

No. 02-1624

IN THE
Supreme Court of the United States

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

v.

MICHAEL A. NEWDOW, ET AL.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**AMICUS CURIAE BRIEF OF AMERICANS
UNITED FOR SEPARATION OF CHURCH AND
STATE, AMERICAN CIVIL LIBERTIES UNION,
AND AMERICANS FOR RELIGIOUS LIBERTY IN
SUPPORT OF AFFIRMANCE**

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February 13, 2004

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INTEREST OF AMICI¹

Americans United for Separation of Church and State is a 75,000-member non-profit organization dedicated to defending separation of church and state and religious liberty. The American Civil Liberties Union is a non-profit organization with 400,000 members and affiliates nationwide, including California, dedicated to liberty and equality under the Constitution. Americans for Religious Liberty is a non-profit organization dedicated to defending religious freedom and separation of church and state. All have appeared before the Court as counsel or amicus in Establishment Clause cases.

SUMMARY

In 1943, in the darkest hours of World War II, the Court took the wrenching step of striking down a school board policy compelling schoolchildren to salute the Flag, a step the Court had decisively rejected only three years earlier. The Court took this step because it concluded that the First Amendment forbids the government to compel individuals to proclaim allegiance to the political beliefs expressed in the Pledge.

The school district policy now under review is also constitutionally flawed, though in a different way than the policy invalidated in 1943. Since 1954 the Pledge has expressed allegiance to religious as well as political beliefs. Although the First Amendment allows the government to promote patriotism as long as participation is

¹ Letters of consent to the filing of this brief have been lodged with the Clerk. No counsel for a party in this case authored this brief in whole or in part and no person or entity other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

not compelled, the Establishment Clause forbids the government to endorse religion or pressure schoolchildren, even indirectly, to proclaim religious belief. The policy under review does both and is therefore unconstitutional.

1. Newdow has standing to challenge EGUSD's Pledge policy. His standing is based on his retained parental rights under California law, as interpreted by the Ninth Circuit. The Ninth Circuit held, as a matter of California law, that (a) Newdow retains a right to influence his daughter's religious development; (b) this retained parental right includes the right to object on constitutional grounds to government action that interferes with his ability to influence his daughter's religious development; and (c) the Superior Court's orders granting the child's mother final decision-making authority with respect to the child did not vitiate this retained parental right.

If the Ninth Circuit correctly interpreted California law, Newdow has standing: He has a legally protected interest (the retained parental right); EGUSD's Pledge policy threatens that interest (by communicating a message of government endorsement of religion to his daughter and indirectly coercing her, within the meaning of *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), to declare religious belief and affirm religion); and invalidating EGUSD's Pledge policy would redress that injury. The arguments against Newdow's standing misperceive his claims, miscalculate a court's power to redress his injury, and ultimately ignore the Ninth Circuit's reliance on California law.

2. EGUSD's Pledge policy violates the Establishment Clause. Unlike other historical and cultural texts, the Pledge is an expression of personal belief and commitment. Its recitation, as the Court has recognized, is a

“ceremony of assent.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The qualities ascribed to the Republic for which the flag stands are not descriptive but aspirational, and to recite the Pledge is to subscribe to those aspirations. *Id.* *Barnette* rejected the contention that the qualities the Pledge ascribes to the Republic are simply “acknowledgements” of historical fact.

Since 1954, the “ceremony of assent” has included an expression of belief in “God” and devotion to a nation “under God.” This is how schoolchildren would naturally understand the Pledge, how social science research indicates schoolchildren actually understand the Pledge, and how Congress meant schoolchildren to understand the Pledge. In adding “under God” to the Pledge, Congress *intended* to make its recitation an affirmation of religious belief. The 1954 law adding “under God” to the Pledge made affirmation of religious belief an official element of patriotism and religiosity an official element of national identity. Reciting the Pledge thus became a religious exercise— not because it refers to “God,” but because it is a *pledge*.

EGUSD’s Pledge policy violates the Establishment Clause both because it communicates to schoolchildren a forbidden message of government endorsement of religion and because, like the school-prayer policies invalidated by the Court beginning with *Engel*, EGUSD’s policy pressures schoolchildren to profess religious belief and affirm religious ideals. Indeed, the policy pressures schoolchildren to profess a *particular* religious doctrine, monotheism, thereby violating the Clause’s command of neutrality among religions. And by yoking patriotism to religion, EGUSD’s policy exerts an even greater coercive pressure than the school-prayer policies, forcing schoolchildren to choose between declaring religious belief and being branded religious *and* political outsiders.

ARGUMENT**I. NEWDOW HAS STANDING IF THE NINTH CIRCUIT CORRECTLY INTERPRETED CALIFORNIA LAW.****A. Newdow has standing to challenge EGUSD's Pledge policy based on his retained parental rights under California law.**

Under Article III, a plaintiff has standing to invoke federal court jurisdiction if three conditions are satisfied: (1) the plaintiff must have suffered “an invasion of a legally protected interest” which is “concrete and particularized” and “actual or imminent”; (2) “the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; (3) “it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and quotations omitted); see also *McConnell v. FEC*, 124 S. Ct. 619, 707 (2003) (citations omitted).

If the Ninth Circuit correctly interpreted California law, Newdow satisfies each of these conditions. First, he is suffering a concrete and particularized invasion of a legally protected interest—his retained parental right under California law to influence his daughter’s religious development. The Ninth Circuit held that a parent in Newdow’s position has such a right as a matter of California law; that this right includes the right to influence his daughter’s religious development free from unconstitutional government interference; and that California law does not permit a state court to impose custody terms that vitiate this right. J.A. 144-56 (discussing *Murga v. Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980), and *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App.

1983)).² Second, Newdow’s injury is “fairly traceable” to EGUSD’s policy because it is the policy that interferes with his retained parental right. Third, invalidation of EGUSD’s policy would redress Newdow’s injury.

B. The arguments against standing lack merit.

1. The United States misperceives the right that the Ninth Circuit found Newdow entitled to assert.

The United States and EGUSD dispute Newdow’s standing by attacking a series of straw men—claims that they ascribe to Newdow but that did not form the basis of the Ninth Circuit’s holding that Newdow has standing.

Contrary to the United States, the issue here is not whether Newdow may “su[e] to enforce [his daughter’s] rights,” US Br. 11, or has a general right to shield her from “other influences,” *id.* at 7, “other viewpoints,” *id.* at 13, or “messages” with which he disagrees, *id.* at 14. Nor is the issue whether Newdow has a right to avoid having his message “countered by governmental speech with which he disagrees,” *id.* at 8, or “diluted by the government’s educational practices,” *id.* at 14, or has a right to “direct the education of his daughter,” *id.* at 11, to “dictate the curriculum” in her school, *id.* at 14, or to decide “whether the child should salute the flag of the United States,” *id.* at 12. The issue also is not whether he may challenge a “playground tort.” *Id.* at 16. And contrary to EGUSD, the issue is not whether he may “prevent[] his

² The state-law basis of the Ninth Circuit’s conclusion that Newdow has standing is discussed in the Amicus Curiae Br. of Justice Joseph R. Grodin in Supp. of Neither Party (Vacatur) [“Grodin Vacatur Br.”] at 6-8, 10-14, 17, 18-24.

daughter from both hearing and reciting the Pledge.” EGUSD Br. 20.

These are all straw men.³ The Ninth Circuit held that Newdow had standing to challenge EGUSD’s Pledge policy on the ground that, by pressuring his daughter to participate in a religious exercise, EGUSD’s policy unconstitutionally interferes with *Newdow’s* right under California law to influence his daughter’s religious development. Unlike the fictional rights addressed by the United States, the right the Ninth Circuit held Newdow entitled to assert is a parental right, not a “generalized interest that could be asserted by a grandparent, nanny, or proselytizing friend,” US Br. 14, or by any other “concerned individual,” *id.* at 15.

2. The United States miscalculates a court’s ability to redress the asserted injury.

The injury claimed by Newdow is EGUSD’s interference with his retained parental right by pressuring his daughter, unconstitutionally, to participate in a religious exercise. This claimed injury is “concrete and particularized” and “actual,” *Lujan*, 504 U.S. at 560, not “diffuse,” US Br. 14. A court can redress this injury by invalidating EGUSD’s Pledge policy.

Because it is the *government’s* sponsorship of the exercise that causes Newdow’s injury, it is irrelevant that the child’s mother could send the child to a private school where recitation of the Pledge or even prayer is required. See *id.* at 14, 17. And because it is the *government’s* in-

³ The United States does not explain its characterization of the Pledge as “governmental speech.” US Br. 8. To recite the Pledge is to declare personal belief and commitment, not to serve as a mouthpiece for the government.

culcation of religion in his daughter that injures Newdow, it is irrelevant that, even if he prevails, the child might still be exposed to “the daily Christian influence of the mother and . . . church activities.” *Id.* at 16-17.

Nor does the fact that the mother has not chosen to enroll the child in private school make the mother an “independent” cause of Newdow’s injury. See *id.* at 16. In our system, public education is the default, especially for those of limited means. Newdow’s injury results not from the fact that the mother has enrolled the child in a public school but from the fact that the public school district coerces its schoolchildren to participate in a religious exercise. A court cannot “control or predict” whether the mother will enroll the child in public or private school. See *id.* at 17. But a court can prevent the injury to Newdow that results when the child *is* enrolled in a public school that coerces her to participate in a religious exercise. Newdow’s injury is therefore redressable.

Noting that the Ninth Circuit stated that Newdow has a right not to have his daughter “subjected to *unconstitutional* state action,” *id.* at 14 (citing Pet. App. 95 (emphasis added)), the United States asserts that the Ninth Circuit erroneously “conflated” the standing inquiry with the merits of Newdow’s claim. See *id.* at 14-15. The Ninth Circuit, however, was simply saying that Newdow has a right to challenge government action that is alleged to be unconstitutional. Here, the injury that Newdow has alleged is government interference with his right to influence his daughter’s religious development; the merits issue he seeks to have decided is the constitutionality of that interference.

