

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

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The Freedom From Religion  
Foundation, *et al.*  
Plaintiffs

v.

The United States Congress, *et al.*  
Defendants

Civil Action No. 07-cv-356-SM

\*\*\*\*\*

STATE OF NEW HAMPSHIRE'S MEMORANDUM OF LAW IN SUPPORT OF  
ASSENTED TO MOTION TO INTERVENE

State of New Hampshire (hereinafter "State"), by and through counsel, the New Hampshire Attorney General Kelly A. Ayotte, submit the following memorandum of law in support of the assented to motion to intervene of the State of New Hampshire.

**I. Summary of Pleadings**

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"). Compl. ¶ 20, 30, 31, 35, 36, 37, 38, 39 and 46.

It also challenges the constitutionality of a state statute, RSA 194:15-c, the New Hampshire School Patriot Act, which requires that New Hampshire public schools educate and instill patriotic values in students by allowing time each day for willing students to recite the Pledge. Compl. ¶ 22, 34, 67 and Prayer ¶ III. It is further alleged that the school districts defendants' compliance with RSA 194:15-c by

leading willing students in the voluntary recitation of the Pledge violates the New Hampshire Constitution, Article 6 and is contrary to RSA 169-D:23.

The defendants named in this suit are the United States of America, the United States Congress, the Hanover School District, the Dresden School District and SAU #70. Compl. ¶ 12-15. The State of New Hampshire is not named as a party.

## **II. Argument**

### **A. The State Is Entitled To Intervene As A Matter Of Right.**

The State is entitled to intervene in this action as a matter of right to defend the constitutionality of the state statutes. Fed. R. Civ. P. 24(a) provides

“(a) Intervention of Right.

On timely application, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Under Fed. R. Civ. P. 24(a)(1) the State has an unconditional right to intervene because federal statutes give the State a right to intervene in any matter “wherein the constitutionality of any statute of that State affecting the public interest is drawn in question.” 28 U.S.C. §2403(b). Plaintiffs challenge to the constitutionality of 4 U.S.C. § 4, as applied under RSA 194:15-c, is plainly a challenge to a statute “affecting the public interest” as the stated purpose of the act is “the policy of teaching our country's history to the elementary and secondary pupils of this state.” RSA 194:15-c, I.

Fed. R. Civ. P. 24(a)(2) also provides the State the right to intervene, the State has an interest in the transaction that is the subject of this lawsuit – the recitation of

the Pledge and that interest may be impaired as the interest of the school district defendants is not coextensive with that of the State. The school districts are primarily concerned with complying with state law, not with whether the state law is constitutional. See Exhibit A, position statement of School Districts. The school district defendants' obligation to respond to the lawsuit has been stayed. See Order granting Dkt # 5.

To intervene as of right under Rule 24(a)(2), a movant “must show that (1) it timely moved to intervene; (2) it has an interest relating to the property or transaction that forms the basis of the ongoing suit; (3) the disposition of the action threatens to create a practical impediment to its ability to protect its interest; and (4) no existing party adequately represents its interests.” B. Fernandez & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 544-45 (1st Cir. 2006) (citation omitted). Application of this standard requires a “holistic” approach that reads the factors “not discretely, but together . . . in keeping with a commonsense view of the overall litigation.” Pub. Serv. Co. of N.H. v. Patch, 136 F.3d 197, 204 (1st Cir. 1998) (citation and internal quotation marks omitted). When these criteria are satisfied, a district court “shall” permit intervention. Fed. R. Civ. P. 24(a); see Fiandaca v. Cunningham, 827 F.2d 825, 832-33 (1st Cir. 1987).

The State meets all of the Rule 24(a)(2) requirements for intervention. First, this motion is timely filed pursuant to the Court's order approving the parties' agreed-upon briefing schedule. See Order of Dec. 26, 2007. Moreover, the State is filing this motion at the same time as the initial pleadings by the federal defendants and is contemporaneously filing a motion to dismiss addressing all issues related to the

constitutionality of RSA 194:15-c as well as the New Hampshire Constitution and other statutes mentioned in the complaint. Intervention will not delay the resolution of this case. See Public Citizen v. Liggett Group, 858 F.2d 775, 784-85 (1st Cir. 1988) (“timeliness” under Rule 24 “is to be determined from all the circumstances”).

Second, the State has an obvious interest in the constitutionality and application of its laws. Here, the federal statute, 4 U.S.C. § 4, does not require students to recite the Pledge. To the extent that a requirement for voluntary daily recitation of the Pledge exists in New Hampshire, it is pursuant to state statute. See Conservation Law Found. v. Mosbacher, 966 F.2d 39, 42 (1st Cir. 1992) (although there is “no precise and authoritative definition of the interest required to sustain a right to intervene,” a prospective intervenor’s interest “must bear a ‘sufficiently close relationship’ to the dispute between the original litigants”) (citation omitted).

Third, a ruling by the Court finds that 4 U.S.C. § 4 or the school districts’ Pledge practices under RSA 194:15-c are unconstitutional, such a finding would surely “impair or impede” the State in defending the validity of RSA 194:15-c. Fed. R. Civ. P. 24(a)(2); see Daggett v. Comm’n on Gov’t Ethics & Election Practices, 172 F.3d 104, 110-11 (1st Cir. 1999) (applying “[t]he practical test of adverse effect that governs under Rule 24(a)”).

Fourth, because the public interest protected by the State is different in kind and scope from the interests of any other party, no existing party will adequately represent the interests of the State in this case. See Mosbacher, 966 F.2d at 44 (weighing the “differing scope of interests” among parties). As pointed out above, and as set forth in the school districts position statement attached hereto, the school

district does not have the same interest in defending the state statute as the State.

Trbovich v. United Mine Workers of Am., 404 U.S. 528, 538 n.10 (1972)

(inadequacy requirement “is satisfied if the applicant shows that the representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal”); accord Mosbacher, 966 F.2d at 44; Patch, 136 F.3d at 207.

Accordingly, the State satisfies Rule 24(a)(2)’s requirements to intervene as of right to defend the constitutionality of RSA 194:15-c<sup>1</sup> and by it’s requirement for the opportunity to participate in recitation of the Pledge, the constitutionality of 4 U.S.C. § 4 and the school districts’ Pledge practices.

B. The State Should Be Allowed Permissive Intervention

Even if the State did not have a right to intervene as of right, the court should allow the State to permissive intervention under Fed. R. Civ. P. 24(b)(2).

(b) Permissive Intervention

(2) By a Government Officer or Agency.

On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency

Here, the Plaintiffs are alleging that the practice of voluntary daily Pledge recitation in New Hampshire public schools violates the Establishment Clause and/or Free Exercise Clause of the United States Constitution. The State has a substantial interest in the constitutionality of RSA 194:15-c under the federal constitution, therefore independent jurisdictional grounds exist for permissive intervention.

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<sup>1</sup> To the extent that Plaintiffs allege that RSA 194:15-c violates the State constitution, the State contends that federal question jurisdiction does not provide supplemental or pendant jurisdiction over the purely state law claims. See Raygor v. Regents of University of Minn., 534 U.S. 533, 540-541 (2002).

International Paper Co. v. Inhabitants of Jay, Maine, 887 F. 2d 338, 345-6 (1<sup>st</sup> Cir. 1989).

### **III. Conclusion**

For the reasons stated herein the State of New Hampshire's assented to motion to intervene should be granted.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorneys,

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### Certification

January 18, 2008

I hereby certify that a copy of the foregoing document was filed electronically and served electronically by operation of the Court's electronic filing system to Michael A. Newdow, Esquire, Rosanna T. Fox, Esquire and Eric B. Beckenhauer, Esquire and to David Bradley, Esquire, Stebbins, Bradley, Harvey, Miller & Brooks and to any amici that have appeared in this case.

/s/ Nancy J. Smith  
Nancy J. Smith

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