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

Civil Action No. 2:05-CV-00017-LKK-DAD

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER;
JAN DOE AND PAT DOE, PARENTS; DOECHILD, A MINOR CHILD;
JAN ROE; PARENT; ROECHILD-1 AND ROECHILD-2, MINOR CHILDREN;

Plaintiffs,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA;
PETER LEFEVRE, LAW REVISION COUNSEL;
THE UNITED STATES OF AMERICA;
ARNOLD SCHWARZENEGGER, GOVERNOR OF CALIFORNIA;
RICHARD J. RIORDAN, CALIFORNIA SECRETARY FOR EDUCATION,
THE ELK GROVE UNIFIED SCHOOL DISTRICT ("EGUSD");
DR. STEVEN LADD, SUPERINTENDENT, EGUSD;
THE SACRAMENTO CITY UNIFIED SCHOOL DISTRICT ("SCUSD");
DR. M. MAGDALENA CARRILLO MEJIA, SUPERINTENDENT, SCUSD;
THE ELVERTA JOINT ELEMENTARY SCHOOL DISTRICT ("EJESD");
DR. DIANNA MANGERICH, SUPERINTENDENT, EJESD;
THE RIO LINDA UNION SCHOOL DISTRICT ("RLUSD");
FRANK S. PORTER, SUPERINTENDENT, RLUSD;

Defendants.

PLAINTIFFS' RESPONSE TO MOTIONS TO INTERVENE

DATE: July 18, 2005

TIME: 10:00 am

COURTROOM: 4

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I. INTRODUCTION

Plaintiffs have challenged the intrusion of the two purely religious words, "under God," into the nation's Pledge of Allegiance, and the use of that now monotheistic Pledge in the public schools. Two Motions to Intervene have been filed. The first was filed by a group of eleven public school students "who desire to continue to recite the Pledge of Allegiance as an important component of their education." Joining them in the Motion is their sixteen parents, as well as the Knights of Columbus. These proposed intervenors are represented by The Becket Fund for Religious Liberty.[1] (Accordingly, these proposed intervenors will hereafter be referred to as the "Proposed 'Religious Liberty' Intervenors.")

The second Motion to Intervene was filed by the United States of America, a party already involved in the case as one of the named Defendants.[2]

[1] In regard to the Becket Fund's name, it might be pointed out that "Religious Liberty" under our Constitution "has never meant that a majority could use the machinery of the State to practice its beliefs." Abington School District v. Schempp, 374 U.S. 203, 226 (1963).

[2] The United States has argued that, due to sovereign immunity, it is not amenable to suit. Federal Defendants' Memorandum in Support of Motion to Dismiss, at 21-22. Plaintiffs have disputed that contention. Plaintiffs' Response to Motions to Dismiss, at 28-29.

II. INTERVENTION OF THE PROPOSED "RELIGIOUS LIBERTY" INTERVENORS SHOULD BE DENIED

Plaintiffs actually would prefer having the Proposed "Religious Liberty" Intervenors involved in this litigation, and do not object to their Motion to Intervene. In fact, should that Motion be denied, Plaintiffs encourage them to seek the Court's permission to write a brief *amicus curiae*. In this way, they will continue to highlight for the Court the reality that the meaning of "under God" in the Pledge of Allegiance is unequivocally religious.[3] Additionally, Plaintiffs appreciate the Proposed "Religious Liberty" Intervenors' admission that "the very entity that led the way in recommending the addition of the phrase 'under God' to the Pledge in 1954," MSMIJC at 1:23-24, was "the largest Catholic laymen's organization," Id. at 8:4-5. Finally, that the religious words that are now in the Pledge "directly impact the content of the education [students] receive from California's public schools," id. at 1:21-22, is also an acknowledgement for which Plaintiffs are grateful.

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[3] Despite the Proposed "Religious Liberty" Intervenors' attempts to characterize the "under God" phrase as "political philosophy," their own explanation reveals that this is merely a semantic device employed to camouflage the purely religious essence of their claim: "[O]ur rights are only inalienable because they inhere in a human nature that has been 'endowed' with such rights by a 'Creator.'" Memorandum in Support of Motion to Intervene of Defendant-Intervenors John Carey, et al. (hereafter "MSMIJC") at 2:13-17. Thus, they suffer from the difficulty that is often found in religious adherents: the inability to recognize that others do not accept the religious "truths" they find so convincing. It is this problem that the Establishment Clause exists to address. "[T]hat the Civil Magistrate is a competent Judge of Religious truth … is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world." Madison's Memorial and Remonstrance, as cited in Everson v. Board of Education, 330 U.S. 1, 41 n.31 (1947) (Rutledge, J., dissenting). It is also this problem that Congress – whom the Proposed "Religious Liberty" Intervenors quote – fell prey to a half century ago:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is **the belief that the human person** is important because he **was created by God and endowed by Him with certain inalienable rights** which no civil authority can usurp. H.R. REP. NO. 83-1693, at 1-2 (1954).

MSMIJC at 9:4-7 (emphases added).

Despite the foregoing, Plaintiffs believe that standing issues preclude the Court from granting this intervention. Unlike Plaintiffs, who have suffered a cognizable harm – i.e., being individually and personally turned into "outsiders" by the government's endorsement of (Christian) Monotheism – the Proposed "Religious Liberty" Intervenors will simply be treated equally with all other citizens when the Pledge reverts to its previous, nonreligious (and nondivisive) form. Losing an unconstitutional favored status is not an "injury" for standing purposes. As should be immediately realized by recalling that the Pledge applied to all Americans irrespective of religious beliefs during its initial sixty-two years (i.e., prior to 1954), having "one Nation indivisible" does not harm anyone. Thus, these proposed intervenors have no protectable interest at stake in this litigation, and their Motion to Intervene should be denied.

III. INTERVENTION OF THE UNITED STATES SHOULD BE DENIED

The United States has moved to intervene – as of right – on two bases. First, it is contended that "[u]nder 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." Memorandum in Support of the United States of America's Motion to Intervene (hereafter "MSUSAMI") at 2:16-18. However, as was noted by the United States, itself, id. at 2:16-23, 28 U.S.C. § 2403(a) states:

> In 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.

(Emphasis added.) Because the United States is a named defendant in the case, intervention should be denied under 28 U.S.C. § 2403(a).

Regarding the second basis for intervention – Fed. R. Civ. P. 24(a)(2) – Plaintiffs agree with the United States:

> [The] four criteria that a movant must satisfy in order to intervene as of right under that Code section [are]: (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.

MSUSAMI at 3:17-23 (citation omitted). Intervention, however, is again inappropriate since the United States is a named defendant. Moreover, Plaintiffs believe that the United States has only met the first of these four criteria (i.e., timeliness). None of the other three criteria are met because – like the Proposed "Religious Liberty" Intervenors – the United States has no "significantly protectable interest." On the contrary, the only "interest" the United States has

is in maintaining purely religious verbiage that advocates for a purely religious viewpoint. This, according to the Establishment Clause, government may not do. Thus, it is not a legally cognizable (much less a "significantly protectable") interest.

The demonstration of this fact is found by simply examining the House Report referenced by the United States, themselves. MSUSAMI at 3:5-7. "H.R. Rep. No. 1693, 83d Cong., 2d Sess., 1954 U.S.C.C.A.N. at 2340" – submitted with the congressional act that resulted in 4 U.S.C. § 4[4] – stated clearly that:

> The inclusion of God in our Pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator.[5] At the same time, it would serve to deny the atheistic … concepts of communism.

As is shown on the following page, this "approval" of Monotheism and "disapproval" of Atheism is clearly forbidden by the Establishment Clause.

[4] The Act of 1954 was actually originally codified in 1954 at 36 U.S.C. § 172. It was recodified in Title 4 in 1998. Pub. L. No. 105-225, § 2(a), 112 Stat. 1494 (1998).

[5] As noted in the Complaint, Appendix F, "**the** Creator" – not "**a** creator" – was used by the 83rd Congress, revealing clearly that it was the Judeo-Christian deity being referenced. Additionally, it wasn't the phrase, "under God" that Congress wished to have "included" in the Pledge. It was "God," the purely religious entity.

GOVERNMENT MAY NOT APPROVE OR DISAPPROVE OF RELIGIOUS IDEALS

> We must remain sensitive, especially in the public schools, to 'the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others.'

Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 269 (1990) (Marshall, J., concurring) (citation omitted);

> If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring);

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any - or all - religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

Grand Rapids School District v. Ball, 473 U.S. 373, 389 (1985);

> The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few words of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the government intends to convey a message of endorsement or disapproval of religion."

Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985) (citation and footnotes omitted);

> What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

IV. BY ATTEMPTING INTERVENTION, THE UNITED STATES SUBMITS TO THE COURT'S JURISDICTION

Although Plaintiffs believe that the United States of America is a proper party defendant, and that, therefore, intervention is inappropriate, it should be noted that a grant of the United States' demand for intervention runs counter to that party's claim of sovereign immunity.[6] "When party intervenes, it becomes full participant in lawsuit and is treated just as if it were original party; intervenor renders himself vulnerable to complete adjudication of issues in litigation between the intervenor and the adverse party." 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1920 (2d ed. 1986) (2005 Pocket Part at 100) (citing Alvarado v. J.C. Penney Co., 997 F.2d 803, 805 (10th Cir. 1993)). See, also, United States v. Oregon, 657 F.2d 1009, 1014 (9th Cir. 1981); City of Santa Clara v. Kleppe, 428 F. Supp. 315 (1976), aff'd in part, rev'd in part, 572 F.2d 660 (9th Cir. 1978), cert. denied 439 U.S. 859 (1979).

[6] Plaintiffs have already demonstrated that the United States' sovereign immunity has been waived. Response to the Motions to Dismiss at 28-29. Not only is it true that "[t]he Federal Tort Claims Act waives the Government's immunity from suit in sweeping language," United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951), but "[t]he government's waiver of sovereign immunity under the APA is much broader than under the FTCA." Golden Pacific Bancorp v. Robert L. Clarke, 837 F.2d 509, 512 (D.C. Cir. 1988).

V. CONCLUSION

The Motions for Intervention should be denied. The Proposed "Religious Liberty" Intervenors do not have standing, and the United States is already a party defendant.

If the Motion of the Proposed "Religious Liberty" Intervenors is granted, it will serve to demonstrate further that "under God" in the Pledge is a purely religious phrase that has turned the nation's previously all-inclusive oath of allegiance into one that endorses a particular religious ideology. This is specifically prohibited by the Establishment Clause.

If the Motion of the United States is granted, it will serve as (an additional) waiver of the claim of sovereign immunity.

Respectfully submitted,

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