

Supreme Court Ducks "Under God," but Dismisses Dad's Claim

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Without addressing the merits of the now-famous challenge to the words "under God" in the Pledge of Allegiance, the U.S. Supreme Court on Monday threw out a California dad's attempt to ban the Pledge from his daughter's school.

Rather than decide the constitutional issue, the Court's majority tiptoed around it, choosing instead to rely on its reluctance to intervene in domestic relations matters.

How did a lofty First Amendment case turn into a "domestic relations" matter? The answer turns on a feud between Michael Newdow and his former wife over custody of their daughter. The child's mother, as it turned out, did not object to her daughter saying the Pledge—and Mom had custody which, in the eyes of the California courts, gave her the authority to determine whether the child would say the Pledge in school.

"Under God" may be safe in the Pledge for the time being, but the Court left the door open to future litigation when it observed that—while Newdow lacked legal "standing" to sue on his daughter's or his own behalf in this case—another parent unencumbered by circumstances like the convoluted domestic dispute in this case could, indeed, exercise such a right.

In the meantime, three concurring justices shed light on their views of the claimed constitutional violation. All would have found that Newdow had legal "standing" to pursue the claim, and then all would have decided the merits against him. Chief Justice Rehnquist concluded that the Pledge—including the words "under God"—does not violate the Constitution because the Pledge is a "patriotic ceremony" that does not become a religious one merely because it contains the words "under God". The Chief Justice likened eliminating "under God" from the Pledge to giving a disgruntled parent a "heckler's veto," and observed that, in his view, the sole Constitutional restriction on reciting the Pledge in school is permitting schoolchildren the right to abstain from doing so. Justices O'Connor and Thomas, with somewhat different analyses, concluded similarly.

For school districts, then, the lesson from this case is probably found in Rehnquist's concurring opinion: take steps to assure that requirements to recite the Pledge in school are accompanied by the student's right to abstain from doing so.

If you need assistance with revision of this or any other school policy, or with other questions related to school law, please contact our Beverly Hall Burns.