICATIONS

Having dismissed the case on prudential standing grounds, the majority never addressed the merits of the alleged constitutional violation. While the concurring opinions provide compelling insight into the views of some of the Court’s members regarding the merits of Newdow’s claim, the question of the Pledge’s constitutionality remains.¹⁰⁸

The concurring opinions of Justice Rehnquist, and particularly that of Justice O’Connor, demonstrate their continued adherence to the doctrine of ceremonial deism, which permits the government to refer to God because the “history, character, and context” of the reference presumably leads the reasonable observer to perceive a nonreligious governmental purpose.¹⁰⁹ The Ninth Circuit, however, rejected this long-standing doctrine in striking down the Pledge.¹¹⁰ Had the Ninth Circuit decision stood, it could have drastically changed Establishment Clause doctrine in that circuit and possibly began to unravel the basis upon which various other government practices—arguably religious practices—and references to God have been upheld in the past.¹¹¹ On the other hand, had the Supreme Court reached the merits and rejected the Ninth Circuit’s interpretation of the Establishment Clause, it would have either explicitly or implicitly solidified the validity of the ceremonial deism exception to the Establishment Clause. This would have had the effect of affirming the holdings of

106. *See id.* at 2323-27 (describing the four bases on which she concluded the Pledge is “ceremonial deism”). These reasons include: 1) the history and ubiquity of the Pledge; 2) the absence of prayer or worship; 3) the absence of a reference to a particular religion; and 4) the negligible religious content. *Id.*

107. *Id.* at 2330-32 (Thomas, J., concurring).

108. *But see Sherman*, 980 F.2d at 445 (finding no constitutional violation where public school teachers lead willing students in the Pledge each day).

109. *Lynch*, 465 U.S. at 676.

110. *Contra Sherman*, 980 F.2d at 445 (upholding the Pledge and characterizing it as a “ceremonial reference” typical in civic life).

111. *See, e.g., Lynch*, 465 at 693 (O’Connor, J., concurring) (upholding the display of a crèche and claiming that it is “no more an endorsement of religion than such governmental ‘acknowledgements’ of religion as legislative prayers . . . printing ‘In God We Trust’ on coins, and opening court sessions with ‘God save the United States and this honorable court’”); *Allegheny*, 492 U.S. at 616 (rejecting the argument that a holiday display consisting of a Christmas tree and Chanukah menorah endorsed religion, and characterizing it as a representation of a secular, winter holiday season).

circuit courts that have previously upheld other government references to God, such as the Ninth and Tenth Circuits' approval of the United States' motto "In God We Trust" and its use on United States currency,¹¹² as well as Ohio's Motto "With God All Things Are Possible."¹¹³

Furthermore, had the Court reached the merits of Newdow's challenge to the Pledge, it could have used this case as an opportunity to clarify the status of the three Establishment Clause tests.¹¹⁴ This would have been particularly helpful to the legal community because of the doubts regarding the viability of the *Lemon* test.¹¹⁵

The Supreme Court's decision in *Newdow* also raises questions about the legal rights of non-custodial parents in the federal courts, and the interplay between state court family laws and exercise of federal jurisdiction. Because the Court did not refute Newdow's Article III standing, presumably any parent with legal custody, or at least authoritative power to make decisions about the best interests of his or her child, could have standing to challenge the constitutionality of the Pledge in federal court in the future.¹¹⁶

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112. See *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (concluding that the national motto has a "patriotic or ceremonial character" and does not establish religion); *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996) (finding that the federal statute establishing the national motto of "In God We Trust" is a form of ceremonial deism). The national motto does not "convey government approval of religious belief" because of its "historical usage and ubiquity." *Id.*

113. *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 299-300 (6th Cir. 2001).

114. Compare *Newdow*, 292 F.3d at 605-11 (applying the endorsement, coercion and *Lemon* tests to a constitutional challenge to the recitation of the Pledge in public schools), with *Sherman*, 980 F.2d at 437 (upholding the constitutionality of reciting the Pledge in public school without applying the endorsement, coercion or *Lemon* tests to the plaintiff's Establishment Clause challenge).

115. See, e.g., *Mitchell v. Helms*, 530 U.S. 793 (2000) (deciding an Establishment Clause attack without applying the *Lemon* test); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (analyzing an Establishment Clause challenge in public school setting without applying the *Lemon* test); *Sherman*, 980 F.2d at 445 (claiming that the Court's decision in *Lee* left the future of the *Lemon* test unknown).

116. See *Newdow*, 124 S. Ct. at 2313 (Rehnquist, C.J., concurring) (noting that the majority does not dispute that *Newdow* satisfied Article III standing).