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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER, **Plaintiff,** **v.** **THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,** **Defendants,** **AND** **PACIFIC JUSTICE INSTITUTE, Proposed Intervenor-Defendant.**	Case No. 2:05-cv-02339-FCD-PAN **NOTICE OF MOTION AND MOTON TO INTERVENE [FRCP 24]** DATE: Jan. 13, 2005 TIME: 10:00 a.m. COURTROOM: 2 TRIAL DATE: none set

To the Honorable Frank C. Damrell and to all Parties and their Attorneys of Record:

PLEASE TAKE NOTICE that on January 13, 2005, at 10:00 a.m. in Courtroom #2 of the United States District Court, Eastern District of California, 501 I Street, Sacramento, California, the

applicant, Pacific Justice Institute, will move this Court for an order to intervene in the above-encaptioned case as per FRCP 24(a) and (b).

Said motion will be based on this Notice of Motion, Motion, on the Points and Authorities filed in support of this motion, and all such other papers filed in support thereof, and such other further evidence that may be introduced at the Hearing of the Motion.

The grounds for this motion are as follows:

1. The movant is entitled to intervene as a matter of right [FRCP 24(a)]; or,
2. The movant may intervene at the discretion of the Court [FRCP 24(b)].

DATED: November 29, 2005

PACIFIC JUSTICE INSTITUTE

/s/ Kevin Snider
Kevin T. Snider
Attorney for Applicant

MOTION

The Pacific Justice Institute hereby moves this Court for an order granting its request for intervention as a matter of right under FRCP 24(a).

In the alternative, the Pacific Justice Institute hereby moves this Court for an order granting its request for permissive intervention at the discretion of the Court as per FRCP 24(b).

/s/ Kevin Snider
Kevin T. Snider
Attorney for Applicant

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER, **Plaintiff,** **v.** **THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,** **Defendants,** **AND** **PACIFIC JUSTICE INSTITUTE, Proposed Intervenor-Defendant.**	Case No. 2:05-cv-02339-FCD-PAN **MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY PACIFIC JUSTICE INSTITUTE** DATE: Jan. 13, 2005 TIME: 10:00 a.m. COURTROOM: 2 TRIAL DATE: none set

INTRODUCTION

Applicant for Intervention, Pacific Justice Institute (sometimes hereinafter "PJI" or "Applicant"), is a Sacramento-based, non-profit organization dedicated to defending religious and civil liberties. See accompanying Affidavit of Brad W. Dacus (hereinafter, "Dacus Aff."), at ¶4. Mr. Dacus is the founder and president of Pacific Justice Institute. *Id.* PJI actively advises and

represents numerous individuals, groups and organizations which have been treated unjustly due to their religious preferences. Dacus Aff. ¶5. PJI also assists in defending governmental entities attacked for public acknowledgments of America's religious heritage. Dacus Aff. ¶8. Applicant seeks to intervene in this litigation because Plaintiff claims that the national motto, "In God We Trust," violates the Establishment and Free Exercise Clauses of the First Amendment as well as the Religious Freedom Restoration Act (42 U.S.C. 2000bb). This litigation would have a substantial impact on PJI's efforts and ability to defend and protect public expression of America's religious history and heritage.

Pacific Justice Institute is entitled to intervention both as of right and permissively under Rule 24. In the alternative, should the court deny these requests for any reason, Pacific Justice Institute requests that it be granted amicus status in the pending litigation.

ARGUMENT

I. Pacific Justice Institute Is Entitled to Intervention as of Right in this Action

Applications for intervention as of right in federal court actions are governed by Federal Rule of Civil Procedure 24(a), which provides in relevant part that:

> [u]pon timely application anyone shall be permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

The Ninth Circuit has broken down Rule 24(a)(2) into four basic elements:

> (1) [T]he application must be timely; (2) the applicant must have a 'significantly protectable interest' relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impeded the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court.

League of United Latin American Citizens ("LULAC") v. Wilson, 131 F.3d 1297 (9th Cir. 1997).

It is well-established that Rule 24 "is construed broadly in favor of the applicants." *Idaho Farm Bureau Feder'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *United States v. Oregon*, 913 F.2d 576, 587 (9th Cir. 1990), cert. denied, *Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991)). Applicant, as will be discussed *infra,* meets each of the Ninth Circuit's four elements for obtaining intervention as of right. In short, its application is first of all timely, having been filed within days of the initiation of the lawsuit challenging "In God We Trust." Second, Applicant has significantly protectable interests in the subject of the litigation, including its ability to continue defending and preserving American symbols and heritage. Third, it is uniquely situated as an organization which has devoted substantial time, resources and education to promoting the rights of Americans to publicly display well-known national symbols without discrimination toward those symbols which have religious connotations. Fourth, and finally, Applicant's interests are inadequately represented before the court in that defendants, the United States Treasury and United States Congress, are large, cumbersome bureaucracies that have complex economic and political interests which differ from those possessed by Pacific Justice Institute, an organization dedicated to defending religious liberty.

A. Applicants' Motion is Timely

"Timeliness is 'the threshold inquiry' for intervention as of right." *LULAC*, 131 F.3d at 1302. It is also easily met in the present case. The timeliness inquiry focuses on whether intervention is too late as determined by the stage of the proceeding, prejudice to the parties, and reasons for the length of the delay. *Id.* The *LULAC* court, for instance, denied intervention due to untimeliness of applicants who sought it more than two years after the lawsuits were filed. At the

same time, the court indicated that other parties had been granted intervention nine months after the original lawsuits commenced. By stark contrast, the present Applicant is filing its motion for intervention within days of the announcement that a lawsuit had been filed by Plaintiff. Thus, it should not be seriously disputed that Applicant's motion is untimely. *See, e.g., Sierra Club v. U.S. E.P.A.*, 995 F.2d 1478, 1481 (9th Cir. 1993) (timeliness not at issue when motion to intervene was filed at outset of litigation, before answer to complaint was even filed).

B. Pacific Justice Institute Has Significantly Protectable Interests Relating to the Subject of this Litigation

By attacking the national motto, Plaintiff has attacked the core mission and values of Pacific Justice Institute—preserving religious liberty, including public expressions of our nation's religious history and heritage. In particular, PJI has recently been active in defending city seals in Los Angeles and Redlands, California, from charges that they are too religious and unconstitutional. The ability of Pacific Justice Institute to defend these and similar expressions of religious heritage against misuse of the Establishment Clause will be severely hindered if this Court declares that "In God We Trust"—and by logical extension, untold similar expressions of our nation's religious heritage—are illegal.

The federal courts have found that a broad variety of interests satisfy the "significantly protectable interests" inquiry. For example, in *Idaho Farm Bureau Federation*, environmental groups were granted intervention in a lawsuit which clarified the Endangered Species Act as it related to procedures for listing species (there, the Bureau Hot Springs Snail) as endangered. The *Idaho Farm Bureau Federation* court reviewed previous Ninth Circuit decisions such as *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) and *Washington State Bldg. and Constr. Trades Council v. Spellman*, 684 F.2d 627 (9th Cir. 1982), cert. denied, *Don't Waste Washington Legal Defense Foundation v. Washington*, 461 U.S. 913 (1983), finding broad

interpretation of what constitutes a "significantly protectable interest." In view of the environmental groups' active efforts to protect the snail at issue, the Ninth Circuit ruled,

> [W]e conclude that disposition in the present action would impair ICL/CIHD's ability to protect their interest in the Springs Snail and its habitat. The action could, and did, lead to a decision to remove the Springs Snail from the list of endangered species. *Cf. Sagebrush Rebellion*, 713 F.2d at 528 (granting intervention and stating that a decision to set aside agency action creating conservation area for birds of prey would impair Audobon Society's interest in preservation of birds and their habitat).

58 F.3d at 1398.

Other circuit courts have joined the Ninth Circuit in favoring intervenors. For instance, in *Utah Association of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001), the Tenth Circuit reviewed decisions from several circuits (including the Ninth Circuit's *Sagebrush Rebellion* decision) involving environmental activists and concluded, "[W]e find persuasive those opinions holding that organizations whose purpose is the protection and conservation of wildlife and its habitat have a protectable interest in litigation that threatens those goals." *Id.* at 1252. And, while wildlife and conservation groups have been among the most prodigious intervenors in federal courts over the last two decades, producing a flood of court opinions on the subject, Rule 24 by no means limits protectable interests to them.

In like manner, people of faith should be given the same concessions as environmentalists. As the United States is a constitutionally neutral entity relative to religious issues, the motion to intervene should be granted so that an advocate for persons of faith will have a voice in the court. This is necessary in that religious persons are confronted with a lawsuit which is facially hostile to their interests. A plain reading of the complaint reveals that the Plaintiff's purpose is to eradicate all remnants of religion from public life. Because of this, religious people should not be forced to stand idly with their "hands in their pockets" to see what fate will await them at the end of this

lawsuit. Applicants therefore fall well within the bounds of the "significantly protectable interest" as articulated in *LULAC*.

C. Applicants Are So Situated that the Disposition of the Action May, as a Practical Matter, Impair or Impede the Applicants' Ability to Protect Their Interest

The federal courts have been careful to note that, under the third element articulated by *LULAC*, prospective intervenors need not show that an unfavorable disposition in the case would necessarily impair their right, only that it "'*may* ... impair or impede [their] ability to protect [their] interest.'" *Purnell*, 925 F.2d at 948 (quoting Rule 24(a)(2) and adding emphasis), that is, that impairment is "possible." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1247 (6th Cir. 1997). See also *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983).

Other federal courts have considered this requirement from the previous one, declaring that "'the question of impairment is not separate from the question of the existence of an interest.'" *Utah Association of Counties*, 255 F.3d at 1253 (quoting *Natural Res. Def. Council v. United States Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978).

As a practical matter, the disposition of this action in favor of the plaintiff would directly impede Applicant's interest and ability to defend and promote American history and heritage. Pacific Justice Institute should therefore be granted intervention as of right in the litigation to defend against the significant negative impact Plaintiff's demands would have on it.

D. Applicant's Interests Are Inadequately Represented by the Parties Before the Court.

With respect to the final requirement under Rule 24, inadequate representation, the federal courts have noted, "The burden of making this showing is minimal." *Pacific Gas and Elec. Co. v. Lynch*, 216 F.Supp.2d 1016, 1025 (N.D. Cal. 2002). *See also, e.g., Utah Assn. of Counties v. Clinton*, 255 F.3d 1246, 1255 (10th Cir. 2001) ("'burden is the "minimal" one of showing that representation "may" be inadequate'") (quoting *Sanguine, Ltd. v. United States Dept. of Interior*,

736 F.2d 1416, 1419 (10th Cir. 1984) and *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

Moreover, "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy this minimal burden." *Id.* (quoting *Natural Res. Def. Council v. United States Nuclear Reg. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978). *Accord, Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). This rule has been interpreted to mean simply that an existing party may fail to make all the prospective intervenor's arguments. *See Michigan State AFL-CIO*, 103 F.3d at 1247. The importance of this approach becomes view of the fact that governmental agencies may choose not to appeal adverse decisions, in view of the complex and competing interests which they must balance. Such decisions would have a seriously detrimental effect on advocacy groups and their members if they were denied intervention in the litigation. *See, e.g. Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002) (intervenors, environmental groups, appealed decision invalidating U.S. Forest Service's "Roadless Rule" restricting potential environmental impact after federal government chose not to appeal); *State of California Dept. of Social Svcs. v. Thompson*, 321 F.3d 835 (9th Cir. 2003) (allowing intervenor to appeal decision even though state chose not to do so).

Pacific Justice Institute is a non-profit organization committed to the preservation of religious liberty, including public expression of America's religious history and heritage. Dacus Aff. ¶4. By contrast, the United States Congress, named as defendant in the instant litigation, has myriad complex and competing interests which may be implicated in the litigation. For all of their beneficial and perhaps even noble attributes, the United States Congress, and for that matter, the United States Government, are at bottom politically-motivated bodies. As such, they can be

expected to support the national motto in such manner and to the extent that it is politically expedient to do so—and no more. It is therefore imperative that Pacific Justice Institute, which wholeheartedly supports and is committed to defending "In God We Trust" regardless of public opinion polls or votes, be granted intervention to defend and, if necessary, appeal on behalf of the national motto. *See, e.g., State of California Dept. of Social Svcs. v. Thompson*, 321 F.3d 835 (9th Cir. 2003) (allowing intervenor to appeal decision even though state chose not to do so)

The potentially divergent interests of Applicant and the present Defendants thus presented are more than sufficient to meet the "minimal" burden of showing inadequate representation. *Pacific Gas and Elec. Co.*,216 F.Supp.2d at 1025. Applicant therefore meets the fourth and final requirement for intervention as of right.

II. Applicants Should, in the Alternative, be Granted Permissive Intervention Under Rule 24(b)

The considerations outlined above which soundly support Applicant's Motion for Intervention as of right also suffice, *a fortiori*, to grant Applicant permissive intervention under Rule 24(b). Rule 24(b) states in relevant part:

> Upon timely application anyone may be permitted to intervene in an action . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 24(b) grants a district court the discretion to allow intervention if the application is timely, *see Purnell*, 925 F.2d at 950, and if the "applicant's claim or defense and the main action have a question of law or fact in common." Fed R. Civ. P. 24(b)(2). In exercising its discretion, the district court should also consider whether "intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Purnell*, 925 F.2d at 951. Unlike intervention

under Rule 24(a), the court need not determine the significance of the interests of the proposed intervenors, nor the adequacy of representation. Overall, the courts have deftly avoided rigidity in granting or denying intervention, opting instead to craft creative, case-specific solutions which will ensure the most complete representation of all parties and disposition of the issues.

Courts have, for example, granted intervention as of right and, in the alternative, permissive intervention. *See, e.g., Pacific Gas & Electric v. Lynch*, 216 F.Supp. 2d 1016, 1025 (N.D. Cal. 2002). Even in cases where the court has determined that federal law precludes intervention as of right, intervention has been allowed on a more limited basis. For instance, in *Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105 (9th Cir. 2000) the court held that the unique structure of the National Environmental Policy Act (NEPA) prevented environmental groups from intervening as of right, because only the government could enforce or be liable as a defendant under NEPA. Nevertheless, the Ninth Circuit still allowed the environmental groups to intervene in the remedial phase of the litigation. *Id.* at 1114. *See also, Purnell v. City of Akron*, 925 F.2d 941 (6th Cir. 1991) (even where intervention as of right was not warranted, permissive intervention should have been granted). Similarly, Applicant represents religious persons and organizations and thus has an interest in defending people of faith against a lawsuit which is aimed at promoting government hostility toward religion.

As demonstrated above, proposed intervenor seeks to interpose defenses that share common factual and legal questions with those raised in the main action. Proposed intervenors seek to protect not merely a generalized, ethereal interest in preserving the national motto; rather, they are actively involved in promoting its important role in society, and they have invested countless amounts of time, energy and resources to preserving and defending this and similar guideposts of American history. Further, as explained above, there is no tenable basis upon which

either party could claim that proposed intervenors' participation will cause prejudice or delay: Applicants have sought intervention promptly after the filing of Plaintiffs' Complaint, and well before any significant progression of this suit. Thus, even if this Court should determine that not all of the requirements of Rule 24(a) have been met, it should permit the requested intervention under Rule 24(b).

CONCLUSION

For the foregoing reasons, Applicant Pacific Justice Institute is entitled to participate in this action as Intervenor-Defendant, either as a matter of right. *see* Fed. R. Civ. P. 24(a), or with the Court's permission, *id.* R. 24(b). In the alternative, Applicant requests that, at the very least, the Court allow it to participate in the litigation as amicus.

Date: November 29, 2005.

By: /s/ Kevin T. Snider

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER, **Plaintiff,** **v.** **THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,** **Defendants,** **AND** **PACIFIC JUSTICE INSTITUTE, Proposed Intervenor-Defendant.**	Case No. 2:05-cv-02339-FCD-PAN **AFFIDAVIT OF BRAD W. DACUS IN SUPPORT OF MOTION TO INTERVENE BY PACIFIC JUSTICE INSTITUTE** DATE: Jan. 13, 2005 TIME: 10:00 a.m. COURTROOM: 2 TRIAL DATE: none set

AFFIDAVIT OF BRAD W. DACUS

I, Brad W. Dacus, do hereby declare as follows:

1. That if called upon, I could and would testify truthfully, as to my own personal knowledge as follows:

2. I am the founder and president of Pacific Justice Institute ("PJI"), a Sacramento-based non-profit legal organization dedicated to the preservation of religious and civil liberties.

3. Since its inception in 1997, PJI has represented numerous individuals, houses of worship, and religious organizations which have been treated unjustly due to their religious preferences.

4. We are well-versed in our nation's religious heritage, as well as more recent trends in Establishment Clause jurisprudence and federal laws protecting religious expression.

5. PJI also assists in defending governmental entities which are attacked for public acknowledgments of America's religious heritage.

6. PJI, along with our thousands of individual supporters, is gravely concerned about the onslaught of recent attacks against the Ten Commandments, the Pledge of Allegiance, and now our national motto.

7. PJI believes it is our solemn duty to defend our nation's religious heritage against overly-restrictive interpretations of the Establishment Clause.

8. Michael Newdow's efforts to eliminate the national motto, "In God We Trust," from our nation's money would have a significantly deleterious effect on our work.

9. Any requirement to forbid the phrase "In God We Trust" from United States currency based only upon its inclusion of the word "God" will be perceived as state hostility to religion by the millions of Americans with a religious back-ground in general and in particular the thousands of people that PJI serves.

10. The United States Justice Department, as a neutral actor on religious matters and/or beliefs, cannot be expected to accurately measure or represent the impact of such hostility upon such Americans.

11. In contrast, it has been the mission and function of PJI to represent such interests of people of faith.

12. Furthermore, if successful, the present lawsuit would greatly restrict PJI's ability to defend governmental actors who regularly seek our advice and representation when they attempt to objectively acknowledge our nation's religious heritage.

13. PJI believes that our national motto is an invaluable and unique expression of our nation's history and heritage, having been adopted during the Civil War as a reminder of America's dependence on God.

14. It is PJI's position that the removal of our national motto from the public square will have a serious, detrimental effect on Americans' awareness and appreciation of our nation's religious heritage.

15. Moreover, were the national motto declared unconstitutional or illegal, many similar public expressions of our religious heritage would be placed in jeopardy, as evidenced by Plaintiffs' concurrent efforts to have recitation of the Pledge of Allegiance declared unconstitutional.

16. Plaintiff Newdow's efforts to eliminate "In God We Trust" as our national motto, extension, similar expressions of America's religious heritage, could have a catastrophic effect not only on our nation, but also on the efforts of Pacific Justice Institute.

17. In summation, Plaintiff's lawsuit would seriously undermine Pacific Justice Institute's organizational mission to protect religious liberty, including public expression of religious heritage.

18. Should this motion for intervention be granted, PJI will file a motion to dismiss for failure to comply with the short and plain statement rule [FRCP 8(a)] or, in the alternative, for a

more definite statement pursuant to FRCP 12(e). As such, a copy of a proposed motion ("Exhibit 1") accompanies this motion as per the requirements of FRCP 24(c).

I declare, under penalty of perjury under the laws of the State of California and the United States of America, that the foregoing is true and correct and is of my own personal knowledge, and indicate such elow by my signature executed on this 29th day of November, 2005, in the County of Sacramento, State of California.

/s/ Brad Dacus
Brad W. Dacus, Declarant