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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, *et al.* *Plaintiffs*, v. THE CONGRESS OF THE UNITED STATES OF AMERICA, *et al.* *Defendants*; and JOHN CAREY, *et al.* *Defendant-Intervenors*.	2:05-cv-00017-LKK-DAD

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE OF DEFENDANT-INTERVENORS JOHN CAREY, *et al.*

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 24, the following parties seek leave to intervene in this case as Defendant-Intervenors: Brenden Carey, Brenden Magnino, Adam Araiza, Michaela Bishop, Teresa Declines, Darien Declines, Ryanna Declines, Anthony Doerr, Sean Forschler, Tiffany Forschler, and Mary McKay (California public school students who desire to continue to recite the Pledge of Allegiance as an important component of their education) ("Student-Intervenors"); John and Adrienne Carey, Dave and Lynette Magnino, Albert and Anita Araiza, Craig and Marie Bishop, Rommel and Janice Declines, Dan and Karen Doerr, Fred and Esterlita Forschler, and Robert and Sharon McKay (parents of these students) ("Parent-Intervenors"); and the Knights of Columbus (the entity responsible, at least in part, for the inclusion of the words "under God" in the Pledge) ("Knight-Intervenors").

These students, their parents, and the Knights of Columbus respectfully request permission to intervene in this case (collectively as "Defendant-Intervenors" or "Intervenors") to protect their substantial interest in defending, against Plaintiffs' Establishment Clause challenge, the constitutionality of the Pledge of Allegiance that is recited daily in California's public schools. As students and parents of students in the California public school system, the Student/Parent-Intervenors will undoubtedly be affected by the outcome of this proceeding. A determination regarding the constitutionality of the Pledge will directly impact the content of the education they receive from California's public schools and the way in which they declare their commitment to the ideals of their country reflected in the Pledge. Furthermore, as the very entity that led the way in recommending the addition of the phrase "under God" to the Pledge in 1954, the Knights have a particularly strong interest in the Pledge's constitutionality that may be impaired if denied the opportunity to intervene in this proceeding.

As set forth in detail below, Intervenors meet all of the criteria the Ninth Circuit has identified for parties to intervene as of right under Fed. R. Civ. P. 24(a). Intervenors also meet the criteria for permissive intervention under Fed. R. Civ. P. 24(b).

THE INTERVENORS

John Carey, Adrienne Carey, and Brenden Carey: John and Adrienne Carey are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. Carey are the parents of Brenden Carey, a student in the California public school system. Brenden presently attends Foulks Ranch Elementary School in the Elk Grove Unified School District.

The Careys recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Careys believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

John and Adrienne Carey therefore encourage their son Brenden to participate in the voluntary daily recitation of the Pledge at his school, and Brenden desires to continue to recite the Pledge at his school.

Dave Magnino, Lynette Magnino, and Brenden Magnino: Dave and Lynette Magnino are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. Magnino

are the parents of Brenden Magnino, a student in the California public school system. Brenden presently attends Franklin High School in the Elk Grove Unified School District.

The Magninos recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Magninos believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Dave and Lynette Magnino therefore encourage their son Brenden to participate in the voluntary recitation of the Pledge at his school, and Brenden desires to continue to recite the Pledge at his school.

Albert Araiza, Anita Araiza, and Adam Araiza: Albert and Anita Araiza are residents of California and federal and state taxpayers in good standing. Albert and Anita Araiza are parents of Adam Araiza, a student in the California public school system. Adam presently attends Harriet Eddy School in the Elk Grove Unified School District.

The Araizas recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political

philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Araizas believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Albert and Anita Araiza therefore encourage their son Adam to participate in the voluntary recitation of the Pledge at his school, and Adam desires to continue to recite the Pledge at his school.

Craig Bishop, Marie Bishop, and Michaela Bishop: Craig and Marie Bishop are residents of California and federal taxpayers in good standing. Craig and Marie Bishop are the parents of Michaela Bishop, a student in the California public school system. Michaela presently attends Isabelle Jackson Elementary School in the Elk Grove Unified School District.

The Bishops recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Bishops believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Craig and Marie Bishop therefore encourage their daughter Michaela to participate in the

voluntary daily recitation of the Pledge at her school, and Michaela desires to continue to recite the Pledge at her school.

Rommel Declines, Janice Declines, Teresa Declines, Darien Declines, and Ryanna Declines: Rommel and Janice Declines are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. Declines are the parents of Teresa Declines, Darien Declines, and Ryanna Declines, students in the California public school system. Teresa, Darien, and Ryanna presently attend Irene B. West Elementary School in the Elk Grove Unified School District.

The Declines recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Declines believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Rommel and Janice Declines therefore encourage their children to participate in the voluntary daily recitation of the Pledge at their school, and Teresa, Darien, and Ryanna desire to continue to recite the Pledge at their school.

Dan Doerr, Karen Doerr, and Anthony Doerr: Dan and Karen Doerr are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. Doerr are the parents of Anthony Doerr, a student in the California public school system. Anthony Doerr presently attends

Harriet Eddy School in the Elk Grove Unified School District.

The Doerrs recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Doerrs believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Dan and Karen Doerr therefore encourage their son Anthony to participate in the voluntary recitation of the Pledge at his school, and Anthony desires to continue to recite the Pledge at his school.

Fred Forschler, Esterlita Forschler, Sean Forschler, and Tiffany Forschler: Fred and Esterlita Forschler are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. Forschler are the parents of Sean Forschler and Tiffany Forschler, students in the California public school system. Sean and Tiffany Forschler presently attend Franklin High School in the Elk Grove Unified School District.

The Forschlers recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political

philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the Forschlers believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Fred and Esterlita Forschler therefore encourage their children Sean and Tiffany to participate in the voluntary recitation of the Pledge at their school, and Sean and Tiffany desire to continue to recite the Pledge at their school.

Robert McKay, Sharon McKay, and Mary McKay: Robert and Sharon McKay are residents of California and federal and state taxpayers in good standing. Mr. and Mrs. McKay are the parents of Mary McKay, a student in the California public school system. Mary McKay presently attends Lincoln High School in the Lincoln School District.

The McKays recognize that at least since the Declaration of Independence was written, our national ethos has held that we have inalienable rights that the State cannot take away, because the source of those inalienable rights is an authority greater than the State. They recognize that the Pledge and its use of the phrase "under God" is, like the Declaration, a statement of political philosophy, not of theology. And they understand that this political philosophy depends for its force on the premise that our rights are only inalienable because they inhere in a human nature that has been "endowed" with such rights by a "Creator." Accordingly, the McKays believe that the continued recitation of the Pledge is an important element of a public school education in order to teach and reaffirm the limited nature of the American Republic, bound as it is to respect the inalienable rights of its people.

Robert and Mary McKay therefore encourage their daughter Mary to participate in the voluntary recitation of the Pledge at her school, and Mary desires to continue to recite the Pledge at her school.

The Knights of Columbus: The Knights of Columbus is the largest Catholic laymen's organization with approximately 1.7 million members in a dozen countries. Ever since its beginnings in the basement of a church in New Haven, Connecticut, its members have understood that American ideals and democracy flow from an authority greater than the government, and that the government must respect the inalienable rights shared by all.

In 1951, the Supreme Board of Directors of the Knights of Columbus amended the Pledge of Allegiance regularly recited at their organizational meetings to include the phrase "under God." *See Amendment of K. of C. for Pledge of Allegiance Adopted by Senate*, NEW HAVEN REGISTER, May 13, 1954; *"Under God" Under Attack*, COLUMBIA, Sept. 2002, at 8-9. In 1952, the Knights recommended this amendment to the President, Vice-President, and members of both Houses of Congress. *See K. of C. Urged Revised Oath*, NEW YORK JOURNAL-AMERICAN, May 18, 1954. The Knights urged this amendment to the Pledge at the height of the Cold War between the United States and Soviet Union to distinguish the nature and extent of human rights in the United States from that in communist Russia. The Knights understood that including the phrase "under God" in the Pledge would draw a distinction between the "natural rights" philosophy of Madison, Jefferson, and other Founders on which the American system is based and the Soviet philosophy that rights, such as they are, are conferred by the State.

Consistent with the Knight's recommendation, Congress officially amended the Pledge in 1954 to include the phrase "under God."[1] Pub. L. No. 396, 68 Stat. 249. Congress was motivated

[1] Codified in 4 U.S.C. § 4, the Pledge as amended in 1954 reads as follows:

by the same principle that drove the Knight's recommendation: *i.e.*, that the dignity of man and certain inalienable rights cannot be usurped by the government or its laws. As the House of Representatives Report on the joint resolution adding "under God" to the Pledge put it:

> Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority can usurp.

H.R. REP. NO. 83-1693, at 1-2 (1954). President Dwight D. Eisenhower similarly recognized this principle when he thanked the Knights for their role in promoting the amendment:

> [W]e are particularly thankful to you for your part in the movement to have the words "under God" added to our Pledge of Allegiance. These words will remind Americans that despite our great physical strength we must remain humble. They will help us to keep constantly in our minds and hearts the spiritual and moral principles which alone give dignity to man, and upon which our way of life is founded. For the contribution which your organization has made to this cause, we must be genuinely grateful.

Letter from Dwight D. Eisenhower to Luke E. Hart, Supreme Knight of the Knights of Columbus, Aug. 17, 1954, *reprinted in "Under God" Under Attack*, *supra*, at 9.

In light of their involvement in shaping the present language of the Pledge, the Knights have a strong interest in defending the constitutionality of the Pledge (and its daily recitation in public schools in California and around the country) so that the Pledge may continue to serve as a daily reminder for all Americans of the political philosophy that has animated this country since its Founding, *i.e.*, that the inalienable rights with which all citizens are endowed must be respected by the State precisely because they are prior to the State.

PROCEDURAL BACKGROUND

On April 11, 2005, Plaintiffs Michael Newdow, *et al.*, filed an amended complaint (the

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> I pledge allegiance to the flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

"Complaint") against the United States of America, the California Department of Education, the Elk Grove Unified School District, and others alleging that the inclusion of the words "under God" in the Pledge of Allegiance violates the Establishment Clause. Compl. ¶ 28. The Complaint demands, *inter alia*, that this Court find the Pledge unconstitutional and prevent students in California public schools, like Student-Intervenors, from voluntarily reciting the Pledge that they have been reciting their whole lives. By a scheduling order of March 16, 2005, this Court directed that any motions to dismiss the Complaint be filed by May 16, 2005. No defendant has yet filed a motion to dismiss.

The Student/Parent-Intervenors—students and parents of students in the California public school system who want the recitation of the Pledge to continue as a part of public school education—and the Knight-Intervenors—the very entity responsible, at least in part, for the inclusion of the phrase "under God" in the Pledge—now file this timely motion to intervene to protect their substantial interests in this case.

ARGUMENT

I. INTERVENORS SATISFY THE REQUIREMENTS OF FED. R. CIV. P. 24(a) AND ARE THEREFORE ENTITLED TO INTERVENE "AS OF RIGHT."

The Ninth Circuit has identified four criteria for intervention to be permitted as of right under Fed. R. Civ. P. 24(a):

> (1) the motion must be timely; (2) the applicant must assert a 'significantly protectable' interest relating to property or a transaction that is the subject matter of litigation; (3) the applicant must be situated so that disposition of action may as a practical matter impair or impede the interest; and (4) the applicant's interest must be inadequately represented by the parties.

Kootenai Tribe of Idaho v. *Veneman*, 313 F.3d 1094, 1107-08 (9th Cir. 2002) (internal citations omitted). But these four factors are not to be narrowly or strictly interpreted. *See United States* v. *Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004). Instead, the Ninth Circuit has emphasized that courts applying these criteria should be "guided primarily by practical and equitable

considerations" and "*the requirements for intervention [should be] broadly interpreted in favor of intervention*." *Id.* (citation omitted) (emphasis added). This is so because

> [a] *liberal policy in favor of intervention* serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, [courts] often prevent or simplify future litigation involving related issues; at the same time, [courts] allow an additional interested party to express its views before the court.

Forest Conservation Council v. *U.S. Forest Service*, 66 F.3d 1489, 1496 n.8 (9th Cir. 1995) (emphasis added).

Intervenors easily satisfy all of the criteria necessary for intervention as of right.

A. <u>The Motion for Intervention Is Timely</u>.

In evaluating the timeliness of a motion to intervene, the Ninth Circuit considers the stage of the proceeding at which intervention is sought and whether any delay might cause prejudice to the existing parties. *See, e.g., Alisal Water*, 370 F.3d at 921 (citations omitted). *See also* 7C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1916 (1986) (a primary consideration is "whether the delay in moving for intervention will prejudice the existing parties to the case"). When evaluating whether intervention would prejudice the existing parties, a primary consideration is whether "relief from long-standing inequities [would be] delayed." *Alaniz* v. *Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978).

Here, intervention is being sought without delay and will not prejudice any of the existing parties. The motion to intervene is being filed while the case before the Court is still very early in the pleadings stage. In fact, the motion was filed less than a month after Plaintiffs filed their amended complaint and before any Defendant filed any response to the complaint. In addition, Intervenors are prepared to fully comply with the deadlines set forth in this Court's scheduling order of March 16, 2005. Thus, there is no basis for a finding of delay or prejudice to the existing parties.

Nor is there any basis for finding that intervention would delay the Plaintiffs from obtaining relief from any alleged "long-standing inequit[y]." Accordingly, Intervenors satisfy the timeliness factor.

B. Intervenors Have an Interest in the Subject Matter of this Litigation.

The Ninth Circuit has held that "the interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Fresno County* v. *Andrus*, 622 F.2d 436, 438 (9th Cir. 1980) (internal quotations and citations omitted). The Ninth Circuit has also emphasized that "interests less plainly protectable by traditional legal doctrines suffice[] for intervention of right." *Sierra Club* v. *E.P.A.*, 995 F.2d 1478, 1482-83 (9th Cir. 1993). Furthermore, "[t]he interest test is not a clear-cut or bright-line rule, because '[n]o specific legal or equitable interest need be established.'" *United States* v. *City of Los Angeles*, 288 F.3d 391, 398 (9th Cir. 2002) (quoting *Greene* v. *United States*, 996 F.2d 973, 976 (9th Cir. 1993).

With respect to Student/Parent-Intervenors, there can be little doubt that students have a significant interest in the content of the education that they receive, and that parents have an equally significant interest in the content of the education that their children receive. The Pledge of Allegiance—the subject matter of this lawsuit—is an important component of the content of a public school education. By instilling patriotism and teaching about the nature of this country's Republican form of government, the Pledge achieves the educational purpose of providing children an "appropriate patriotic exercise[]." Cal. Educ. Code § 52750.

Accordingly, to protect their interest in the educational content they receive from the public schools, Student/Parent-Intervenors have an interest in the specific content of the Pledge. It is their position that without the words "under God" in the Pledge, the quality of the content of the public school education they receive would decline. In their view (as discussed *supra*), removal of the

words "under God" would mean that the Pledge would no longer serve to teach and remind students of the political philosophy that has guided this Republic since its founding—*i.e.*, that citizens have inalienable rights that the State cannot take away because the source of those inalienable rights is an authority greater than the State.

In sum, there can be little doubt that Student/Parent-Intervenors' interest in the content of the education they receive from the public schools—as implicated by this lawsuit concerning the constitutionality of the Pledge—is an interest that provides a sufficient basis for intervention. Indeed, courts have repeatedly upheld the right of parents and their school age children to intervene in cases that affect their interests in the nature and content of their education. *See, e.g.*, *Zelman* v. *Harris*, 536 U.S. 639 (2002); *Agostini* v. *Felton*, 521 U.S. 203 (1997); *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Johnson* v. *San Francisco Unified School District*, 500 F.2d 349 (9th Cir. 1974); *Bauchman for Bauchman* v. *West High School*, 132 F.3d 542 (10th Cir. 1997); *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Atkins* v. *State Board of Education of North Carolina*, 418 F.2d 874 (4th Cir. 1969); *Smuck* v. *Hobson*, 408 F.2d 175, 177 (D.C. Cir. 1969).

Moreover, that Student/Parent-Intervenors have a sufficient interest in the subject matter of this litigation is also evident when one compares their interest to that of the Plaintiffs. Like the Plaintiffs, the Student/Parent-Intervenors are public school students and their parents with an interest in the content of the public school education they receive. The only difference between them is that one group of students and parents requests that the content of the education they receive be modified by removing the words "under God" from the Pledge, while the other group asks that the content of their education remain the same. In short, the Student/Parent-Intervenors have at least as great an interest in the subject matter of this litigation as do Plaintiffs.

As for the Knights of Columbus, it was, at least in part, because of their recommendation that

Congress amended the Pledge of Allegiance in 1954 to include the words "under God" to the Pledge. *See supra*. Accordingly, Knight-Intervenors have a particular and special interest in defending the constitutionality of the Pledge. Where the role that a particular organization has played in influencing a law is at stake, the Ninth Circuit has repeatedly granted intervenor status as of right to defend its interests in the law. *See, e.g., Yniguez* v. *Arizona*, 939 F.2d 727 (9th Cir.1991) (intervention as of right by sponsors of ballot initiative declaring English to be the official language in litigation challenging the constitutionality of that statute); *Sagebrush Rebellion* v. *Watt*, 713 F.2d 525 (9th Cir. 1983) (intervention as of right by National Audubon Society in suit challenging creation of conservation area); *Washington State Bldg. & Constr. Trades Council* v. *Spellman*, 684 F.2d 627 (9th Cir.) (intervention as of right by advocacy group which had sponsored antinuclear statute in suit challenging that statute), *cert. denied*, 461 U.S. 913 (1982); *Idaho* v. *Freeman*, 625 F.2d 886 (9th Cir. 1980) (intervention as of right by National Organization of Women in suit challenging the procedures for ratification of the proposed Equal Rights Amendment); *Fresno County*, 622 F.2d at 438 (intervention as of right by National Land of People (NLP) in suit involving government regulations that the NLP played a role in having promulgated).

C. <u>Disposition of this Action May Impair the Intervenors' Interests</u>.

"It is generally agreed that in determining whether disposition of the action will impede or impair the applicant's ability to protect his interest *the question must be put in practical terms rather than in legal terms*." 7C Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1908 (1986) (emphasis added). *See also Utah Association of Counties* v. *Clinton*, 255 F.3d 1246, 1253 (10th Cir. 2001) (practical impairment is sufficient and legal impairment not required because "court is not limited to consequences of a strictly legal nature") (quotations omitted). And though Intervenors "might challenge various determinations in separate proceedings, those proceedings

would be constrained by the *stare decisis* effect of the lawsuit from which it had been excluded." *Sierra Club*, 995 F.2d at 1486 (internal citations omitted). *See also Sierra Club* v. *Espy*, 18 F.3d 1202, 1207 (5th Cir. 1994) (*stare decisis* effect of decision is sufficient potential impairment to satisfy requirements of Rule 24(a)(2)).

Practically speaking, it is evident that the Intervenors' interests would be impaired by a judgment that inclusion of the words "under God" in the Pledge is unconstitutional. Student/Parent-Intervenors' significant interest (as discussed *supra*) in preserving the present language of the Pledge as an important component of their education would be completely extinguished by a declaration that the Pledge is unconstitutional. Indeed, the effect on their education would be direct and dramatic. The Pledge that Student-Intervenors began reciting on a daily basis when they first entered the public school system would suddenly be altered to strip out the words "under God." Without those words, the Pledge would no longer serve to teach and remind Student-Intervenors (and others) of the political philosophy that has guided this country since its Founding, *i.e.*, that the State is limited in its power and may not take away the inalienable rights endowed by a Creator. Accordingly, Student/Parent-Intervenors should have a full and fair opportunity to defend their interest in the Pledge because it is they who will be directly affected by the outcome of this litigation and "constrained by the *stare decisis* effect of th[is] lawsuit." *Sierra Club*, 995 F.2d at 1486 (citation omitted).

Similarly, it is evident that the interests of Knight-Intervenors would be significantly impacted by a holding that declares unconstitutional the very language of the Pledge that they succeeded in having added to the Pledge in 1954. Consistent with the Ninth Circuit precedent (cited *supra*) governing the intervention of organizations in cases challenging laws that they helped to enact, Knight-Intervenors must also be afforded the full and fair opportunity to defend the

constitutionality of the Pledge.

D. <u>The Intervenors' Interests Are Not Adequately Represented by the Parties</u>.

An "applicant [for intervention] is required only to make a *minimal showing* that representation of its interests may be inadequate." *People of State of California* v. *Tahoe Regional Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (emphasis added). The Ninth Circuit has held that this minimal burden is satisfied unless it is evident that the original parties to the case "will *undoubtedly* make *all* the intervenor's arguments" and are "capable and willing to make such arguments." *Id.* Moreover, the burden may also be satisfied if "the intervenor would offer *any* necessary elements to the proceedings that other parties would neglect." *Id*. (emphasis added). In other words, the moving party "ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee." 7A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (1972). Intervenors, therefore, need not address inadequacy of representation until the party opposing intervention sufficiently demonstrates adequacy of representation.

However, even if Intervenors were required to demonstrate inadequacy of representation before opposition to intervention is made, this minimal burden is easily satisfied. For example, Student/Parent-Intervenors are uniquely situated to make arguments from the perspective of public school students who recite the Pledge daily. Similarly, Knight-Intervenors are uniquely situated to provide information and offer arguments from the perspective of the entity that was responsible, at least in part, for the inclusion of the words "under God" in the Pledge. Moreover, undersigned counsel for Intervenors litigates extensively on First Amendment grounds in state and federal courts throughout the country, and thus is capable of presenting information and arguments that would shed additional light on the constitutional issues before the Court.

II. IN THE ALTERNATIVE, INTERVENORS SATISFY THE REQUIREMENTS OF FED. R. CIV. P. 24(b) FOR PERMISSIVE INTERVENTION

Fed. R. Civ. P. 24(b) provides in relevant part:

> Upon timely application anyone may be permitted to intervene in an action…when an applicant's claim or defense and the main action have a question of law or fact in common…In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

As discussed, *supra*, the motion to intervene was filed while the case before the Court is still very early in the pleadings stage, without delay, and absent any prejudice to the existing parties. As students and parents of students in the California public school system, Student/Parent-Intervenors will undoubtedly be affected by the outcome of this proceeding. A determination regarding the constitutionality of the Pledge will directly impact the way in which they begin each school day and affect the nature of their public school education. Knight-Intervenors' interest in the issue before the Court, namely the constitutionality of the Pledge that they helped to amend in 1954, will be significantly impaired by a determination finding the Pledge and its recitation unconstitutional.

If denied the opportunity to intervene and defend their interests in this case, Intervenors would be impaired in their ability to defend the Pledge in any subsequent proceeding. Permissive intervention is designed to protect parties from such impairment. *See* 7C Wright & Miller § 1911 (where intervention as of right would be improper, the scales of justice may nevertheless be tipped "in favor of allowing permissive intervention" when the doctrine of *stare decisis* would bar the protection of interest in subsequent suit). *See also E.E.O.C.* v. *National Children's Center, Inc.*, 146 F.3d 1042, 1045-1046 (D.C. Cir. 1998) (counseling "flexible approach" to permissive intervention under Fed. R. Civ. P. 24(b)) (emphasis added).

CONCLUSION

For the reasons set forth above, Intervenors meet all the requirements for intervention as of

right under Fed. R. Civ. P. 24(a) and satisfy the criteria for permissive intervention under Fed. R. Civ. P. 24(b). Intervenors therefore respectfully request that their Motion to Intervene be granted.

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