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

12 \_\_\_\_\_ )  
13 THE REV. DR. MICHAEL A. NEWDOW, )  
et. al., )

14 Plaintiffs, )

15 v. )

16 THE CONGRESS OF THE UNITED )  
STATES OF AMERICA, et al., )

17 Defendants. )  
18 \_\_\_\_\_ )  
19

CIV. NO. 2:05-CV-00017-LKK-DAD

**UNITED STATES OF AMERICA'S  
REPLY IN SUPPORT OF 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

20 Plaintiffs' response ("Response") to the United States of America's motion to intervene  
21 ("motion"), although nominally opposing the motion, makes clear that plaintiffs do not oppose  
22 the United States' participation as a party in this case to defend the constitutionality of 4 U.S.C.  
23 § 4, a federal statute codifying the wording of the Pledge of Allegiance to the Flag ("Pledge"),  
24 and the policies of four California public school districts of leading willing students in the  
25 voluntary recitation of the Pledge. Plaintiffs' position is that there is no need for the United  
26 States to intervene because plaintiffs have named the United States as a defendant. Response at  
27 4, 7.  
28

1 Plaintiffs have named the United States as a defendant with respect to their claim that 4  
2 U.S.C. § 4 is unconstitutional on its face. Plaintiffs, however, have identified no waiver of the  
3 United States' sovereign immunity with respect to that claim.<sup>1</sup> Moreover, plaintiffs have not  
4 named the United States as a defendant with respect to their claim that 4 U.S.C. § 4 is  
5 unconstitutional as applied by the school districts through their Pledge policies; that claim lies  
6 only against the state and school district defendants.

7 The United States seeks intervention as a party to ensure that it will be able to participate  
8 fully in defending 4 U.S.C. § 4, both in this Court and in any subsequent appellate proceedings.  
9 Plaintiffs' Response offers no substantive basis for denying the United States' motion; nor do  
10 plaintiffs oppose the United States' participation in this case. Notwithstanding plaintiffs'  
11 argument (Response at 4-6) that 4 U.S.C. § 4 is unconstitutional, the United States has a clear  
12 interest in defending the Pledge statute on its face and as applied by the school districts. Indeed,  
13 the United States previously defended the same application of 4 U.S.C. § 4 in Elk Grove Unified  
14 Sch. Dist. v. Newdow, 124 S.Ct. 2301 (2004), a case brought by the lead plaintiff in this action  
15 against one of the defendant school districts. The United States also intervened to defend the  
16 Pledge on its face and as-applied in Mayo v. Judicial Council of California, et al., No. Civ. S-04-  
17 1920 FCD PAN (E.D. Cal.). The motion to intervene should be granted for all of the reasons  
18 stated in our opening brief.

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23 <sup>1</sup>Plaintiffs argue (Response at 7 n.6) that the Administrative Procedure Act ("APA") and  
24 the Federal Tort Claims Act waive the sovereign immunity of the United States from their  
25 claims. While the United States may be a defendant in an APA case, see 5 U.S.C. § 702, the  
26 APA only waives the government's sovereign immunity for claims brought by a person "suffering  
27 legal wrong because of agency action." Id. Plaintiffs do not challenge any agency action in this  
28 case. The Federal Tort Claims Act is not applicable because it only waives sovereign immunity  
for certain claims for money damages. See 28 U.S.C. § 1346(b).

1 Respectfully Submitted,

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14 Dated: July 8, 2005