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## Elk Grove Unified School District v. Newdow

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### Ten Commandments of Oral Arguments


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ARGUED MARCH 24, 2004

DAHLIA LITHWICK

*Michael Newdow's daughter attended public school in the Elk Grove Unified School District in California. Elk Grove teachers began school days by leading students in a voluntary recitation of the Pledge of Allegiance, including the words under God, added by a 1954 congressional act. Newdow sued in federal district court in California, arguing that making students listen—even if they choose not to participate—to the words under God violates the Establishment Clause of the U.S. Constitution's First Amendment. The U.S. Ninth Circuit Court of Appeals held that Newdow had standing “to challenge a practice that interferes with his right to direct the religious education of his daughter.” It also ruled that both Congress's 1954 act adding the words under God to the Pledge and the school district policy requiring that the Pledge be recited violated the First Amendment's Establishment Clause.*

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WATCHING JUST A HANDFUL OF ORAL ARGUMENTS AT THE U.S. Supreme Court quickly leads to the recognition that only a few immutable rules of the road exist, separating the truly outstanding oral advocates from the really terrible ones. A small cadre of attorneys—the Supreme Court’s Harlem Globetrotters—argues the vast majority of the high-profile cases at the high court. This group of lawyers frequently mops up the Court with the earnest criminal defense attorneys, overworked state attorneys general, and well-meaning trial lawyers who have shepherded their cases all the way up from the lower courts. It’s not that the Harlem Globetrotters are smarter or better lawyers than their opponents. It’s simply that ordinary attorneys haven’t always been instructed in the very different rules that apply on Maryland Avenue. These aren’t rules about the briefing schedule. These are the rules of how to persuade nine grumpy old justices.

The best oral advocates seem to have memorized and internalized these rules: You don’t get emotional or overwrought in laying out your case; you don’t bore the justices with a tear-jerking narrative; you don’t betray your suspicion that you’re smarter than the justices (even when you are); and you never, ever try to be funnier than they are (even when you can be). Perhaps most urgently, you never become so invested in some matter of national legal concern—particularly one that involves a member of your own family—that you get yourself admitted to the Supreme Court bar for the sole purpose of arguing your own case. All this advice boils down into a single immutable commandment: There is no room for a tenth ego at the U.S. Supreme Court.

That’s what made oral argument in *Elk Grove Unified School District v. Newdow* (2004)<sup>1</sup> the biggest surprise for Court-watchers that year. It also made *Newdow*—widely known as the Pledge of Allegiance case—one of the most instructive oral arguments I’ve ever watched. Not because Michael Newdow—who argued the case, as he had done at every court since the first motions were filed—followed all the rules about how to conduct himself at the marble temple. Somehow, he performed brilliantly even as he broke virtually every one of those rules. True, the case ultimately was not resolved in his favor. But despite the

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1. 542 U.S. 1.

fact he seemingly did everything wrong, he managed to wow the spectators, charm the press, and even—although I doubt they would ever admit it—impress most of the justices. So, on the theory that sometimes you learn more from the rule breakers than the followers, here's a walk through the Newdow argument.

Argued on March 24, 2004, the case promised to be a train wreck. Michael Newdow is one of those smartest-kids-in-class guys, the man who somehow manages to rub everyone—even his greatest admirers—the wrong way. Newdow is a physician who attended law school but never practiced law. He was disputing the constitutionality of the words *under God* in the Pledge of Allegiance, arguing that they violated the First Amendment's ban on entangling church and state. The trigger for his outrage was that his young daughter was being pressured to recite the pledge at her public school, a space in which the courts have traditionally been particularly anxious about any hint of religious coercion. Newdow, who had no staff or paralegals and didn't even take the bar exam until 2002, filed his action and argued it all the way up through the Ninth Circuit Court of Appeals, where he prevailed on most of his claims. The nation went crazy, and the Supreme Court agreed to hear the matter. Newdow, not surprisingly, planned to argue it there as well.

Long before Newdow darkened the Court's marble halls, magazine and newspaper profiles revealed him to be the antithesis of the silver-tongued hired guns that usually argue such major cases. The advocate was pushy and self-justifying, emotionally overinvolved, seemingly incapable of separating his fury over an ugly custody battle with the child's mother from the constitutional merits of the dispute, and brash in a way one simply never sees at the Court (with the exception of certain justices). Within seconds of his argument, it was abundantly clear that he was not going to play by any of the Court's genteel rules of conduct. Newdow was a barroom brawler, and he made no apology for it.

Among the many, many unspoken laws of oral advocacy shattered by Newdow that day, the following were only the most notable.

1. *Thou Shalt Not Insult the Integrity of the Judiciary in Advance of Oral Argument.* Even before he showed his face at the Court, Newdow shocked Court watchers and even the justices themselves by filing

an almost unheard-of motion seeking the recusal of Justice Antonin G. Scalia based on the justice's public remarks before hearing the case. Newdow not only overtly and publicly questioned Scalia's ability to hear the case impartially but also succeeded in getting the usually intransigent justice to stay off the case ("Scalia Attacks" 2003).

2. *Thou Shalt Not Make a Play for Judicial Heartstrings That Are Not in Evidence.* The first sentence out of Newdow's mouth was both personal and emotional.

Every school morning in the Elk Grove Unified School District's public schools, government agents, teachers, funded with tax dollars, have their students stand up, including my daughter, face the flag of the United States of America, place their hands over their hearts, and affirm that ours is a nation under some particular religious entity, the appreciation of which is not accepted by numerous people, such as myself. . . . I am an atheist. I don't believe in God. And every school morning my child is asked to stand up, face that flag, put her hand over her heart, and say that her father is wrong.




This is an astonishing opening in many ways. He isn't telling the Court what the constitutional dispute means to them or to the nation; he is describing, in completely personal terms, how it affects him and his relationship with his *child*, of all things. The Court usually shuts down this sort of emotionalism in a second. Yet within moments, he was interrupted by Justice Anthony M. Kennedy, seeking to address Newdow's standing to bring suit. What was amazing was that Kennedy phrased the standing question in the most personal terms as well: "It seems to me these aren't just technical rules that we lawyers are interested in, but that there's a common-sense component to it. . . . It seems to me that your daughter is—is the one that bears the blame for this. She's going to face the public outcry."




It is also unusual at oral argument to hear the justices fretting about the ruling's effect on a party, even if that party is a child. He privileges concern for that child over the "technical rules." Kennedy is making a larger point here about Newdow's standing to sue. But he is less con-

cerned with standing than with negative publicity, which is not a legal issue in and of itself. This is rather tenderhearted language, especially coming from this particular bench.

And Newdow's response is quite deft: He tells Kennedy that "harms that occur as the result of prejudices of our society" are not a sound basis for ignoring a constitutional wrong. It is as if he is telling the justice, "This is personal to me, but you should focus on the constitutional problems, please." 

3. *Thou Shalt Not Describe the Parties in the Case in Reference to Thine Own Self.* The words *I* and *mine* are as anathema to most oral advocates as they are staples of small children. All of the best Supreme Court attorneys know that the justices don't much care what the attorneys think and don't want to hear what they want or how the case will affect them personally. The justices care about the following things, ranked in declining order of importance: (1) the Constitution; (2) the Court; (3) not looking stupid; (4) not overtly overruling anything; (5) the dignity of states; (6) the dignity of the parties; (7) what they are going to eat for dinner; (8) what the oral advocates want.


For these reasons, most attorneys presenting oral arguments do not talk about themselves or their stake in the litigation. Granted, Newdow was somewhat unusual in that he in fact had a very personal stake in this litigation; this was, after all, his child. But anyone advising him prior to oral argument would have urged him to argue this case on its constitutional merits alone. Those suggestions clearly would have fallen on deaf ears. And the extent to which Newdow kept reminding the Court of his investment in the outcome was quite amazing and—counterintuitively—very effective. When Kennedy made it clear that he believed Newdow's interests and his daughter's interests diverged and that he wasn't sure whether Newdow had standing on his own, Newdow's reply was unequivocal: "I am saying [that] I as her father have a right to know that when she goes into the public schools, she's not going to be told every morning to be asked to stand up, put her hand over her heart, and say 'Your father is wrong.' . . . That is an actual, concrete, discrete, particularized, individualized harm to me." 


4. *Thou Shalt Not Be Combative with the Justices.* In the normal, garden-variety oral argument, oral advocates push back at the justices only very gently. In the most extreme cases, someone will say something like, “Respectfully, I disagree.” But not Michael Newdow. His willingness to let the justices know the precise depth and width of their wrongness knew almost no bounds. When Justice Ruth Bader Ginsburg observed that “there is another custodian of this child who makes the final decision who doesn’t agree with you,” Newdow’s response teetered right on the border of rude: “Well, first of all, I’m not convinced about her making the final decision. I think it was shown when I tried to get my child to attend the Ninth Circuit that she certainly does *not* have the final decision-making power. She has a temporary final decision-making power which is good for about three days until we get to Court.” It’s not totally clear what “temporary final decision-making power” even means as a legal matter, but it certainly sounded convincing.

5. *Thou Shalt Not Suggest That Thou Art Smarter Than Thine Justices.* Newdow went to the mat with Justice Kennedy over whether the Pledge of Allegiance can be characterized as a prayer, similar to the prayer in *Lee v. Weisman* (1992),<sup>2</sup> which barred “coercive” religious prayer at a school graduation. Kennedy wrote the decision in that case, yet in *Elk Grove*, Newdow almost scolded the justice about what constitutes coercion under the Establishment Clause. When Kennedy observed, “One is a prayer, the other isn’t,” Newdow responded, “Again. The Establishment Clause does not require a prayer. To put the Ten Commandments on the wall was not a prayer, yet this Court said that violated the Establishment Clause. To teach evolution or not teach evolution doesn’t involve prayer. But that can violate the Establishment Clause!” Newdow took another whack at Kennedy later in the argument, claiming near the end that although he believes that the Pledge is a “religious exercise,” “whether or not you do or I do [believe it] is somewhat, I think, irrelevant.” It’s not often that you hear an attorney tell a justice that what he thinks is “irrelevant.” I generally wouldn’t suggest doing so. But Newdow somehow pulled it off.

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2. 505 U.S. 577.

6. *Thou Shalt Not Wax Metaphysical with Thine Justices.* Justice Stephen G. Breyer is a notorious pragmatist, forever searching for a way to bridge the divide between the parties to the case and the Court. Newdow rebuffed the justice's attempt to reach out a conciliatory hand, as Breyer seemed to anticipate. He prefaced his question with, "I think the answer's gonna be 'no,' but . . ." before asking whether Newdow could find a place in his heart for an inclusive "set of beliefs—sincere beliefs—which in any ordinary person's life fills the same place as a belief in God fills in the life of an orthodox religionist. So it's reaching out to be inclusive, maybe to include you." Newdow replies, "I don't think that I can include *under God* to mean no God, which is exactly what I think. I deny the existence of God, and for someone to tell me that *under God* should mean some broad thing that even encompasses my religious beliefs sounds a little, you know, it sounds like the government is imposing what it wants me to think in terms of religion." There wasn't much left for Breyer to say after that. 

7. *Thou Shalt Not Use Multiplex-Grade Sound Effects When Appearing before the Justices.* Oral advocates, don't try this at home. In attempting to explain why the words *under God* are not meaningless or "under the constitutional radar" for an atheist, Newdow arguably goes over the top: "When I see the flag and I think of pledging allegiance, it's like I'm getting slapped in the face every time. BAM!" Yet somehow, when Newdow spoke these words, he conveyed to the Court the degree of his outrage at the words *under God* in the Pledge. 


8. *Thou Shalt Not Seek Perfection in the Law.* No veteran Supreme Court lawyer would have bickered with Justice Breyer when he stated that the Pledge is "not perfect, but it serves a purpose of unification at the price of offending a small number of people like you." But Newdow revealed himself to be a constitutional romantic with his rejoinder, which really was just about perfect: "For sixty-two years, the Pledge did serve its purpose of unification, and it did so perfectly. It didn't include some religious dogma that separated out some. . . . The Pledge of Allegiance . . . got us through two world wars, got us through the depres-

9. *Thou Shalt Not Break up the Crowd in Uproarious Laughter, Especially at the Expense of the Chief Justice.* sion, got us through everything without God, and then Congress stuck God in there for that particular reason.”

9. *Thou Shalt Not Break up the Crowd in Uproarious Laughter, Especially at the Expense of the Chief Justice.* The absolute high point of oral argument came when Newdow made the crowd laugh harder than did Chief Justice William H. Rehnquist. Rehnquist landed a solid punch when he asked Newdow what the vote was in Congress when it incorporated the words *under God* into the Pledge. Newdow replied that the vote was unanimous, and Rehnquist cracked, “Well, that doesn’t sound divisive,” causing the gallery to burst out laughing. Not content to let the chief have his moment, Newdow cut him off: “That’s only because no atheist can get elected to public office! The studies show that 48 percent of the population cannot get elected.” At which point the laughter turned to boisterous clapping, a sound I have heard neither before nor since at the Court. And while the chief justice was visibly annoyed—he promptly threatened to clear the courtroom in the event of any more clapping—the justices seemed not to hold the incident against Newdow.

10. *Thou Shalt Not Cite Extralegal Sources.* Newdow was the first oral advocate I’ve seen cite newspapers and opinion columns as frequently as the Constitution. Most lawyers stick to the fiction that the justices are too busy sipping sherry and reading hornbooks to care what the world thinks. Responding to a question from Justice John Paul Stevens about whether the words *under God* have the same meaning to the country today as they did when they were inserted into the Pledge, Newdow offered an amazingly effective response: “I would merely note that ninety-nine out of ninety-nine senators stopped what they were doing and went out on the front steps of the Capitol to say that they want *under God* there. The president of the United States in a press conference with Vladimir Putin decided the first thing he was going to talk about was this decision. It was on the front page of every newspaper. This was supposed to be one of the major cases of this Court’s term.” It may be unorthodox to cite to the world outside the courthouse, but doing so certainly conveyed Newdow’s point that people want the words *under God* to be retained.



Finally, Newdow somehow managed to time his conclusion perfectly, like an Olympic skater landing a triple lutz. Most oral advocates run out of time or finish abruptly in midsentence. But Newdow somehow managed to close exactly as his half hour ran out: “There’s a principle here, and I’m hoping the Court will uphold this principle so that we can finally go back and have every American want to stand up, face the flag, place their hand over their heart, and pledge to one nation, indivisible—not divided by religion—with liberty and justice for all.” 

Newdow did not prevail on his claims, although his loss on the question of standing certainly left the door open for future challenges (which Newdow has spearheaded). But to my mind, the enduring lesson of *Elk Grove* is the same lesson taught by just about every movie about a rebellious teenage football player/dancer/spelling bee competitor/science fair participant: sometimes, the outsider, with all his rough edges and miscues, can prevail over the smooth polish of the insider, not because he knows all the rules but because his passion to win is greater than the sum of those rules.