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9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA

11 **THE REV. DR. MICHAEL A.**
12 **NEWDOW, IN PRO PER, et al.,**

13 Plaintiffs,

14 v.

15 **THE CONGRESS OF THE UNITED**
16 **STATES OF AMERICA, et al.,**

17 Defendants.

CASE NO. 2:05-CV-0017-LKK-DAD

**OPPOSITION TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDERS**

Hearing: March 7, 2005

Time: 10:00 A.M.

Courtroom: #4

Judge: The Hon. Lawrence K. Karlton

18 **PRELIMINARY STATEMENT**

19 Plaintiff filed this action using pseudonyms for all plaintiffs but himself. In his Motion for
20 Protective Orders, Plaintiff asks this court to maintain the anonymity of all other plaintiffs in order
21 to protect them from harassment which Plaintiff contends may follow from their public association
22 with the views expressed in the Complaint underlying this lawsuit. The affidavits submitted by
23 Plaintiff fail to demonstrate that as-yet unnamed plaintiffs in this case are likely to be harassed if
24 their identities were known. But even if the affidavits were adequate to make such a showing, that
25 would not justify an over-broad order preventing the Defendants from learning the plaintiffs'
26 identities. Without such knowledge, the Defendants would be foreclosed from inquiring into the
27 facts underlying plaintiffs' claims of standing, at the threshold of this case, and sufficiency of the
28 alleged injury, on challenge to the merits.

1 ARGUMENT

2 **A. THE STATE IS ENTITLED TO INQUIRE CONCERNING**
3 **LEGAL GUARDIANSHIP OF THE MINOR PLAINTIFFS AND**
4 **OTHER FACTUAL MATTERS RELEVANT TO THEIR**
5 **STANDING TO BRING THIS SUIT.**

6 In this case, the plaintiffs' identity is critical to determining standing. The Supreme
7 Court of the United States dismissed Plaintiff's previous constitutional challenge to the recitation
8 of the Pledge of Allegiance to the Flag in his minor daughter's school, holding that he lacked
9 prudential standing. *Elk Grove Unified School District v. Newdow*, ___ U.S. ___, 124 S.Ct. 2301,
10 159 L.Ed.2d 98 (2004) (*Newdow I*). In reaching its determination, the Supreme Court held that
11 Plaintiff's allegations that he paid taxes to the school district indirectly through child support
12 payments to his daughter's mother were insufficient to confer taxpayer-standing status to challenge
13 the constitutionality of Elk Grove Unified School District's policy of requiring teacher-led recitation
14 of the Pledge. The standing decision turned on the Supreme Court's construction, pursuant to
15 California domestic relations law, of the custody agreement between Plaintiff and his daughter's
16 mother:

17 "The parties will have joint legal custody defined as follows: Ms.
18 Banning [the child's mother] will continue to make the final
19 decisions as to the minor's health, education, and welfare if the two
20 parties cannot mutually agree. The parties are required to consult
21 with each other on substantial decisions relating to the health,
22 education and welfare of the minor child, including ... psychological
23 and educational needs of the minor. If mutual agreement is not
24 reached in these areas, then Ms. Banning may exercise legal control
25 of the minor that is not specifically prohibited or is inconsistent with
26 the physical custody."

27 *Newdow I*, 124 S.Ct. 2301, at 2310 n. 6. The Supreme Court construed this language to give the
28 mother a "tie-breaking vote" on education matters and thus to deprive Plaintiff of standing to
challenge the school district's practice:

29 Despite the use of the term "joint legal custody"--which is defined by California
30 statute, see Cal. Fam.Code Ann. § 3003 (West 1994)--we see no meaningful
31 distinction for present purposes between the custody order issued February 6,
32 2002, and the one issued January 9, 2004. Under either order, Newdow has the

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1 right to consult on issues relating to the child's education, but
2 Banning possesses what we understand amounts to a tiebreaking vote.

3 *Id.*

4 Under California law, a minor child is entitled to pursue his or her legal claims but those
5 claims may be prosecuted on the child's behalf only by the child's legal guardian. Cal. Fam. Code
6 § 6601.^{1/} Because the standing of the alleged parent plaintiffs turns on the question whether under
7 California law they are legal guardians of the minor plaintiffs, the State is entitled to inquire
8 concerning the legal custody of minor plaintiffs.

9 Plaintiffs also challenge the constitutionality of California Education Code, section 52720,
10 pursuant to which California public schools are permitted but not required to include recitation of
11 the Pledge of Allegiance to the Flag in required daily patriotic exercises.^{2/} Thus, for purposes of
12 determining jurisdictional standing, the State is entitled to inquire whether the minor plaintiffs are
13 enrolled in California public schools which include recitation of the Pledge in their daily patriotic
14 exercises.

15 **B. THE AFFIDAVITS PLAINTIFF SUBMITTED IN SUPPORT**
16 **OF PLAINTIFF'S MOTION ARE INSUFFICIENT TO MERIT**
THE RELIEF REQUESTED.

17 In support of his Motion for Protective Orders, Plaintiff has submitted affidavits from five
18 persons: Joann Bell, Karl James Black, Bailey Wood Frei, Abigail Schweter, and Ellen Janowitz.
19 None of these five persons are plaintiffs in this case. As explained more fully below, the affidavits
20 are irrelevant, immaterial and/or inadmissible. They describe events which are remote
21 chronologically and/or geographically from the circumstances alleged to give rise to Plaintiff's
22 lawsuit, and contain hearsay. The State submits that these affidavits are insufficient to merit grant
23 of the relief requested.

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- 27 1. A copy of this California statute is attached as Exhibit A.
28 2. A copy of this California statute is attached as Exhibit B.

1 **The Bell Affidavit**

2 Ms. Bell's affidavit is inadmissible because it is not signed under penalty of perjury.
3 Plaintiff's Exhibit A. Further, her affidavit should be excluded because the events she describes do
4 not involve any of the parties to this lawsuit and allegedly occurred 24 years ago in Cleveland
5 County, State of Oklahoma. *Id.*

6 **The Black Affidavit**

7 The affidavit of Mr. Black describes events which he alleged were witnessed by his
8 daughter in 1984 at "Tyler Elementary School in the Van Buren Public School System" somewhere
9 in the State of Michigan. Plaintiff's Exhibit B. His affidavit is inadmissible because it contains
10 hearsay as to which no exception exists.

11 **The Frei Affidavit**

12 In her affidavit executed December 5, 2003, Ms. Frei describes herself as "a ten year old
13 girl" and relates three incidents, about at least one of which she has no affective memory, which
14 allegedly occurred "at Sunflower Elementary, a public school in Lawrence, Kansas": one involving
15 a single other student presumably in her current class, one involving a single inappropriate question
16 asked by her third grade teacher, and one involving an answer a teacher gave to a classmate's
17 question in her kindergarten class. Plaintiff's Exhibit C.

18 **The Schweter Affidavit**

19 Ms. Schweter does not identify the location of the school system in which she felt
20 "ostracized" by her teachers and classmates. Plaintiff's Exhibit D. Her affidavit was signed under
21 penalty of perjury under the laws of the State of New York on December 11, 2003, but the copy
22 received by the State has no visible notary seal. Further, since Ms. Schweter alleges that she is
23 currently "a parent [herself]," the events she described occurred remotely in time as well as location.
24 *Id.*

25 **The Janowitz Affidavit**

26 Ms. Janowitz describes events occurring in her tenth grade public-school class in Palo
27 Alto, California, in 1963. Plaintiff's Exhibit E. The State submits that these events are simply too
28 remote in time to merit admitting into the record of these proceedings.

1 **CONCLUSION**

2 As noted above, the State does not oppose a protective order narrowly tailored to prohibit
3 release of the Plaintiffs' identities—other than Dr. Newdow's—to the public, and including such
4 judicial devices as maintaining identifying documents under seal and closing proceedings to the
5 public. But the State is entitled to all the information necessary to defend the constitutionality of the
6 California Education Code, including all information needed to determine the Plaintiffs' standing
7 to raise the claims set out in their Complaint.

8 Dated: February 17, 2005

9 Respectfully submitted,

10 BILL LOCKYER
Attorney General of the State of California

11 LOUIS MAURO
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Exhibit A

C

Effective: [See Text Amendments]

WEST'S ANNOTATED CALIFORNIA CODES
FAMILY CODE
DIVISION 11. MINORS
PART 2. RIGHTS AND LIABILITIES; CIVIL ACTIONS AND PROCEEDINGS
§ 6601. Enforcement of minor's rights

A minor may enforce the minor's rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian must conduct the action or proceedings.

CREDIT(S)

(Stats.1992, c. 162 (A.B.2650), § 10, operative Jan. 1, 1994.)

< General Materials (GM) - References, Annotations, or Tables >

LAW REVISION COMMISSION COMMENTS

2004 Main Volume

Enactment (Revised Comment)

Section 6601 continues former Civil Code Section 42 without substantive change. See Code Civ. Proc. §§ 372 (minor must appear either by a guardian of the estate or by a guardian ad litem), 373 (appointment of guardian ad litem to represent interest of minor); Lab. Code §§ 5307.5, 5408 (appointment of trustee or guardian ad litem to represent minor in workers' compensation proceeding); Prob. Code § 1003 (appointment of guardian ad litem to represent interest of minor in proceeding under Probate Code), 2462 (representation by guardian of estate in actions and proceedings), 2500-2507 (compromise of claims, actions, and proceedings by guardian), 3500, 3600-3603 (compromise by parent of minor's disputed claim). For related provisions concerning emancipated minors, see Sections 7002 (conditions of emancipation), 7050(e)(4) (emancipated minor may sue in own name), 7050(e)(5) (emancipated minor may compromise claim). [23 Cal.L.Rev.Comm. Reports 1 (1993)]

HISTORICAL AND STATUTORY NOTES

2004 Main Volume

Derivation: Civil Code former § 42, enacted 1872.

CROSS REFERENCES

Actions and proceedings, representation by guardian of estate, see Probate Code § 2462.

Appearances, minor required to appear either by guardian of estate or guardian ad litem, see Code of Civil Procedure § 372.

Appointment of guardians, generally, see Probate Code § 1510 et seq.

Compromise and settlement,

Actions and proceedings by guardian, see Probate Code § 2500 et seq.

Minor's disputed claim, see Probate Code § 3600 et seq.

Exhibit B

C

Effective: [See Text Amendments]

WEST'S ANNOTATED CALIFORNIA CODES
EDUCATION CODE
TITLE 2. ELEMENTARY AND SECONDARY EDUCATION
DIVISION 4. INSTRUCTION AND SERVICES
PART 28. GENERAL INSTRUCTIONAL PROGRAMS
CHAPTER 11. MISCELLANEOUS
ARTICLE 2. PATRIOTIC EXERCISES
§ 52720. Daily performance of patriotic exercises in public schools

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

CREDIT(S)

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

1989 Main Volume

Derivation: Educ.C.1959, § 5211, added by Stats.1961, c. 254, p. 1281, § 1.

LAW REVIEW AND JOURNAL COMMENTARIES

One nation, without God? 33 Sw.U.L.Rev. 119 (2003).

LIBRARY REFERENCES

1989 Main Volume

Constitutional Law ↪ 82(12).

Schools ↪ 164.

C.J.S. Constitutional Law §§ 467 to 469.

C.J.S. Schools and School Districts § 485.

RESEARCH REFERENCES

ALR Library

110 ALR, Federal 211, Constitutionality of Regulation or Policy Governing Prayer, Meditation, or "Moment of Silence" in Public Schools.

DECLARATION OF SERVICE

Case Name : NEWDOW v. US CONGRESS
Case No. : CV-00017-LKK-DAD
Court : USDC Eastern

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled case.

On the date indicated below, I served the following:

OPPOSITION TO PLAINTIFF'S MOTION FOR PROTECTIVE ORDERS

Addressed as follows:

Michael Newdow
P.O. Box 233345
Sacramento, CA 92823

Craig Blackwell
U.S. Department of Justice
Civil Division - Rm 7106
20 Mass Ave. NW
Washington D.C. 20530

Terence John Cassidy
Porter, Scott, Weiberg & Delehant
350 University Avenue, Ste. 200
Sacramento, CA 95825

William Mayo
Mayo Law Clinic
132 West Second Street
Chico, CA 95928-5227
Fax: (530) 230-2846

☒ **U.S. MAIL:** I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

☐ **FACSIMILE TRANSMISSION:** On the date below from facsimile machine number (916) 324-5567, I personally transmitted to the above-named person(s) to the facsimile number(s) shown above, pursuant to California Rules of Court 2003-2008. A true copy of the above-described document(s) were transmitted by facsimile transmission and the transmission was reported as complete and without error. A copy of the transmission report issued by the transmitting machine is attached to this proof of service.

☐ **OTHER SERVICE:** I caused such envelope(s) to be delivered to the office of the addressee(s) listed above by:

- ☐ Express Mail
- ☐ Golden State Overnight
- ☐ California Overnight
- ☐ Messenger

☐ **PERSONAL SERVICE:** By causing a true copy of the above-described documents to be hand delivered to the office(s) of the addressee(s).

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on **February 18, 2005**, at Sacramento, California.


PAMELA DIAS