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 INTERVENOR-DEFENDANT
THE UNITED STATES OF AMERICA'S RENEWED MOTION TO DISMISS

In accordance with the Court's Orders of November 14 and December 5, 2008, intervenor-defendant the United States of America hereby submits this memorandum of law in support of its renewed motion to dismiss, addressing only the newly clarified claims in Plaintiffs' First Amended Complaint.

BACKGROUND

Plaintiffs' original Complaint challenged the constitutionality of the federal Pledge statute, 4 U.S.C. § 4, both facially and as applied by the Pledge-recitation practices of the defendant school districts. In its Order of August 7, 2008, the Court dismissed Plaintiffs' claims against the United States of America and the United States Congress, holding that Plaintiffs lack federal taxpayer standing and that Congress is immune to suit under the Speech or Debate Clause. See slip op. at 12, 19 [Dkt. No. 44]. However, the Court permitted the United States to remain in the case as an intervenor to defend the constitutionality of 4 U.S.C. § 4. See id. at 20.

In their First Amended Complaint, Plaintiffs abandon their facial challenge to 4 U.S.C. § 4, but continue to press their as-applied challenge. As relief, they seek a declaration that the school districts' Pledge practices "violate the Establishment and Free Exercise Clauses of the First Amendment [and] the Due Process and Equal Protection Clauses of the Fourteenth Amendment," 1st Am. Compl. ¶ I, and an injunction that would require the school districts to refrain "from using the now-sectarian Pledge of Allegiance in [their] public schools," id. ¶ III.[1] Plaintiffs' as-applied challenge should be dismissed for the reasons previously set forth in the memoranda of law submitted in support of the Federal Defendants' Motion to Dismiss [Dkt. Nos. 16-2 & 42].

This memorandum addresses only Plaintiffs' newly clarified claims alleging violations of parental and familial rights under the U.S. Constitution.[2] In its Order of August 7, 2008, the Court read Plaintiffs' original Complaint to raise claims that the school districts' Pledge practices abridge the Doe parents' right "to instill their own religious beliefs in their children" and the Doe children's right "to acquire religious values from their parents." Id. at 6-7 (citing Compl. ¶¶ 42-45). In the original Complaint, which was not organized into discrete counts, Plaintiffs did not distinguish these claims from their free exercise claims or identify an independent source of any such rights. In their First Amended Complaint, by contrast, Plaintiffs specifically allege that the school districts' Pledge practices infringe upon the Doe parents' "federal constitutional right of parenthood, which includes the right to instill the religious beliefs chosen by the parents," 1st Am. Compl. ¶ 68 (citing Wisconsin

[1] Plaintiffs also seek a declaration that the school districts' Pledge practices violate Article 6 of Part I of the New Hampshire Constitution and N.H. Revised Statutes § 169-D:23, see 1st Am. Compl. ¶ I, and that N.H. Revised Statutes § 194:15-c is void as against public policy, see id. ¶ II. This memorandum does not address these state law issues.

[2] This memorandum does not address Plaintiffs' claim that the school districts' Pledge practices violate the Doe parents' state parenthood rights or any associated rights of the Doe children. See 1st Am. Compl. ¶ 79.

v. Yoder, 406 U.S. 205 (1972)), and the Doe children's "corresponding right . . . to be instructed in the religion of their parents," id. ¶ 69. Despite this repackaging, these claims add nothing to Plaintiffs' case, and they should be dismissed under Rule 12(b)(6) for failure to state a claim.

ARGUMENT

This Court need not look beyond the First Circuit's decision in Parker v. Hurley, 514 F.3d 87 (1st Cir. 2008), to dispose of Plaintiffs' federal parental and familial rights claims. The plaintiffs in Parker raised free exercise and substantive due process[3] challenges to a Massachusetts school district's failure to provide them with an opportunity to exempt their children from classroom exposure to books whose portrayal of same-sex marriage they found "religiously repugnant." Id. at 90. The Parker court interpreted the Supreme Court's decision in Wisconsin v. Yoder to require that where, as here, a plaintiff's asserted parental or familial rights overlap with his free exercise rights, the claims should not be analyzed separately, but rather "considered . . . interdependently, given that those two sets of interests inform one another." Parker, 514 F.3d at 98 (citing Yoder, 406 U.S. at 213-14, 232-34). This "tandem" analysis, however, does "not alter the standard constitutional threshold question" — namely, "whether the plaintiff's free exercise is interfered with at all." Id. at 99 (citation omitted).

Here, as in Parker, Plaintiffs' claims fail this threshold test because there is no cognizable burden on their free exercise rights. As to the Doe parents' rights, the Parker court unambiguously held that a public school student's mere exposure "to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently." Id. at 105; see also id. ("A

[3] The First Circuit has analyzed asserted parental and familial rights under the rubric of substantive due process. See Parker, 514 F.3d at 101-03; Brown v. Hot, Sexy and Safer Productions, 68 F.3d 525, 532-534 & n.5 (1st Cir. 1995).

parent whose 'child is exposed to sensitive topics or information [at school] remains free to discuss these matters and to place them in the family's moral or religious context, or to supplement the information with more appropriate materials.'") (citation omitted; alteration in original). Moreover, the Supreme Court spoke directly to this issue in Elk Grove, where it recognized that a school district's daily Pledge recitation practices did nothing to "impair[] Newdow's right to instruct his daughter in his religious views." Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 16 (2004). The circumstances here are indistinguishable.

The related claims of the Doe children fare no better. As fully explained in our previous briefs, see Br. at 35-36 [Dkt. 16-2], Reply Br. at 17-18 [Dkt. 42], the mere "exposure to ideas" simply does "not constitute a constitutionally significant burden on the plaintiffs' free exercise of religion." Parker, 514 F.3d at 105 (citation omitted). Public schools are "not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them." Id. at 106. Here, it is undisputed that the school districts' Pledge practices do not "require" the Doe children to recite the Pledge; indeed, state law explicitly protects their right to "opt out" of Pledge recitation, see N.H. Rev. Stat. Ann. § 194:15-c. These practices are fully protective of the Doe children's free exercise rights, and thus of any overlapping familial rights. See Parker, 514 F.3d at 99, 106; W.Va. State Board of Educ. v. Barnette, 319 U.S. 624 (1943).

CONCLUSION

For the foregoing reasons, in addition to those previously set forth in the memoranda of law submitted in support of the Federal Defendants' Motion to Dismiss [Dkt. Nos. 16-2 & 42], the United States's renewed motion to dismiss should be granted.

Dated: December 19, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 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; David H. Bradley, counsel for the School District Defendants; Nancy Smith, counsel for intervenor-defendant the State of New Hampshire; and Eric C. Rassbach, Kevin J. Hasson, and Bradford T. Atwood, counsel for intervenor-defendants Muriel Cyrus, et al.

/s/ *Eric B. Beckenhauer*
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