Elk Grove Unified School District v. Newdow  
Argued: March 24, 2004  
Decided: June 14, 2004

I. Directions: Read and Highlight *or underline* the Following   
Facts:   
  
Michael Newdow is an atheist and the father (though not a custodial parent) of a minor child who attends public elementary school. He objects to his daughter’s hearing and voluntarily reciting of the Pledge of Allegiance in school. California law requires “appropriate patriotic exercises” to be conducted daily in all public elementary schools during the school year. Reciting the Pledge is one way of satisfying this requirement, and it was the policy adopted by Elk Grove Unified School District.

Congress first codified the Pledge in 1942. Twelve years later, at the height of the Cold War, Congress amended the text of the Pledge of Allegiance to include the words “under God.” According to the Congressional Record, Congress “intended the inclusion of God in our pledge … [to] further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.” According to the House Report, including a reference to God in the Pledge would also “serve to deny the atheistic and materialistic concepts of communism.” Anticipating a potential Establishment Clause challenge, Congress noted the addition was not an “an act establishing a religion or one interfering with the ‘free exercise’ of religion.”

Newdow does not claim that the school district or teacher requires his daughter to participate in reciting the Pledge. Such required participation was prohibited by the Supreme Court in the 1943 case, West Virginia v. Barnette, decided even before “under God” was added. Rather, he claims that his daughter has a legally recognizable injury (that he can bring on her behalf) when she is compelled to “watch and listen as her state-employed teacher in her state-run school leads her classmates in a recitation proclaiming that there is a God, and that ours is one nation under God.” Newdow argues that the 1954 modification of the Pledge by Congress, as well as the state law and school rule requiring daily recitation, violate the First Amendment’s Establishment Clause. He seeks declaratory and injunctive relief (i.e., a ruling that the Pledge of Allegiance is unconstitutional with the addition of the words “under God” and a court order prohibiting the school from requiring the daily recitation).

Procedural History:   
  
A federal magistrate judge recommended that the U.S. District Court rule that the Pledge recitation did not violate the Establishment Clause. U.S. District Court Judge Edward J. Schwartz in California accepted the recommendation and dismissed Newdow’s case. Newdow appealed to the U.S. Court of Appeals for the Ninth Circuit, where a three-judge panel ruled in his favor, and initially declared that the Pledge itself was unconstitutional. The Bush Administration and the school district requested that a larger panel of Ninth Circuit judges rehear the case. On February 28, 2003, the Ninth Circuit denied the rehearing request and issued an opinion that affirmed its previous ban on teacher-led recitation of the Pledge in public schools. However, the Court amended its initial ruling, and omitted the portion that invalidated the Pledge itself.

After the Supreme Court granted a writ of certiorari to hear the case, Justice Scalia removed (recused) himself from participating in the case. Newdow had filed papers with the Supreme Court asking Scalia to bow out, because the justice had spoken critically of the Ninth Circuit ruling at a Religious Freedom Day event in Fredericksburg, Virginia. The code of conduct for federal judges states that a judge should avoid public comment on the merits of a pending case.

In the event of a tie on the Court (a 4-4 decision), the lower court ruling would stand as a precedent only in the nine states that comprise the Ninth Circuit and the Supreme Court’s decision would not create a national precedent.

Question:   
  
Does a school district policy that requires public school teachers to lead willing students in reciting the Pledge of Allegiance with the words “under God” violate the Establishment Clause of the First Amendment?  
  
II. My response to the above right now includes (respond in 3-5 Sentences referencing the facts of the case)... \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
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*Note: The case also raises a procedural question of Newdow’s standing, that is, whether he has a legal stake in the case, given the fact that he was never married to his daughter’s mother and does not have custody of the child. The Supreme Court’s oral argument focused more on the merits of the question regarding the Establishment Clause of the First Amendment. For the purposes of our moot court exercise, we will focus on the substantive constitutional religion question, rather than the “standing” issue. We will simply assume that Mr. Newdow has standing.*

Constitutional Provision:

**The Establishment Clause of the First Amendment:** “Congress shall make no law respecting the establishment of religion.”   
  
These words have been interpreted as limiting governmental action of two types: action that discriminates among religions, and action that promotes religion in general.

**Precedents**

* **West Virginia v. Barnette (1943)**

Even before the words “under God” were added to the Pledge, the Court held that no child may be *required* to recite the Pledge in a public school.

* **Stone v. Graham (1980)**

The Supreme Court dismissed a state legislature’s claimed secular purpose for requiring schools to post a copy of the Ten Commandments and held the policy unconstitutional.

* **Wallace v. Jaffree (1985)**

The state legislature amended the requirement of a generic moment of silence to one that required a moment of silence “for prayer or meditation.” The Court struck down the policy because the purpose in amending the law was religious. No other reason could be offered for the amendment than to reinforce the need for prayer.

* ***Lee v. Weisman (1991)***  
  The Court held that including a prayer at graduation created a subtle and indirect coercion, forcing students to act in ways which establish a state religion and violate the conscience of the students in attendance.
* **Santa Fe Independent School District v. Doe (2000)**

The Court applied the coercion test to strike down a school district’s policy regarding the selection of a student to deliver an invocation before home football games because it promoted public prayer.

* **Town of Greece v. Galloway (2013)**The town's practice of opening its town board meetings with a prayer offered by members of the clergy does not violate the Establishment Clause when the practice is consistent with the tradition long followed by Congress and state legislatures. The Court determined the that guests conducting business were not a captive audience and the prayer does not coerce participation with non-adherents.
* While not binding on the Supreme Court of the United States, we note that the 7th Circuit issued an opinion in *Sherman v. Wheeling Township Schools* (1992) that held that it was not unconstitutional for teachers and willing students to recite the pledge of allegiance in class daily. One reason for granting certiorari in *Newdow* is that the decisions in *Sherman* (7th Circuit) and *Newdow* (9th Circuit) were in direct conflict.

**III. Applying Precedent:** Read each of the above precedents and determine how the Supreme Court would likely rule based upon which cases they found **analogous** (similar) and apply in their ruling. Explain how they are likely to rule applying precedent and be sure to include specific precedent(s) from above in your response.

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**IV.** Identifying Arguments: read each of the following arguments and place an **EG** next to those arguments that support Elk Grove Unified School District and a **N** next to those that support the Michael Newdow’s position*.*

\_\_\_\_\_1. **EG/N** Reciting the Pledge of Allegiance is a patriotic exercise, not a statement of religious belief. The reference to God *permissibly* acknowledges the role that faith in God has played in the country’s formation, political foundation, and constitutional development.

\_\_\_\_\_2. **EG/N** Focusing on the purpose and effect of the Pledge as a whole, rather than looking only at the 1954 amendment, the policy of reciting it in school does not violate the *Lemon* test because it serves the secular *purpose* of promoting patriotism and national unity. Also, it does not have the *effect* of advancing or inhibiting religion.

\_\_\_\_\_3. **EG/N** The rights of parents to instill non-monotheistic values (belief in something other than one God) in their children are denied when tax-paid teachers lead impressionable children in joint recitation that the nation is united under one god on a daily basis.

\_\_\_\_\_4. **EG/N** The 1954 amendment to the Pledge reflects a traditional concept that our nation was founded on a fundamental belief in God that is reflected in the Declaration of Independence (“endowed by their Creator”) and on American currency (“In God We Trust”). It is, therefore, an acknowledgement of religious tradition, but it does not endorse any particular religious belief.

\_\_\_\_\_5. **EG/N** Reciting the Pledge in elementary schools is unconstitutional under the *Lemon* test because the preeminent *purpose* of adding “under God” was religious and it has the *effect* of promoting monotheistic religious beliefs.

\_\_\_\_\_6. **EG/N** “One nation under God” is an unconstitutional endorsement of religion because it is the profession of a religious belief, namely, a belief in monotheism, and impermissibly takes a position with respect to the purely religious question of the existence and identity of God. (Congressional committee notes demonstrate that members added the phrase, in part, to show that “atheistic American” was a contradiction in terms.)

\_\_\_\_\_7. **EG/N** As in *Lee*, the school district’s Pledge policy is coercive because it places students in the untenable position of having to choose between participating in exercises with religious content and protesting. The coercion is arguably greater than in *Lee* because younger, more impressionable students are involved, and the Pledge is repeated each day, multiplying the coercive effects.

\_\_\_\_\_8. **EG/N** The Pledge policy is not a violation of the coercion test because the Pledge is not a religious act or profession of religious beliefs. The phrase “under God” is not equivalent to the religious act of prayer at issue in *Lee*. Instead it is a form of “ceremonial deism,” or generically religious actions largely devoid of specific religious meaning, which are constitutional.  
  
**V. The Argument(s) above I thought was most persuasive stated….** **because…**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 **VI. When I asked my Parents/Guardians/Adult in my life the court case issue, they told me....**

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**VII.** 3 classmates and their ideas that I made me rethink my position, articulated my views well, or were particularly impressive in their thoughtfulness. Who presented it and what or why did you like about their argument?(if not present, what do your parents, peers, coworkers, etc. say about this issue)

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**VIII. What I said in the discussion today OR what I would have said if I had spoken?   
  
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IX. Did your group come to a consensus? If not, why not? If so, what did your group decide?**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  
 **X. What I Learned Through this Class Assignment/**Which number best describes the value you found in this exercise?

1 2 3 4 5 6 7 7

NO DEEPER

UNDERSTANDING

MUCH DEEPER

UNDERSTANDING

**XI. Reason(s) I chose the above Number Include... What I like/did not like about the class deliberation include(s)…  
  
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XII. After the deliberation, my opinion changed/did not change because…My final thoughts include…**

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