

Supreme Court avoids Pledge of Allegiance ruling

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It was supposed to be a ruling to settle one of our country's most controversial issues: Is the Pledge of Allegiance to the American flag constitutional with the words "under God" included?

In late June, the U.S. Supreme Court ruled, in effect, that the pledge is constitutional, but in actuality it sidestepped the question by dismissing the case on a technicality unrelated to the core issue.

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." The statute provides that the "giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. The Elk Grove Unified School District implemented California law by requiring that "each elementary school class recite the Pledge of Allegiance to the Flag once each day."

Michael Newdow is an atheist, as well as an emergency room physician and a licensed attorney, whose daughter participates in that daily exercise along with her kindergarten classmates in Elk Grove. Because the Pledge contains the words "under God," Newdow viewed the district's policy as a religious indoctrination of his child in violation of the First Amendment to the U.S. Constitution.

Newdow initiated legal action against the district on behalf of his daughter. The 9th Circuit Court of Appeals agreed with him, holding that the words "under God" in the Pledge violated the First Amendment.

"[I]n light of the obvious importance of that decision," the Supreme Court granted certiorari to review the First Amendment issue surrounding the content and the mandatory recitation of the Pledge in the Elk Grove School District.

The Supreme Court issued its opinion on June 24. In an 8-0 decision, it held that Newdow did not have proper legal standing to pursue the constitutional challenge on behalf of his daughter. Although Newdow shared "physical custody" of his daughter with Sandra Banning, the daughter's natural mother, Banning had obtained a court order granting her "exclusive legal custody" of the child which included the "sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. Banning objected to her ex-husband's litigation on behalf of their daughter.

The Court ruled that under California law, Newdow had no status as either "next friend" or as a natural parent to pursue legal action on behalf of his daughter. The Court did not reach the legal merits of the case: Does the phrase "under God" contained in the Pledge violate the First Amendment? However, the effect of the Court's decision reversed the

decision of the 9th Circuit Court of Appeals, which held that the Pledge was unconstitutional.

Justice John Paul Stevens delivered the majority opinion and three justices authored opinions concurring in judgment, but expressing various views about why the Pledge should be deemed constitutional under the First Amendment. The “split” in the Court followed recent tradition on such issues with Justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg and Stephen Breyer joining Justice Stevens in the majority opinion. Justices William Rehnquist, Sandra Day O’Connor and Clarence Thomas shared opinions which concurred in the judgment, but dissented from the majority decision not to review the constitutional issue presented.

The concurring justices argued in their concurring opinions that the Pledge of Allegiance is constitutional, but for differing legal reasons. Justice Antonin Scalia took no part in the consideration or decision of the case, removing himself because of his public comments in support of the Pledge prior to the grant of certiorari by the Court.

So, the current recitation of the Pledge is constitutional for now, pending a subsequent challenge by other litigants and another grant of certiorari by the Supreme Court.

Although there are no current cases challenging the Pledge that are pending in any of the Circuit Courts of Appeal, there are several anticipated cases that will probably be filed soon and the issue will likely be before the Supreme Court in the foreseeable future.