

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

<hr/>)
THE FREEDOM FROM RELIGION)
FOUNDATION, <i>et al.</i>)
)
<i>Plaintiffs,</i>)
)
v.)
	Civil Action No. 07-356 (SM))
)
THE CONGRESS OF THE UNITED STATES)
OF AMERICA, <i>et al.</i>)
)
<i>Defendants,</i>)
)
and)
)
MURIEL CYRUS, <i>et al.</i> ,)
)
<i>Defendant-Intervenors.</i>)
<hr/>)

**MEMORANDUM IN SUPPORT OF ASSENTED-TO MOTION TO DISMISS OF
PROPOSED DEFENDANT-INTERVENORS MURIEL CYRUS, *et al.***

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INTRODUCTION

The following proposed intervenors respectfully seek leave to intervene in this case as defendant-intervenors:

1. Anna Chobanian, John Chobanian, Kathryn Chobanian, Schuyler Cyrus, Elijah Cyrus, Rhys Cyrus, Austin Cyrus, and Daniel Phan (Hanover School District students who desire to continue to recite the Pledge of Allegiance as an important component of their education) (“Student-Intervenors”)
2. Muriel Cyrus, Michael Chobanian, Margarethe Chobanian, Minh Phan, and Suzu Phan (parents of these students) (“Parent-Intervenors”); and
3. the Knights of Columbus (the organization responsible, at least in part, for the inclusion of the words “under God” in the Pledge) (“Knights”).

These students, their parents, and the Knights of Columbus (collectively “Intervenors”) respectfully request leave to intervene in this case to protect their substantial interest in defending, against Plaintiffs’ constitutional challenge, the constitutionality of the Pledge of Allegiance that is recited daily in Hanover’s public schools. As students and parents of students in the Hanover public school system, the Student- and 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 New Hampshire’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 may intervene both as of as of right under FED. R. CIV. P. 24(a) and by permissive intervention under FED. R. CIV. P. 24(b). All parties have assented to this motion.

FACTUAL BACKGROUND

Proposed Student- and Parent-Intervenors are all residents of Hanover, New Hampshire. See Exhibit A, Declaration of Muriel Cyrus, Exhibit B, Declaration of Michael Chobanian, and Exhibit C, Declaration of Minh Phan. All Student-Intervenors (save Rhys Cyrus) currently attend public schools in the Hanover School District or the Dresden School District. Exs. A, B, C. Rhys Cyrus will attend Hanover High School later this year after he returns from an exchange year in Germany. Ex. A.

Parent- and Student-Intervenors 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. Exs. A, B, C. 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. Exs. A, B, C. 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.” Exs. A, B, C. Accordingly, these Intervenors 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. Exs. A, B, C.

Parent-Intervenors therefore encourage their children to participate in the voluntary recitation of the Pledge at their respective schools, and Student-Intervenors desire to continue to

recite the Pledge at those schools. Exs. A, B, C. Parent-Intervenors feel that Student-Intervenors' education will be diminished if their schools alter the Pledge. Exs. A, B, C. Moreover, Parent-Intervenors feel that by editing the words "under God" out of the Pledge, the government would send a message of unreasoned hostility towards religion by stating that any government use of the word "God"—religious or not—is unconstitutional. Exs. A, B, C.

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. See Exhibit D, Declaration of John W. O'Reilly. The Knights have over 7,000 members in New Hampshire, including the town of Hanover. Ex. D. One or more of its members has a child attending Hanover public schools. Ex. D. 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, Catholic and non-Catholic alike. Ex. D.

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. Ex. D.

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 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 New Hampshire and around the country) so that the Pledge may continue to

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

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.

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. Ex. D. The Knights have already have already intervened to defend the Pledge in federal district and appellate court in *Newdow v. Carey*, Nos. 05-17257, 05-17344, 06-15093 (9th Cir.). The Knights are seeking both individual standing, as in the foregoing case, and associational standing to assert the rights of their members.

Plaintiffs Freedom From Religion Foundation, Jan Doe, Pat Doe, and Doechildren-1,-2 and -3 sued Defendants United States Congress, the United States, Hanover School District, Dresden School District, and School Administrative Unit 70 on October 31, 2007. Dkt No. 1. Since then the only activity of note in the case has been the United States' motion, granted by this Court, to delay the time for filing a motion to dismiss to January 18, 2008. Dkt No. 5.

ARGUMENT

I. Intervenors Are Entitled to Intervene As of Right Under FED. R. CIV. P. 24(a).

The First Circuit has identified four criteria a putative intervenor must show to intervene as of right under FED. R. CIV. P. 24(a)(2):

(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. Fernández & Hnos., Inc. v. Kellogg USA, Inc., 440 F.3d 541, 544-45 (1st Cir. 2006) (internal citations omitted). Intervenors easily satisfy all of the criteria necessary for intervention as of right. In two nearly identical cases, courts granted intervention as of right. *See Newdow v. Congress of the U.S.*, No. 05-cv-17, Dkt No. 79 (July 18, 2005) (granting motion to intervene by

Knights, students and parents); *see also Newdow v. Congress of the United States*, 2006 WL 47307 (E.D. Cal. Jan. 6, 2006) (granting public interest group’s motion for intervention as of right in national motto case). This case is no different.

A. The motion to intervene is timely.

Since very little has occurred in this lawsuit to date, the motion is timely. Moreover, because all of the existing parties have consented to this motion, there can be no prejudice. *See* 7C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1916 (1986) (a primary consideration in determining timeliness is “whether the delay in moving for intervention will prejudice the existing parties to the case”).

B. Intervenors have an interest relating to the basis of this lawsuit.

Intervenors arguably have *more* of an interest in the basis of this lawsuit than do Plaintiffs. Because reciting the Pledge is completely voluntary, Intervenors are the ones who will be silenced if Plaintiffs are successful, while Plaintiffs can already be silent now if they choose to be. *See* N.H. REV. STAT. ANN. § 194:15-c (Pledge recitation “voluntary”); *see also West Virginia State Board of Educ. v. Barnette*, 319 U.S. 624 (1943). Thus proposed Intervenors “belong to a small group, quite distinct from the ordinary run of citizens, who could expect” to be subject to an injunction barring them from continuing to recite the Pledge. *Daggett v. Commission on Governmental Ethics & Election Practices*, 172 F.3d 104, 110 (1st Cir. 1999) (potential for injunction binding intervenors constituted interest sufficient to intervene).

Specifically with respect to the Student- and 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 teaching our country's history to the elementary and secondary pupils of this state." N.H. REV. STAT. ANN. § 194:15-c.

Accordingly, to protect their interest in the educational content they receive from the public schools, Student- and 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 above), 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- and 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). Indeed, the Eastern District of California granted intervention to a very similar

group of parents, and students (and the Knights) in counsel for Plaintiffs' almost identical challenge to the Pledge now pending before the Ninth Circuit Court of Appeals. *See Newdow v. Congress of the U.S.*, No. 05-cv-17, Dkt No. 79 (E.D. Cal. July 18, 2005) (granting motion to intervene); *see also Newdow v. Congress of the United States*, 2006 WL 47307 (E.D. Cal. Jan. 6, 2006) (granting public interest group's motion for intervention as of right in national motto case).

Moreover, that Student- and 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- and 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 forcing others to stop saying the words "under God" in the Pledge, while the other group asks that the content of their education remain the same. In short, the Student- and 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* pp. 3-5. Accordingly, Knights 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, courts have 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); *see also Newdow*, 2006

WL 47307 at *3 (granting intervenor status to public interest group because of its interest in “public expressions of the nation’s religious history and heritage”).

C. Disposition of the action threatens to create a practical impediment to Intervenor’s ability to protect their interests.

“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). And “[t]he ‘practical’ test of adverse effect that governs under Rule 24(a) is easily satisfied” where a proposed intervenor “could be subject to a federal court injunction against implementation of [a] statute.” *Daggett*, 172 F.3d 104, 110 (citing *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 824-25 (5th Cir. 1967)). *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 Intervenor “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 v. EPA*, 995 F.2d 1478, 1486 (9th Cir. 1993) (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 Intervenor’s interests would be impaired by a judgment that inclusion of the words “under God” in the Pledge is unconstitutional. Student- and Parent-Intervenor’s significant interest 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 and an injunction prohibiting recitation of the Pledge. 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 government is limited in its power and may not take away the inalienable rights endowed by a Creator. Accordingly, Student- and Parent-Intervenors should have a full and fair opportunity to defend their interest in the Pledge because it is they, rather than the federal government or the school districts 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, in addition to the impact on the members of the Knights organization, it is evident that the interests of Knights 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 precedent cited above governing the intervention of organizations in cases challenging laws that they helped to enact, Knights must also be afforded the full and fair opportunity to defend the constitutionality of the Pledge.

D. No existing party adequately represents Intervenors’ interests.

Intervenors’ interest in being able to continue to benefit from the educational value of the Pledge is unique and cannot be adequately represented by the government Defendants. “Typically, an intervenor need only make a ‘minimal’ showing that the representation afforded by a named party would prove inadequate.” *Kellogg*, 440 F.3d at 545 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). 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). For instance, it may be in the school districts’ interest to alter or end Pledge recitation, thus avoiding the difficulty and expense of continued litigation. And it is unclear whether the federal government shares Intervenors’ interest in continuing the practice of reciting the Pledge in Hanover schools, as opposed to defending the constitutionality of federal statutes. But even if they did have some interest specifically in maintaining Pledge recitation in Hanover schools, that interest differs in kind, degree and perhaps intensity from Intervenors’:

One way for the intervenor to show inadequate representation is to demonstrate that its interests are sufficiently different in kind or degree from those of the named party. *See United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1982); *Glancy v. Taubman Cts., Inc.*, 373 F.3d 656, 675 (6th Cir. 2004) (“Asymmetry in the intensity ... of interest can prevent a named party from representing the interests of the absentee.”).

Kellogg, 440 F.3d at 546. For example, Student- and Parent-Intervenors are uniquely situated to make arguments from the perspective of public school students who recite the Pledge daily. Similarly, Knights 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 qualify for permissive intervention under FED. R. CIV. P. 24(b).

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.

Id. As discussed above, this motion to intervene has been 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 Hanover public school system, Student- and 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. Knights' 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).

III. The Knights of Columbus Qualify for Associational Standing.

In addition to the foregoing interests in the case, Knights also meet the standards for associational standing. In order to establish associational standing, an organization must show: “(i) that individual members would have standing to sue in their own right; (ii) that the interests at stake are related to the organization’s core purposes; and (iii) that both the asserted claim and

the requested relief can be adjudicated without the participation of individual members as named plaintiffs.” *Maine People’s Alliance v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st Cir. 2006) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). The Knights easily meet all three factors. First, the Knights have demonstrated that individual members could sue in their own right—among its members are one or more parents with children in Hanover public schools. Ex. D. Second, the interests at stake are related to the Knights’ core purpose: encouraging community, charity, patriotism, and respect for the rights of others. Ex. D. The Knights’ involvement with the addition of “under God” demonstrates their commitment to the ideals of limited government premised upon inalienable human rights. *See supra*; Ex. D. Finally, the claims may be adjudicated without the participation of members as named plaintiffs. This is not a “fact-intensive-individual inquiry,” or one involving the calculation of damages, *see New Hampshire Motor Transport Ass’n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006), so participation of individual members is unnecessary. Because they have associational standing to assert the interests of their parent-members, the Knights are entitled to intervention on the same basis as the other Parent-Intervenors.

CONCLUSION

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.

Dated: January 18, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2008, I electronically filed the foregoing document with the Clerk of the United States District Court for the District of New Hampshire by using the CM/ECF system. The following parties will be electronically served by the CM/ECF system:

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