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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

THE REV. DR. MICHAEL A. NEWDOW, in pro per, Plaintiff, v. THE CONGRESS OF THE UNITED STATES OF AMERICA, et al., Defendants.	CASE NO. 2:05-CV-02339-FCD-PAN (JFM) **FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date: May 19, 2006 Time: 10:00 a.m. Judge: Hon. Frank C. Damrell, Jr. Courtroom: No. 2

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PRELIMINARY STATEMENT

This is neither a close case nor a difficult one. Plaintiff claims that the national motto, "In God We Trust," and its inscription on United States coins and currency, are unconstitutional and seeks declaratory and injunctive relief against the motto. But consistent affirmations of the constitutionality of the motto are woven into virtually every phase in the development of the Supreme Court's Establishment Clause jurisprudence over the past five decades. If that were not enough, thirty-six years ago the United States Court of Appeals for the Ninth Circuit held that the national motto, "In God We Trust," and its inscription on our Nation's coins and currency, are fully constitutional. Aronow v. United States, 432 F.2d 242 (9th Cir. 1970). The Court of Appeals held:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

Id. at 243. Not only did the Court of Appeals unequivocally reject the challenge in that case, it agreed with the District Court that the challenge was so insubstantial that it was not even necessary for a three-judge court to be convened to hear it. Id. Aronow remains the binding law of this Circuit, and controls this case.

Even if the Supreme Court's consistent statements and the Ninth Circuit's holding in Aronow were not binding precedent, there are numerous independent reasons why the complaint must be dismissed, ranging from plaintiff's lack of standing, to the fact that a de novo analysis would show that every court to consider this issue has agreed with Aronow and upheld the constitutionality of the national motto. But it is not necessary for the Court to consider all of these other issues in depth. Stare decisis clearly dictates that this case be dismissed pursuant to binding precedent.

BACKGROUND

A. THE NATIONAL MOTTO AND ITS INSCRIPTION ON COINS AND CURRENCY – STATUTORY AND HISTORICAL BACKGROUND

1. The National Motto

In 1956, Congress passed legislation "[t]o establish a national motto of the United

States." Act of July 30, 1956, ch. 795, 70 Stat. 732. The motto was declared to be "In God we trust." 36 U.S.C. § 302 (formerly codified as 36 U.S.C. § 186). This was consistent with the longstanding National Anthem, "The Star-Spangled Banner," composed in 1814 and formally designated national anthem by statute in 1931,[1] whose lyrics include the phrase """And this be our motto -- 'In God is our trust.'""" Engel v. Vitale, 370 U.S. 421, 440 n.5, 82 S. Ct. 1261, 1272 n.5 (1962) (Douglas, J., concurring) (quoting S. Rep. No. 84-2703, at 2 (1956) (quoting "The Star-Spangled Banner")).

In 2002, Congress expressly reaffirmed the national motto. Pub. L. No. 107-293, § 3, 116 Stat. 2057, 2060-61 (Nov. 13, 2002).

2. **Coins and Currency**

The United States Constitution confers on Congress the power "[t]o coin Money." U.S. Const., art. I, § 8, cl. 4. Congress has directed the Secretary of the Treasury to mint and issue coins with a design and appearance as prescribed by statute. 31 U.S.C. §§ 5111(a), 5112. That design and appearance includes, among other things, the specification that "United States coins shall have the inscription 'In God We Trust.'" Id. § 5112(d)(1).[2] In addition, coins are to have several other inscriptions at various places, e.g., "Liberty," "United States of America," and "E Pluribus Unum." Id.

Congress has likewise directed the Secretary of the Treasury to engrave and print United States currency. 31 U.S.C. § 5114(a). The applicable statute provides that "United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate." Id. § 5114(b).

The inscription of the phrase "In God We Trust" on United States money dates back to

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[1] Act of Mar. 3, 1931, ch. 436, 46 Stat. 1508 (currently codified at 36 U.S.C. § 301, immediately preceding the national motto).

[2] See also 31 U.S.C. § 5112(n)(2)(C)(i), as added by Presidential $1 Coin Act of 2005, Pub. L. No. 109-145 § 102, 119 Stat. 2664, 2666 (Dec. 22, 2005) (providing for edge-incusion (i.e., placing inscriptions on the edge rather than the face of coins) of "E Pluribus Unum" and "In God We Trust" into new one-dollar coins beginning in 2007).

the Civil War era. In 1864, Congress first authorized the Director of the United States Mint and the Secretary of the Treasury to fix "the shape, mottoes, and devices" of two-cent coins. Act of Apr. 22, 1864, ch. 65, § 1, 13 Stat. 54, 55. Pursuant to this authority, the phrase "In God We Trust" began to be included on certain coins. In 1865, Congress specifically authorized the Mint to include the phrase "In God We Trust" on United States coins, Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 517, 518, and it carried forward that authorization in subsequent legislation, Act of Feb. 12, 1873, ch. 131, § 18, 17 Stat. 424, 427. In 1908, Congress passed legislation requiring inclusion of the phrase "In God We Trust" on coins. Act of May 18, 1908, ch. 173, § 1, 35 Stat. 164, 164.[3] Finally, in 1955 legislation primarily addressing currency, Congress formally extended inscription of "In God We Trust" to all United States coins. Act of July 11, 1955, ch. 303, 69 Stat. 290. The relevant language was initially codified as part of 31 U.S.C. § 324 and later moved to 31 U.S.C. § 5112(d)(1).

The same 1955 legislation also provided for the inscription of the motto on United States currency, enacting the language now codified in the first sentence of 31 U.S.C. § 5114(b) (previously codified as 31 U.S.C. § 324a).

B. THIS LITIGATION

Plaintiff filed his Original Complaint on November 18, 2005, naming as defendants the Congress of the United States of America; Peter LeFevre, Law Revision Counsel; the United States of America; John William Snow, Secretary of the Treasury; Henrietta Holsman Fore, Director, United States Mint; and Thomas A. Ferguson, Director, Bureau of Engraving and Printing (collectively, "Federal Defendants"). Plaintiff asserts that the statute establishing the national motto as "In God We Trust," 36 U.S.C. § 302, and the statutes providing for inscription of "In God We Trust" on coins and currency, 31 U.S.C. §§ 5112(d)(1), 5114(b), are unconstitutional under, inter alia, the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution. Plaintiff further asserts claims under the

[3] Although the prescription of the 1908 Act technically covered only silver and gold coins, the motto was placed on other coins as a matter of administrative discretion.

Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. Plaintiff requests that the Court issue a declaratory judgment that Congress violated the Constitution by enacting the challenged statutes, and that the challenged statutes themselves are unconstitutional under the Establishment and Free Exercise Clauses and violate RFRA as well. Plaintiff also seeks an injunction forbidding defendants (1) "from continuing to mint coins and print currency on which is engraved 'In God We Trust,'" and (2) "from including in the United States Code any act or law that claims that 'In God We Trust.'" Compl. Prayer for Relief ¶¶ IV, V.

ARGUMENT

The Federal Defendants' argument proceeds in four parts. First, this case is directly controlled by numerous statements by the Supreme Court and the Ninth Circuit's holding in Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), which mandate that plaintiff's challenge be rejected and judgment be entered for defendants. Second, plaintiff lacks standing to bring this challenge, and therefore the Court lacks subject matter jurisdiction. Third, plaintiff's claims against the Congressional defendants are barred by sovereign and legislative immunity. Fourth, even if this Court were empowered to reexamine the issue settled by Aronow – which it is not – the jurisprudence of the Supreme Court, the decisions of other Circuits, and simple logic all lead ineluctably to the conclusion that the constitutionality of our national motto must be upheld, and plaintiff's remaining claims are likewise wholly without merit.

I. BINDING PRECEDENT CONTROLS THIS CASE AND MANDATES DISMISSAL

A. Repeated Statements of the Supreme Court

The landmarks of the Supreme Court's Establishment Clause jurisprudence over the last fifty years are indelibly etched with specific and repeated indications that the national motto and its inclusion on United States money comport with the Establishment Clause. While there have been variations in the Court's delineation of the outer limits of what is and is not forbidden under the Establishment Clause, one constant that has emerged time and again as a point of agreement among the Justices is the constitutionality of the national motto. Indeed, the Court has often used the undoubted constitutionality of the national motto as an anchoring principle even as it defined

the standards that would govern Establishment Clause analysis in much closer cases.

Although earlier cases had laid the groundwork for finding the national motto permissible under the Constitution,[4] the Court's first direct nod to its constitutionality came in Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962). In that case, the Court considered the constitutionality of a program of official prayer in public schools. While the Court declared that program unconstitutional under the Establishment Clause, it emphasized that "[t]here is of course nothing in the decision reached here that is inconsistent with the fact that . . . [inter alia] there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise" struck down in Engel. Id. at 435 n.21, 82 S. Ct. at 1269 n.21. The Court gave some specific examples of those permitted "patriotic or ceremonial occasions," which included the "recit[ation] [of] historical documents such as the Declaration of Independence which contain references to the Deity" and "singing officially espoused anthems which include the composer's professions of faith in a Supreme Being." 370 U.S. at 435 n.1, 82 S. Ct. at 1269 n.21. This latter example, of course, refers to the National Anthem, "The Star-Spangled Banner," whose fourth verse includes the lyrics, "'And this be our motto -- "In God is our trust."'" Engel, 370 U.S. at 440 n.5, 82 S. Ct. at 1272 n.5 (Douglas, J., concurring); see also Compl. ¶ 126 (noting consistency between National Anthem

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[4] In 1952, the Court noted that "references to the Almighty . . . run through our laws, our public rituals, our ceremonies," including "[p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths," and even "the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'" Zorach v. Clauson, 343 U.S. 306, 312-13, 72 S. Ct. 679, 683 (1952). The Court expressed incredulity that the First Amendment could be stretched to the "extremes" of barring such references. Id. at 313, 72 S. Ct. at 683. While the Court did not specifically include the national motto in its illustrative examples of permitted references – perhaps not surprisingly, since it would be another two to four years before the statutes challenged in this case, formally establishing the national motto and providing for its inscription on all coins and currency, would be enacted – there is little in principle to distinguish "In God We Trust" from "So help me God" or "God save the United States and this Honorable Court" in this regard.

and national motto).[5]

The next Term, concurring in a decision striking down a program of Bible reading in public schools, Justice Brennan intimated that "In God We Trust" did not pose any problems under the Establishment Clause:

> As we said in McGowan v. Maryland, 366 U.S. 420, 442, 81 S. Ct. 1101, 1113, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. . . . The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 303, 83 S. Ct. 1560, 1614 (1963) (Brennan, J., concurring).

This view has been carried forward in more recent decisions. In Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 (1984), a decision upholding inclusion of a creche in a Christmas display, Justice O'Connor justified the inclusion of the creche in a larger display by characterizing it as "no more an endorsement of religion than such governmental 'acknowledgments' of religion as . . . [inter alia] printing of 'In God We Trust' on coins." Id. at 692-93, 104 S. Ct. at 1369 (O'Connor, J., concurring). Such printing, along with other comparable "government acknowledgments of religion,"

> serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval or particular religious beliefs.

Id. at 693, 104 S. Ct. at 1369-70 (O'Connor, J., concurring) (emphasis added). The dissenting Justices differed on the constitutionality of the creche, but found common ground with Justice

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[5] In a pattern repeated in later Establishment Clause cases, the Court's opinion was not unanimous on the constitutionality of the specific practice before the Court, but even the dissent agreed with the majority that "In God We Trust" comports with the Constitution. See Engel, 370 U.S. at 449-50 & nn. 8, 9, 82 S. Ct. at 1277 & nn. 8, 9 (Stewart, J., dissenting) (offering the fact that "[s]ince 1865 the words 'IN GOD WE TRUST' have been impressed on our coins" as an example of the types of "official expressions of religious faith in and reliance upon a Supreme Being" that he agreed with the majority did not violate the Establishment Clause).

O'Connor's statements underscoring the constitutionality of "In God We Trust":

> While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto . . . can best be understood, in Dean Rostow's apt phrase, as a form [of] "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

Id. at 716-17, 104 S. Ct. at 1382 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.) (footnote and citations omitted).

In County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086 (1989), the Court reached a seemingly opposite outcome from Lynch on the merits of the issue before it – it held that a creche displayed in a county courthouse was unconstitutional – but meanwhile expressly rejected what it called the "far reaching" implication that its holding would somehow call into question the constitutionality of, inter alia, the national motto. The Court explained:

> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. Lynch, 465 U.S. at 693, 104 S. Ct., at 1369 (O'Connor, J., concurring); id., at 716-717, 104 S. Ct., at 1382 (Brennan, J., dissenting). We need not return to the subject of "ceremonial deism," see n. 46, supra, because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

Id. at 602-03, 109 S. Ct. at 3105-06. In a concurring opinion, Justice O'Connor added:

> [I]n my view, acknowledgments such as the legislative prayers upheld in Marsh v. Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983), and the printing of "In God We Trust" on our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society." Lynch, 465 U.S., at 693, 104 S. Ct., at 1369 (concurring opinion). Because they serve such secular purposes and because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs.

Id. at 625, 109 S. Ct. at 3118 (O'Connor, J., concurring in part and concurring in the judgment).

To be sure, these decisions did not involve direct challenges to the national motto. Nevertheless, they are controlling authority regarding the national motto's constitutionality.

"When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 67, 116 S. Ct. 1114, 1129 (1996). The Supreme Court and its individual Justices, in opinions for the Court, concurrences, and dissents alike, have repeatedly and consistently articulated the constitutionality of "In God We Trust" as one of the "first principles" of Establishment Clause jurisprudence. Indeed, the Court's analysis in these cases has provided a fixed constitutional baseline for permissible official acknowledgments of religion against which the practices at issue in each of those cases were then measured. As such, the Court's analysis of "In God We Trust" in these cases was an integral part of the rationale upon which the Court decided those cases.

Because the Supreme Court and individual Justices for decades "have grounded [their] decisions in the oft-repeated understanding," Seminole Tribe, 517 U.S. at 67, 116 S. Ct. at 1129, that the national motto and similar references are constitutional, the Court's specific statements in this regard are decisive. See United States v. Underwood, 717 F.2d 482, 486 (9th Cir. 1983) ("[a] lower federal court cannot responsibly decline to follow a principle directly and explicitly stated by the Supreme Court as a ground of decision and subsequently applied by the Supreme Court as an integral part of a systematic development of constitutional doctrine"), cert. denied, 465 U.S. 1036, 104 S. Ct. 1309 (1984); Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992) ("If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so."), cert. denied, 508 U.S. 950, 113 S. Ct. 2439 (1993). Just as Justice Brennan sagely observed that the country had "simply interwoven the motto so deeply into the fabric of our civil polity," Schempp, 374 U.S. at 303, 83 S. Ct. at 1614 (Brennan, J., concurring), it might also be said that the Supreme Court has interwoven the constitutionality of the motto equally deeply into the fabric of its Establishment Clause jurisprudence.[6]

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[6] For the above reasons, these repeated statements in Supreme Court opinions may well be more than just dicta. In Brown v. United States, 329 F.3d 664 (9th Cir.), cert. denied, 540 U.S. 878, 124 S. Ct. 281 (2003), the Ninth Circuit was presented with a closely analogous

B. The Ninth Circuit's Decision in *Aronow*

In Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), the Ninth Circuit considered an appeal from a judgment dismissing a complaint "challenging the use of expressions of trust in God by the United States Government on its coinage, currency, official documents and

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question about the authoritativeness of reasoning in Supreme Court opinions. The Court of Appeals found dispositive a Supreme Court case that dealt with a different issue but in which all three of the Justices' opinions "recognized as established and accepted in their reasoning the proposition" that addressed the issue before the Brown court. Id. at 680. The Court of Appeals appreciated that the Supreme Court's statements had not been directed at the issue before the Supreme Court in that case; "[i]nstead, each opinion recited a uniform background assumption against which the more difficult issue [actually before the Supreme Court in that case] was to be evaluated." Id. In those circumstances, the Court of Appeals held, the Supreme Court statements should not be treated as dicta because they "were not made 'casually and without analysis,'" id. at 680-81 (quoting United States v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001) (Kozinski, J., concurring)), and because they "formed part of the 'analytical structure of the opinion,'" id. at 681 (quoting United States v. Crawley, 837 F.2d 291, 293 (7th Cir. 1988)). Similarly, here, the Supreme Court's repeated, consistent affirmations of the constitutionality of the national motto have not been made casually and without analysis, and they have formed part of the analytical structure of opinions that have went on to evaluate government practices that, unlike the national motto, the Court found to present genuine issues under the Establishment Clause.

Even if dicta, however, these statements must at least be treated with "due deference." United States v. Baird, 85 F.3d 450, 453 (9th Cir.), cert. denied, 519 U.S. 995, 117 S. Ct. 487 (1996); see also United States v. Montero-Camargo, 208 F.3d 1122, 1132 n.17 (9th Cir.) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding.") (internal quotation marks omitted), cert. denied, 531 U.S. 889, 121 S. Ct. 211 (2000); Brown, 329 F.3d at 681 ("[E]ven if dicta, the language is still Supreme Court dicta, and dicta uniform among Justices otherwise very much divided by the case before them."). "Such observations by the Court, interpreting the First Amendment and clarifying the application of its Establishment Clause jurisprudence, constitute the sort of dicta that has considerable persuasive value in the inferior courts." Lambeth v. Board of Comm'rs of Davidson County, 407 F.3d 266, 271 (4th Cir.) (involving challenge to "In God We Trust" in context of local government), cert. denied, 126 S. Ct. 647 (2005); see also Gaylor v. United States, 74 F.3d 214, 217 (10th Cir.) ("[T]his court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements."), cert. denied, 517 U.S. 1211, 116 S. Ct. 1380 (1996). In any event, precisely where these statements in Supreme Court opinions fall on the spectrum between persuasive and binding is largely academic in this case because the Ninth Circuit's decision in Aronow, discussed below, is unquestionably a binding holding, not dicta.

publications." Id. at 243. Specifically, and identically to the complaint in this case, the complaint in Aronow challenged (1) the statute that provided for the inscription of the words "In God We Trust" on coins and currency, and (2) the statute that declared the national motto of the United States to be "In God We Trust." Id.[7]

The Ninth Circuit squarely held:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

Id. The Court observed the distinction drawn in the Supreme Court's Establishment Clause jurisprudence between religious activities violating the Establishment Clause, on the one hand, and "purely patriotic and ceremonial expressions," on the other. Id. (citing Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962)). The Court held that the national motto and its inscription on coins and currency clearly fell in the latter category, reasoning that "[i]t is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust' or the study of a government publication or document bearing that slogan." Id. The Court also emphasized that analysis "'under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.'" Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669-70, 90 S. Ct. 1409 (1970)) (emphasis omitted). It is clear from the Ninth Circuit's opinion that it found the national motto and its inscription on coins and currency neither to have been intended to establish or interfere with religious beliefs and practices, nor to have had that effect. Accordingly, the Ninth Circuit affirmed the district court's dismissal of the complaint.[8]

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[7] While the Aronow court referred to statutes bearing different section numbers than the current provisions, the provisions at issue in Aronow were simply older versions of those presently codified at 36 U.S.C. § 302 (national motto) and 31 U.S.C. §§ 5112(d)(1), 5114(b) (coins and currency), i.e., the specific provisions challenged in the instant case. See supra at 1-3 (tracing statutory lineage).

[8] Not only did the Court of Appeals affirm the district court on the merits, it also agreed with the district court that the merits of the claim of unconstitutionality were so insubstantial as

The Ninth Circuit's holding in Aronow binds this Court, and it is dispositive of plaintiff's challenge to the same statutes in this case thirty six years later. This Court is thus constrained to dismiss the complaint based on Aronow.

Because plaintiff's otherwise legal citation-intensive complaint does not even acknowledge Aronow's existence, it is unclear how plaintiff may believe that this case escapes Aronow's binding effect. Plaintiff may argue that Aronow has somehow been called into question by later case law (though it is difficult to imagine what that case law could be), but when "'a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue,'" as unquestionably occurred in Aronow, "'that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court.'" Padilla v. Lever, 429 F.3d 910, 916 (9th Cir. 2005) (quoting United States v. Johnson, 256 F.3d 895, 916 (9th Cir. 2001) (en banc) (Kozinski, J., concurring)). Aronow "is binding precedent on this Court unless and until it is withdrawn by the Ninth Circuit or it is overruled by the Supreme Court." Jardines-Guerra v. Ashcroft, 262 F. Supp. 2d 1112, 1114-15 (S.D. Cal. 2003) (citing Yong v. INS, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000)); see also Hudson v. Kane, No. C 04-02232SI, 2005 WL 2035590, *7 (N.D. Cal. Aug. 23, 2005) ("[t]his Court, of course, is not free to ignore Ninth Circuit precedent" that plaintiff asserts is "erroneous").

Plaintiff may hope to evade binding Supreme Court and Ninth Circuit precedent by restyling his objections to "In God We Trust" as something other than an Establishment Clause claim – for example, as a claim that the motto violates distinct rights under the Free Exercise Clause, see Compl. ¶¶ 196-233. This claim, however, is simply a restatement of the former claim. A review of the portion of the Complaint that alleges a Free Exercise Clause violation shows that the unmistakable gravamen of those paragraphs remains that the motto "repeatedly forces Newdow to confront a religious belief he finds offensive" (Compl. ¶ 197), an archetypal

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to dispense with the necessity of convening a three-judge court (as was generally required by statute at the time in order to hear applications to restrain enforcement of an act of Congress for unconstitutionality). See 432 F.2d at 423.

Establishment Clause claim.[9] Indeed, the limitations or burdens that plaintiff alleges are placed on his religious exercise by the national motto all flow from the notion that having "In God We Trust" as the national motto and on coins and currency connotes an endorsement of Christian monotheism, and plaintiff's own desire to avoid any personal association with that notion. Under governing Supreme Court precedent and the Ninth Circuit's own holding in Aronow, that underlying notion is invalid as a matter of law. Since Aronow held as a matter of law that such uses of the phrase "In God We Trust" do not constitute evangelism or religious endorsement, any claim rooted in that legally erroneous premise cannot be sustained under Aronow, regardless of how it is packaged. Indeed, another court that analyzed the constitutionality of the national motto and its inscription on coins and currency noted that Establishment Clause and Free Exercise Clause challenges to the motto "raise basically the same constitutional issues," and proceeded to address them both – and reject them both – in a consolidated fashion. O'Hair v. Blumenthal, 462 F. Supp. 19, 19 (W.D. Tex. 1978), aff'd on opinion below, 588 F.2d 1144 (5th Cir.), cert. denied, 442 U.S. 930, 99 S. Ct. 2862 (1979).

This is not the first time plaintiff has attempted to branch off from a standard Establishment Clause theory to a novel claim under the Free Exercise Clause in a bid to avoid binding precedent upholding the challenged government practice. In recent litigation in the United States District Court for the District of Columbia, plaintiff challenged the constitutionality of prayers by invited clergy at presidential inaugural ceremonies. The heart of plaintiff's challenge was naturally that such prayer at inaugurations violated the Establishment Clause. However, as the court held, that claim was foreclosed by binding Supreme Court precedent. See Newdow v. Bush, 355 F. Supp. 2d 265, 283-90 (D.D.C. 2005) (citing Marsh v.

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[9] See also, e.g., Compl. ¶¶ 205 ("persistent messages, sent by Defendants, that the United States is a nation that trusts in God"), 207 ("forced to confront government-endorsed, purely religious dogma that is directly contrary to his faith and to the tenets of his church"), 208 (citing Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 (1984), County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086 (1989), and Van Orden v. Perry, 125 S. Ct. 2854 (2005), all Establishment Clause cases), 215 ("'In God We Trust' on the coins and currency serves as a form of religious evangelism").

Chambers, 463 U.S. 783, 103 S. Ct. 3330 (1983)). Having rejected the Establishment Clause challenge, the court quickly disposed of plaintiff's attempt to pursue an assertedly independent claim under the Free Exercise Clause:

> Newdow's remaining claims carry little force. He argues that inaugural prayer burdens his rights under the Free Exercise Clause and RFRA. . . . Newdow does not cite a single authority that has even indicated that government-sponsored prayer might not only establish a favored religion (under the Establishment Clause) but also infringe the free exercise rights of adherents to a disfavored religion (under the Free Exercise Clause or RFRA). The Court is unaware of any such authority.

Id. at 290. As in the prior challenge to inaugural prayer, the Court should not allow plaintiff's fringe claims to distract from the outcome that binding Supreme Court and Ninth Circuit precedent demands.

II. PLAINTIFF LACKS STANDING[10]

The "judicial power of the United States defined by Article III is not an unconditioned authority to determine the constitutionality of legislative or executive acts," but is limited to the resolution of actual "cases" and "controversies." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 758 (1982). The doctrine of "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130,

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[10] Because the complaint can be readily dismissed based on Supreme Court and Ninth Circuit precedent that forecloses plaintiff's claim, the Court does not necessarily need to reach the question of standing, which is why we discuss standing second in our sequence of arguments. Indeed, courts that have considered past constitutional challenges to the national motto have commonly upheld the motto while expressly not reaching the question of standing. See Aronow, 432 F.2d at 243 ("Inasmuch as we agree on the insignificance of the charge of unconstitutionality, we do not reach the question of standing."); Gaylor v. United States, 74 F.3d 214, 216 (10th Cir. 1996) ("we assume, without deciding, that the [plaintiff] has standing to assert its claim"), cert. denied, 517 U.S. 1211, 116 S. Ct. 1380 (1996); O'Hair v. Blumenthal, 588 F.2d 1144 (5th Cir. 1979) ("Pretermitting the issues of standing and case or controversy, which are not free from doubt, we affirm on the opinion of the district court [upholding constitutionality]." (citation omitted)), cert. denied, 442 U.S. 930, 99 S. Ct. 2862 (1979).

We note that each of the above cases was decided prior to the Supreme Court's decision in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S. Ct. 1003 (1998), which generally instructs the courts to resolve Article III jurisdiction issues, including constitutional standing, before turning to other issues. However, Steel Co. itself recognizes an exception to that instruction in situations where the plaintiff's claim is so "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Id. at 89, 118 S. Ct. at 1010 (quoting Oneida Indian Nation of N.Y. v. County of Oneida, 414 U.S. 661, 666, 94 S. Ct. 772, 777 (1974)); accord Center for Reproductive Law & Policy v. Bush, 304 F.3d 183, 193-95 (2d Cir. 2002) (holding, based on the foregoing language in Steel Co., that "where, as here, a governmental provision is challenged as unconstitutional, and a controlling decision of this Court has already entertained and rejected the same constitutional challenge to the same provision, the Court may dispose of the case on the merits without addressing a novel question of jurisdiction"). As discussed above, see supra Section I, plaintiff's claims are so plainly foreclosed by Aronow and by the Supreme Court's own jurisprudence as to be insubstantial, implausible, and completely devoid of merit. Therefore, it would be consistent with Steel Co. for the Court to dismiss plaintiff's claims without reaching standing.

2136 (1992).[11] The Supreme Court has observed that "[its] standing inquiry has been especially rigorous" in cases such as the one at bar, where "reaching the merits of the dispute would force [it] to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." Raines v. Byrd, 521 U.S. 811, 819-20, 117 S. Ct. 2312, 2317-18 (1997); see also Valley Forge, 454 U.S. at 473-74, 102 S. Ct. at 759 (holding that the need for attention to standing is most pronounced when the court is asked to "accept for adjudication claims of constitutional violation by other branches of government").

To have standing, a plaintiff first "must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136 (citations, footnote, and internal quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of . . . ." Id. In particular, "the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" Id. (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926 (1976)). "Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. (internal quotation marks omitted).

Undergirding the law of standing is the principle that "standing to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220, 94 S. Ct. 2925, 2932 (1974). "[A] plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not

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[11] "[T]he party invoking federal jurisdiction bears the burden of establishing its existence." Steel Co., 523 U.S. at 104, 118 S. Ct. at 1017. Federal courts should presume that they lack jurisdiction "unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 316, 111 S. Ct. 2331, 2336 (1991) (internal quotation marks omitted).

state an Article III case of controversy." Lujan, 504 U.S. at 573-74, 112 S. Ct. at 2143; accord Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975) ("[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). Thus, the requirement, noted above, that the injury be "particularized" means that it "must affect the plaintiff in a personal and individual way." Lujan, 504 U.S. at 560 n.1, 112 S. Ct. at 2136 n.1 (emphasis added). "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of that action and it is not sufficient that he has merely a general interest common to all members of the public." Ex parte Levitt, 302 U.S. 633, 634, 58 S. Ct. 1, 1 (1937); accord United States v. Richardson, 418 U.S. 166, 178, 94 S. Ct. 2940, 2947 (1974) (noting that in Levitt, even allegations that "made out an arguable violation of an explicit prohibition of the Constitution" were "held insufficient to support standing because, whatever Levitt's injury, it was one he shared with 'all members of the public'").

A. There is No Concrete, Personal, and Particularized Injury in Fact

In this case, plaintiff alleges that the national motto and its appearance on coins and currency cause him harm because "he finds it deeply offensive to have his government and its agents advocating for a religious view he specifically decries." Compl. ¶ 148. Borrowing standard verbiage from the Supreme Court's Establishment Clause jurisprudence, he further alleges that the motto "degrades" him and other atheists and makes them feel like "political outsiders." Compl. ¶¶ 166, 171, 174 . Indeed, plaintiff claims to suffer this injury through each and every appearance of the word "God" anywhere in the United States Code. Compl. ¶¶ 168, 242-250, p. 57 (Prayer for Relief) ¶ V.[12]

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[12] The complaint contains some scattered references to arguably more concrete injuries such as being denied a position as an emergency physician by a private organization (Compl. ¶ 204), giving up hope of obtaining elective office (Compl. ¶ 200), and ostensibly being unable to (continued...)

This type of injury to one's feelings falls short of the type of "concrete and particularized" injury "affect[ing] the plaintiff in a personal and individual way" that Article III requires. Lujan, 504 U.S. at 560 & n.1, 112 S. Ct. at 2136 & n.1. The "psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Article III, even though the disagreement is phrased in constitutional terms." Valley Forge, 454 U.S. at 485-86, 102 S. Ct. at 765. Plaintiff plainly disagrees with the inclusion of the words "In God We Trust" in the challenged statutes and believes they are unconstitutional, and even proposes some alternative mottos. But absent some concrete injury, his disagreement with the law cannot create standing. Diamond v. Charles, 476 U.S. 54, 62, 106 S. Ct. 1697, 1703 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements"). Thus, Article III injury "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." Valley Forge, 454 U.S. at 486, 102 S. Ct. at 766; accord Allen v. Wright, 468 U.S. 737, 755-56, 104 S. Ct. 3315, 3327 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 n.13, 94 S. Ct. 2925, 2933 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury).

Further, because of the ubiquity of coins and currency in everyday life, plaintiff's encounters with the national motto are not uniquely experienced by him. Rather, plaintiff's exposure is "undifferentiated from that of all other" residents of the United States who have a similar degree of daily contact with United States coins and currency in their daily business. Schlesinger, 418 U.S. at 217, 94 S. Ct. at 2930. Such an injury is not specific enough under

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[12](...continued)
serve in certain military or civil service positions (Compl. ¶ 250). To the extent that these allegations would show a cognizable injury in fact (a matter we do not concede), it cannot reasonably be argued that they are traceable to the laws challenged in the complaint, nor that they could be redressed through this lawsuit. See infra Sections II.B, II.C.

Plaintiff separately claims injury on the basis that he pays federal taxes. That alleged ground for standing is discussed infra at Section II.D.

Article III, which requires a plaintiff to show that he or she is "in danger of suffering [a] particular concrete injury," not one that is "undifferentiated and common to all members of the public." United States v. Richardson, 418 U.S. 166, 176-77, 94 S. Ct. 2940, 2946 (1974) (internal quotation marks omitted); see also Warth, 422 U.S. at 499, 95 S. Ct. at 2205 (injury must be more than one that is "shared in substantially equal measure by all or a large class of citizens"). Such "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches" are inappropriate for judicial determination. Valley Forge, 454 U.S. at 475, 102 S. Ct. at 760 (quoting Warth v. Seldin, 422 U.S. at 499-500, 95 S. Ct. at 2205-06). The psychological harm that plaintiff alleges he suffers as a result of the same kind of routine, mundane contact with coins and currency that virtually every person in the United States experiences does not qualify as a sufficiently particularized, personal, and individual injury in fact to support standing under Article III.

The fact that the complaint frames allegations of injury in language that evokes the Supreme Court's Establishment Clause jurisprudence does not create standing in this case. As noted above, plaintiff repeatedly alleges that the motto "degrades" him and other atheists and makes them feel like "political outsiders." Compl. ¶¶ 166, 171, 174. As plaintiff acknowledges, Compl. ¶ 174, Justice O'Connor has used similar language to explain in general terms what may constitute a violation of the Establishment Clause. Lynch v. Donnelly, 465 U.S. 668, 687-88, 104 S. Ct. 1355, 1367 (1984) (O'Connor, J., concurring) ("The second and more direct infringement [of the Establishment Clause is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community . . . ."). The quoted passage was not a discussion of standing,[13] and this

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[13] In Lynch, while the Supreme Court's opinion makes no mention of standing, the lower court opinions make clear that standing was based on the plaintiffs' payment of municipal taxes used to fund the display, a distinct type of standing governed by a specific type of analysis. Donnelly v. Lynch, 691 F.2d 1029, 1030-32 (1st Cir. 1982); Donnelly v. Lynch, 525 F. Supp. 1150, 1162 (D.R.I. 1981). As we show below, plaintiff does not have standing as a federal (continued...)

discussion of general Establishment Clause merits principles cannot reasonably be interpreted as creating a rule that an "injury in fact" can be willed into existence in Establishment Clause cases merely by pleading that one feels like a political outsider. To the contrary, just two terms earlier, in holding that plaintiffs lacked standing to challenge the conveyance of government property to a religious institution, the Court had made clear that more was required, decisively rejecting the notion that the policies underlying the Establishment Clause demand "special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself." Valley Forge, 454 U.S. at 483-87, 488, 102 S. Ct. at 764-67, 767.[14]

B. Plaintiff Asserts Injuries Not Traceable to the Challenged Statutes

The second prong of the Article III standing inquiry requires that there be "a causal connection between the injury and the conduct complained of," i.e., that the injury is "'fairly

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[13](...continued)
taxpayer (the analogue to the municipal taxpayer standing established in Lynch). See infra Section II.D.

[14] Plaintiff argues that his case compares favorably for standing purposes to Lynch, County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 109 S. Ct. 3086 (1989), and Van Orden v. Perry, 125 S. Ct. 2854 (2005), contending that his "confrontations" with money are "far more pervasive and offensive than those which occurred in such cases." Compl. ¶ 208. Those cases, which each involved displays of allegedly religious significance on public property or sponsored by public entities (holiday season displays in Lynch and County of Allegheny; the Ten Commandments on State Capitol grounds in Van Orden), do not provide a meaningful benchmark for assessing plaintiff's standing in this case. As discussed above, see supra note 13, the standing of the plaintiffs in Lynch was as payers of municipal taxes that funded the display, a type of standing that is not applicable here. Putting aside significant differences in factual context, see Van Orden, 125 S. Ct. at 2858 (involving six feet tall and three-and-a-half feet wide granite monolith prominently displayed on State Capitol grounds), the Supreme Court's opinions in County of Allegheny nor Van Orden simply do not discuss standing and thus are of no aid to plaintiff in establishing standing in this case. See United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 38, 73 S. Ct. 67, 69 (1952) ("Even as to our own judicial power or jurisdiction, this Court has followed the lead of Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio."); Leisnoi, Inc. v. United States, 170 F.3d 1188, 1192 n.7 (9th Cir. 1999). In any event, these cases have little in common with this case, where plaintiff's encounters with coins and currency are no different in kind or quantity than those of virtually every other resident of the United States.

trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party." Lujan, 504 U.S. at 560, 112 S. Ct. at 2136 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926 (1976)). To the extent the complaint cites harms more tangible than "abstract stigmatic injur[ies]" that are insufficient to establish standing, Allen v. Wright, 468 U.S. 737, 755-56, 104 S. Ct. 3315, 3327 (1984), such harms are "not fairly traceable to the Government conduct [plaintiff] challenge[s] as unlawful." Id. at 757, 104 S. Ct. at 3327.

The complaint lists a number of hardships that plaintiff claims he has experienced because he is an atheist, but devotes less attention to linking the alleged injuries to the specific governmental actions challenged in this particular case, i.e., the national motto and the phrase "In God We Trust" on coins and currency. Many of the injuries plaintiff claims to have suffered seem to stem from alleged mistreatment by private actors and society in general. Such injuries include, for example, plaintiff's having "just recently [been] refused a job because of the (mis-)perception of his activism" (Compl. ¶ 173; see also id. ¶¶ 204-205, 241; see also App. I, ¶¶ 34-36); plaintiff's "giv[ing] up hope of obtaining elected office" (Compl. ¶ 200; see also App. I, ¶ 37); "the derogatory remarks that have repeatedly been hurled at Newdow since his Atheism became known" (Compl. ¶ 222; see also App. I, ¶ 12); and "a societal environment where prejudice against Atheists – and, thus, against Plaintiff here – is perpetuated" (Compl. ¶ 241). Of course, with respect to these alleged injuries, which involve the independent actions of prospective employers, voters, and fellow citizens, it cannot be reasonably argued that there is a "causal connection . . . [to] the conduct complained of" in this case, i.e., the national motto. Lujan, 504 U.S. at 560, 112 S. Ct. at 2136; see also Simon, 426 U.S. at 42, 96 S. Ct. at 1926 (rejecting theory of traceability that the federal regulations sought to be overturned "encouraged" the actions of private entities that resulted in the injury complained of); Warth, 422 U.S. at 507, 95 S. Ct. at 2209 (no traceability where plaintiffs "rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had [defendants]

acted otherwise").[15]

C. Plaintiff's Injuries Are Not Redressable Through this Litigation

Whereas the "fairly traceable" component "examines the causal connection between the assertedly unlawful conduct and the alleged injury," the redressability inquiry "examines the causal connection between the alleged injury and the judicial relief requested." Allen, 468 U.S. at 753 n.19, 104 S. Ct. at 3325 n.19. Plaintiff lacks standing in this case because, in addition to the lack of a cognizable injury in fact that is "fairly traceable" to the challenged statutes, he cannot prove that the injury he alleges is "'likely'" to be "'redressed by a favorable decision.'" Lujan, 504 U.S. at 560 (quoting Simon, 426 U.S. at 38, 43, 96 S. Ct. at 1924, 1926). The operative judicial relief plaintiff seeks would enjoin defendants "from including in the United States Code any act or law that claims that 'In God We Trust'" and "from continuing to mint coins and print currency on which is engraved 'In God We Trust.'" Compl. p. 57, ¶¶ IV, V. This relief would not, however, meaningfully redress the so-called injury that plaintiff claims.

Setting aside for the moment the fact that an injunction forbidding Congress or its officers from including certain language in the United States Code or commanding them to remove language from the Code would exceed the judicial power,[16] such relief would in any event be

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[15] To the extent plaintiff's thesis is that the existence of the national motto and the statutes providing for its inscription on coins and currency have somehow "caused" the general societal negativity toward atheism that he alleges, that clearly would not constitute traceable "causation" in any meaningful legal sense of the word. Cf. Allen, 468 U.S. at 756-61, 104 S. Ct. at 3327-30 (rejecting theory that lack of racial integration in schools was traceable, for Article III standing purposes, to tax policies that were allegedly too lenient toward segregated schools, because "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain [plaintiffs'] standing"). Moreover, for what it is worth, the complaint portrays the cause-and-effect relationship as running in the opposite direction: whole appendices seek to prove that "American society was overtly partial to (Christian) monotheism" and "overtly antagonistic to atheism at the time of the passage [of] the Acts of 1955 and 1956," Compl. Apps. B, C (emphasis added) (appendix titles), i.e., the societal attitude "caused" the challenged statutes to be enacted in the first place, rather than vice versa.

[16] Such relief would be constitutionally intolerable because, among other reasons, the (continued...)

ineffectual to redress plaintiff's alleged injury. Plaintiff's proposed remedy appears to stem from a basic misunderstanding of the role of the United States Code in the federal legislative system. The legal authority of acts of Congress flows not from the inclusion of language in the United States Code, but from their passage by Congress as reflected in the Statutes at Large, which are authoritative over the United States Code. See, e.g., Stephan v. United States, 319 U.S. 423, 426, 63 S. Ct. 1135, 1136 (1943) (per curiam); Preston v. Heckler, 734 F.2d 1359, 1367 (9th Cir. 1984); see also 1 U.S.C. § 204(a). To the extent that a particular word or phrase were to be excised from wherever it appears in the United States Code, as plaintiff requests, that might confound judges and lawyers everywhere by introducing inconsistency between the United States Code and the Statutes at Large, but it would not negate the legal force of any act of Congress.

Nor would plaintiff's proposed injunctions be effective in redressing the injuries he claims to experience every time he comes into contact with coins and currency bearing the words "In God We Trust." Plaintiff requests that defendants be enjoined from "continuing to mint coins and print currency on which is engraved 'In God We Trust,'" Compl. p. 57, ¶ IV, but this would leave untouched the vast quantities of United States coins and currency already in circulation, including, notably, the present contents of the personal coin collection he has been developing for forty years (Compl. ¶ 206). Thus, as a practical matter, plaintiff would continue, far into the future, to regularly experience the unwanted contacts both in his routine daily transactions and in his "not infrequent[]" examinations of his coin collection (Compl. ¶ 207). Cf. Lujan, 504 U.S. at 571, 112 S. Ct. at 2142 (rejecting theory of redressability where the agency

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[16](...continued)
Court lacks authority to order Congress to perform particular legislative acts, such as passing legislation, repealing legislation, or embarking on the code editing project that plaintiff proposes. See Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500 (1866) ("The Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."); Franklin v. Massachusetts, 505 U.S. 788, 829, 112 S. Ct. 2767, 2790 (1992) (Scalia, J., concurring) ("we cannot direct . . . the Congress to perform particular legislative duties"). As discussed infra, the Legislative Branch defendants are immune from plaintiff's claims in multiple ways. See infra Section III.

funding the plaintiffs sought to enjoin constituted only a small fraction of the funding for the projects that plaintiffs alleged caused them injury).

Thus, assuming arguendo that plaintiff establishes a cognizable injury in fact that is fairly traceable to the challenged statutes, standing is still lacking in this case, because plaintiff cannot prove that the injury he alleges is "'likely'" to be "'redressed by a favorable decision.'" Lujan, 504 U.S. at 560, 112 S. Ct. at 2136 (internal quotation marks omitted).

D. Plaintiff Lacks Taxpayer Standing

Plaintiff also contends (see, e.g., Compl. ¶¶ 189-195) that he has federal taxpayer standing to challenge the national motto. This is meritless. As a general rule, citizens may not rely on the "injury" of paying federal taxes as a basis for standing to challenge federal action. See Frothingham v. Mellon, 262 U.S. 447, 487-88, 43 S. Ct. 597, 601 (1923). This rule is subject to a "narrow exception" in certain types of Establishment Clause cases. See Bowen v. Kendrick, 487 U.S. 589, 618, 108 S. Ct. 2562, 2579 (1988). To qualify for this exception and demonstrate taxpayer standing, a plaintiff must show: (i) that the challenged government action is an "exercise[] of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution"; and (ii) that "the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." Flast v. Cohen, 392 U.S. 83, 102-03, 88 S. Ct. 1942, 1954 (1968); see also Valley Forge, 454 U.S. at 481, 102 S. Ct. at 763 (Flast's two-part test is applied with "rigor").

Plaintiff's attempt to invoke taxpayer standing founders on the first Flast element, for two independent reasons. First, plaintiff does not identify any expenditure of federal dollars made specifically to support the inclusion of "In God We Trust" on coins and currency or its status as the national motto. Plaintiff points to several categories of expenditures: the salaries of the individual defendants and employees working under them; "the manufacture of the coins and currency that bears the religious motto"; "the physical plants wherein the perpetuation and promotion of the religious motto occurs (including construction, maintenance, and utilities)"; and "the printing of the United States Code." Compl. ¶¶ 191-192. None of these categories of expenditures, however, involve the government "spen[ding] tax dollars solely on the challenged

conduct," as is necessary to sustain taxpayer standing. Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794 (9th Cir. 1999) (en banc). "If the plaintiff identifies no public funds that were spent solely on the challenged activity, then the plaintiff has not alleged a taxpayer injury." Id. at 797 (emphasis added). Here, the general operating expenditures cited by plaintiff are qualitatively indistinguishable from those that the en banc Ninth Circuit found insufficient in Doe, in which it rejected an attempt to challenge a school's graduation prayer policy via taxpayer standing:

> Doe instead alleges that defendants spent tax dollars on renting a hall, printing graduation programs, buying decorations, and hiring security guards. But those are ordinary costs of graduation that the school would pay whether or not the ceremony included a prayer. Therefore, those expenditures cannot establish taxpayer standing.

Id. at 794 (citing Doremus v. Bd. of Educ., 342 U.S. 429, 433-34, 72 S. Ct. 394, 397 (1952) (holding that school expenditures for teachers' salaries, equipment, building maintenance, and the like were insufficient to confer taxpayer standing despite the fact that among the school's activities was daily Bible reading)). As in Doe and Doremus, the government would have to pay the salaries of defendants and their employees and the ordinary operating costs incident to minting coins, printing currency, and publishing the United States Code regardless of whether the phrase "In God We Trust" appeared on coins and currency or in certain places in the United States Code, and there is no allegation here that those expenditures would be any less if plaintiff were granted the relief he seeks.[17]

Second, even if plaintiff could identify a specific expenditure of federal dollars spent solely on the challenged activity, that expenditure would not in any event derive from Congress's authority under the Taxing and Spending Clause, U.S. Const. art. I, § 8, cl. 1. The taxing and spending power provides constitutional authority for "federal taxing and spending programs,"

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[17] While Doe and Doremus both involved issues of state or local, as opposed to federal, taxpayer standing, these principles carry equal if not greater weight in the context of federal taxpayer standing, which, after all, is even narrower than state or local taxpayer standing. See Hoohuli v. Ariyoshi, 741 F.2d 1169, 1180 (9th Cir. 1984) (citing Public Citizen, Inc. v. Simon, 539 F.2d 211 (D.C. Cir. 1976)).

Flast, 392 U.S. at 101, 88 S. Ct. at 1953, i.e., congressional programs to promote the "'general welfare'" by the "'expenditure of public moneys for public purposes . . . not limited by the direct grants of legislative power found in the Constitution.'" South Dakota v. Dole, 483 U.S. 203, 207, 107 S. Ct. 2793, 2796 (1987) (citation omitted). The statutes challenged here are plainly enacted in exercise of Congress's authority "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures," U.S. Const. art. I, § 8, cl. 5.[18] Under well-established precedent, plaintiff's taxpayer standing argument therefore fails. See United States v. Richardson, 418 U.S. 166, 175, 94 S. Ct. 2940, 2945 (1974) (no standing where plaintiffs' challenge was "not addressed to the taxing or spending power, but to the statutes regulating the CIA"); Valley Forge, 454 U.S. at 480, 102 S. Ct. at 762 (no standing where the challenged government action "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8").

III. THE LEGISLATIVE BRANCH DEFENDANTS ARE IMMUNE AND MUST BE DISMISSED

Even if plaintiff could establish standing, his claims against the Legislative Branch defendants (i.e., Congress and the Law Revision Counsel) would have to be dismissed because those defendants enjoy both Speech or Debate Clause immunity and sovereign immunity.

A. Plaintiff's Claims Against the Legislative Branch Defendants Are Barred By Speech Or Debate Clause Immunity

The Speech or Debate Clause of Article I of the Constitution precludes courts from exercising jurisdiction over Congress, or any of its Members, for claims arising from their legislative activities. The Clause provides that "[t]he Senators and Representatives . . . shall not be questioned in any other Place" for "any Speech or Debate in either House." U.S. Const. art. I,

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[18] "Congress need not draw authority from [the Taxing and Spending Clause] if another constitutional provision confers the power to spend for a specific purpose." Richardson v. Kennedy, 313 F. Supp. 1282, 1285 (W.D. Pa. 1970) (three-judge court) (holding that there was no taxpayer standing to challenge a congressional pay raise enacted under authority other than the Taxing and Spending Clause), aff'd mem., 401 U.S. 901, 91 S. Ct. 868 (1971). The complaint's formulaic (and erroneous) statement that some or all of the cited expenditures are "apportioned under the taxing and spending power" (Compl. ¶ 193) is an unsupported legal conclusion that should not be credited.

§ 6, cl. 1. The Speech or Debate Clause "reinforc[es] the separation of powers," United States v. Johnson, 383 U.S. 169, 178, 88 S. Ct. 749, 754 (1966), and its "guarantees . . . are vitally important to our system of government," Helstoski v. Meanor, 442 U.S. 500, 506, 99 S. Ct. 2445, 2448 (1979).

The Supreme Court has read the Speech or Debate Clause "broadly to effectuate its purposes," such that any conduct falling within the "'sphere of legitimate legislative activity'" is absolutely immune from scrutiny by the courts. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 501, 95 S. Ct. 1813, 1820 (1975); see also Hutchinson v. Proxmire, 443 U.S. 111, 126, 99 S. Ct. 2675, 2684 (1979) (immunity provided by the Clause applies "'to things generally done in a session of the House by one of its members in relation to the business before it'") (citation and emphasis omitted). The Clause applies equally to officers and other employees of the Congress when they are engaged in legislative activity. See, e.g., Gravel v. United States, 408 U.S. 606, 618, 92 S. Ct. 2614, 2623 (1972) (Speech or Debate Clause confers immunity upon a Senator's aide in situations where the conduct of the aide would be a protected legislative act if performed by the Senator himself); Eastland, 491 U.S. at 501, 95 S. Ct. at 1820 (actions of Chief Counsel protected by Speech or Debate Clause); Cable News Network v. Anderson, 723 F. Supp. 835, 841 (D.D.C. 1989) (dismissing case against defendants, including Clerk of the House, on Speech or Debate Clause grounds).[19]

Of course, plaintiff's claims in this case address quintessentially legislative activity. See, e.g., Gravel, 408 U.S. at 624, 92 S. Ct. at 2626 (voting by Members protected); Eastland, 421 U.S. at 504, 95 S. Ct. at 1821-22 (Clause protects all activities "'integral'" to the "'consideration and passage or rejection of proposed legislation'") (citation omitted). Plaintiff sues Congress as

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[19] Speech or Debate Clause protection applies regardless of whether the challenged conduct is alleged to violate the First Amendment. See Eastland, 421 U.S. at 509-11, 95 S. Ct. at 1824. The Clause also precludes courts from "inquiry . . . into the motivation for" legislative acts, id., 421 U.S. at 508, 95 S. Ct. at 1824 (internal quotation marks and emphasis omitted), underscoring the lack of absence of any legal significance in plaintiff's diatribe against of the motives of Members of the Congresses of 1954 and 1955, see, e.g., Compl. ¶¶ 80-103, 117-128, Appendices B, C, D, E.

"the branch of government in which all legislative powers are granted under Article I, Section 1 of the United States Constitution." Compl. ¶ 8. The complaint reads like an indictment of the Congress of 1954 and 1955 for enacting the statutes challenged in this case. See Compl. ¶¶ 81-108, 117-131, Appendices B, C, and D. And plaintiff requests that the Court declare that Congress violated the Constitution by passing the challenged statutes. Compl. p. 57, ¶ I. These claims fall within the core of what is protected by the Speech or Debate Clause.[20]

Plaintiff's claims against the Law Revision Counsel are equally barred under the Speech or Debate Clause. As noted above, the Supreme Court has held that the Speech or Debate Clause confers immunity upon congressional officers and staff for participation in legislative activities to the same extent as upon Congress itself. See Gravel, 408 U.S. at 618, 92 S. Ct. at 2623 (involving aide to Senator). The Law Revision Counsel is an office within the House of Representatives whose "principal purpose" is "to develop and keep current an official and positive codification of the laws of the United States." 2 U.S.C. § 285a. Plaintiff asserts claims against the Law Revision Counsel for his "preparation and publication of the United States Code" under the direction of Congress. See, e.g., Compl. ¶¶ 9, 165, 192, 242-248. There can be little doubt that the preparation and publication of the United States Code under the auspices of the United States Congress fall among activities that are legislative in nature, and, therefore, are protected by Speech or Debate Clause immunity.

B. Plaintiff's Claims Against the Legislative Branch Defendants Are Also Barred By Sovereign Immunity

In addition to Speech or Debate Clause immunity, sovereign immunity also bars plaintiff's claims against the Legislative Branch defendants. The government, as well as any

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[20] The Ninth Circuit previously held that Congress was entitled to Speech or Debate Clause immunity in litigation in which plaintiff challenged the constitutionality of the Pledge of Allegiance. Newdow v. U.S. Congress, 328 F.3d 466, 484 (9th Cir. 2003), rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). While the Supreme Court reversed the Ninth Circuit's merits decision in plaintiff's favor because plaintiff lacked standing, the Court denied plaintiff's petition for certiorari as to the Speech or Debate Clause immunity of Congress, Newdow v. U.S. Congress, 540 U.S. 962, 124 S. Ct. 386 (2003) (Mem.). The Ninth Circuit's prior analysis of Speech or Debate Clause immunity is persuasive.

body thereof, "'is immune from suit save as it consents to be sued . . ., and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Mitchell, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351 (1980) (citation omitted) (alteration in original); see also Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1117 (9th Cir. 2003) ("Absent a waiver of sovereign immunity, courts have no subject matter jurisdiction over cases against the government"). Consent to be sued must be "'unequivocally expressed'" in legislation. Mitchell, 445 U.S. at 538, 100 S. Ct. at 1351 (citation omitted); accord Lane v. Pena, 518 U.S. 187, 192, 116 S. Ct. 2092, 2096 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text"); Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 475, 114 S. Ct. 996, 1000 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"). Plaintiff bears the burden of establishing an unequivocal textual waiver of immunity. See Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987), cert. denied, 487 U.S. 1204, 108 S. Ct. 2845 (1988).

Plaintiff has identified, and can identify, no statute waiving the sovereign immunity of Congress for the claims he asserts. The Legislative Branch defendants, therefore, are immune. See Keener v. Congress of the United States, 467 F.2d 952, 953 (5th Cir. 1972) (per curiam) (affirming dismissal of suit as "frivolous" because Congress is "protected from suit by sovereign immunity"); see also Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985) ("It has long been the rule that the bar of sovereign immunity cannot be avoided by naming officers and employees of the United States as defendants").[21]

IV. THE NATIONAL MOTTO AND ITS APPEARANCE ON COINS AND CURRENCY DO NOT VIOLATE THE CONSTITUTION

As discussed above, both the Supreme Court and the Ninth Circuit have already directly

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[21] Claims challenging federal statutory or regulatory provisions typically are raised against the Executive Branch "agency or an officer or employee thereof" responsible for administering or enforcing the challenged provision, and the necessary waiver of sovereign immunity is supplied by the Administrative Procedure Act. 5 U.S.C. § 702. Congress is not an "agency" under the Administrative Procedure Act. 5 U.S.C. § 701(b)(1)(A). Therefore, the Administrative Procedure Act's waiver of sovereign immunity does not permit claims against Congress or its officers or employees.

spoken on the very question before the Court. As this Court is bound by those pronouncements, there is no need to proceed further with analysis in this case. However, we show below that even if this were a case of first impression, any fresh examination of the merits of this issue would only confirm the soundness of the higher courts' prior analyses. Indeed, every other court to have considered the matter has upheld the constitutionality of the national motto and its inscription on coins and currency.

Plaintiff asks the Court "to judge the constitutionality of [Acts] of Congress — 'the gravest and most delicate duty that [a court] is called upon to perform.'" Rostker v. Goldberg, 453 U.S. 57, 64, 101 S. Ct. 2646, 2651 (1981) (internal quotation marks omitted). It is well established that Acts of Congress are presumptively constitutional. See United States v. National Dairy Prods. Corp., 372 U.S. 29, 32, 83 S. Ct. 594, 597 (1963).

A. The Establishment Clause Permits Official Acknowledgments of the Nation's Religious History And Character

"[R]eligion has been closely identified with our history and government." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 212, 83 S. Ct. 1560, 1566 (1963). Many of this Nation's earliest European settlers came here seeking refuge from religious persecution and a home where they could practice their faith. See Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment) (describing "a Nation founded by religious refugees and dedicated to religious freedom"). In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact in which they announced that their voyage was undertaken "for the Glory of God." See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. Settlers established many of the original thirteen colonies for the specific purpose of securing religious liberty for their inhabitants. See Engel v. Vitale, 370 U.S. 421, 427, 434, 82 S. Ct. 1261, 1265, 1268-69 (1962).

The Framers' deep-seated faith provided the philosophical groundwork for the governmental structure they adopted. See Lynch v. Donnelly, 465 U.S. 668, 675, 104 S. Ct. 1355, 1360 (1984) ("'[w]e are a religious people whose institutions presuppose a Supreme Being'") (citation omitted) (emphasis added). In "perhaps their most important contribution,"

the Framers "conceived of a Federal Government directly responsible to the people . . . and chosen directly . . . by the people." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821, 115 S. Ct. 1842, 1863 (1995). That system of government was a direct outgrowth of the Framers' conviction that each individual was entitled to certain fundamental rights "endowed by their Creator," as most famously expressed in the Declaration of Independence. See Declaration of Independence of 1776 ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Schempp, 374 U.S. at 213, 83 S. Ct. at 1566.

It is no surprise, therefore, that the Framers considered references to God in official documents and official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the principles of religious autonomy embodied in the First Amendment. The Constitution itself refers to the "Year of Our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. See U.S. Const. art. I, § 7; id. art. VII. And the First Congress, which wrote the Establishment Clause, adopted a policy of selecting a paid chaplain to open each session of Congress with prayer. See Marsh v. Chambers, 463 U.S. 783, 787-88, 103 S. Ct. 3330, 3334 (1983).

Indeed, the day after proposing the Establishment Clause, the First Congress urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" Lynch, 465 U.S. at 675 n.2, 104 S. Ct. at 1360 n.2 (citation omitted). The President responded by proclaiming November 26, 1789, a day of thanksgiving to "offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." Id. (citation omitted). President Washington also included a reference to God in his first inaugural address, stating: "'it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe . . . that His

benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.'" Newdow v. Bush, 355 F. Supp. 2d 265, 287 (D.D.C. 2005) (quoting compilation of inaugural addresses).

This "tradition [of the Founders] has endured." Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 446 (7th Cir. 1992), cert. denied, 508 U.S. 950, 113 S. Ct. 2439 (1993). Beginning with President Washington, references to God or a Higher Power have been a "characteristic feature" of presidential inaugural addresses, see Lee v. Weisman, 505 U.S. 577, 633, 112 S. Ct. 2649, 2680 (1992) (Scalia, J., dissenting); Newdow, 355 F. Supp. 2d at 266-68 (tracing history of such references in inaugural addresses), and almost every President, beginning with Washington, has issued Thanksgiving proclamations, see Elk Grove, 124 S. Ct. at 2317 (Rehnquist, C.J., concurring in the judgment). Since the time of Chief Justice Marshall, moreover, the Supreme Court has opened its sessions with "'God save the United States and this Honorable Court.'" Engel, 370 U.S. at 446, 82 S. Ct. at 1275 (Stewart, J., dissenting).

Other examples abound. President Lincoln referred to a "nation[] under God" in his historic Gettysburg Address. See Elk Grove, 124 S. Ct. at 2317-18 (Rehnquist, C.J., concurring in the judgment). In 1931, Congress adopted as the National Anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto 'In God is our Trust.'" Engel, 370 U.S. at 449, 82 S. Ct. at 1277 (Stewart, J., dissenting). Like the Constitution of the United States, see U.S. Const. art. VII, the Constitutions of all 50 States also include express references to God. See Appendix B to Brief for the United States as Respondent Supporting Petitioners in Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624 (S. Ct.), available at 2003 WL 23051994 (listing citations). Since 1954, and as reaffirmed by Congress in 2002, the Pledge of Allegiance has read: "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." 4 U.S.C. § 4; Pub. L. No.

107-293, 116 Stat. 2057 (2002).[22]

Given this "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," Lynch, 465 U.S. at 674, 104 S. Ct. at 1360, the Supreme Court and individual Justices, time and again, have affirmed the proposition that official acknowledgments of the Nation's religious heritage and character are constitutional. The Court's statement in Engel v. Vitale, in which the Court struck down New York's required school prayer, is representative:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to [conduct held to violate the Establishment Clause].

Engel, 370 U.S. at 435 n.21, 82 S. Ct. at 1269 n.21.[23]

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[22] A Judge of this Court recently held that school district policies providing for daily voluntary recitation of the Pledge of Allegiance were unconstitutional, believing the issue to be controlled by the Ninth Circuit's prior decision regarding the Pledge in Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), notwithstanding the subsequent reversal of that decision by the Supreme Court, Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004). See Newdow v. Congress of the United States, No. Civ. S-015-17 LKK/DAD, 383 F. Supp. 2d 1229 (E.D. Cal. 2005). That decision has been appealed to the Ninth Circuit and stayed pending all appeals. See Nos. 05-17257, 05-17344, 06-15093 (9th Cir.). Other courts have held to the contrary. See, e.g., Myers v. Loudoun Cty. Pub. Schs., 418 F.3d 395 (4th Cir. 2005).

[23] See also, e.g., Marsh, 463 U.S. at 792, 103 S. Ct. at 3337 (opening legislative sessions with prayer "has become part of the fabric of our society'"); Schempp, 374 U.S. at 213, 83 S. Ct. at 1566 (referring favorably to the numerous public references to God that appear in historical documents and ceremonial practices in public life, such as oaths ending with "So help me God"); Elk Grove, 124 S. Ct. at 2319 (Rehnquist, C.J., concurring in the judgment) ("our national culture allows public recognition of our Nation's religious history and character."); id. at 2322 (O'Connor, J., concurring in the judgment) (eradicating references to divinity in our Nation's symbols, songs, mottos, and oaths is unnecessary and "would sever ties to a history that sustains this Nation even today"); Lynch, 465 U.S. at 693, 104 S. Ct. at 1369 (O'Connor, J., concurring) ("God save the United States and this honorable court" is a constitutionally permissible acknowledgment of religion); Schempp, 374 U.S. at 307, 83 S. Ct. at 1616 (Goldberg, J., concurring, joined by Harlan, J.) ("today's decision does not mean that all incidents of

(continued...)

Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678, 104 S. Ct. at 1361-62; see also Walz v. Tax Comm'n, 397 U.S. 664, 668, 90 S. Ct. 1409, 1411 (1970) (Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity"). Rather, "public acknowledgment of the [Nation's] religious heritage long officially recognized by the three constitutional branches of government," Lynch, 465 U.S. at 686, takes note of the historical truth that "religion permeates our history," Edwards v. Aguillard, 482 U.S. 578, 607, 107 S. Ct. 2573, 2590 (1987) (Powell, J., concurring), and, more specifically, that religious faith played a singularly influential role in the settlement of the Nation and the founding of its government. Because of their "'history and ubiquity,' such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625, 109 S. Ct. 3086, 3118 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (citation omitted).

Even if the Supreme Court had not already and repeatedly identified the national motto as a paradigmatic example of a permissible acknowledgment of our Nation's religious history and character, a de novo analysis would lead to the same conclusion. As with other "public acknowledgment[s] of the religious heritage long officially recognized by the three constitutional branches of government," any notion that the "In God We Trust" motto "pose[s] a real danger of establishment of a state church is far-fetched indeed." Lynch, 465 U.S. at 686, 104 S. Ct. at 1366. The motto is undeniably historical and ubiquitous to the point where it is not understood as endorsing a particular religious belief. Lynch, 465 U.S. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). Indeed, it no more "establishes a religion or religious faith, or tends to do so," Lynch, 465 U.S. at 678, 104 S. Ct. at 1361-62, than do, for example, the National Anthem's

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[23](...continued)
government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause," citing to divine references in the Declaration of Independence and official anthems).

inclusion of nearly identical language, the reference to a "Creator" in the Declaration of Independence, express references to God in the United States Constitution and the Constitutions of all 50 States, the government's declaration of holidays that originated with religious significance, the swearing of oaths with the phrase "So help me God," or the opening of court sessions with the exclamation, "God save the United States and this Honorable Court." Simply put, no reasonable observer could understand the "In God We Trust" motto as "conveying an endorsement of particular religious briefs." County of Allegheny, 492 U.S. at 625, 109 S. Ct. at 3118 (O'Connor, J., concurring in part and concurring in the judgment).

Plaintiff inveighs against the notion that the motto could be a permissible ceremonial acknowledgment of religion, calling it a "bogus excuse." Compl. ¶¶ 260, 261, and Apps. G, H, and N. In particular, plaintiff insists that the national motto is not "ceremonial," pointing as evidence to the fact that during or following his prior litigation challenging the phrase "under God" in the Pledge of Allegiance, significant public and political support was expressed for the Pledge. Compl. Apps. G, H. Plaintiff's theory appears to be that if a lawsuit challenging a "governmental acknowledgment[] of religion," County of Allegheny, 492 U.S. at 625, 109 S. Ct. at 3118 (O'Connor, J., concurring in part and concurring in the judgment), receives wide publicity and/or engenders numerous expressions of support for the challenged acknowledgment, such reaction itself betrays the unconstitutional character of the acknowledgment. Absolutely no support can be found in the jurisprudence for such a theory. Whether government acknowledgments of religion are "not understood as conveying an endorsement of particular religious beliefs" turns on whether "they serve . . . secular purposes"[24] and on their "history and ubiquity," id. at 625, 109 S. Ct. at 3118 (O'Connor, J., concurring in part and concurring in the judgment), not on the level of popular support for the acknowledgment in question or the amount of publicity generated by litigation. Indeed, the Supreme Court has held that "[a] litigant cannot, by the very act of commencing a lawsuit . . . create the appearance of divisiveness and then

[24] See infra Section IV.C (discussing secular purposes).

exploit it as evidence of entanglement." Lynch, 465 U.S. at 684-85, 104 S. Ct. at 1365.[25] Many of the governmental acknowledgments of religion that have been upheld by the Supreme Court and the lower courts in the past have no doubt enjoyed substantial support from the public and the political community.

B. In Addition to the Supreme Court and the Ninth Circuit, Other Courts Have Uniformly Upheld the National Motto Against Challenge

Every court to have considered the matter has concluded, in accord with the Supreme Court and the Ninth Circuit, that the national motto and its inscription on coins and currency do not violate the First Amendment. Not a single case is to the contrary.

In O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978), aff'd on opinion below, 588 F.2d 1144 (5th Cir.), cert. denied, 442 U.S. 930 (1979), plaintiffs alleged that the statutes making "In God We Trust" the national motto, providing for inscription of the motto on coins and currency, and criminalizing the defacement of the motto on coins and currency violated the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause. The district court agreed with the Ninth Circuit that the motto "served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange." Id. at 20 (citing Aronow v. United States, 432 F.2d 242 (9th Cir. 1970)). "Moreover," the court held, "it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion." Id. The district court dismissed the complaint for failure to state a claim upon which relief can be granted, and the Fifth Circuit affirmed on the basis of the district court's opinion. 588 F.2d 1144.

Yet another challenge was mounted in Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), cert. denied, 517 U.S. 1211, 116 S. Ct. 1380 (1996). There, as here, suit was brought against the United States and Department of Treasury officials for declaratory and injunctive relief against the national motto and its inscription on coins and currency. Affirming the district

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[25] Among other problems, the test plaintiff proposes would be impracticable and nonsensical because one would have to wait until after litigation challenging the governmental practice was filed, and then gauge the public reaction in order to determine the practice's constitutionality.

court's dismissal of the suit for failure to state a claim, the Tenth Circuit held that the challenged statutes "easily" passed constitutional muster. Id. at 216. In particular, the court held that the national motto "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." Id. (citations omitted). The motto "is a form of 'ceremonial deism' which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief." Id. And, "a reasonable observer, aware of the purpose, context, and history of the phrase 'In God we trust,' would not consider its use or reproduction on U.S. currency to be an endorsement of religion." Id. at 217.

Still other courts have upheld the ceremonial use of the phrase "In God We Trust" in contexts other than United States coins and currency. For example, in Lambeth v. Board of Comm'rs of Davidson County, 407 F.3d 266 (4th Cir.), cert. denied, 126 S. Ct. 647 (2005), plaintiffs challenged the inscription of "In God We Trust" on the facade of a county building. The Fourth Circuit noted that it had "heretofore characterized the phrase, 'In God We Trust,' when used as the national motto on coins and currency, as a 'patriotic and ceremonial motto' with 'no theological or ritualistic impact,'" id. at 270 (quoting North Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1151 (4th Cir. 1991), cert. denied, 505 U.S. 1219, 112 S. Ct. 3027 (1992)); that "[t]he use of the challenged phrase as the national motto is long-standing, and it has been used extensively over the years by the federal government," id.; and that "[t]he Supreme Court has strongly indicated on several occasions, albeit in dicta, that governmental use of the motto, 'In God We Trust,' does not, at least in certain contexts, contravene the mandate of the Establishment Clause," id.[26] Thus, the complaint failed to state a claim upon which relief could be granted. Id. at 273.

C. To the Extent the *Lemon* Test Applies, the Motto Passes Muster

The line of cases discussed above, see supra Section IV.A, specifically upholding official

[26] See supra Section I.A (discussing repeated statements by the Supreme Court and its Justices).

governmental acknowledgments of our Nations' religious history and character because such acknowledgments do not establish a religion or tend to do so dispenses with any need to resort to the general test from Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971), for analyzing Establishment Clause issues. See, e.g., Newdow v. Bush, 355 F. Supp. 2d 265, 283 (D.D.C. 2005) (describing Marsh as an "exception[] to the Lemon test"); see also Marsh, 463 U.S. 781, 103 S. Ct. 3330 (upholding legislative prayer without reference to Lemon). Moreover, as a general matter, the Supreme Court has recently questioned the "fate of the Lemon test in the larger scheme of Establishment Clause jurisprudence." Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (plurality opinion); see also id. at 2869 (Breyer, J., concurring in the judgment) ("no single mechanical formula [] can accurately draw the constitutional line in every case"). Nevertheless, even if the Lemon test were applied in this case, the statutes challenged here would easily pass that test.

Under the Lemon test, as recently modified, government action passes muster under the Establishment Clause if it (1) has "a secular legislative purpose," and (2) has a "principal or primary effect" that "neither advances nor inhibits religion." Lemon, 403 U.S. at 612-13, 91 S. Ct. at 2111 (quotation marks and citation omitted); see also Agostini v. Felton, 521 U.S. 203, 233, 117 S. Ct. 1997, 2015 (1997) (refining the Lemon test by incorporating what had previously been a third prong – whether the statute fosters an "excessive government entanglement with religion" – as "an aspect of the inquiry into the statute's effect").

First, the statutes providing for the national motto and its inscription on coins and currency clearly have a secular purpose: "[t]he motto symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." Gaylor v. United States, 74 F.3d 214, 216 (10th Cir. 1996) (citations omitted), cert. denied, 517 U.S. 1211, 116 S. Ct. 1380 (1996). Indeed, "the printing of 'In God We Trust' on our coins serve[s] the secular purposes of 'solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society.' As discussed above, see supra Section IV.A, because they serve such secular purposes and because of their 'history and ubiquity,' such government acknowledgments of religion are not understood

as conveying an endorsement of particular religious beliefs." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 625, 109 S. Ct. 3086, 3118 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

Second, it is beyond cavil that the primary effect of the challenged statutes is neither to promote nor to advance religion. This part of the Lemon test turns on whether the reasonable, objective observer, acquainted with the history and context relevant to the government action at issue, would perceive it as government "endorsement" of particular religious beliefs. See, e.g., Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 308, 120 S. Ct. 2266, 2278 (2000); County of Allegheny, 492 U.S. at 631, 109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment). The "reasonable observer" is deemed to be "a personification of a community ideal of reasonable behavior," a "hypothetical observer who is presumed to possess a certain level of information." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 779-80, 115 S. Ct. 2440, 2455 (1995) (O'Connor, J., concurring in part and concurring in the judgment). In particular, the "reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." Id. at 780, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment); accord Zelman v. Simmons-Harris, 536 U.S. 639, 655, 122 S. Ct. 2460, 2468-69 (2002). The endorsement inquiry "is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." Capitol Square, 515 U.S. at 779, 115 S. Ct. at 2455 (O'Connor, J., concurring in part and concurring in the judgment).

From the perspective of the "reasonable observer," government acknowledgments of religion that are essentially ceremonial in nature simply "'are not understood as conveying government approval of particular religious beliefs.'" County of Allegheny, 492 U.S. at 596 n.46, 109 S. Ct. at 3102 n.46 (quoting Lynch, 465 U.S. at 693, 104 S. Ct. at 1370 (O'Connor, J., concurring)). Rather, because these limited, nonsectarian references to the nation's religious heritage run through society, any religious connotations have long been tempered by a largely civil, ceremonial import. Marsh, 463 U.S. at 790-94, 103 S. Ct. at 3335-37; Zorach v. Clauson,

343 U.S. 306, 313, 72 S. Ct. 679, 683 (1952) (religious references "run through our laws, our public rituals, our ceremonies"). Indeed, in one of the very cases that embodies "the proposition that government may not communicate an endorsement of religious belief," the Court noted (and declined to revisit) that it had repeatedly characterized the national motto as "consistent" with that proposition. County of Allegheny, 492 U.S. at 602-03, 109 S. Ct. at 3106.

D. Plaintiff's Remaining Claims Likewise Fail As a Matter of Law

Plaintiffs' remaining claims – that the "In God We Trust" motto and the placement of that phrase on coins and currency violate the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and other constitutional provisions – can be easily dismissed. The Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion." Bowen v. Roy, 476 U.S. 693, 700, 106 S. Ct. 2147, 2152 (1986) (emphasis added); accord Grove v. Mead Sch. Dist. No. 354, 753 F.2d 1528, 1533 (9th Cir.) ("[t]he free exercise clause recognizes the right of every person to choose among types of religious training and observance, free of state compulsion"), cert. denied, 474 U.S. 826, 106 S. Ct. 85 (1985); see also Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451, 108 S. Ct. 1319, 1326 (1988) ("The crucial word in the constitutional text [of the Free Exercise Clause] is 'prohibit' . . . ."); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572 (1963) ("a violation of the Free Exercise Clause is predicated on coercion").

The challenged statutes providing for the national motto and the placement of "In God We Trust" on coins and currency simply are not coercive in nature and do not regulate the conduct of citizens. The statute designating a national motto does not require the nation's citizens themselves to espouse it, nor does it dictate or forbid any beliefs or conduct by the nation's citizens; similarly, the statutes regulating the form and appearance of money are framed as directions from Congress to the Secretary of the Treasury. These statutes neither require plaintiff to do anything, nor prohibit him from doing anything. The Supreme Court has stated that when there is no element of coercion, "[i]t takes obtuse reasoning to inject any issue of the 'free exercise' of religion . . . ." Zorach v. Clauson, 343 U.S. 306, 311, 72 S. Ct. 679, 682 (1952).

Two Supreme Court cases in particular show that the Free Exercise Clause does not reach the type of issue before the Court in this case. In Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147 (1986), a parent argued that statutes requiring the use of a social security number in the government's processing of welfare benefits for his daughter violated the Free Exercise Clause because the number conflicted with his Native American religious beliefs by "'robbing the spirit.'" Id. at 696, 106 S. Ct. at 2150. The Supreme Court rejected this sweeping claim, holding that "[t]he Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." Id. at 700, 106 S. Ct. at 2152. Plaintiff could no more prevail on his claim, the Court explained, "than he could on a sincere religious objection to the size or color of the Government's filing cabinets." Id.

In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319 (1988), plaintiffs brought Free Exercise Clause claims challenging the government's timber harvesting and road construction activities in an area of a national forest that had religious significance to Native Americans. It was undisputed that these government operations would have "devastating effects" on and posed an "extremely grave" threat to traditional Indian religious practices. Id. at 451, 108 S. Ct. at 1326; see also Northwest Indian Cemetery Protective Ass'n v. Lyng, 795 F.2d 688, 692-93 (9th Cir. 1986) (lower court finding that the government operations would "virtually destroy the . . . Indians' ability to practice their religion"), rev'd on other grounds, 485 U.S. 439. Even so, the Supreme Court held, following Bowen, that the Free Exercise Clause was inapplicable. Even if "the challenged Government action would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs," the government action was outside the scope of the Free Exercise Clause because it neither "coerced" the plaintiffs "into violating their religious beliefs" nor "penalize[d] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." Lyng, 485 U.S. at 449, 108 S. Ct. at 1325.

The Lyng Court rejected the plaintiff's attempt to distinguish Bowen on the ground that the government's use of social security numbers for processing was "'at some physically

removed location where it places no restriction on what a practitioner may do'" and that the interference with religious tenets in Bowen was merely "'from a subjective point of view, where the government's conduct of "its own internal affairs" was known to [the Bowen plaintiffs] only secondhand,'" as opposed to the government activities in Lyng, which plaintiff alleged would "'physically destroy'" conditions indispensable to religious practice. Id. (quoting respondents' brief). The Court found this distinction "unavailing" because the common denominator of the two cases was that they involved "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious briefs." Id. at 449-50, 108 S. Ct. at 1325-26 (emphasis added).

The statutes here are analogous to the government actions held to be outside the scope of the Free Exercise Clause in Bowen and Lyng. They are framed as an abstract statement, in one case, and as directives from Congress to the Treasury Department respecting the form and appearance of money, in the others. They do not purport to regulate plaintiff's conduct, coerce him to engage in any kind of religious exercise, coerce him into acting contrary to his religious beliefs, or prohibit him from engaging in any kind of religious exercise. They do not coerce him at all, because they have no coercive effect on anyone other than the agencies to whom they are directed.[27]

To the extent that plaintiff is exposed to something he finds offensive as an incidental effect of Congress's directive to the Treasury Department, that exposure is certainly no more cognizable under the Free Exercise Clause than the "devastating effects" that timber harvesting

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[27] Moreover, to the extent that the challenged statutes could somehow be deemed to regulate plaintiff's own conduct, they would constitute "neutral laws of general applicability" because any mandates or prohibitions that could be deemed to flow from the challenged statutes would apply uniformly and in the same manner to all citizens regardless of religion, and would concededly not violate the Free Exercise Clause as applied to the vast majority of citizens who do not have religious objections to the national motto. On that basis, the challenged statutes would be free from Free Exercise Clause scrutiny (albeit not from RFRA scrutiny) pursuant to Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990), which held that a "valid and neutral law of general applicability" that incidentally burdens religion generally need not be justified by a compelling governmental interest.

and road construction had on the Lyng plaintiffs' religious observance, Lyng, 485 U.S. at 451, 108 S. Ct. at 1326, or the Bowen plaintiff's being subjected to the use of a social security number that he considered as "'robbing the spirit,'" Bowen, 476 U.S. at 696, 106 S. Ct. at 2150. In none of these cases "would the affected individuals be coerced by the Government's action into violating their religious beliefs; nor would [the] governmental action penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." Lyng, 485 U.S. at 449, 108 S. Ct. at 1325; see also Newdow v. Bush, 355 F. Supp. 2d 265, 290 (D.D.C. 2005) ("Newdow does not cite a single authority that has even indicated that government-sponsored prayer might not only establish a favored religion (under the Establishment Clause) but also infringe the free exercise rights of adherents to a disfavored religion (under the Free Exercise Clause or RFRA). The Court is unaware of any such authority.").[28]

While Bowen and Lyng, both predating RFRA, addressed claims under the Free Exercise Clause, these same considerations are fatal to plaintiff's claims under RFRA because the threshold concept of "substantial burden" is coextensive in the two contexts.[29] In enacting

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[28] That plaintiff cannot rely on the Free Exercise Clause or RFRA to support his claims is illustrated by the fact that the typical remedy for a viable Free Exercise Clause or RFRA claim – an exemption to allow the plaintiff to engage in his religious exercise unhindered by the challenged governmental law or action – would make no sense here. It would be impossible for plaintiff to be awarded an "exemption" from the national motto, because the statutes pertaining to the national motto do not apply to plaintiff or regulate any of his personal conduct in the first place.

[29] RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can demonstrate that application of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1. RFRA was enacted in 1993 to extend protection of religious exercise against neutral laws of general applicability that the Court in Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990), held were not subject to scrutiny under the Free Exercise Clause (see supra note 27). Although the Supreme Court held that RFRA was unconstitutional as applied to the states, City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997), the Ninth Circuit has found it constitutional as applied to the federal government, Guam v. Guerrero, 290 F.3d 1210, 1221 (9th (continued...)

RFRA, Congress expected "that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. No. 103-111 at 8-9 (1993), 1993 U.S.C.C.A.N. 1892, 1898. The Senate Report stressed in this regard that "[p]re-Smith case law makes it clear" both that "only governmental actions that place a substantial burden on the exercise of religion must meet the compelling interest test set forth in the act" and that "strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources," citing Bowen and Lyng. Id. at 8, 9 & n.19, 1993 U.S.C.C.A.N. at 1898 & n.19 (emphasis added).

Thus, courts analyzing RFRA claims have applied Free Exercise Clause cases such as Lyng and Bowen in addressing the threshold question of whether the challenged government action is subject to scrutiny under RFRA. See Newdow, 355 F. Supp. 2d at 290 (interpreting Lyng as applying identically to Free Exercise Clause and RFRA claims); Thiry v. Carlson, 887 F. Supp. 1407, 1412-14 (D. Kan. 1995) (finding Lyng equally applicable to RFRA claims and dismissing RFRA claim based on Lyng), aff'd, 78 F.3d 1491 (10th Cir.), cert. denied, 519 U.S. 821, 117 S. Ct. 78 (1996); Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 180 (D.D.C. 2000) (finding Bowen equally applicable to RFRA claims).

Even if the challenged statutes were subject to scrutiny under the Free Exercise Clause or RFRA, they would easily survive such scrutiny. First, plaintiff has not alleged any facts that would permit the conclusion that the national motto "substantially burdens" his religious exercise as that phrase has been interpreted for First Amendment and RFRA purposes. Plaintiff's principal argument revolves around the fanciful proposition that the national motto and its appearance on coins and currency "force" him to engage in "evangelism" every time he transacts business in cash, see, e.g., Compl. ¶ 219, which he says becomes particularly problematic, even to the point of causing him to forgo transactions altogether, when he has to transact business for

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[29](...continued)
Cir. 2002).

his own religious activities, see, e.g., Compl. ¶ 230. But the argument that plaintiff is being enlisted to aid in the government's alleged "evangelism" collapses along with plaintiff's Establishment Clause claim that the government is engaging in such "evangelism" in the first place. As established by Aronow, numerous Supreme Court cases, and the doctrine generally permitting ceremonial government acknowledgments of religion, the national motto simply does not represent any government "evangelism" or endorsement of particular religious beliefs. See supra Sections I, IV.A, B, C.

Further, it takes an active imagination to indulge the notion that any retail merchant, fellow citizen, or overseas currency exchange, let alone a fellow adherent who is familiar with plaintiff's teachings, would interpret plaintiff's doing business with them in United States cash money as a form of proselytization or evangelical outreach. Simply put, no reasonable person assumes that a bearer of coins or currency personally vouches for any words or messages engraved thereon. As the Supreme Court stated, in distinguishing this type of situation from a message on a license plate which could be reasonably imputed to the vehicle owner, "[c]urrency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." Wooley v. Maynard, 430 U.S. 705, 717 n.15, 97 S. Ct. 1428, 1436 n.15 (1977). Courts have soundly rejected analogous claims that having a church building as a polling place violated the Free Exercise Clause on the ground that voters, by coming into the building, were forced to "attest to the nature of [their] religious beliefs," Otero v. State Election Board of Okl., 975 F.2d 738, 741 (10th Cir. 1992), cert. denied, 507 U.S. 977, 113 S. Ct. 1426 (1993); see also Berman v. Bd. of Elections, 420 F.2d 684, 686 (2d Cir. 1969), cert. denied, 397 U.S. 1065, 90 S. Ct. 1502 (1970), or that a city insignia containing a Latin Cross and regularly encountered by plaintiffs in dealings with city violated the Free Exercise Clause by creating "'subtle coercion for the Plaintiffs to adhere to the majoritarian faith symbolized by the cross in the seal,'" Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) (holding that plaintiff's claim "is a far cry from cases dealing with actual interference or actual compulsion which have presented viable

Free Exercise claims" (internal quotation marks omitted)), cert. denied, 505 U.S. 1219, 112 S. Ct. 3028 (1992).

And, even assuming arguendo plaintiff's religious exercise has been "substantially burdened," there is undoubtedly a compelling governmental interest in maintaining a national motto that "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future," and in having coins and currency reflect that national motto. Gaylor v. United States, 74 F.3d 214, 216 (10th Cir.), cert. denied, 517 U.S. 1211, 116 S. Ct. 1380 (1996). Any argument that there might be less restrictive means of satisfying this compelling government interest would amount to, essentially, a proposal for a different, alternative national motto, see Compl. ¶ 270 (listing twelve proposed "candidates" for a replacement national motto), but it would contradict the very concept of a national motto to allow such a "heckler's veto" over the overwhelming will of the citizenry as expressed through the political process. Cf. Good News Club v. Milford Central School, 533 U.S. 98, 119, 121 S. Ct. 2093, 2106 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto . . . .").

Finally, plaintiff asserts, almost in passing, that the national motto also violates the Free Speech Clause of the First Amendment and the equal protection component of the Fifth Amendment. Compl. ¶¶ 240-241. These claims are wholly without merit. With respect to the Free Speech Clause claim, plaintiff cites Wooley v. Maynard, 430 U.S. 705, 97 S. Ct. 1428 (1977), but neglects to acknowledge that Wooley itself disavows the proposition for which plaintiff cites it.[30] With respect to the equal protection claim, the statutes challenged here are not susceptible to equal protection analysis because they make no classifications or distinctions. See, e.g., Sturm v. Clark, 835 F.2d 1009, 1016 (3d Cir. 1989) ("Government action cannot violate the

[30] Wooley held that a state law requiring motorists to display the state motto, "Live Free or Die," on their license plates violated the First Amendment by coercing the motorists' speech, but expressly cautioned that its holding did not extend to the appearance of the national motto on coins and currency. See supra p. 43-44 (quoting Wooley, 430 U.S. at 717 n.15, 97 S. Ct. at 1436 n.15).

equal protection clause if it does not create classifications among, or discriminate between, those affected."). Contrary to plaintiff's suggestion, the equal protection component of the Fifth Amendment does not reach situations where, rather than itself making classifications or distinctions, a law is merely accused of allegedly "creat[ing] a societal environment where prejudice against Atheists . . . is perpetuated," Compl. ¶ 241.[31] Thus, plaintiff's free speech and equal protection claims should be dismissed.[32]

CONCLUSION

For the foregoing reasons, the Federal Defendants respectfully request that this action be dismissed for lack of subject matter jurisdiction and/or failure to state a claim upon which relief may be granted.

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[31] Moreover, to the extent plaintiff challenges the statutes on some theory that they contribute to general societal prejudice, he would lack Article III standing because general societal prejudice is not a sufficient injury in fact and would be neither fairly traceable to the challenged statutes nor redressable by the relief plaintiff seeks. See supra Section II.B, II.C. In any event, for the same reasons that the national motto does not violate the Establishment Clause, it plainly does not encourage or condone any prejudice against atheists.

[32] In addition to challenging the statutes establishing the national motto and providing for its inscription on coins and currency, the complaint also briefly attacks a host of other miscellaneous statutes that plaintiff also finds objectionable but that have nothing to do with the national motto. Compl. ¶¶ 242-250. To the extent that this lawsuit is intended to encompass specific challenges to these other statutes, but compare Compl. ¶¶ 242-250 with Prayer for Relief (not mentioning these statutes), these claims should be dismissed as well. The complaint plainly does not contain allegations sufficient to establish plaintiff's standing with respect to challenges to these statutes, which require the President to designate a national day of prayer, prescribe oaths of office for various positions in military and civil service, and contain miscellaneous references to God in certain other contexts, and, in any event, plaintiff has not named as defendants the relevant administering government officials as would be required for any actual, concrete challenge to these other statutes. See generally Section II supra; see also 5 U.S.C. § 702. Moreover, with respect to the oath statutes in particular, plaintiff both (1) simply misstates their effect by implying that they prohibit military or civil service by atheists, which a plain reading shows they do not, and (2) overlooks that anyone who does not want to swear an oath is free to simply make an affirmation instead. See 1 U.S.C. § 1 (throughout U.S. Code, "'oath' includes affirmation, and 'sworn' includes affirmed"); Black's Law Dictionary 59 (7th ed. 1999) ("affirmation, n. A pledge equivalent to an oath but without reference to a supreme being or to 'swearing.'").

Respectfully Submitted,

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