

The Becket Fund for Religious Liberty  
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IN THE UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF CALIFORNIA

_____	)	
THE REV. DR. MICHAEL A. NEWDOW, <i>et al.</i>	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	2:05-cv-00017-LKK-DAD
	)	
THE CONGRESS OF THE UNITED STATES	)	<b>Defendant-Intervenors'</b>
OF AMERICA, <i>et al.</i>	)	<b>Memorandum in Support of</b>
	)	<b>Petition for Certification of Order</b>
	)	<b>for Interlocutory Appeal</b>
<i>Defendants,</i>	)	
	)	Date: October 24, 2005
and	)	Time: 10:00 a.m.
	)	Judge: Hon. Lawrence K. Karlton
JOHN CAREY, <i>et al.</i>	)	Courtroom: No. 4
	)	
<i>Defendant-Intervenors.</i>	)	
_____	)	

**MEMORANDUM OF DEFENDANT-INTERVENORS JOHN CAREY, ET AL.  
 IN SUPPORT OF PETITION FOR CERTIFICATION OF  
ORDER FOR INTERLOCUTORY APPEAL**

This Court should certify its Order of September 14, 2005 granting in part and denying in part Defendants' various motions to dismiss (the "September 14 Order") because it "involves a *controlling question of law* as to which there is *substantial ground for difference of opinion* and that

an immediate appeal from the order *may materially advance the ultimate termination of the litigation.*” 28 U.S.C. § 1292(b) (emphasis added). All three of these elements are present with respect to the September 14 Order. Moreover, this case “raises serious legal questions taking the case out of the ordinary run,” questions that the Supreme Court has recognized are uniquely suited for § 1292(b) interlocutory appeal. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 883 (1994).

**I. The constitutionality of the School Districts’ policies with respect to the Pledge of Allegiance involves a “controlling question of law.”**

A “question of law may be deemed ‘controlling’ if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so.” *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996). Here, the resolution of the question of the constitutionality of the School Districts’ policies with respect to the Pledge of Allegiance is a question of law that is not only likely to affect the course of the litigation, it is the central subject of the litigation. Since in the Ninth Circuit even “‘issues collateral to the merits’ may be the proper subject of an interlocutory appeal,” *a fortiori* the central question of this litigation may be taken up in an interlocutory appeal. *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (quoting *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1027 n.5 (9th Cir. 1982)).

**II. A “substantial ground for difference of opinion” exists concerning the constitutionality of the School Districts’ policies with respect to the Pledge of Allegiance.**

As the Court is aware, a circuit split has developed regarding the constitutionality of reciting of the Pledge of Allegiance in the public schools. *Compare Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005), *and Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *with Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002). Since a circuit split is the epitome of a “substantial ground for difference of opinion,” the September 14 Order clearly meets this element of the 1292(b) test and should be certified for interlocutory review.

**III. Interlocutory review will “materially advance the ultimate termination of the litigation.”**

Certifying the September 14 Order for interlocutory appeal will also “materially advance the *ultimate* termination of this litigation.” 28 U.S.C. §1292(b) (emphasis added). The Court should first determine how this litigation will likely end, and then determine what course of action will bring that end the soonest. It is no secret that whatever happens in this Court, the ultimate outcome will be decided by either the Ninth Circuit or the Supreme Court. The Court recognized this fact in basing its September 14 Order on prior Ninth Circuit rulings. *See* September 14 Order at 26. It is therefore clear that this litigation will end more speedily if the Court certifies the central question in this case for immediate interlocutory appeal.

**IV. The uniqueness of this case favors 1292(b) interlocutory review.**

As the Court noted in its September 14 Order, this case is “something of a cause celebre” that merits special treatment by the courts. September 14 Order at 1. The Supreme Court has recognized that 28 U.S.C. § 1292(b) acts as a “safety valve” for “serious legal questions taking the case out of the ordinary run.” *Digital Equip. Corp.*, 511 U.S. at 883. The Court should use that “safety valve” to allow the speediest possible resolution of this extraordinary case.

In addition, it is proper in these circumstances for the Court to consider whether it is prudent to “cause the needless expense and delay” of holding hearings on injunctive relief and then policing the promised injunction “in a forum that has no power to decide the matter.” *Kuehner*, 84 F.3d at 319. Although the Court has ruled on the central issue of law in the case, it is highly likely that both the scope and wording of any potential injunction will be thoroughly contested by the parties, and may even require discovery and the resolution of factual disputes. Moreover, any order enjoining the recitation of the Pledge in public schools, in its current form, would alter more than fifty years of settled public educational practice. This expense, delay, and disruption would be “needless” because

the Ninth Circuit, and perhaps the Supreme Court, will be revisiting the substance of this ruling.

In short, the Court has two alternatives going forward: (1) reviewing additional submissions of the parties on injunctive relief, holding hearings on those submissions, crafting an equitable order, and monitoring compliance with that order; or (2) certifying the September 14 Order for immediate interlocutory appeal, thereby putting the central legal issue promptly before the Ninth Circuit, where it belongs. Defendant-Intervenors respectfully submit that this litigation will reach an earlier conclusion if the Court certifies the September 14 Order for 1292(b) interlocutory review.

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court certify the September 14 Order for 1292(b) interlocutory review and stay further proceedings in this case. Defendant-Intervenors also respectfully request that the Court resolve this Petition before ruling on any application for injunctive relief.

Respectfully submitted,

/s/ Derek L. Gaubatz

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Date: September 19, 2005

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