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The Assignment: Student is to write a research paper on a Constitutional issue.

I. The Case

Michael Newdow is an atheist whose daughter attends public elementary school in Elk Grove, California. He has brought a suit against the State of California; two local school districts; the US Congress and the President of the United States, claiming injury to his daughter when the teachers in her public school led the recitation of the Pledge of Allegiance[1]. He claims the words "under God" in the Pledge are an endorsement of religion and therefore a violation of the Establishment Clause[2] of the First Amendment Freedom of Religion.

II. History of The Pledge of Allegiance

The original Pledge of Allegiance was written in 1892 by Francis Bellamy. Bellamy was a Baptist minister in Boston and was prominent in the Christian Socialist movement of the time. Bellamy was also an official in the National Education Association and the teachers' union. He created the Pledge as part of a school flag-raising ceremony to mark the 400th anniversary of Columbus' arrival in America.

The original words of the Pledge were: "I pledge allegiance to my Flag and to the Republic for which it stands one Nation indivisible, with Liberty and Justice for all."

In 1923 "The flag of the United States" replaced the words "my Flag". It was felt that some foreign-born people might have in mind the flag of their birth country instead of the United States flag. IN 1924 the words "of America" were added following "United States."

In 1954, at the height of the Cold War, a campaign was initiated by the Knights of Columbus, a Catholic men's service organization and other religious leaders who felt that the pledge needed to be distinguished from similar addressed being used by other countries that were regarded as godless communists. Congress agreed to add the words "under God" to the Pledge. The legislative history of the 1954 Act states:

> "At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."

1 *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002)

2 U.S. Const. amend. I. ("Congress shall make no law respecting an *establishment of religion*, or prohibiting the free exercise thereof…") (emphasis added)

When President Dwight D. Eisenhower signed the act adding "under God", he said, "From this day forward, the millions of our school children will daily proclaim in every city and town, every village and rural schoolhouse, the dedication of our Nation and our people to the Almighty."

III. The Issues

Newdow is not claiming that is daughter is required to recite the Pledge. In 1943, in *West Virginia State Board of Education* v. Barnette, the Supreme Court ruled that compelling students to recite the Pledge of Allegiance violated the First Amendment[3].

> In 1942, the Board of Education had adopted a resolution ordering the salute to the flag to become 'a regular part of the program of activities in the public schools' and refusal to salute the Flag would be regarded as an act of insubordination. A group of Jehovah's Witness brought a suit against the Board of Education stating their religion beliefs held that the flag was an 'image' and the Bible forbade them to 'worship' any graven images. The Court rules that no citizen can be forced to confess their loyalty or love of country.

Newdow is claiming that his daughter is injured when she is compelled to watch and listen while her classmates and teacher recite a "ritual proclaiming that there is a God."[4]
Newdow is a physician who holds a law degree and represents himself, saying he is trying to restore the pledge to its pre-1954 version, claiming that no one should be forced to worship a religion in which they don't believe.

IV. The Court's Jurisdiction

The original suit was filed in the Eastern District Court of California. A federal judge in the District Court dismissed the suit. An appeal was filed in the Ninth Circuit Court of Appeals in March, 2002.
The appellate court dismissed the President of the United States as an inappropriate defendant. Due to the separation of powers, the President has no authority to amend a statute or declare a law unconstitutional; these functions are reserved to Congress and the federal judiciary.
In addition, the federal court lacks jurisdiction to issue orders directing Congress to enact or amend legislation. However, the court felt that Newdow's suit brought up the issue of the constitutionality of the 1954 Act amending the words of the Pledge and that issue was to be addressed by this court.

V. The Merits of the Case

In determining the constitutionality of this case, the court turned to a series of three interrelated tests used by the Supreme Court over the last three decades:

A. The "endorsement" test
B. The "coercion" test

3 *West Virgina State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.")
4 *Newdow v. United States Congress*, supra

C. The *Lemon* test

The "endorsement" test was adopted by a majority in Allegheny County v. ACLU:[5]

> "[T]he prohibition against government endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."

The court's standing on the "endorsement" test was that "the text of the official Pledge, codified in federal law, impermissibly takes a position with respect to the purely religious question of the existence and identify of God."[6] Using the "endorsement" test, the Pledge is an unacceptable government endorsement of religion because it 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.

In Lee v. Weisman[7], the Court formulated the "coercion" test.

> 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.

The court held that the school district policy[8] requiring teachers to begin each school day by leading their students in a recitation of the Pledge of Allegiance, and the Barnette[9] act which held that children were not required to participate in the recitation of the Pledge both failed the "coercion" test.

The coercive effect of this policy is particularly pronounced in the school setting given the age and impressionability of school children, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students. The *Barnette* act placed students in the difficult position of choosing between participating in an exercise with religious content or protesting.

The *Lemon* test was originally set forth in *Lemon* v. *Kurtzman*[10] and modified by the Supreme Court in *Agostini* v. *Felton*[11]. The Lemon test provides:

The government action must have a secular purpose and effect in order to be consistent with the Establishment Clause.

As defined in the legislative history of the 1954 Act, the words "under God" were indented to recognize a Supreme Being at a time when the government was publicly differentiating our nation against atheistic communism. The purpose of the 1954 Act was to take a position on the question of theism, namely to support the existence and moral

5 *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989)
6 *Newdow v. United States Congress*, supra
7 *Lee v. Weisman*, 505 U.S. 577, 580 (1992)
8 Cal. Educ. Code § 52720. This section provides that "at the beginning of the first regularly scheduled class or activity period… there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section."
9 *West Virginia State Board of Education v.* Barnette, supra
10 *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971)
11 *Agostini v. Felton*, 521 U.S. 203 (1997)

authority of God, while "deny[ing]…atheistic and materialistic concepts."[12] Such a purpose contradicts the Establishment Clause of the Constitution, which prohibits the government's endorsement not only of one particular religion at the expense of other religions, but also of region at the expense of atheism.

VI. The Court's Decision

The court held that both the Elk Grove school district's policy of teacher-led recitation of the Pledge and the 1954 Act adding the words "under God" to the Pledge of Allegiance failed the *Lemon* test as well as the "endorsement" and "coercion" tests, thereby violating the Establishment Clause found in the First Amendment to the United States Constitution.

The case was decided by a three-judge panel rather than the full court of 11 judges. Two judges concurred: Circuit Judge Alfred T. Goodwin, appointed by President Nixon and Circuit Judge Stephen Reinhardt, appointed by President Carter. One judge dissented: Circuit Judge Ferdinand F. Fernandez, appointed by the first President Bush.
Judge Fernandez dissented on the merits by denying that the words "under God" implied religious endorsement by the government. He stated that the Supreme Court had specifically approved Congress's addition of these words to the Pledge because the words have "no tendency to establish a religion in this country or to suppress anyone's exercise, or non-exercise, of religion…"[13]

> "My reading of the stelliscript [majority ruling] suggests that upon Newdow's theory of our Constitution, accepted by my colleagues today, we will soon find ourselves prohibited from using our album of patriotic songs in many public settings. 'God Bless America' and 'America The Beautiful' will be gone for sure, and while use of the first three stanzas of "The Star-Spangled Banner' will still be permissible, we will be precluded from staying into the fourth. And currency beware!"[14]

VII. Arguments

After the court ruling, the States Attorney submitted a petition to the court for rehearing and rehearing en banc [full court]. In this petition, it was noted that the Ninth Circuit Court's ruling conflicted with the Supreme Court's precedent held in several cases:

- ◊ *County of Allegheny v. ACLU*[15]
- ◊ *Lynch v. Donnelly*[16]
- ◊ *Aronow v. United States*[17]

In Lynch, the Supreme Court held that a city did not violate the Establishment Clause by including a nativity scene as part of its Christmas display. In upholding the Christmas display, the Court explained that ceremonial acknowledgments of our nation's religious heritage, including the reference to God in the Pledge of Allegiance, do not establish a religion or religious faith.

12 H.R. Rep. No. 83-1693, at 1-2 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340.
13 *Newdow v. United States Congress*, supra
14 *Id.*
15 *Allegheny County v. Greater Pittsburgh* ACCLU, supra
16 *Lynch v. Donnelly*, 465 U.S. 668 (2984)
17 *Aronow v. United States*, 432 F.2d 242, 243-244 (9th Cir. 1970)

There are many ceremonial references to God by our Founding Fathers and contemporary leaders:

- ◊ The day after the First Amendment was proposed, Congress urged President Washington to proclaim a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many favors of Almighty God.
- ◊ The Declaration of Independence contains multiple references to God, including the following: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, and that among these are Life, Liberty, and the pursuit of Happiness"
- ◊ The Supreme Court begins its public sessions with "God save the United States and this Honorable Court."
- ◊

In light of these references to God in our founding documents and contemporary roles, *Lynch* concluded that ceremonial acknowledgments of our nation's religious heritage do not violate the Establishment Clause

In *County of Allegheny*, the court struck down a Christmas display at a county courthouse because it included a patently Christian message: "Glory to God for the birth of Jesus Christ."

In arriving at their decision, the court reaffirmed *Lynch's* approval of the reference to God in the Pledge, noting that all the Justices in *Lynch* viewed the Pledge as consistent with the proposition that government may not communicate an endorsement of religious belief. The court recognized an obvious distinction between the Christmas display message and the references to God in the motto and the pledge.

The ruling also conflicts with *Aronow v. United States* where the Court upheld the references to God in the National Motto and on our coins and paper currency. Their decision was based primarily on the same reasons *Lynch* and *County of Allegheny* approved the Pledge.

The court explained that use of the term "God" in these contexts "is of a patriotic or ceremonial character and bears no resemblance to a government sponsorship of a religious exercise."[18]

VIII. Newdow's Standing to Bring the Lawsuit

Shortly after the Court issued their opinion, Sandra Banning, the Mother of Michael Newdow's daughter filed a motion for leave to intervene, [19] challenging Newdow's standing. Banning held a custody order, awarding Banning sole legal custody of the child.

Ironically, Banning Stated that her daughter "attends Sunday school" and "is being raised in a Christian home". Banning wanted to set the record straight, she felt Michael Newdow was implying that her daughter was an atheist.

18 *Aronow v. United States*, supra

19 Black's Law Dictionary, Intervention: The entry into a lawsuit by a third party who, despite not being named a party to the action, has a personal stake in the outcome. The intervenor sometimes joins the plaintiff in claiming what is sought, sometimes joins the defendant in resisting what is sought, and sometimes takes a position adverse to both the plaintiff and the defendant. Refers also to the legal procedure by which such a third party is allowed to become a party to the litigation.

Her daughter, being aware of the father's actions and said "That's OK, Mom, because even if they do change the Pledge of Allegiance, I'll still say 'under God' and no one will know what I'm breaking the law."

The court, after considering the question of Newdow's standing in light of the custody order, affirmed their holding that he has standing as a parent to continue to pursue his claim in federal court. However, Newdow cannot name his daughter as a party to a lawsuit against Banning's wishes.

X. Popular Media Opinions

The Ninth Circuit is the nation's most overturned appellate court in the country. This is partly because it is the largest, but also because it tends to make liberal, activist opinions. The cases it hears range on issues from environmental laws to property rights to civil rights and tend to challenge the status quo.

California Gov. Gray Davis said his state was "going to take decisive action to overturn this decision." He said the state was in touch with the Justice Department and local school boards named in the suit. "This decision was wrongheaded and it should not be allowed to stand."

White House press secretary Ari Fleischer said "The Supreme Court itself begins each of its sessions with the phrase 'God save the United States and this honorable court." Fleischer said "The Declaration of Independence refers to God or to the creator four different times. Congress begins each session of the Congress each day with a prayer, and of course our currency says, 'In God We Trust.' The view of the White House is that this was a wrong decision and the Justice Department is now evaluating how to seek redress."

President Bush sharply criticized the ruling, calling it "out of step" with American traditions and promising to appoint judges that see things his way. "We need common-sense judges who understand that our rights were derived from God. Those are the kind of jungles I intend to put on the bench."

X. Status of the Claim

In December, 2002, the panel voted to deny the petition for rehearing and rehearing en banc. Judge Reinhardt dissented to the denial, stating the following:

> "We should have reheard *Newdow* en banc, not because it was controversial, but becuas it was wrong, very 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."
>
> "My disagreement with the panel majority has nothing to do with bending to the will of an outraged populace, and everything to do with the fact that Judge Goodwin and Judge Reinhardt misinterpret the Constitution and 40 years of Supreme Court precedent. That most people understand this makes the decision no less wrong. It doesn't take an Article III judge to recognize that the voluntary recitation of the Pledge of Allegiance in public school does not violate the First Amendment."

> "We should have given 11 judges a chance to determine whether the two-judge majority opinion truly reflects the law of the Ninth Circuit. This case presents the classic situation required for our court to rehear a case en banc. En banc consideration would have allowed us to correct the error of a prior panel's decision with respect to the Pledge *and* resolve a constitutional question of exceptional importance that affects the lives of millions of school children who reside within the geographical boundaries of the Ninth Circuit[20]. The exceptional importance of this case reinforces the need for correction of the panel's mistaken view of our Constitution."
>
> "Reciting the Pledge of Allegiance cannot possibly be an "establishment of religion" under *any* reasonable interpretation of the Constitution."

XI. Next Steps

Within the judicial appellate process, the next step is to take this case on appeal to the Supreme Court of the United States. The appeals court ruling is on hold while the government and the California school districts seek Supreme Court review.

In May, 2003, the Bush administration asked the Supreme Court to reverse the decision.

> In a brief, announced by Attorney General John Ashcroft, the Justice Department emphasized that not every reference to God amounted to an unconstitutional government endorsement of religion. It said the phrase in the pledge was an "official acknowledgment or our nation's religious heritage," no different than other religious references in public life, including the motto "In God we trust," which appears on American currency.
> The Justice Department also is urging the court to rule that Newdow lacked the legal authority to bring the lawsuit in the first place, because he does not have custody of his daughter. That approach would avoid a ruling on the merits, leaving the issue open for another day.

Should the Supreme Court decide to take up the case, it would hear arguments in the fall of 2004. While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years. In the 2001 term, of the 7,852 case filings, the Court heard arguments in only 88 cases[21].

20 The nine states that make up the Ninth Circuit are: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.
21 *See* Supreme Court of the United States, *2002 Year-End Report on the Federal Judiciary*, at http://www.supremcourtus.gov/publicinfo/year-end/2002year-endreport.htm.