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IN THE SUPREME COURT OF THE UNITED STATES

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ELK GROVE UNIFIED SCHOOL :
DISTRICT AND DAVID W. :
GORDON, SUPERINTENDENT :

Petitioners:

v. : No. 02-1624

MICHAEL A. NEWDOW, ET AL. :

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Washington, D.C.
Wednesday, March 24, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:08 a.m.

APPEARANCES:

TERENCE J. CASSIDY, ESQ., Sacramento, California; on
behalf of the Petitioners.

GEN. THEODORE B. OLSON, ESQ., Solicitor General,
Department of Justice, Washington, D.C., as amicus
curiae, supporting the Petitioners.

MICHAEL A. NEWDOW, Sacramento, California; on behalf of
the Respondents.

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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 02-1624, the Elk Grove Unified School District and David W. Gordon v. Michael A. Newdow.

Mr. Cassidy.

ORAL ARGUMENT OF TERENCE J. CASSIDY

ON BEHALF OF THE PETITIONERS

MR. CASSIDY: Mr. Chief Justice, and may it please the Court:

The daily recitation of the Pledge of Allegiance to the flag by millions of school children across our country does not violate the Establishment Clause. Petitioners submit that the decision of the Ninth Circuit Court of Appeals was incorrect for two reasons. First, respondent lacks standing to assert the claims in this case, and second, the school district policy of willing students reciting the pledge with the words, one nation under God, is a patriotic exercise that is part of an unbroken history of official government acknowledgment of the role of religion in American life.

The issue of standing in this case is one of first impression for this Court. Respondent seeks to invoke the aid of a Federal court to override the state family law court in an ongoing custody dispute. We look

1 to the state law to define the rights of parents involved
2 in custody disputes. The state court custody order in
3 effect both at the time this matter was pending before the
4 Ninth Circuit Court of Appeals, as well as before this
5 Court --

6 QUESTION: Counsel --

7 MR. CASSIDY: -- has limited --

8 QUESTION: Counsel, on the standing issue,
9 normally, I guess, we defer to the courts of appeals in
10 deciding issues of state law. Now, I guess the California
11 Supreme Court hasn't really weighed in on this question
12 and the Ninth Circuit seems to have relied on some court
13 of appeals decisions in making its decision about
14 standing.

15 Now, normally we would just defer to that,
16 wouldn't we, and move on to the merits? Is there some
17 reason why we shouldn't do that here?

18 MR. CASSIDY: Well, it is our position, Your
19 Honor, that the Ninth Circuit made an incorrect analysis
20 in --

21 QUESTION: Well, maybe they did, but is it not
22 the case that we normally defer to courts of appeals on
23 questions of state law on issues of standing?

24 MR. CASSIDY: I would say the Court does defer at
25 times. However, the Court has the right, and in this case

1 the obligation, to reassess the rights when those are
2 incorrectly decided by the Ninth Circuit Court of Appeals.
3 In this --

4 QUESTION: Is this just a question of Article III
5 standing or would it be open to us under our precedents to
6 say that we think there's Article III standing, but this
7 really involves rights of third parties, and as a
8 prudential matter, we do not think it's appropriate to
9 exercise jurisdiction --

10 MR. CASSIDY: I think, Justice --

11 QUESTION: Because, as I understand certainly the
12 Government's brief, and I think yours, you don't argue
13 prudential standing, it's just a question, an Article III
14 question. Would you --

15 MR. CASSIDY: Well, I would say both, Your Honor,
16 that the respondent is not a stakeholder within the
17 meaning of Article III. However, we would likewise submit
18 that I think that prudential argument was vis-a-vis the
19 Rooker-Feldman doctrine. We have requested that this
20 Court not interfere with the state court ongoing custody
21 dispute on that basis, because essentially this is one of
22 a collateral attack of a state court proceeding.

23 QUESTION: Well, I -- I saw the Rooker-Feldman
24 cite. I just wonder if you have any other authority for
25 the fact that there's a prudential standing problem here

1 and then you cite us a case other than Rooker v. Feldman,
2 would be Craig and Boren or Rescue Army or something?

3 MR. CASSIDY: I don't know that it -- this case
4 fits precisely in either the Rooker-Feldman or other
5 prudential cases, but we do have a case that certainly
6 merits that type of consideration. We believe this Court
7 should defer and not interfere with what amounts to the
8 mother's rights and interests in the upbringing,
9 educational upbringing of the daughter. Second --

10 QUESTION: Well, then that gets us to Article
11 III, the father says that it's not a level playing field,
12 that he has a right under state law and he might even have
13 a constitutional right to have some access to the -- to
14 the child and to try to affect the child's development,
15 and that the state is tilting the balance,
16 unconstitutionally he could say.

17 MR. CASSIDY: Well, we would certainly disagree
18 with that position, Your Honor.

19 QUESTION: Well, but I mean, that's -- it's just
20 a question of standing. Does -- does -- he has no
21 standing to make that claim?

22 MR. CASSIDY: Well, I think it's -- the best way
23 to approach this is whether respondent has a legally
24 protected interest, which he does not. He does not have a
25 legally protected right. Therefore, he is not a

1 stakeholder within the meaning of Article III, and -- and
2 I would suggest --

3 QUESTION: Well, he's -- he's -- may I ask you on
4 the question of legally protected right to zero in on
5 this. Put Rooker-Feldman aside for a moment, put next
6 friend standing aside for a moment. As I understand it,
7 and you correct me if I'm wrong, as I understand it, he's
8 saying, look, simply as the father of this child, I have
9 an interest which is in fact being infringed here. Even
10 though under state law the mother of the child has the
11 right to cast the final decision on matters of morals,
12 education, religion, I nonetheless have an interest as a
13 father, and that interest is in seeing that my child is
14 not subjected to what I believe is an unconstitutional
15 religious interest or religious influence.

16 What is your answer to his claim that that is
17 enough to give him personal standing?

18 MR. CASSIDY: I have to answer that question,
19 Justice Souter, based upon how the school district
20 perceives respondent's rights, and in this case, the
21 school district must look to only a single decision-maker.
22 It's the only way a school district can function. It's
23 the same way this Court should approach, we would suggest,
24 the standing issue.

25 QUESTION: Well, the mother isn't a decision-

1 maker for the school district, neither is the father a
2 decision-maker. If there's going to be a decision-maker,
3 it's ultimately going to be a judicial decision-maker on
4 the constitutional question. He is simply saying, I have
5 a right to raise that question by virtue of my interest as
6 a father, even though at the present time under state law
7 I cannot control her presence or absence at the school.

8 MR. CASSIDY: We would submit, Justice Souter,
9 that the question is truly what is in the best interest of
10 the child. That's ultimately the determination made when
11 we look to parents' rights in custody disputes under state
12 law.

13 QUESTION: But aren't -- aren't you basically
14 answering the question as if I were asking you a next
15 friend standing question? Who should stand for the child
16 in court as next friend is between these two parents. I'm
17 asking the question simply about his interest, not as next
18 friend but as father, admittedly with limited rights.

19 MR. CASSIDY: With limited rights, his rights
20 become on a more abstract level. They are certainly not
21 of the degree that provide a legally protectable interest
22 in asserting those rights. His right to redress --

23 QUESTION: California says otherwise. It says
24 he has the right to have an equal shot at trying to
25 influence and raise this child and that this is his right.

1 MR. CASSIDY: The reason, Justice Kennedy, that
2 we look to the state law to define those rights is that
3 because when there are custody disputes, the court directs
4 which parent gets the ultimate decision-making
5 responsibility and authority. In this case --

6 QUESTION: Yes, but the judge didn't tell him to
7 -- to discontinue the litigation, did he? The judge has
8 tolerated the prosecution of the case?

9 MR. CASSIDY: We would submit, Justice Stevens,
10 that the state judge cannot determine an Article III
11 standing. The judge --

12 QUESTION: Well, he could certainly tell the
13 father, this is not in the best interest of the child,
14 discontinue the litigation. He would have authority to do
15 that, at least to say, you can't bring this suit
16 purporting to represent the best interests of the child.

17 MR. CASSIDY: But when the respondent bypasses
18 the state court, the respondent -- the record reflects that
19 respondent and the mother met with the principal and the
20 kindergarten teacher of the daughter and respondent wanted
21 to --

22 QUESTION: But that doesn't go to the question of
23 whether he can maintain the litigation.

24 MR. CASSIDY: But --

25 QUESTION: That's a standing issue as to whether

1 he can bring this lawsuit.

2 MR. CASSIDY: But certainly if he bypasses the
3 state court and never has a determination made as to
4 whether this is in the best interest of the daughter,
5 you're correct. You would not have that decision.

6 QUESTION: But she never asked for a relief along
7 that line. She -- as I understand it, the mother never
8 asked to tell him to discontinue the lawsuit.

9 MR. CASSIDY: Well, she certainly sought
10 dismissal in a -- in a manner of speaking from the Ninth
11 Circuit Court of Appeals, and/or to intervene to -- to
12 demonstrate to the --

13 QUESTION: And I think --

14 MR. CASSIDY: -- Ninth Circuit Court of Appeals
15 as to what was in the best interest of her daughter.

16 QUESTION: Yeah, but the judge said the daughter
17 could go hear him argue the case as I understand it.

18 MR. CASSIDY: But likewise in this Court the
19 judge said she could not. So we have a situation where we
20 have to defer in a custody dispute like this to the state
21 court's judgment as to what's ultimately in the best
22 interest of the child. When -- when we go back and look
23 at the rights as defined, the ultimate decision-making
24 authority is with the mother in this case, and the reason
25 that the courts adopt that is consistent with the

1 California education code for school districts, because
2 under the California education code, the school districts
3 have to have only one decision-maker. Otherwise, they
4 couldn't function properly when there are disagreements
5 with parents that are involved in custody disputes.

6 In referencing that code section, California
7 education code section 51100 sub D, in relation to the
8 rights of parents to participate in the education of their
9 children, the California education code specifically
10 provides, this section does not authorize a school to
11 permit participation by a parent in the education of a
12 child if it conflicts with a valid order for custody
13 issued by a court of competent jurisdiction.

14 With that, I would like to reserve the remainder
15 of my time, Mr. Chief Justice.

16 QUESTION: Very well, Mr. Cassidy.

17 General Olson, we'll hear from you.

18 ORAL ARGUMENT OF GEN. THEODORE B. OLSON

19 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

20 SUPPORTING THE PETITIONERS

21 MR. OLSON: Mr. Chief Justice, and may it please
22 the Court:

23 Respondent has no right to bring this case in
24 his daughter's name and no independent, legally protected
25 right to challenge in Federal court the conditions of his

1 daughter's education. A California domestic relations
2 court with specialized expertise and continuing
3 jurisdiction has determined that the best interests of the
4 child require that decisions with respect to the
5 conditions of the child's education are matters that
6 should be made -- those decisions should be made by the
7 child's mother.

8 QUESTION: Well, he says, I have my own rights.
9 He says -- I'll -- I'll characterize his argument. He's
10 saying, you may be right about that, I have my own rights.
11 I have a right as a father to -- to try to influence this
12 child --

13 MR. OLSON: Well, it's --

14 QUESTION: -- in -- consistent with her going to
15 school and with her mother and that's -- and the state set
16 up an unfair playing field.

17 MR. OLSON: Well, we submit, Justice Kennedy,
18 that a fair reading of what -- what the domestic relations
19 court, which considered the best interests of the child,
20 focused in on the legally protected rights of the -- with
21 respect to this child's education. He's claiming a right,
22 a legally protected right to challenge the conditions in
23 the public school with respect to how the child shall be
24 educated.

25 This record is relatively clear, not only with

1 respect to affidavits from the child's mother, but also
2 with respect to the decisions, the transcript of the
3 September 11, 2003, decision of this domestic relations
4 court, and the order that the court issued on January 9 of
5 this year with respect to what was damaging to the
6 interests of the child. In fact, when the respondent
7 brought this case when he had joint custody without
8 consulting with the mother, the trial court found here
9 that it was unconscionable to bring this case, especially
10 when he knew that it might adversely affect the interests
11 of the child.

12 We submit that, under this Court's rulings with
13 respect to, even in connection with the right of the
14 father under Stanley v. Illinois, that may be trumped when
15 there is a powerful interest of the child, a powerful
16 countervailing interest under Stanley v. Illinois and --

17 QUESTION: One -- one more question on standing.
18 Am I correct that you don't argue this is a prudential
19 standing case and you don't --

20 MR. OLSON: We -- we do also, Justice Kennedy.

21 QUESTION: What's your best authority?

22 MR. OLSON: Well, I -- first of all, there's two.
23 It's Rooker-Feldman in the sense that what -- recognizing
24 standing here will have the effect of disturbing and
25 upsetting the effect of the trial court, of the domestic

1 relations court's decision with respect to the best
2 interests of the child.

3 Secondly, with respect to the Ankenbrandt case
4 where the Court has decided that the Federal courts don't
5 have jurisdiction with respect to domestic, the so-called
6 domestic relations exception, and that was specifically
7 referred to include divorce, alimony, and custody. So
8 there are those -- those factors all come together with --
9 with respect to describing the legally protected interest
10 of the -- of the defendant -- of the respondent in this
11 case with respect to the matters involving the child.

12 QUESTION: Is this your argument, Mr. Olson? In
13 -- in determining whether we should recognize his next
14 friend standing, we should take into consideration the
15 state custody arrangements and the state judgments about
16 what is in the best interests of the child. When we go to
17 the second question, should we recognize his individual
18 standing, if we do recognize his individual standing, but
19 we don't recognize his standing as next friend, we will
20 undercut the interests which are being protected by
21 refusing to recognize his standing as next friend. We've
22 got to go, in effect, we've got to come to the same
23 conclusion in each case or we will undercut our conclusion
24 on -- on next friend standing if it's adverse.

25 MR. OLSON: That's -- that's absolutely correct,

1 Justice Souter, and I think that's consistent with the so-
2 called domestic relations exception, the -- and the -- and
3 the court in that case recognized the special expertise of
4 family courts with continuing jurisdiction with respect to
5 sensitive matters. With respect to that, this Court would
6 collide with those concerns.

7 If I might turn to --

8 QUESTION: But the -- the merits here certainly
9 have nothing to do with domestic relations.

10 MR. OLSON: The -- well, and they do in the sense
11 that they -- the -- the matters that are before this Court
12 with respect to the Pledge of Allegiance in the public
13 school has to do with the child's education and impacts
14 with respect -- and there is in the record, Mr. Chief
15 Justice, affidavits from the mother expressing her concern
16 about the effect on the child of being thrust into the
17 vortex of this constitutional case.

18 One decision-maker has to make decisions with
19 respect to the best interests of the child and the
20 collision of those interests, and that comes into play
21 because the child is the one that -- it's interesting that
22 the respondent's brief are full of references to the
23 interests of the child, the alleged coercive effect of the
24 Pledge of Allegiance, the impact on the child's rights and
25 so forth, though -- therefore, although the respondent

1 talks about this separate independent right of his
2 interest when his -- when it comes to his brief, the
3 issues that he's articulating throughout the brief don't
4 support that standing. They support the standing of the
5 next friend on behalf of the child.

6 If I might turn to the merits, this Court has
7 repeatedly noted that the Pledge of Allegiance is a
8 ceremonial, patriotic exercise that acknowledges, and as
9 this Court has repeatedly held --

10 QUESTION: Do you mean repeatedly held or
11 repeatedly said?

12 MR. OLSON: Repeatedly said and in the -- in the
13 -- in the sense of *Seminole Tribe*, Justice Stevens, this
14 is more than dicta. It is -- it is explanations by the
15 Court for the holdings in those -- in those cases by the
16 Court. Indeed, I found, and this -- it's a -- this is a
17 calculation that's capable of being made by reference to
18 the cases cited in the brief, 14 separate Justices
19 articulating that there was a significant difference
20 between a purely religious exercise, such as in the prayer
21 cases, and the ceremonial reference in solemn public
22 occasions of -- with respect to the Pledge of Allegiance.

23 Fourteen Justices of this Court since the Pledge
24 of Allegiance was amended have indicated that the Pledge
25 of Allegiance is not a religious exercise, it is something

1 different of a ceremonial nature.

2 QUESTION: Without benefit of brief and oral
3 argument.

4 MR. OLSON: Well, they -- there were references
5 to the case in -- of -- of course in the briefs and -- and
6 in connection with the case, but the fact is that the
7 Court was distinguishing, and the Court repeatedly said
8 that, that there is a major distinction between those
9 purely religious exercises such as prayers or recitation
10 of the Ten Commandments, or in the evolution cases. The
11 respondent cites nine cases that he says support the
12 proposition that he's articulating. He left out a number
13 of other cases where the Court has considered the issue of
14 religion in public schools, but those very cases,
15 including the -- the Lee v. Weisman case involved a Pledge
16 of Allegiance at the same time that the prayer was being
17 uttered. Those -- all of those cases refer to the
18 difference in significant constitutional respects.

19 QUESTION: Do you think the state or the school
20 district has the obligation to excuse from the classroom a
21 child whose parents disagree with the pledge?

22 MR. OLSON: Yes, and it does. There's no
23 question about that.

24 QUESTION: There -- there is that -- that -- that
25 constitutional right?

1 MR. OLSON: Yes, and that has been addressed, of
2 course, in -- throughout the brief.

3 QUESTION: Why -- why is that if this is not a
4 prayer or not an exercise?

5 MR. OLSON: Well, the -- the Court held in West
6 Virginia v. Barnette that persons of conscience being
7 concerned about expressing allegiance to -- and that case
8 occurred at a time before the pledge was amended.

9 QUESTION: Well, that was not a prayer either.
10 That was saluting the flag.

11 MR. OLSON: That was the Pledge of Allegiance to
12 the flag, but -- but that's the same thing that's
13 happening here, Mr. Chief Justice, that the child are
14 excused from reciting the -- the Pledge of Allegiance to
15 the flag. What I'm referring to in these other cases, as
16 I indicated, 14 individual Justices have expressed a
17 difference between prayers, purely religious --

18 QUESTION: They've expressed the view it's just a
19 ceremonial matter. Do you think that the pledge has the
20 same meaning today as when it was enacted with -- when the
21 words, under God, were inserted into the prayer, into the
22 pledge?

23 MR. OLSON: Well, I think that the, as this, the
24 language of the Justices of this Court have expressed that
25 --

1 QUESTION: Well, forget the --

2 MR. OLSON: -- because of --

3 QUESTION: -- forget the, forget all that dicta
4 for just a moment. Do you think in -- is it the
5 Government's position that the words, under God, have the
6 same meaning today as when they were first inserted in the
7 pledge?

8 MR. OLSON: Yes and no, and I would like to
9 answer, explain if I may.

10 (Laughter.)

11 QUESTION: Because it's a terribly important
12 question.

13 MR. OLSON: It's an important question because
14 the reference to under God in the pledge, as numerous
15 decisions of this Court have indicated in dicta, what as a
16 part of a -- of a thought process of coming about to the
17 conclusion that it -- it is an acknowledgment of the
18 religious basis of the framers of the Constitution, who
19 believed not only that the right to revolt, but that the
20 right to vest power in the people to create a government
21 became -- came as a result of religious principles. In
22 that sense, the Pledge of Allegiance is today, that has
23 that same significance to this country as it did in 1954
24 when it was amended.

25 But as this Court has also said, and that's the

1 other part of my answer to your question, this Court has
2 also said the ceremonial rendition of the Pledge of
3 Allegiance in context repeatedly over the years has caused
4 -- would cause a reasonable observer familiar -- as this
5 Court's First Amendment Establishment Clause jurisdiction
6 points out -- would cause a reasonable observer to
7 understand that that is -- this is not a religious
8 invocation. It is not like a prayer, it is not a
9 supplication, it's not an invocation. It is --

10 QUESTION: Your -- your argument is that there's
11 a stronger case now than there would have been 50 years
12 ago?

13 MR. OLSON: Yes, Justice Ginsburg, and that is
14 for many reasons, for -- because of the reason that I just
15 made, but also because the Congress revisited this issue
16 in 2002 after the decision below in this case. There are
17 findings in the record which are a part of the brief, with
18 respect to what the -- what the pledge means, the context
19 of the pledge in its historical context, in the connection
20 with its civic invocation, its ability to invoke certain
21 principles that are indisputably true, which gave rise to
22 the institutions which have given us freedom over all this
23 period of time.

24 It's in -- it is significant that the Court in,
25 the Congress, in making those findings, specifically

1 referred to the decisions that I was referring to before,
2 which have been characterized as dicta, but very important
3 dicta, because they explain how the Court came to its
4 conclusions.

5 So those are differences. The other difference
6 that should be made is that the challenge here too is not
7 directly to the Pledge of Allegiance, but it's to the
8 invocation or the -- the articulation of the Pledge of
9 Allegiance in the Elk Grove School District. The State of
10 California requires those patriotic exercises in that
11 school district under the phrase, patriotic
12 responsibilities of the schools, or words to that effect,
13 and that -- and the school district itself puts this in
14 the category of a patriotic exercise.

15 And to go back to what this Court has taught us
16 with respect to the Establishment Clause and the
17 endorsement prong of the Establishment Clause, it's the
18 entire context. It's the nation's history, it's a Pledge
19 of Allegiance to the flag and to the nation for which it
20 stands, and then a descriptive phrase, under God,
21 indivisible, with liberty and justice for all. So --

22 QUESTION: Well, why not have it like oath or
23 affirmation? That is, give people a choice, don't say
24 it's got to be all one way or all the other, but say
25 children who want to say under God can say it and children

1 who don't, don't have to say it.

2 MR. OLSON: Well, they don't. They don't have to
3 say it. They don't --

4 QUESTION: But they can be -- take part in the
5 pledge.

6 MR. OLSON: They can take part in the pledge --

7 QUESTION: In their own way.

8 MR. OLSON: -- without saying any words. They
9 can decide not to participate in the pledge at all, and I
10 think that's covered by the West Virginia v. Barnette
11 decision of this Court. The -- the -- and I want to make
12 this point before my time elapses, is that the respondent
13 makes a point of saying, this is the same as requiring the
14 pledge to say one nation under Jesus. That is completely
15 different. It's not supported by the history where the
16 framers of our Constitution repeatedly referred to God,
17 Lord, the creator, and there's a very interesting piece of
18 history with respect to that.

19 When the Virginia bill of establishing religious
20 freedom was articulated, they -- they used the phrase, the
21 holy author. Thomas Jefferson in his autobiography, which
22 was published in 1811, said there was a motion to amend to
23 refer to the holy author, Jesus Christ, and he said in his
24 autobiography that that was rejected because the framers
25 of the Virginia Bill of Rights, or act establishing

1 religious freedom, which is a precursor to the
2 Establishment Clause, was intended not to include any
3 particular sect, but to -- to apply to Jews, Hindus,
4 Mohammedens, and it even says the word infidels in Thomas
5 Jefferson's explanation for the background of that act.

6 In -- in summary, the state -- the Pledge of
7 Allegiance is not what this Court has said the
8 Establishment Clause protects against, that is to say,
9 state-sponsored prayers, religious rituals or ceremonies,
10 or the imposition or the requirement of teaching or not
11 teaching a religious doctrine.

12 The Establishment Clause does not prohibit civic and
13 ceremonial acknowledgments of the indisputable historical
14 fact of the religious heritage that caused the framers of
15 our Constitution and the signers of the Declaration of
16 Independence to say that they had the right to revolt and
17 start a new country, because although the king was
18 infallible, they believe that God gave them the right to
19 declare their independence when the king has not been
20 living up to the unalienable principles given to them by
21 God.

22 QUESTION: Thank you, General Olson.

23 Mr. Newdow, we'll hear from you. Am I
24 pronouncing your name correctly?

25 MR. NEWDOW: Yes, you are.

1 QUESTION: Please proceed.

2 ARGUMENT OF MICHAEL A. NEWDOW

3 ON BEHALF OF THE RESPONDENTS

4 MR. NEWDOW: Mr. Chief Justice, and may it please
5 the Court:

6 Every school morning in the Elk Grove Unified
7 School District's public schools, government agents,
8 teachers, funded with tax dollars, have their students
9 stand up, including my daughter, face the flag of the
10 United States of America, place their hands over their
11 hearts, and affirm that ours is a nation under some
12 particular religious entity, the appreciation of which is
13 not accepted by numerous people, such as myself. We
14 cannot in good conscience accept the idea that there
15 exists a deity.

16 I am an atheist. I don't believe in God. And
17 every school morning my child is asked to stand up, face
18 that flag, put her hand over her heart, and say that her
19 father is wrong.

20 QUESTION: Well now, let's -- let's talk first
21 about standing. You only give it two pages in your brief.
22 It -- it seems to me important to recognize that these
23 aren't just technical rules that we lawyers are interested
24 in, but that there's a common sense component to it. And
25 you are asking the Court to exercise the extraordinary,

1 the breathtaking power to declare Federal law
2 unconstitutional, and the common sense of the matter, it
3 seems to me, is that your daughter is -- is the one that
4 bears the blame for this. She's going to face the public
5 outcry, the public outrage, and we take the case, I think,
6 on the assumption that even at her tender years she
7 probably doesn't agree with that and that her mother
8 certainly doesn't.

9 And it seems to me that your insisting on
10 standing here contradicts that common sense core of the
11 standing rule, which is -- and I'm just talking about her
12 standing, I'm not talking about yours -- that the common
13 sense core of the standing rule is, when a citizen wants
14 the courts to exercise this awful power, that they take
15 the consequences, and you're putting that on her. That's
16 the common sense of the matter to me, Mr. Newdow.

17 MR. NEWDOW: I would answer that in two ways.
18 First of all, *Palmore v. Sidoti* says that we shouldn't
19 look at the harms that occur to people as a result of
20 prejudices of our society. If, in fact, the Constitution
21 is being violated, if in -- and there are consequences
22 from people trying to uphold the Constitution, that just
23 happens to happen. I'm not convinced that there are going
24 -- going to be adverse consequences to my daughter. My
25 daughter's going to be able to walk around and say that my

1 father helped uphold the Constitution of the United
2 States.

3 QUESTION: Maybe so, maybe no, but the rule of
4 standing is that the person who brings the suit has to
5 affirm that they have that stake now when the suit is
6 brought, and she doesn't.

7 MR. NEWDOW: Correct, but I'm not bringing this
8 in her behalf, that was taken out. I'm bringing this in
9 my behalf, and my child --

10 QUESTION: That's -- that's a different point
11 altogether, but if she has no standing, then it seems to
12 me the next question is whether or not the rights that you
13 assert, and I understand what they are, do seem to
14 undercut her position.

15 MR. NEWDOW: They may well do that, but she's a
16 separate entity. I have a right of standing, and the
17 question that this Court has is merely, do I have that
18 right. And my daughter is told every morning --

19 QUESTION: Yet -- but see, then -- then you're
20 getting back to your daughter. It seems to me this case
21 has to be about your rights, and you began this argument
22 by talking about your daughter and you're talking about
23 her now. I think she has, at least we'll say, I have
24 serious concerns about her standing, and so it seems to me
25 that her position is irrelevant.

1 MR. NEWDOW: And I agree with that, Your Honor.
2 I am saying I as her father have a right to know that when
3 she goes into the public schools she's not going to be
4 told every morning to be asked to stand up, put her hand
5 over her heart, and say your father is wrong, which is
6 what she's told every morning. That is an actual,
7 concrete, discrete, particularized, individualized harm to
8 me, which gives me standing, and not only gives me
9 standing, demonstrates to this Court how the --

10 QUESTION: Well, she does have a right not to
11 participate.

12 MR. NEWDOW: She has a -- yes, except under Lee
13 v. Weisman she's clearly coerced to participate. If there
14 was coercion in Lee v. Weisman --

15 QUESTION: That was a prayer.

16 MR. NEWDOW: Well, I'm not sure this isn't a
17 prayer, and I'm -- I am sure that the Establishment Clause
18 does not require prayer. President Bush, and this is in
19 the Americans United brief, stated himself that when we
20 ask our citizens to pledge allegiance to one nation under
21 God, they are asked to participate in an important
22 American tradition of humbly seeking the wisdom and
23 blessing --

24 QUESTION: Yeah, but I suppose reasonable people
25 could look at the pledge as not constituting a prayer.

1 MR. NEWDOW: Well, President Bush said it does
2 constitute a prayer.

3 QUESTION: Well, but he -- we certainly don't
4 take him as the final authority on this.

5 (Laughter.)

6 QUESTION: What -- what you say is, I pledge
7 allegiance to the flag of the United States of America and
8 to the republic for which it stands. So that certainly
9 doesn't sound like anything like a prayer.

10 MR. NEWDOW: Not at all.

11 QUESTION: Then why isn't General Olson's
12 categorization of the remainder as descriptive, one nation
13 under God, with liberty and justice for all? You can
14 disagree it's under God, you can disagree that it's -- has
15 a liberty and justice for all, but that doesn't make it a
16 prayer.

17 MR. NEWDOW: First of all, I don't think that we
18 want our -- that the purpose of the Pledge of Allegiance
19 is to disagree that it's liberty and justice for all. I
20 think the whole purpose of the pledge is to say that, and
21 this Court has stated it's an affirmation of belief, an
22 attitude of mind when we pledge, and I think you have to
23 take all the words. It says under God. That's as purely
24 religious as you can get and I think it would be an
25 amazing child to suddenly come up with this knowledge of

1 the history of our society and -- and what our nation was
2 founded on.

3 QUESTION: What -- what -- Mr. Newdow -- what if,
4 instead of the Pledge of Allegiance, the school required
5 the children to begin their -- their session by singing
6 God Bless America? Would that make your case weaker or
7 stronger?

8 MR. NEWDOW: I don't think so. If it was --
9 well, if it --

10 QUESTION: Well, you don't think weaker or you
11 don't think stronger?

12 MR. NEWDOW: I -- I think that if -- if they
13 stood up the child and they said, stand up, face the flag,
14 put your hand on your heart and you say God bless America,
15 I think that would clearly violate the line as well, just
16 as in God we trust.

17 QUESTION: Well, what I -- my -- my hypothesis is
18 that they ask the children to stand and to sing the -- the
19 patriotic song, God Bless America.

20 MR. NEWDOW: I think the Court would have to go
21 through its -- its normal procedures and say, was this
22 done for religious purpose? Does it have religious
23 effects? Is it attempting to endorse religion? We would
24 look at the text --

25 QUESTION: Sounds pretty much, much more like a

1 prayer than under God, God bless America.

2 MR. NEWDOW: I -- I don't -- I don't think so. I
3 mean, we're saying that this --

4 QUESTION: You're --

5 MR. NEWDOW: -- nation is under God. I mean,
6 Congress told us itself when it passed the law.

7 QUESTION: And if children who say God bless
8 Mommy and God bless Daddy, they think they're saying a
9 prayer.

10 MR. NEWDOW: They think they're saying God bless,
11 yes, and when they say, if Daddy and Mommy were under God,
12 they'd be also assuming that there was a God there if they
13 said that, and especially if they're stood up in the
14 public schools. If they did that --

15 QUESTION: It's two words sandwiched in the
16 middle of something and the child doesn't have to say
17 those words.

18 MR. NEWDOW: But the Government is not allowed to
19 take a position on that. Government is saying there's a
20 God. Certainly the child doesn't have to affirm that
21 belief if there weren't the coercion that we see in --

22 QUESTION: The child doesn't have to if it
23 doesn't want to. That's not an issue in this case.

24 MR. NEWDOW: The issue is whether or not
25 government can put that idea in her mind and interfere

1 with my right. I have a absolute right to raise my child
2 as whatever I see. Government is weighing in on this
3 issue.

4 QUESTION: No, you don't, you don't. You --
5 there is another custodian of this child who makes the
6 final decision who doesn't agree with you.

7 MR. NEWDOW: Well, first of all, I'm not
8 convinced about her making the final decision. I think it
9 was shown when I tried to get my child to attend the Ninth
10 Circuit that she certainly does not have the final
11 decision-making power. She has a temporary final
12 decision-making power, which is good for about three days
13 until we get to court.

14 But more importantly is the issue that
15 government is weighing in here. The mother has no right
16 to tell Elk Grove Unified School District how to run their
17 morning exercises. There is nothing in the custody order
18 that is affected by what I am asking. If, in fact, this
19 Court grants the relief that I suggest and that we take
20 out the words, under God, or at least tell the Elk Grove
21 Unified School District they can no longer do that, then
22 nothing in the custody order will be affected in any way.
23 The mother can still advocate to have God and she can do
24 all the things she wants.

25 QUESTION: Of course, we have -- we have so many

1 references to God in our daily lives in this country. We
2 opened this session of the Court today --

3 MR. NEWDOW: Correct, and there are --

4 QUESTION: -- with a reference, and I suppose you
5 would find that invalid as well.

6 MR. NEWDOW: Not -- not under what the -- this
7 Court has to distinguish in this case. No one -- when
8 this Court opens, God save this honorable Court, nobody's
9 asked to stand up, place their hand on their heart and
10 affirm this belief. This Court stated in West Virginia v.
11 Barnette that this is an affirmation, a personal
12 affirmation. Senator --

13 QUESTION: And you have no problem with, in God
14 we trust, on the coins and that sort of thing?

15 MR. NEWDOW: If my child was asked to stand up
16 and say, in God we trust, every morning in the public
17 schools led by her teachers --

18 QUESTION: It's all right for her to have the
19 coins and use them and read them, but it's -- it's the --
20 the problem of being asked to say the pledge?

21 MR. NEWDOW: I'm saying in this --

22 QUESTION: Which she doesn't have to say.

23 MR. NEWDOW: Well, first of all, under Lee v.
24 Weisman, she is coerced in --

25 QUESTION: Now, wait a minute. We have other

1 authorities saying that no child is required to say the
2 pledge.

3 MR. NEWDOW: And no child was required to be at
4 the graduation at Lee v. Weisman, but we said this is a
5 coercive effect on --

6 QUESTION: That was a prayer.

7 MR. NEWDOW: And -- then we're back to the idea
8 of why did Congress -- Congress told us why they stuck
9 this in their -- their -- into the pledge.

10 QUESTION: Well, let's -- we have to be careful
11 about the facts here. Your -- your daughter is not
12 required, and of course, I have a serious problem about
13 your daughter's standing, but your daughter is not
14 required to put her hand over her heart and face the flag.
15 That's a misstatement. She is not required to do that.

16 MR. NEWDOW: She's not required but she is
17 coerced. She is standing there. She's a 6-, 7-year-old
18 kid at the time, and she --

19 QUESTION: Justice O'Connor points out that's the
20 difference in Lee and Weisman and West Virginia Board of
21 Education v. Barnette. One is a prayer, the other isn't.

22 MR. NEWDOW: Well, it's -- again, the
23 Establishment Clause does not require a prayer. To put
24 the Ten Commandments on the wall was not a prayer yet this
25 Court said that violated the Establishment Clause. To

1 teach evolution or not teach evolution doesn't involve
2 prayer, but that can violate the Establishment Clause. The
3 issue is is it religious, and to say this is not religious
4 seems to me to be somewhat bizarre.

5 And as a matter of fact, we can look at the
6 standing argument and we can look at Elk Grove Unified
7 School District's brief, in which eight times they mention
8 that this is the mother involved with religious
9 upbringing, they keep talking about religious upbringing,
10 18 times they spoke about religious education, religious
11 training, religious interest. All of this has to do with
12 religion, and to suggest that this is merely historical or
13 patriotic seems to me to be somewhat disingenuous.

14 QUESTION: I mean, it's pretty, it's a pretty
15 broad use of religion sometimes. I -- does it make you
16 feel any better, and I think the answer's going to be no,
17 but there is a case called Seeger, which referred to the
18 Constitution -- to the statute that used the word, supreme
19 being, and it said that those words, supreme being,
20 included a set of beliefs, sincere beliefs, which in any
21 ordinary person's life fills the same place as a belief in
22 God fills in the life of an orthodox religionist. So it's
23 reaching out to be inclusive, maybe to include you, I
24 mean, to -- because many people who are not religious
25 nonetheless have a set of beliefs which occupy the same

1 place that religious beliefs occupy in the mind and woman
2 of a religious -- of a religious mind in men and women.

3 So do you think God is so generic in this
4 context that it could be that inclusive?

5 MR. NEWDOW: I think --

6 QUESTION: And if it is, then does your objection
7 disappear?

8 MR. NEWDOW: I don't think so, because if I'm not
9 mistaken with regard to Seeger, Seeger -- the Government
10 was saying what Seeger thought about religion and what's
11 occupied in Seeger's mind. Here it is the Government and
12 there's a crucial difference between government speech
13 endorsing religion, which the Establishment Clause
14 forbids, and -- and private speech endorsing religion,
15 which the Free Speech and Free Exercise Clauses protect.
16 And in that case we're talking about protecting that
17 individual's right for him to say in his view that this
18 occupies the same thing as God.

19 Here we're talking about government, everybody
20 on the way here is government. It's Congress that stuck
21 the two words, under God, into the pledge, clearly for a
22 religious purpose. It's the State of California that
23 says, go ahead, use the Pledge of Allegiance, which is now
24 religious. It is the city of Elk Grove that says, now
25 we're going to demand --

1 QUESTION: But what I'm thinking there is that
2 perhaps when you get that broad in your idea of what is
3 religious, so it can encompass a set of religious-type
4 beliefs in the minds of people who are not traditionally
5 religious, when you are that broad and in a civic context,
6 it really doesn't violate the Establishment Clause because
7 it's meant to include virtually everybody, and the few
8 whom it doesn't include don't have to take the pledge.

9 MR. NEWDOW: You're referring to the two words,
10 under God?

11 QUESTION: Yeah, under God is this kind of very
12 comprehensive supreme being, Seeger-type thing.

13 MR. NEWDOW: I don't think that I can include
14 under God to mean no God, which is exactly what I think.
15 I deny the existence of God, and for someone to tell me
16 that under God should mean some broad thing that even
17 encompasses my religious beliefs sounds a little, you
18 know, it seems like the Government is imposing what it
19 wants me to think of in terms of religion, which it may
20 not do. Government needs to stay out of this business
21 altogether. And this Court has always referred to --

22 QUESTION: How about what the ending of every
23 executive order, in the year of our Lord, so and so? Now
24 that, it seems to me, on your scale would be more
25 problematic because it's a specific Lord and not a generic

1 God.

2 MR. NEWDOW: Well, I would note that this Court
3 in its bar certificates when it passes those out has in
4 the year of the Lord, and actually it gives an exemption
5 for people who find that offensive. And it would seem to
6 me that we ought to be --

7 QUESTION: As -- as -- but it doesn't take away
8 in the year of our Lord, which is what you would like to
9 do. There's an option here too. The child does not have
10 to say it at all, can say it except for the words, under
11 God, or can say the whole thing.

12 MR. NEWDOW: I think that's a huge imposition to
13 put on a small child. Imagine you're the one atheist with
14 30 Christians there and you say to this child, let's all
15 stand up, face the flag, say we are one nation under God
16 and we're going to impose on a small child the -- this
17 immense amount of power, prestige, and financial support -
18 -

19 QUESTION: Now, I just -- I just want to point
20 out that once again you're arguing based on the child, and
21 I -- I think there's a serious standing problem.

22 MR. NEWDOW: I think the argument I'm trying to
23 make, and I may not be making it well, is that government
24 is doing this to my child. They are telling her, they're
25 putting here in a milieu where she says, hey, the

1 Government is saying that there is a God and my dad says
2 no, and that's an injury to me that it is --

3 QUESTION: When -- when you put it the way you
4 just did, that we are -- the school district is making her
5 an atheist, you're -- you're certainly overstating the
6 case, I think.

7 MR. NEWDOW: I'm not --

8 QUESTION: There's no indication that she is an
9 atheist.

10 MR. NEWDOW: I'm not saying either. I'm -- I'm
11 saying that she -- that my right to inculcate my religious
12 beliefs includes the right to know that government will
13 not in the public schools influence her one way in -- or
14 the other. And government is coming in here every morning
15 to start off the morning, say put your hand on your heart,
16 pledge to that flag and incorporate in that Pledge of
17 Allegiance that there exists this purely religious dogma
18 that your father has told you doesn't exist, and
19 government may not do that.

20 QUESTION: What -- what do you make of -- of this
21 argument? I will assume, and I -- I do assume, that --
22 that if you read the pledge carefully, the -- the
23 reference to under God means something more than a mere
24 description of how somebody else once thought. We're
25 pledging allegiance to the flag and to the republic. The

1 republic is then described as being under God, and I think
2 a fair reading of that would -- would be I think that's
3 the way the republic ought to be conceived, as under God.
4 So I think -- I think there's some affirmation there. I
5 will grant you that.

6 What do you make of the argument that in actual
7 practice the -- the -- the affirmation in the midst of
8 this civic exercise as a religious affirmation is -- is so
9 tepid, so diluted then so far, let's say, from a
10 compulsory prayer that in fact it -- it should be, in
11 effect, beneath the constitutional radar. It's -- it's
12 sometimes, you know the phrase, the Rostow phrase, the
13 ceremonial deism.

14 What -- what do you make of -- of that argument,
15 even -- even assuming that, as I do, that there is some
16 affirmation involved when the child says this as a
17 technical matter?

18 MR. NEWDOW: I think that that whole concept goes
19 completely against the ideals underlying the Establishment
20 Clause. We saw in *Minersville v. Gobitis* and *West*
21 *Virginia v. Barnette* something that most people don't
22 consider to be religious at all to be of essential
23 religious value to those Jehovah's Witnesses who objected.
24 And for the Government to come in and say, we've decided
25 for you this is inconsequential or unimportant is -- is an

1 arrogant pretension, said James Madison. He said in his
2 memorial --

3 QUESTION: Well, I think the argument is not that
4 the Government is -- is saying, we are defining this as
5 inconsequential for you. I think the argument is that
6 simply the way we live and think and work in schools and
7 in civic society in which the pledge is made, that the --
8 that whatever is distinctively religious as an affirmation
9 is simply lost. It -- it's not that the -- that the
10 Government is saying, you've got to pretend that it's
11 lost. The argument is that it is lost, that the
12 religious, as distinct from a civic content, is close to
13 disappearing here.

14 MR. NEWDOW: And again, I -- I don't mean to go
15 back, but it seems to me that is a view that you may
16 choose to take and the majority of Americans may choose to
17 take, but it doesn't -- it's not the view I take, and when
18 I see the flag and I think of pledging allegiance, I --
19 it's like I'm getting slapped in the face every time, bam,
20 you -- you know, this is a nation under God, your
21 religious belief system is wrong.

22 And here, I want to be able to tell my child
23 that I have a very valid religious belief system. Go to
24 church with your mother, go see Buddhists, do anything you
25 want, I love that -- the idea that she's being exposed to

1 other things, but I want my religious belief system to be
2 given the same weight as everybody else's. And the
3 Government comes in here and says, no, Newdow, your
4 religious belief system is wrong and the mother's is right
5 and anyone else who believes in God is right, and this
6 Court --

7 QUESTION: If you had her in this courtroom and
8 she stood up when the Justices entered and she heard the
9 words, God save the United States and this honorable
10 Court, wouldn't the injury that you're complaining about
11 be exactly the same, so you would have equal standing on
12 your account of things to challenge that as you do to
13 challenge what the school district does here?

14 MR. NEWDOW: I don't think the injury would be
15 even close to the same. She's not being asked to stand
16 up, place her hand on her heart, and say, I affirm this
17 belief, and I think that can easily distinguish this case
18 from all those other situations. Here she is being asked
19 to stand and say that there exists a God. Government
20 can't ever impose that --

21 QUESTION: If she's -- if she's asked to repeat
22 or to sing, as the Chief Justice suggested, God Bless
23 America, then she is speaking those words.

24 MR. NEWDOW: Again, if it were a situation where
25 we said, let's only do nothing else in this classroom, all

1 right, we'll say God bless America and let's just say
2 those words or something, I think that would violate the
3 Constitution as well. If it's just, let's sing one song a
4 day and once a month we get God Bless America, no, that
5 would be certainly fine. We don't want to be hostile to
6 religion.

7 But here we're not -- it's not a question of
8 being hostile to religion. It's -- it's indoctrinating
9 children and Congress said that was the purpose. This
10 Court is supposed to give credence and --

11 QUESTION: Do we think of that, God Bless
12 America, as religion? It's not exactly like a hymn that
13 you'd sing in church?

14 MR. NEWDOW: No, and again, if it were used for
15 the purpose to say that there exists a God, then I think
16 it would violate the Constitution. If it's merely a song
17 and this is one of many songs, then it would be fine. But
18 here there's nothing else in the Pledge of Allegiance,
19 there's no other view here. There's one view being
20 enunciated, that is that there exists a God, and
21 government may not take a view. This Court has all --
22 every Justice here --

23 QUESTION: Well, we're -- I don't know. I mean,
24 that's the point where -- I have no doubt that it offends
25 you and I respect the fact that you're -- your right to be

1 offended. I understand that. But the question is whether
2 Congress, whether -- whether the -- whether the Government
3 has the power to work that kind of offense. And on that,
4 because you say, well, it doesn't have the right. Well,
5 why doesn't it have the right? It isn't that divisive if,
6 in fact, you have a very broad understanding of God. It's
7 not a prayer, it's in a ceremonial context, and it has a
8 long history of being evoked for civic purposes. Of
9 course, some people will be offended, but those people who
10 are offended can in fact ask the child, where they have
11 custody, to be excused or not to say the words, under God.

12 So it's not perfect, it's not perfect, but it serves
13 a purpose of unification at the price of offending a small
14 number of people like you. So tell me from ground one why
15 -- why the country cannot do that?

16 MR. NEWDOW: Well, first of all, for 62 years
17 this pledge did serve the purpose of unification and it
18 did do it perfectly. It didn't include some religious
19 dogma that separated out some -- and I don't think there's
20 anything in the Constitution that says what percentage of
21 people get separated out. Additionally, again, we can use
22 that example that I raised before with one nation under
23 Jesus. That would also separate out just a few people
24 relatively in our country. There's not that many more.
25 It's about 86 percent to 93 percent, somewhere in that

1 vicinity, so we're separating out another amount of
2 people, but again, the principle is the same. We are
3 separating out people. We don't need to.

4 Again, the Pledge of Allegiance did absolutely
5 fine and with -- got us through two world wars, got us
6 through the Depression, got us through everything without
7 God, and Congress stuck God in there for that particular
8 reason, and the idea that it's not divisive I think is
9 somewhat, you know, shown to be questionable at least by
10 what happened in the result of the Ninth Circuit's
11 opinion. The country went berserk because people were so
12 upset that God was going to be taken out of the Pledge of
13 Allegiance.

14 QUESTION: Do we know -- do we know what the vote
15 was in Congress apropos of divisiveness to adopt the under
16 God phrase?

17 MR. NEWDOW: In 1954?

18 QUESTION: Yes.

19 MR. NEWDOW: It was apparently unanimous. There
20 was no objection. There's no count of the vote.

21 QUESTION: Well, that doesn't sound divisive.

22 (Laughter.)

23 MR. NEWDOW: It doesn't sound divisive if --
24 that's only because no atheist can get elected to public
25 office. The studies show that 48 percent of the

1 population cannot get elected.

2 (Applause.)

3 QUESTION: The courtroom will be cleared if
4 there's any more clapping. Proceed, Mr. Newdow.

5 MR. NEWDOW: The -- there are right now in eight
6 states in their constitutions provisions that say things
7 like South Carolina's constitution, no person who denies
8 the existence of a supreme being shall hold any office
9 under this constitution. Among those eight states there's
10 1328, I believe the number of legislators, not one of
11 which has tried to get that -- those phrases out of their
12 state constitutions, because they know, should they do
13 that, they'll never get re-elected, because nobody likes
14 somebody to stand up for atheists, and that's one of the
15 key problems, and we perpetuate that every day when we
16 say, okay class, including Newdow's daughter, stand up,
17 put your hand on your heart and pledge, affirm that we are
18 a nation under God.

19 QUESTION: You have a clear free exercise right
20 to get at those laws, wouldn't you, that you recited that
21 said atheists can't run for office, atheists can't do this
22 or that? That -- that would be plainly unconstitutional,
23 would it not?

24 MR. NEWDOW: That would be, yes. Those clauses
25 are clearly nullities at this time in view of *Torcaso v.*

1 Watkins.

2 QUESTION: And is --

3 MR. NEWDOW: However, they still exist. And the
4 fact that those clauses, I mean, we saw what happened to
5 the -- to -- when the Confederate flag was over the
6 statehouse in South Carolina, they had a big, you know,
7 everyone got, you know, very upset and said, let's get
8 that out. That was a flag that can mean anything to
9 anyone. Could we imagine a clause in the South Carolina
10 constitution that said no African-American shall hold any
11 office under this constitution, no Jew shall hold any
12 office under this constitution? That would be there for
13 two seconds maybe. But no atheists? Hey, let it stick
14 around, it's been there, in eight states right now today
15 in 2004.

16 QUESTION: Well, if anyone challenged that --

17 QUESTION: May I ask you the same question I
18 asked just General Olson? Do you think that the words,
19 under God, in the pledge, and I think of things like, in
20 God we trust, on the dollar bill, which nobody really
21 cares very much about anymore, but do you think the words,
22 under God, in the Pledge of Allegiance have the same
23 meaning today that they did to the country when the words
24 were inserted in the -- in the pledge?

25 MR. NEWDOW: I would merely note that 99 out of

1 99 Senators stopped what they were doing and went out on
2 the front steps of the Capitol to say that they want under
3 God there. The President of the United States in a press
4 conference with Vladimir Putin decided the first thing
5 he's going to talk about was this decision. It was on the
6 front page of every newspaper. This is supposed to be one
7 of the major cases of this Court's terms. I think clearly
8 it has enormous significance to the American public and
9 that's why this is important. That's why this case is so
10 critical.

11 QUESTION: And that's why you would not take the
12 same position with regard to the words, in God we trust,
13 on the dollar bill?

14 MR. NEWDOW: I -- I think this Court can easily
15 distinguish that situation from here, where we're asking
16 children to stand up, being coerced in the setting, hold
17 your hand over your heart and pledge your own personal
18 affirmation to some religious entity. Government is not
19 even supposed to be anywhere near this question.
20 Government's supposed to stay out of the religion
21 business, and here it came into it, it was completely
22 unnecessary, and Congress said in 1954, in House Report
23 1693, the inclusion of God in the pledge, therefore -- and
24 they didn't use the phrase, under God, they said the
25 entity God -- the inclusion of God in the pledge,

1 therefore, would further acknowledge the dependence of our
2 people and our Government upon the moral directions of the
3 creator and we'll note it wasn't a creator, it was the
4 creator, the Christian creator and we know that because
5 when they put the flag up the flagpole, they played Onward
6 Christian Soldiers Marching as to War.

7 I mean, this is -- clearly we know what was
8 going on here. It was to get religion in our government,
9 and the outcry that came when the Ninth Circuit issued its
10 opinion shows that people still want their religious
11 beliefs in our government. And the Free Exercise Clause
12 is fine, they can do anything they want in the public
13 schools, they can go into class, they can do whatever they
14 want, but the Free Exercise Clause has never meant that a
15 majority may use the machinery of the state to practice
16 its beliefs, and that's precisely what we have in this
17 situation.

18 Again, I would point out that this Court, every
19 member of this Court has demanded neutrality. Seven
20 members of this Court, six sitting today, have said that
21 we need -- that have authored their own opinions that say
22 that we need neutrality, and here we have the
23 quintessential religious question, does there exist a God?
24 And government has come in, yes, there exists a God. That
25 is not neutrality by any means.

1 QUESTION: What -- what -- is there any merit to
2 the argument that there's a difference in a religious
3 exercise and a pledge -- in the pledge -- or has that been
4 your whole point here that there is no difference?

5 MR. NEWDOW: I think there is a difference when
6 the pledge doesn't have religious dogma as part of the
7 religious --

8 QUESTION: But when it doesn't.

9 MR. NEWDOW: -- when it doesn't have a religious
10 creed or religious doctrine inserted.

11 QUESTION: No, no, I mean this pledge.

12 MR. NEWDOW: This -- this pledge --

13 QUESTION: You say this is the same as the prayer
14 in Lee v. Weisman?

15 MR. NEWDOW: No, not at all. I'm saying it's a
16 religious exercise, and clearly the whole idea, the intent
17 of Congress was --

18 QUESTION: You're saying both as a religious --
19 are religious exercises?

20 MR. NEWDOW: Well, I think religious exercise is
21 a larger set, prayer is a subset. I would say again the
22 President of the United States considers the pledge in
23 that subset. Whether or not you do or I do is -- is
24 somewhat, I think irrelevant, because the question --

25 QUESTION: Well, now, it -- it -- let's suppose,

1 I thought the case turned on whether this was a religious
2 exercise.

3 MR. NEWDOW: Correct.

4 QUESTION: Which -- which clearly there was in
5 Lee v. Weisman.

6 MR. NEWDOW: Correct.

7 QUESTION: Why -- why is this a religious
8 exercise, or -- or is it?

9 MR. NEWDOW: I think it definitely is, and it is
10 because the two words are, under God, and I can't see of
11 anything that's not religious under God, and again, I
12 would point out in the standing argument made by the Elk
13 Grove Unified School District, they repeatedly reference
14 the fact it's the whole issue here with the mother is
15 because she directs the, quote, religious upbringing.
16 There wasn't anything about --

17 QUESTION: Well, let -- let's assume that in Lee
18 v. Weisman it was 100 percent prayer, let's just assume
19 that.

20 MR. NEWDOW: Okay.

21 QUESTION: Is there -- this is maybe only --
22 you've probably figured out, 5 percent prayer under your -
23 - your view --

24 MR. NEWDOW: Well, I don't think --

25 QUESTION: -- under your view.

1 MR. NEWDOW: That -- that's one of the issues
2 that -- that gets confusing. The question is, when you
3 look at what it -- the religious part, and then the
4 question is, what are you going to define that as being
5 encompassed in? In Lee v. Weisman, it was the prayer
6 within the context of the graduation and I think it was
7 like an hour and a half for the graduation and two minutes
8 for the prayer.

9 So here we have, I think, if you actually
10 multiply and look at the ratio, the ratio of the two
11 words, under God, to the Pledge of Allegiance is greater
12 than the ratio of the time spent on prayer versus the
13 graduation exercise in Lee v. Weisman. You can do that
14 with anything. We have Allegheny County showing, you
15 know, we -- if you talk about the staircase and just
16 being, you know, this individual thing, we could say,
17 well, the staircase is this -- this transportation mode
18 just like here the pledge is this patriotic mode.

19 But the question is, why did you stick the
20 creche in the middle of this grand staircase? The
21 question is here, why did you stick these two purely
22 religious words, under God, in the middle of the Pledge of
23 Allegiance? So I would say that it's clear here there is
24 a purely religious purpose, we have purely religious
25 effects, it fails the endorsement test, it fails the

1 outsider test. Imagine you're this one child with a class
2 full of theists and you -- you're -- you have this idea
3 that you want to perhaps at least consider and you have
4 everyone imposing their view on you, it fails every test
5 this Court has ever come up with, and there's a principle
6 here and I'm hoping the Court will uphold this principle
7 so that we can finally go back and have every American
8 want to stand up, face the flag, place their hand over
9 their heart and pledge to one nation, indivisible, not
10 divided by religion, with liberty and justice for all.

11 QUESTION: Thank you, Mr. Newdow.

12 Mr. Cassidy, you have five minutes remaining.

13 REBUTTAL ARGUMENT OF TERENCE J. CASSIDY

14 ON BEHALF OF THE PETITIONERS

15 MR. CASSIDY: I would like to take this
16 opportunity to respond to several points. First, under
17 Lynch we know that acknowledgment of the role of religion
18 in American society is not exercising religion, nor is it
19 endorsing religion.

20 Second, respondent has stated his daughter is
21 being required to stand up and say the pledge. His
22 daughter is not required to stand up and say the pledge.
23 It is the parents' choice, the parent chooses whether the
24 child recites the pledge. In this case, the mother has
25 exercised her legal right under the state custody order

1 and we have discussed that previously, but therefore, Mr.
2 -- respondent's recourse is to object to the mother's
3 decision, to seek his recourse in state court for the
4 mother's decision, because there is a lack of a causal
5 relationship with respect to his not having a legally
6 protectable right to assert what he seems to be asserting
7 in this case, that it is his daughter who is affected by
8 the pledge.

9 Third, following Barnette, schools across the
10 country, including the Elk Grove Unified School District,
11 have developed a number of procedures to accommodate
12 students who wish to opt out of the pledge exercise. They
13 do so by consulting with the teachers and the principals,
14 who are in the best position to know how to adopt that to
15 the various class members. In particular, there may be
16 several ways that a child could opt out and exercise the
17 rights that were developed post-Barnette.

18 Equally important to the opt-out procedure or
19 the voluntary requirement is the fact that teachers now
20 instruct the students about mutual respect, respect of
21 other belief systems, of all persons' belief systems.

22 Third, I would like to go back to the issue that
23 was presented in this case, which was whether the school
24 district policy violates the Establishment Clause.
25 Respondent conceded at the Ninth Circuit Court of Appeals

1 that the school district policy had a secular purpose.
2 There's nothing in the record to show that the school
3 district policy was adopted solely for religious purpose,
4 nor is there anything in the record that shows there was
5 any religious purpose in adopting, in adopting, the school
6 district policy.

7 Moreover, the Pledge of Allegiance in grammar
8 schools, in public schools, is part of a teaching program,
9 and that's what we're here about, to talk about the
10 educational upbringing of a child, and it has to do with
11 national unity and citizenship of our young students.

12 QUESTION: May I ask you just one question? I
13 hate to take your rebuttal time, but one of the amicus
14 briefs filed in this case has this sentence in it. I'd
15 like you to comment on. If the religious portion of the
16 pledge is not intended as a serious affirmation of faith,
17 then every day government asks millions of school children
18 to take the name of the Lord in vain. Would you comment
19 on that argument?

20 MR. CASSIDY: I would disagree, because we feel
21 that the use of the term, one nation under God, reflects a
22 political philosophy, and the political philosophy of our
23 country, as set forth in the Declaration of Independence,
24 is one is -- that ours is one of a limited government, and
25 that is the philosophy that's now more enhanced, more

1 reflected in the 1954 act.

2 But back to our school district policy, which is
3 what is being challenged in this case, I would point the
4 Court to the joint appendix at page 149, which sets forth
5 not only that the pledge is recited in grammar school, but
6 also that the pledge is then -- also can be recited in
7 secondary schools, and likewise, that policy provides that
8 school children are to look at all the different
9 components of our history, speeches, historical documents,
10 whether they be state constitutions, the Declaration of
11 Independence, the Bill of Rights, and likewise, that's
12 incorporated into the history and social sciences content
13 standards for California, specifically at grade one level.

14 Not only are the students learning the Pledge of
15 Allegiance and singing songs such as My Country 'Tis of
16 Thee, but likewise they're learning about the Declaration
17 of Independence, so they are learning about our country's
18 nationalism and civic unity at a very early stage. They
19 don't say the Pledge of Allegiance and go home.

20 Likewise, I would submit that the Pledge of --

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Cassidy.
22 The case is submitted.

23 (Whereupon, at 12:03 p.m., the case in the
24 above-entitled matter was submitted.)

25