

# High court listens to 'pledge' arguments: The Newdow case

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A ruling is not likely until June, but a church-state case widely discussed in the public has finally been aired in the U.S. Supreme Court. A California atheist and lawyers supporting the public school district where his daughter says “under God” each school day appeared before the high court to field questions by the justices on whether that phrase in the Pledge of Allegiance is constitutional.

Physician Michael Newdow argued on March 24 that every time his daughter—directed by a tax-funded teacher—stands and recites the pledge, the government is making her “say that her father is wrong.”

Solicitor General Theodore Olson, arguing against Newdow and for the Bush administration, said justices of the court have stated more than a dozen times that there is a difference between religious exercise such as a prayer and solemn ceremonies such as the pledge. “Fourteen justices . . . have indicated that the Pledge of Allegiance is not a religious exercise,” he said.

Prior to the much-anticipated arguments, dozens of briefs were filed by supporters and opponents of Newdow—from pantheists to politicians. They followed a 2-1 ruling in June 2002 by the Ninth Circuit Court of Appeals, which determined that the words “under God” make the pledge unconstitutional because they are not neutral toward religion. The appeals court has stayed its decision until all appeals are exhausted, so children in nine Western states continue to recite the pledge in its entirety.

While those closely watching the case have often focused on whether the words “under God” violate the First Amendment’s establishment clause, the justices spent a significant amount of their time March 24 on issues related to Newdow’s standing in the case and his daughter’s circumstances. He shares custody of his daughter, but the girl’s mother makes the decisions concerning where she is educated and does not object to her reciting the pledge.

Terence Cassidy, the attorney for the Elk Grove Unified School District near Sacramento, California, argued that Newdow's claims should be rejected because the "ultimate decision-making authority is with the mother."

Justice Anthony Kennedy questioned Newdow about the impact the case would have on his daughter if the court should declare the law calling for the pledge unconstitutional. "Your daughter is the one who bears the blame for this," he said. "She's going to suffer the public outcry."

Newdow looked at the possible outcome differently: "My daughter's going to be able to walk around and . . . say, 'My father defended the Constitution of the United States.'"

Several justices attempted to clarify that students can opt out of saying some or all of the pledge and schools have an obligation to permit those options, which date to a 1943 decision by the high court. When Justice Sandra Day O'Connor brought up that point with Newdow, asking him if his daughter had the "right not to participate," he replied that he believes she is coerced.

When O'Connor and Chief Justice William Rehnquist discussed whether the pledge is a prayer, Newdow argued that it is an "affirmation of belief." He added that he doesn't understand how others can suggest that the pledge is solely historical and patriotic, which has been argued in many amicus briefs. "To say this is not religious seems to me to be somewhat bizarre," he said.

The outcome of the case could be affected by unusual circumstances involving both Newdow's standing and the absence of one justice. Experts on both sides of the case say the court could sidestep the church-state controversy by declaring that Newdow does not have standing in the case.

Justice Antonin Scalia recused himself from the case after Newdow requested he do so because the justice had made comments criticizing the appellate decision. A majority of the justices on the high court could agree with the lower court, disagree with it, or end up with a 4-4 tie. A tie vote would leave schoolchildren in nine western states saying a different pledge from those in the rest of the country. -

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