IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

THE FREEDOM FROM RELIGION FOUNDATION, et al.,	)	
Plaintiffs,	)	
v.	)	**Civil Action No. 07-356 (SM)**
THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF THE UNITED STATES OF AMERICA'S ASSENTED-TO MOTION FOR LEAVE TO INTERVENE

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 requiring New Hampshire public schools to set aside time during the school day for Pledge recitation, and three New Hampshire public school districts' practices 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") and the United States Congress ("Congress") are named as defendants (collectively "Federal Defendants"), as are three public school districts in Hanover, New Hampshire. There are no named state defendants, although the State of New Hampshire has indicated its intent to intervene.

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 defendant school districts all relate

to their contention that 4 U.S.C. § 4 is unconstitutional as applied by the school districts' Pledge practices. Although the United States technically is not a defendant with respect to Plaintiffs' as-applied challenge 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 an analogous challenge to 4 U.S.C. § 4 in Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), a case in which Plaintiffs' counsel, Rev. Dr. Michael A. Newdow, challenged the statute both on its face and as applied by the Pledge practices of two California public school districts. See also Newdow v. U.S. Congress, No. 05-17 (E.D. Cal. July 18, 2005) (docket entry no. 79) (minute order granting the United States leave to intervene in post-Elk Grove litigation).

As explained below, the United States has a clear right to intervene in this action under 28 U.S.C. § 2403(a) and Federal Rule of Civil Procedure 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)

28 U.S.C. § 2403(a) grants the United States an unconditional right to intervene in cases challenging the constitutionality of an Act of Congress. It provides:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in 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 (1984); Int'l Ladies' Garment Workers' Union v. Donelly Garment Co., 304 U.S. 243, 249 (1938) (per curiam) (discussing predecessor statute to 28 U.S.C. § 2403); see generally 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil § 1906, at 274-46 (3d ed. 2007).

Plaintiffs challenge the constitutionality of 4 U.S.C. § 4, which sets forth the wording of the Pledge of Allegiance. See Act of June 14, 1954, Pub. L. No. 83-396, 68 Stat. 249 (1954). 4 U.S.C. § 4 plainly is a statute "affecting the public interest." 28 U.S.C. § 2403(a); see, e.g., H.R. Rep. No. 83-1693, at 1-2, reprinted in 1954 U.S.C.C.A.N. 2339, 2339-40. 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 by the school districts' Pledge practices. As noted above, the United States recently defended the constitutionality of analogous Pledge practices in Elk Grove and in later related litigation in the Ninth Circuit. 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.

II. THE UNITED STATES HAS A RIGHT TO INTERVENE UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a)(2)

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 Federal Rule of Civil Procedure 24(a)(2). 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 protects 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 United States 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 United States is filing this motion shortly after receiving authorization to intervene from the Solicitor General. See 28 C.F.R. § 0.21. And, because the Federal Defendants' contemporaneously filed motion to dismiss addresses all issues related to the constitutionality of 4 U.S.C. § 4, 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 United States has an obvious interest in the constitutionality and application of its laws; indeed, as noted earlier, it previously defended an analogous application of 4 U.S.C. § 4 in Elk Grove and in later related litigation. 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); see also San Juan County v. United States, 503 F.3d 1163, 1195 (10th Cir. 2007) (en banc) (describing Rule 24(a)(2)'s "interest" requirement as "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 defending the statute's validity. 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 United States is different in kind and scope from the interests of any other party, no existing party will adequately represent the interests of the United States in this case. See Mosbacher, 966 F.2d at 44 (weighing the "differing scope of interests" among parties). Indeed, because the school districts' obligation to answer has been stayed, unless intervention is permitted there will be no party presently able to defend the constitutionality of 4 U.S.C. § 4 in the context of the school districts' Pledge practices. 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 United States satisfies Rule 24(a)(2)'s requirements to intervene as of right to defend the constitutionality of 4 U.S.C. § 4 and the school districts' Pledge practices.[1]

[1] In the alternative, the United States also satisfies the criteria for permissive intervention under Rule 24(b), which provides in pertinent part that, upon timely motion, an applicant may be permitted to intervene when it "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b); see Mass. Food Ass'n v. Mass. Alcoholic Bevs. Control Comm'n, 197 F.3d 560, 568 (1st Cir. 1999) (Rule 24(b) sets a "low threshold"). Here, the United States seeks to intervene to defend the constitutionality of the school districts' Pledge practices, one of the principal issues in the 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.

CONCLUSION

For all the foregoing reasons, the United States of America's assented-to motion to intervene should be granted. A proposed order is attached.

Dated: January 18, 2008

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

THOMAS P. COLANTUONO
United States Attorney

CARL J. NICHOLS
Deputy Assistant Attorney General

THEODORE C. HIRT
Assistant Director, Federal Programs Branch

/s/ *Eric B. Beckenhauer*
ERIC B. BECKENHAUER, Cal. Bar No. 237526
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
Telephone: (202) 514-3338
Facsimile: (202) 616-8470
E-mail: eric.beckenhauer@usdoj.gov

Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, the foregoing document was filed with the Clerk of Court via the CM/ECF system, causing it to be served on Michael A. Newdow and Rosanna T. Fox, counsel for the Plaintiffs, and David Bradley, counsel for the School District Defendants.

I further certify that on January 18, 2008, a true and correct copy of the foregoing document was sent via e-mail to Nancy Smith, counsel for proposed intervenor-defendant the State of New Hampshire, at Nancy.Smith@doj.nh.gov.

/s/ *Eric B. Beckenhauer*
ERIC B. BECKENHAUER
Trial Attorney
U.S. Department of Justice