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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, et. al., Plaintiffs, v. THE CONGRESS OF THE UNITED STATES OF AMERICA, et al., Defendants.	CIV. NO. 2:05-CV-00017-LKK-DAD **MEMORANDUM IN SUPPORT OF UNITED STATES OF AMERICA'S MOTION TO INTERVENE UNDER 28 U.S.C. § 2403(a) AND FED. R. CIV. P. 24** Date: July 18, 2005 Time: 10:00 a.m. Judge: Hon. Lawrence K. Karlton Courtroom: No. 4

INTRODUCTION

This case challenges the constitutionality of 4 U.S.C. § 4, a federal statute codifying the wording of the Pledge of Allegiance to the Flag ("Pledge"). It also challenges the constitutionality of a state statute permitting California public schools to satisfy a requirement to conduct patriotic exercises by giving the Pledge, and the practices of four California public school districts of leading willing students in the voluntary recitation of the Pledge. Plaintiffs' principal constitutional claim is that the Pledge and the school districts' Pledge practices violate the Establishment Clause because the Pledge contains the words "under God." The United States of America ("United States"), the United States Congress ("Congress"), and Peter LeFevre, a

congressional officer, are named as defendants (collectively "federal defendants"), as are the State of California, the Governor of California, California's Education Secretary, and four local California public school districts and their superintendents (collectively "state defendants").

Plaintiffs' claims against the federal defendants all relate to their contention that 4 U.S.C. § 4 is unconstitutional on its face. Plaintiffs' claims against the state defendants all relate to their contention that the school districts' Pledge practices are unconstitutional. Although the United States technically is not a defendant with respect to plaintiffs' claim that 4 U.S.C. § 4 is unconstitutional as applied to the school districts' Pledge practices, it has an obvious interest in defending 4 U.S.C. § 4 as applied to the voluntary recitation of the Pledge in public schools. Indeed, the United States previously defended this application of 4 U.S.C. § 4 in Elk Grove Unified Sch. Dist. v. Newdow, 124 S.Ct. 2301 (2004), a case brought by the lead plaintiff in this action against one of the defendant school districts. The United States has a clear right to intervene under 28 U.S.C. § 2403(a) and Fed. R. Civ. P. 24 and its motion should be granted.

ARGUMENT

I. THE UNITED STATES HAS A STATUTORY RIGHT TO INTERVENE UNDER 28 U.S.C. § 2403(a)

Under 28 U.S.C. § 2403(a), Congress has granted the United States an unconditional right to intervene in cases challenging the constitutionality of an Act of Congress. This statute provides:

> [i]n any action, suit or proceeding . . . to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of an Act of Congress affecting the public interest is drawn into question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

28 U.S.C. § 2403(a); accord Fed. R. Civ. P. 24(a)(1) ("Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene . . . ."). See also Heckler v. Edwards, 465 U.S. 870, 882-83 & n.18, 104 S.Ct. 1532, 1539 n.18 (1984); International Ladies' Garment Workers' Union v.

Donelly Garment Co., 304 U.S. 243, 249, 58 S.Ct. 875, 879 (1938) (per curiam) (discussing predecessor statute to 28 U.S.C. § 2403); see generally 7C Charles A. Wright, Arthur B. Miller, Mary K. Kane, Federal Practice & Procedure, § 1906, at 243-44 (2d ed. 1986).

Plaintiffs have challenged the constitutionality of 4 U.S.C. § 4, an Act of Congress establishing the wording of the Pledge of Allegiance to the Flag. 4 U.S.C. § 4 plainly is a statute affecting the public interest. See, e.g., H.R. Rep. No. 1693, 83d Cong., 2d Sess., 1954 U.S.C.C.A.N. at 2340. Moreover, although the United States is a defendant with respect to plaintiffs' claim that 4 U.S.C. § 4 is unconstitutional on its face, it is not technically a defendant with respect to plaintiffs' claims challenging the application of 4 U.S.C. § 4 to the school districts' Pledge policies. Accordingly, the United States should be permitted to intervene in this action to defend against all of plaintiffs' constitutional challenges to 4 U.S.C. § 4. As noted above, the United States recently defended the constitutionality of one of the challenged Pledge policies in Elk Grove.

II. THE UNITED STATES HAS A RIGHT TO INTERVENE UNDER FED. R. CIV. P. 24(a)

The United States also has a right to intervene in this action to defend 4 U.S.C. § 4 and the school districts' Pledge practices under Fed. R. Civ. P. 24(a)(2). The Ninth Circuit has identified four criteria that a movant must satisfy in order to intervene as of right under Rule 24(a)(2): (i) the application to intervene must be timely; (ii) the movant must have a significantly protectable interest relating to the property or transaction that is the subject of the action; (iii) the movant must be so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (iv) the movant's interest must not be adequately represented by the existing parties to the suit. Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir.) (citation omitted), cert. denied, 540 U.S. 1017, 124 S.Ct. 570 (2003). These criteria "traditionally receive[] liberal construction in favor of applicants for intervention." Id.; see also 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1904 (2d ed. 1986). A district court must grant a motion to intervene under Rule 24(a)(2) if all four criteria

have been met. United States v. State of Washington, 86 F.3d 1499, 1503 (9th Cir. 1996).

The United States meets all of the requirements for intervention under Rule 24(a)(2). First, with respect to timeliness, the United States is filing this motion shortly after receiving authorization to intervene from the Solicitor General. Moreover, in its motion to dismiss, the United States is addressing all issues related to the constitutionality of 4 U.S.C. § 4; intervention therefore will not delay the current briefing schedule.

Second, the United States has an obvious interest in how 4 U.S.C. § 4 is applied; indeed, it previously defended the specific application at issue in this case in Elk Grove. See Reich v. ABC/York-Estes Corp., 64 F.3d 316, 322 (7th Cir. 1995) ("In ascertaining a potential intervenor's interest in a case, our cases focus on the issues to be resolved by the litigation and whether the potential intervenor has an interest in those issues"); cf. Nuesse v. Camp, 385 F.2d 694, 700 (D.C. Cir. 1967) (recognizing that the "interest" requirement under Rule 24(a)(2) is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process").

Third, a ruling by the Court that 4 U.S.C. § 4 or the school districts' Pledge practices are unconstitutional would surely "impair or impede" the interests of the United States in upholding the Pledge statute. Fourth, because the public interest protected by the United States is different from the interests of any other party, none of the existing parties will adequately represent the interests of the United States in this case. See, e.g., Lake Investors Dev. Group, Inc. v. Egidi Dev. Group, 715 F.2d 1256, 1261 (7th Cir. 1983) (adequate representation requirement satisfied if "'the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal'") (quoting Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10, 92 S.Ct. 630, 636 n.10 (1972)). The United States, accordingly, satisfies the four requirements for establishing a right to intervene under Rule 24(a)(2) to defend

4 U.S.C. § 4 and the school districts' Pledge practices.[1]

CONCLUSION

For all the foregoing reasons, the United States' motion to intervene should be granted.

Respectfully Submitted,
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[1] In the alternative, the United States also satisfies the criteria for permissive intervention under Fed. R. Civ. P. 24(b)(2). Cf. Nuesse, 385 F.2d at 706 (permissive intervention liberally granted to public officials seeking to assert public interest); see also SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459-60, 60 S.Ct. 1044, 1055 (1940). Rule 24(b) provides in pertinent part that, upon timely application, an applicant may be permitted to intervene in an action "when [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). Here, the United States seeks to intervene to defend the constitutionality of the school districts' Pledge policies, a principal issue the parties will be addressing in this case. Indeed, intervention is particularly appropriate because the United States has a substantial interest in defending the constitutionality and application of its laws and because its participation would assist the Court in considering the constitutional questions. Intervention also would not prejudice the adjudication of the rights of any party or hamper the ability of the parties to present their cases on the underlying dispute.