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**UNITED STATES DISTRICT COURT**  
**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,**

**AND**

**PACIFIC JUSTICE INSTITUTE,  
Proposed Intervenor/Defendant.**

Case No. 2:05-cv-02339-FCD-PAN

**PACIFIC JUSTICE INSTITUTE'S  
MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO  
DISMISS PURSUANT TO FRCP  
12(b)(6)**

Date: May 19, 2006  
Time: 10:00 a.m.  
Judge: Hon. Frank C. Damrell, Jr.  
Courtroom: 2

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## INTRODUCTION

Plaintiff, Michael Newdow (hereinafter “Plaintiff” or “Newdow”) filed a complaint in this Court against numerous federal officials, agencies, Congress and the United States challenging the legality of the national motto, “In God We Trust” (36 U.S.C. §302), which is inscribed on U.S. coins and currency pursuant to 31 U.S.C. §§5112(d)(1); 5114(b). The Rev. Dr. Newdow seeks to use the judicial branch to purge all traces of religion from government and thus impose a secular interpretation of the Constitution which is more French than American. *McCreary County, Ky v. American Civil Liberties Union of Ky*, 125 S.Ct. 2722, 2748 (2005) (Scalia, J. dissenting). The Pacific Justice Institute (“PJI”) files this motion to dismiss<sup>1</sup> based on the proposition that the national motto, though religious, is not sectarian and hence its appearance on money does not violate the Establishment Clause.

## SUMMARY OF THE ARGUMENT<sup>2</sup>

Dr. Newdow has failed to state a cause of action in his Complaint because use of the national motto on coins and the like does not violate the First Amendment’s Establishment Clause. First, PJI argues that the three pronged test of *Lemon v.*

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<sup>1</sup> PJI brings this motion pursuant to FRCP 12(b)(6).

<sup>2</sup> The Federal Defendants filed a motion to dismiss under FRCP 12(b)(1) and (6) which the Intervenor/Defendant, Pacific Justice Institute, has joined. For the sake

1 *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), is not applicable to the law and facts  
 2 in this controversy. Second, “In God We Trust” is not, on its face, sectarian. Third,  
 3 the motto is not sectarian because of (1) its historical ubiquity and (2) its primarily  
 4 ceremonial and/or solemnizing purpose.  
 5

## 6 **ARGUMENT**

### 7 **I. The National Motto Does Not Violate The Establishment Clause**

#### 8 **a. *Lemon* is not applicable to all Establishment Clause** 9 **Cases.**

10 In Establishment Clause cases, the Supreme Court frequently uses the three-  
 11 prong test from *Lemon*, i.e., (1) secular legislative purpose; (2) principal or primary  
 12 effect of law or conduct must be one that neither advances nor inhibits religion; and,  
 13 (3) said law or conduct must not foster excessive government entanglement with  
 14 religion. *Id.*, 612-613. It is important to recognize that in analyzing Establishment  
 15 Clause cases, the High Court has stopped short of making the *Lemon* prongs  
 16 universal.  
 17

18 Chief Justice Rehnquist wrote in *Van Orden v. Perry*, 125 S.Ct. 2854 (2005)  
 19 that “the factors identified in *Lemon* are no more than helpful signposts.” *Id.*, 2861.  
 20 For example, in addition to *Van Orden*, *Lemon* was not used in *Zelman v. Simmons-*  
 21

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22 of judicial economy, arguments raised by the Federal Defendants will not be  
 23 repeated.  
 24

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1 *Harris*, 536 U.S. 639, 718, 122 S.Ct. 2460 (2002) (upholding school voucher  
2 program); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093  
3 (2001) (holding that allowing religious school groups to use school facilities does  
4 not violate the Establishment Clause); or *Marsh v. Chambers*, 463 U.S. 783, 103  
5 S.Ct. 3330 (1983) (confirming the constitutionality of legislative prayer).  
6  
7

8 Further, although the Supreme Court has not directly ruled on the  
9 constitutionality of the national motto, in its *dicta* it has **never** scrutinized “In God  
10 We Trust” using *Lemon*’s three prongs.<sup>3</sup> It is PJI’s position that this Court should  
11 follow the Supreme Court’s lead and also resist that temptation.  
12

13 Absent consideration of rulings that do not rely on *Lemon*, Plaintiff’s radical  
14 interpretation of *Lemon* would have breathtaking implications. Cities would have to  
15 change their names because they are overtly religious, e.g., Sacramento (sacrament)  
16 or Santa Cruz (Holy Cross). An unquestioning loyalty to *Lemon* will end in  
17 draconian restrictions which will rob a predominantly religious people’s government  
18 of its historical traditions. Instead, a more nuanced approach to the Establishment  
19 Clause is appropriate.  
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25 <sup>3</sup> For a detailed discussion of the Supreme Court’s *dicta* on the motto, see, generally,  
26 pp. 4-8 of the Federal Defendants’ Motion to Dismiss. Other than the fact that PJI  
27 joins that motion, for the sake of judicial economy, PJI will not repeat those  
28 arguments.

**b. The national motto is not sectarian.**

At the outset it is important to note that Dr. Newdow and PJI are in agreement that a constitutional prohibition on government support of sectarian laws or practices is a legal maxim. A brief review of this proposition is sufficient.

The high court has made the following observations: *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in ... religion....”); *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another.”); *Watson v. Jones*, 80 U.S. 679, 728 (1871) (“The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”)

The disagreement between Dr. Newdow and PJI is whether the phrase, “In God We Trust,” is sectarian. Not surprisingly, Dr. Newdow’s position is that “In God We Trust” is a “sectarian” phrase. He asserts that “‘In God We Trust’ on the coins and currency (and as our national motto) lends that ‘power, prestige and financial support’ to the sectarian view that there exists a God.” Complaint, pg. 34, ¶184. Plaintiff paints with too broad a stroke. To the contrary, belief in God encompasses such a wide expanse of religions and philosophies that it would rob language of its meaning to assert that such a generalized concept is sectarian.

Perhaps this dispute is best resolved by observing that **none** of the Supreme Court *dicta* on the national motto has characterized “In God We Trust” as sectarian. *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03, 109 S.Ct. 3086 (1989) (O'Connor, J., concurring); and *Lynch v. Donnelly*, 465 U.S. 668, 693, 104 S.Ct. 1355 (1984) (O'Connor, J., concurring); *Wooley v. Maynard*, 430 U.S. 705, 717, n.15, 97 S.Ct. 1428 (1977), *see, also* (Rehnquist, C.J. dissenting at 722); *Engel v. Vitale*, 370 U.S. 421, 440-441, 82 S.Ct. 1261 (1962);<sup>4</sup> *School Dist. of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 304, 83 S.Ct. 1560 (1963) (Brennan, J. concurring); *Stone v. Graham*, 449 U.S. 39, 45, 101 S.Ct. 192 (1980) (Rehnquist, C.J. dissenting); *Marsh v. Chambers*, 463 U.S. 783, 818, 103 S.Ct. 3330 (1983) (Brennan, J. dissenting); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290, 322-323, 120 S.Ct. 2266 (2000) (Rehnquist, C.J. dissenting); *Van Orden v. Perry*, 125 S.Ct. 2854, 2879 (2005) (Stevens, J. dissenting); *McCreary County, Ky v. American Civil Liberties Union of Ky*, 125 S.Ct. 2722, 2749-2750 (2005) (Scalia, J. dissenting).

In addition to the Supreme Court’s having never characterized the motto as sectarian, in view of the ordinary usage of the word, it is PJI’s position that the

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<sup>4</sup> It should be noted that in Justice Douglas’ concurrence he argued for a bright line that all religious aid, including the national motto, is unconstitutional. Despite this, he does not characterize the motto as sectarian.



1 motto is not, on its face, sectarian. “Sectarian” means “adhering or confined to the  
 2 dogmatic limits of a sect or denomination; partisan; of, relating to, or characteristic  
 3 of a sect.”<sup>5</sup>  
 4

5 In contrast to the plain meaning of *sectarian*, Dr. Newdow discusses in his  
 6 Complaint how he seeks to have this word defined in the most expansive of ways  
 7 possible. In a section entitled, “IN GOD WE TRUST,” CONSTITUTIONALLY, IS  
 8 SECTARIAN (Complaint, pp. 53-56) the Plaintiff asserts that “[S]ectarianism... --  
 9 in constitutional terms – refers not only to beliefs held by any one religious sect, but  
 10 to all religious beliefs that are not universal. In other words, any belief that is not  
 11 adhered to by all is – from the point of view of the Constitution as well as the  
 12 nonadherent – a sectarian belief.” Complaint, pg. 53, ¶ 285.  
 13  
 14  
 15  
 16

17 The consequence of a court adopting such a position is sobering. It would  
 18 require that any governmental conduct, statement, or practice that relates to  
 19 “religion” must be **unanimous** to avoid unlawful sectarianism. Thus, government  
 20 would be unable to take a position on any values or attitudes unless the public is in  
 21  
 22  
 23  
 24

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25 <sup>5</sup> Dictionary.com © (<http://dictionary.reference.com/search?q=sectarian>).  
 26 Accessed March 29, 2006.  
 27  
 28

1 **total unanimity** on the issue. Otherwise, the public officials would entangle  
2 themselves in a sectarian dispute.

3  
4 But Plaintiff does not stop there. His concept of the word “religion” or  
5 “religious” is the broadest possible. “Religion” is used in a manner that does not  
6 necessarily include spirituality, i.e., “personal beliefs or values: a set of strongly-held  
7 beliefs, values, and attitudes that somebody lives by.”<sup>6</sup>

8  
9 For example, as an atheist, Dr. Newdow and those in his church insist that  
10 they are “religious.” (Complaint, pg. 1, ¶ 7; pg. 29, ¶¶ 148, 150-152). Further,  
11 Plaintiff alleges that he is an ordained minister (Complaint, pg. 1, ¶ 7) in the First  
12 Amendmist Church of True Science (“FACTS”) (Complaint, pg. 29, ¶ 151). In  
13 understanding the enormous scope of Dr. Newdow’s use of the term “religion,” it is  
14 important to recognize that FACTS does not have ten commandments but rather  
15 three “suggestions” for its members.<sup>7</sup> *Id.*

16  
17 Plaintiff’s view is so expansive that anyone who lives by a mere hand full of  
18 **suggestions** is “religious.” This is problematic because Dr. Newdow asserts that  
19 constitutionally, “sectarian refers to all *religious* beliefs that are not universal.”  
20  
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25 <sup>6</sup> Encarta Dictionary © <http://dictionary.reference.com/search?q=religion>. Accessed  
26 March 30, 2006.

27 <sup>7</sup>(1) Question, (2) Be honest, and (3) Do what’s right. Complaint, pg. 29, ¶ 151).  
28

1 Complaint, pg. 53, ¶ 285 (emphasis added). This view is fundamentally flawed  
2 because of its breadth.

3  
4 Even though “In God We Trust” is concededly a religious sentiment on its  
5 face, it is not sectarian merely because it is not a belief unanimously held by the  
6 populace. Simply put, there is no legal authority to support Plaintiff’s breathtaking  
7 proposition as to what is “sectarian.” Taken to its logical conclusion, any value-  
8 based law or conduct by a state actor, whether ceremonial or even codified in penal  
9 codes (e.g., prohibitions on larceny), would violate the Establishment Clause  
10 because such judgments are “sectarian.” In view of this, the Court should reject Dr.  
11 Newdow’s position as unworkable.

12  
13  
14 **A. Historically based conduct is not sectarian.**

15  
16 A law or conduct should not be deemed sectarian if it has an historical basis.  
17 The reason is self-evident. A nation’s history, both good and bad, is something that  
18 its citizens share in common. Because of its commonality, said history is not  
19 sectarian, even if religious.

20  
21 Plaintiff’s Complaint, as well as the Federal Defendants’ Motion to Dismiss  
22 and *amici* briefs, discuss at length the religious history of this country, particularly  
23 as it relates to the national motto. For purposes of this motion PJI will not burden  
24 the Court with more of the same. It is sufficient to note that this country was  
25  
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1 founded on religious principles and its people are now, and have always been,  
2 religious. *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679 (1952).

3  
4 Though not setting down a precise rule, the Supreme Court relied on the  
5 concept of historical background in one of its most recent Establishment Clause  
6 cases. In *Van Orden v. Perry*, 125 S.Ct. 2854, (2005), four justices penned separate  
7 opinions in a case involving a monument displaying the Ten Commandments. Chief  
8 Justice Rehnquist wrote the lead opinion in which he found the monument  
9 constitutional. The essence of the argument was that the display did not violate the  
10 Establishment Clause because of its nature and “by our Nation’s history” (*Id.*, 2861),  
11 recognizing “the role the Decalogue plays in America’s heritage.” *Id.*, 2863.

12  
13 Similarly, Justice Scalia argued that Establishment Clause jurisprudence  
14 should be in “accord with our Nation’s past and present practices.” *Id.*, 2864  
15 (Scalia, J. concurring). In like manner, Justice Thomas opined that it is permissible  
16 for the government to engage in conduct which is consistent with acknowledging the  
17 religious history of our country. *Id.*, 2865. (Thomas, J. concurring). Though using  
18 a different construct, Justice Breyer also asserted that history, in the context of a  
19 given case, should be factored into Establishment Clause analysis. *Id.*, 2870-71.  
20 (Breyer, J. concurring).

1 The forerunner of this line of reasoning probably comes from Justice  
 2 O'Connor who determined that governmental conduct which is ingrained in  
 3 "historical ubiquity" is not sectarian. *Lynch, Id.*, 693 (O'Connor, J. concurring).  
 4

5 Examples of historical ubiquity would include reciting the pledge of  
 6 allegiance (i.e., "one nation under God"), singing the national anthem (verse 4),  
 7 displaying historically based art work with religious themes in government  
 8 buildings, opening legislative sessions in prayer<sup>8</sup> and opening court sessions with  
 9 "God save the United States and this Honorable Court." Justice O'Connor explains  
 10 that these types of practices "cannot fairly be understood to convey a message of  
 11 government endorsement of religion." Moreover, "because of their history and  
 12 ubiquity, those practices are not understood as conveying government approval of  
 13 particular religious beliefs. The display of the crèche likewise serves a secular  
 14 purpose--celebration of a public holiday with traditional symbols." *Lynch, Id.*, 693  
 15 (O'Connor, J. concurring). (Emphasis added).  
 16  
 17  
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 19

20 Dr. Newdow raises two issues of protest. First, he writes: "'In God We Trust'  
 21 places the government on one side in the quintessential theological debate: Does  
 22 God exist?" Complaint, pg. 55, ¶ 292. In view of this country's origins, it is not  
 23 surprising that the government would reflect the Nation's religious history in its  
 24  
 25

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26  
 27 <sup>8</sup> Consistent with this theme, the prayer was found constitutional due to its "unique  
 28 history." *Marsh, Id.*, 790-792.

1 motto. Indeed, the initiating document (Declaration of Independence) makes  
2 numerous references to God. Because the belief in the existence of God is the  
3 historical reality of the founding of this country, it is not *per se* sectarian for the  
4 government to officially recognize something entwined in the Nation's heritage.  
5 "The truth is that *we have simply interwoven the motto so deeply into the fabric of*  
6 *our civil polity* that its present use may well not present that type of involvement  
7 which the First Amendment prohibits." *School Dist. of Abington Township, Pa. v.*  
8 *Schempp, Id.*, 304 (1963) (Brennan, J. concurring). (Emphasis added).  
9

10  
11  
12 Second, the Plaintiff takes issue with the fact that the national motto is self-  
13 evidently monotheistic. Complaint, pp. 16-17, ¶¶ 76-77. Again, this is not  
14 surprising in that this Nation's initiating document's references to the divine are  
15 always monotheistic, e.g., "We, therefore, the Representatives of the United States  
16 of America...*appealing to the Supreme Judge of the world* for the rectitude of our  
17 intentions, do,...solemnly publish and declare, That these United Colonies are, and  
18 of Right ought to be Free and Independent States...." (Declaration of Independence,  
19 emphasis added). Though there is certainly no unanimity relative to polytheism  
20 versus monotheism, the monotheistic national motto is consistent with this country's  
21 history as reflected in the Declaration of Independence.  
22  
23  
24

25 Because history is something that all citizens of a country have in common,  
26 official laws and practices which reflect a religious history pass constitutional muster  
27  
28

1 under the reasoning in *Van Orden* and *Lynch*. For this same reason, “In God We  
2 Trust” is lawful because it is not sectarian.

3  
4 **B. Ceremonial or solemnizing acts are not sectarian.**

5 Official law or conduct should not be deemed sectarian if they involve mere  
6 ceremonial or solemnizing acts. Certain “government acknowledgments of religion  
7 serve, in the only ways reasonably possible in our culture, the legitimate secular  
8 purposes of solemnizing public occasions, expressing confidence in the future, and  
9 encouraging the recognition of what is worthy of appreciation in society.” *Lynch*,  
10 *Id.*, 693 (O’Connor, J. concurring). Justice O’Connor further explained in a case  
11 familiar to the Plaintiff, as follows:

12 There are no *de minimis* violations of the Constitution--no constitutional  
13 harms so slight that the courts are obliged to ignore them. Given the  
14 values that the Establishment Clause was meant to serve, however, I  
15 believe that government can, in a discrete category of cases,  
16 acknowledge or refer to the divine without offending the Constitution.  
17 This category of “ceremonial deism” most clearly encompasses such  
18 things as the national motto (“In God We Trust”), religious references in  
19 traditional patriotic songs such as the Star-Spangled Banner, and the  
20 words with which the Marshal of this Court opens each of its sessions  
21 (“God save the United States and this honorable Court”). See *Allegheny*,  
22 *492 U.S. at 630, 109 S.Ct. 3086* (opinion of O’CONNOR, J.). These  
23 references are not minor trespasses upon the Establishment Clause to  
24 which I turn a blind eye. Instead, their history, character, and context  
25 prevent them from being constitutional violations at all. (*Elk Grove*  
26 *Unified School Dist. v. Newdow*, 542 U.S. 1, 36-37, 124 S.Ct. 2301  
27 (2004))

28 It is self-evident that ceremony and tradition go hand in hand. The  
question must be asked, how can the government engage in meaningful  
ceremony or other solemnizing acts without reference to a common heritage of

1 religion? Should it sacrifice an animal or engrave “Hail Caesar” on the  
2 penny? These may be perfectly fine ceremonial or solemnizing acts in other  
3 nations. But in this country, such acts lack the traditions based in our common  
4 historical roots to have meaning. As such, it is appropriate that “In God We  
5 Trust” is engraved on coins and a variety of government buildings given the  
6 religious history of this country. In sum, because it is primarily ceremonially  
7 based upon religious historical tradition, use of the national motto is not  
8 sectarian. *Lynch, Id.*, 693 (O’Connor, J. concurring).

### 12 CONCLUSION

13 For the foregoing reasons PJI requests that the Complaint be dismissed for  
14 failure to state a cause of action upon which relief can be provided.

17 Date: March 31, 2006.

PACIFIC JUSTICE INSTITUTE

19 By: /s/ Kevin T. Snider  
20 Kevin T. Snider  
21 Attorney for Intervenor/Defendant