



Client Alert

TEL: 661.636-4830
FAX: 661.636-4843
E-mail: sls@kern.org
www.schoolslegalservice.org

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FEDERAL DISTRICT COURT JUDGE DECLARES “PLEDGE OF ALLEGIANCE” UNCONSTITUTIONAL

This is the second time in approximately five years that a federal court based in California has declared the “Pledge of Allegiance” unconstitutional because it contains the phrase “under God.”

Previous Case

In July 2000, a federal judge in the United States District Court, Sacramento Division of the Eastern District of California, declared that the Elk Grove Unified School District’s use of the Pledge of Allegiance (containing the phrase “under God”) was **not** unconstitutional. That decision was subsequently overturned by the federal Court of Appeals, Ninth Circuit (San Francisco) in 2002. The Ninth Circuit, in concluding that the Pledge was unconstitutional, stated that the Pledge “impermissibly coerces a religious act” thereby placing students in the “untenable position of choosing between participating in an exercise with religious content or protesting.”

The school district then filed a request for review which was granted by the United States Supreme Court (“Supreme Court”). It agreed to hear the case and in June 2004 overruled the Ninth Circuit’s decision on the basis that the individual who initiated the lawsuit, Michael Newdow, had no legal standing/right to sue. By ruling on the technical issue of “standing to sue,” the Supreme Court never ruled on the constitutionality of the Pledge.

Current Case

It appears that Mr. Newdow then elicited the cooperation of several parents who had children enrolled in three different school districts in the Sacramento area. A new lawsuit was initiated by these plaintiffs challenging the constitutionality of the Pledge. On September 14, 2005, federal district court judge Lawrence K. Karlton ruled, based upon Ninth Circuit’s previous 2002 decision, that the Pledge, in its present form, is unconstitutional.

The Becket Fund, which is a party defendant in the case, has stated that it will immediately appeal the federal district court decision to the Ninth Circuit Court of Appeals. If the Ninth Circuit decides,

consistent with its previous decision that the Pledge violates the Establishment Clause of the First Amendment, the Becket Fund will seek review by the United States Supreme Court.

While the Court could deny review and simply refuse to hear the case, we feel that this is unlikely for two reasons. First, the case appears to have generated a high degree of public interest. And, in light of the current debate over the issue of judicial activism, the Court will be hard pressed to avoid deciding the issue—that is the constitutionality of the Pledge. Second, following the Supreme Court’s June 2004 decision in *Newdow’s* first lawsuit, another federal appellate court, the Fourth Circuit (Richmond, Virginia), in August 2005, decided that a Virginia school district’s Pledge, which also contained the phrase “under God,” was **not** unconstitutional—that the Pledge was, in effect, a patriotic exercise, not a religious affirmation. Concluding that neither the purpose nor the effect of recitation of the Pledge was to promote religion, the court observed:

The notion that official acknowledgments of religion and its role in the founding of our nation such as that in the Pledge “pose a real danger of establishment of a state church is simply farfetched. [Citation.] The Establishment Clause works to bar sponsorship, financial support, and active involvement of the sovereign in religious activity. [Citation.] The Pledge, which is not a religious exercise, poses none of these harms and does not amount to an establishment of religion. Accordingly, the Recitation Statute, requiring daily, voluntary, recitation of the Pledge in the classrooms of Virginia’s public schools is constitutional. (*Myers v. Loudoun County Public Schools* (2005) 418 F.3d 395, 408.)

Consistent with the Fourth Circuit’s decision, Jack O’Connell, California Superintendent of Public Instruction, in his reaction to the court’s decision, stated in part:

I am disappointed in today’s ruling. Reciting the Pledge of Allegiance at the start of the school day is one of our country’s great traditions and is an appropriate expression of patriotism to our country for students to learn and practice. . . . This ruling declares that leading students in the daily Pledge of Allegiance, as we know it today, is unconstitutional. . . . I have asked my attorneys to work with the state Attorney General to review every legal avenue to protect student’s rights to participate in the Pledge of Allegiance. . . . At the end of the day, I strongly believe that every student in California should be able to express their patriotism by pledging allegiance to the flag.

Recommendation

Since there has been no final judicial decision issued in the current case, you are free, if you so choose, to conduct business as usual. In effect, this means that you can continue to use the Pledge, with the phrase “under God,” if you so choose, until a final court decision has been rendered—that is, until all appeals have been exhausted. In all probability, that will occur when the United States Supreme Court renders its decision on the constitutionality of the Pledge.

If you have any questions whatsoever concerning this matter, please do not hesitate to call me.

— *Dwaine L. Chambers, General Counsel*

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