Michael Newdow, in pro per
[Cal Bar #220444]
PO Box 233345
Sacramento, CA 95823
916-427-6669

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

Civil Action No. **2:05−CV−02339−FCD−PAN (JFM)**

THE REV. DR. MICHAEL A. NEWDOW, IN PRO PER;

Plaintiff,

v.

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;
THOMAS A. FERGUSON, DIRECTOR, BUREAU OF ENGRAVING AND PRINTING;

Defendants, and

PACIFIC JUSTICE INSTITUTE;

Intervenor-Defendant

PLAINTIFF'S RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS

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

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PRELIMINARY STATEMENT

The Federal Defendants begin their Motion by stating "This is neither a close case nor a difficult one." Federal Defendants' Memorandum in Support of Motion to Dismiss (hereafter "FDM") at 1:2. With this statement, Plaintiff wholeheartedly agrees. Whether the Court applies any of the Supreme Court's tests or – more importantly – adheres to the magnificent principle of religious equality that those tests are designed to uphold, deciding whether the United States government has violated the Constitution by choosing a sectarian religious phrase as the nation's motto is the easiest case in the world. The question is only whether or not the Courts will follow the Defendants' lead in seeking out excuses to justify that clear constitutional violation.

The Federal Defendants have claimed that (1) the case is controlled by binding precedent, (2) Plaintiff lacks standing, (3) the claims are barred by sovereign and legislative immunity, and (4) the federal government may espouse the sectarian, purely religious view that "In God We Trust." For continuity, Plaintiff will make his arguments within this framework.

ARGUMENT

I. THERE IS NO CONTROLLING PRECEDENT REGARDING PLAINTIFF'S RFRA CLAIM. THE ESTABLISHMENT CLAUSE PRECEDENT IS CONTROLLING, BUT MISTAKEN

A. THERE IS NO CONTROLLING PRECEDENT REGARDING PLAINTIFF'S RFRA CLAIM.

This case involves the government's choice of the phrase "In God We Trust" to be the nation's motto,[1] and its decision to place that motto on every coin and currency bill. In deciding this case, it is expected that the Court will adhere to "the canon of constitutional avoidance," and, therefore, the constitutional claims will not need to be decided. Dep't of Hous. v. Rucker, 535 U.S. 125, 134 (2002). That is because there exists a statutory basis for ruling that the laws under consideration are invalid. 42 U.S.C. § 2000bb et seq. (Religious Freedom Restoration Act (RFRA)). RFRA wasn't promulgated until 1993,[2] and the question of whether or not the use of "In God We Trust" as the motto and on the money is valid under RFRA has never been litigated in the Supreme Court or in this Circuit.

Plaintiff's Free Exercise claim is likely subsumed by the RFRA claim.

B. THE ESTABLISHMENT CLAUSE PRECEDENT IS CONTROLLING, BUT MISTAKEN

As for the Establishment Clause claim, Plaintiff agrees – as he must – that there is adverse precedent for the Court to follow in this case. Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) is directly on point. However, Aronow was decided thirty-six years ago, before any of the current Supreme Court Establishment Clause tests were introduced. Application of any of those tests would result in invalidation of the motto and an overruling of Aronow, as Plaintiff plans to argue in the Court of Appeals. Accordingly, although he expects that the Court here will likely feel compelled to follow Aronow, Plaintiff is including his contrary arguments in this Response in order to preserve his right to make those arguments before the Ninth Circuit panel.

[1] 36 U.S.C. § 302 reads, "'In God we trust' is the national motto."
[2] Pub. L. 103-141, Sec. 2, Nov. 16, 1993, 107 Stat. 1488.

(1) Aronow Was Wrongly Decided

The opinion in Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) – in which the laws placing "In God We Trust" on our coinage, currency and official documents were first challenged – indicates that the lower court (which apparently issued no published opinion) dismissed the complaint because (a) the plaintiff lacked standing, and (b) "the merits of the claim of unconstitutionality were insubstantial." Id. at 243.

The Circuit Court upheld that ruling, stating right off:

> 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. Of course this is the heart of the matter, and one would expect some discussion of substance in defending the oxymoronic-appearing notion that making "In God We Trust" our nation's official motto and placing those words on our coins and currency "has nothing whatsoever to do with the establishment of religion." This dismissive approach – where judicial fiat trumps constitutional principle – is reminiscent of another judicial ruling of similar value:

> A statute which implies merely a legal distinction between the white and colored races -- a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color -- has no tendency to destroy the legal equality of the two races.

Plessy v. Ferguson, 163 U.S. 537, 543 (1896).

Reading the Aronow opinion, it seems clear that its author did as many jurists do in Establishment Clause cases – i.e., work backward from a predetermined end, rather than to simply rely upon "the strength of those universal principles of equality and liberty [to] provide the means of resolving contradictions between principle and practice."[3]

First the Aronow Court prepared to "justify" its position by quoting Engel v. Vitale, 370 U.S. 421 (1962):

[3] Clarence Thomas, *An Afro-American Perspective: Toward a "Plain Reading" of the Constitution -- The Declaration of Independence in Constitutional Interpretation*, 1987 How L.J. 691, 702 (1987).

> 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 the unquestioned religious exercise that the State of New York has sponsored in this instance. Id. at 434 n. 21.

This passage, of course, in no way sustains the claim that "In God We Trust" on our coins and as our motto is constitutionally permissible. Reciting the words of a document of clear historical significance, having as our national anthem a song that incidentally mentions the composer's religious views, and realizing that there have been and continue to be citizens who believe in God all have nothing whatsoever to do with government taking an active role in the establishment of such a belief. Furthermore, Engel held that recitation of a daily school prayer – which one could also contend has "ceremonial character [that] bears no true resemblance to a governmental sponsorship of a religious exercise" – is unconstitutional.

The Aronow Court next wrote:

> It 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.

432 F.2d, at 243. Interestingly, the United States Mint,[4] the congressional committee that recommended the inclusion of the motto on the currency,[5] and the man responsible for getting that subcommittee to consider the matter[6] all seemed to have no problem whatsoever discerning that religious significance. Moreover, the Establishment Clause issue is not an

[4] In the Mint's Annual Report for the year 2003, for example, it was written that "United States coins … serve as reminders of the values that all Americans share … [and] are small declarations of our beliefs. They showcase how we see ourselves and our sense of sovereign identity. And they serve as ambassadors of American values and ideals. Accessed at http://www.usmint.gov/downloads/about/annual_report/2003AnnualReport.pdf on May 8, 2005.

[5] Rep. Herman P. Eberharter (PA) noted that "the American dollar travels all over the world, into every country of the world, and frequently gets behind the Iron Curtain, and if it carries this message in that way I think it would be very good. I think that is one of the most compelling reasons why we should put it on our currency." *United States Currency Inscription: Hearing on H.R. 619 and related bills, before the Committee on Banking and Currency*, 84th Cong., 1st Sess. 53 (Tuesday, May 17, 1955).

[6] Matthew H. Rothert is the man credited with getting those religious words placed on the currency. His stated purpose was to "affirm our trust in God in such a manner that it will be heard around the

individual's paying a bill or studying a document. Rather, it is the government's unwarranted placement of "In God We Trust" on the monetary instrument used to pay the bill and on the document being studied, for "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226, 250 (1990). Yet nowhere in the Aronow decision was that distinction observed or that purely governmental activity addressed.

The illogic of this "reasoning" can be readily appreciated by analogy, again using Engel. In that case, the Supreme Court ruled that beginning each school day with a prayer[7] is "a practice wholly inconsistent with the Establishment Clause." (Id. at 424). Would one really try to overturn that holding by using:

> It is not easy to discern any religious significance attendant the solving of equations in the math class of a school that started the day with a prayer to God, or the study of literature in the library of a school that will recite such a prayer the next day.

as his or her argument?

The Court then truly stood logic on its head by attempting to further bolster the proposition that "In God We Trust" is not religious by noting that President Theodore Roosevelt felt its religious significance was so great that he personally battled to keep it off the Nation's coinage. 432 F.2d, at 243. This was followed by judicial fiat: "the motto has no theological or ritualistic impact" – footnoted with a passage that says nothing of the sort.[8]

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world." *Camden Man Asks Treasury To Put Religious Motto on Bills*, Arkansas Gazette, December 6, 1953, page 10C.

[7] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Engel, at 422.

[8] The Court's footnote was comprised of a quote from Leo Pfeffer's highly-regarded book, *Church, State and Freedom*. 432 F.2d, at 244 n.2. Pfeffer's quote warned of the exact problem in which the Aronow opinion, itself, engaged, i.e., using Jefferson's references to the Almighty (in the Declaration of Independence and his Virginia Religious Freedom statute) to justify constitutional violations of the Establishment Clause. "'[S]uch reference[s'] … importance lies in their facile and frequent use to justify practices that raise substantial and practical church-state problems.'" Id. Turning individuals into "political outsiders" on the basis of religious belief is precisely such a "substantial and practical church-state problem." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."). Jefferson, it may be recalled, specifically noted that the "protection of [religious] opinion was meant to be universal." *Autobiography of Thomas Jefferson*, in Foner PS. *Basic Writings of Thomas Jefferson* (Wiley Book Co.: New York; 1944) at 437.

Continuing, the Court quoted Chief Justice Warren, who made it clear in McGowan v. Maryland, 366 U.S. 420 (1961) that legislation violates the Establishment Clause when "it can be demonstrated that its purpose – evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect – is to use the State's coercive power to aid religion." Aronow, 432 F.2d, at 244 (quoting McGowan, 366 U.S., at 453). In fact, by all three counts – on its face, by its legislative history and by its operative effect – the plaintiff in Aronow (as Plaintiff here has already done in his Complaint, and will be able to do further at trial) could easily have demonstrated that both the purpose and the effect of 36 U.S.C. § 302[9] is "to use the State's coercive power to aid religion." Yet despite its acknowledgement that this is the analysis that was required, the Aronow Court just glossed over the issue, stating simply, "As we have seen, the national motto has no such purpose." 432 F.2d, at 244.

When did "we" ever see this? How does this work – courts are entrusted with this enormous power and they figure that means they can just make up statements as they go along? The fact is that "we" were never given any showing that "the national motto has no such purpose." On the contrary, as is detailed in Plaintiff's Complaint, ¶¶ 43-131, the purpose was clearly, unequivocally and absolutely "to use the State's coercive power to aid religion." It put belief in God – a purely religious belief, denied by millions of Americans – in a governmentally-favored position that disbelief in God can never attain.

The Aronow Court ended its opinion by citing Walz v. Tax Commission, 397 U.S. 664, 669-70 (1970). One must wonder if the words were read:

> [T]he basic purpose of [the Religion Clauses] … is to insure that no religion be sponsored or favored, none commanded, and none inhibited.
>
> [W]e will not tolerate either governmentally established religion or government interference with religion.
>
> [We seek] a benevolent neutrality which will permit religious exercise to exist without sponsorship.

The Aronow panel even emphasizes a key notion that is violated by having "In God We Trust" as the national motto:

[9] As noted, 36 U.S.C. § 302 reads, "'In God we trust' is the national motto." The motto was codified at 36 U.S.C. § 186 when Aronow was decided.

> Each value judgment under the Religion Clauses must therefore 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.

As the history makes clear – and the responses of the public and our governmental officials corroborate – choosing "In God We Trust" as our national motto (and placing that phrase on the coins and currency) was unquestionably intended to establish (Christian) Monotheism as the religious belief of Americans. It has, unconstitutionally, had precisely that effect.

(2) The Court Decisions in the Challenges to the Motto which Followed Aronow Have Been No Less Flawed[10]

O'Hair v. Blumenthal, 462 F. Supp 19 (W.D. Tex.), aff'd sub nom. O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1978) (per curiam), cert. denied, 442 U.S. 930 (1979) was the second attempt to strike down "In God We Trust" as the motto and on the money. The District Court decision there was as flawed as the Ninth Circuit's in Aronow, upon which most of the decision was based. In fact, after some introductory words, including a mention of the three-prong test enunciated by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), the District Court simply stated, "That the challenged laws do not in fact run afoul of these proscriptions has in fact already been decided by the Ninth Circuit in the case of Aronow v. United States, 432 F.2d 242 (9th Cir. 1970)." The Judge then applied that opinion to Lemon's prongs, relying on no evidence whatsoever. Instead, merely by judicial decree, he claimed that constitutionality was met.

For instance, in regard to Lemon's first prong – that the law must "reflect a clearly secular purpose," 462 F. Supp, at 19 – the Court simply quoted the Aronow court (which, of course, never discussed any of the relevant history). In regard to the second prong – that the law must "have a primary effect that neither advances nor inhibits religion," id. – the analysis didn't even receive that much review: "As such it is equally clear that the use of the motto on the currency or otherwise does not have a *primary* effect of advancing religion." 462 F. Supp, at 20 (emphasis in original)). What other effect can those four words have? Could any four words have more of a religious effect?

[10] Although there is no suggestion that the decisions of other Circuits are "binding" upon this Court, Plaintiff is placing this discussion here, again for reasons of continuity.

The O'Hair Court concluded by quoting some completely inconclusive dicta from the Supreme Court.[11] Upon appeal, the decision was affirmed with no discussion. See O'Hair v. Murray, 588 F.2d 1144 (5th Cir. 1978) (per curiam). Certiorari was denied by the U.S. Supreme Court, 442 U.S. 930 (1979).

The third attempt to bring to light the unconstitutional nature of these laws was Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), cert. denied 517 U.S. 1211 (1996). There, members of the Freedom from Religion Foundation, Inc., sought declaratory and injunctive relief against the use of "In God we trust" on United States currency. The lower court began its opinion by recognizing its duty under Rule 12(b)(6) to "liberally construe all of the Plaintiff's pleadings, … accept all factual allegations as true, and … draw all reasonable inferences in favor of the Plaintiffs." Appendix 2A, at 2. Then, it did absolutely none of those things. Instead, as with O'Hair, the Court simply "applied" the three-pronged Lemon test without any analysis vis-à-vis the issues that had been raised.

Seemingly intent on disposing of the case, the Court also pulled out quotes from various Supreme Court decisions, but reviewed them with an obvious plan to rule against the Plaintiffs. For instance, Abington School District v. Schempp, 374 U.S. 203 (1963), was cited. One must wonder how the phrase "In God We Trust" can be permissibly placed on every coin and dollar bill in a manner consistent with these words of Justice Clark, Abington's author:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

374 U.S., at 226. Similarly, Lemon v. Kurtzman was cited, wherein it was stated that:

> A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

403 U.S., at 612, and

[11] The minimal value of the Supreme Court dicta allegedly upholding the use of "In God We Trust" will be discussed at pages 10-18, infra.

> The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice.

403 U.S., at 625. How can a Motion to Dismiss possibly be granted in view of such statements while "draw[ing] all reasonable inferences in favor of the Plaintiffs?" Justice O'Connor's concurrence in Lynch v. Donnelly, 465 U.S. 668 (1984), was also referenced. Surely, the history of "In God We Trust" – as provided in the Complaint in the case at bar – shows that the "government's actual purpose [wa]s to endorse … religion … [and] the practice under review in fact conveys a message of endorsement." 465 U.S., at 690 (O'Connor, J., concurring). Yet the District Court in Gaylor dismissed the lawsuit.

One would think that County of Allegheny v. ACLU, 492 U.S. 573 (1989) – also cited by the Gaylor court – would have provided extraordinarily strong support for finding the motto unconstitutional, since it was distinguished from Lynch because "[h]ere, in contrast, the creche stands alone: it is the single element of the display on the Grand Staircase." Id., at 598. Isn't Monotheism the "single element" of the motto (which has virtually infinitely greater exposure than a crèche on a staircase in Pittsburgh)? How can one read that, "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs." Id., at 597, and then not even hold a hearing on the subject? Appendix 2A, at 6.

The last case involving a challenge to the motto was decided just last year.[12] Lambeth v. Bd. of Comm'rs, 407 F.3d 266 (4th Cir. 2005). In that case, the plaintiffs were suing the local county board of commissioners for inscribing (in eighteen inch letters) the words, "In God We Trust" on the Government Center. This, of course, is always problematic for injured plaintiffs, since – due to Congress's misdeeds in the 1950s – the motto is the nation's motto. Thus, any state or municipality can always defend against a claim of religious bias (which everyone knows is really what's behind the efforts to have "In God We Trust" displayed) by simply alleging that they were motivated by a sense of "patriotism," "nationalism," and "love of country." Thus, the purpose prong of Lemon v. Kurtzman is essentially unavailable for the

[12] An earlier case – in which it appears that the plaintiffs did a very poor job in preparing – was decided against the plaintiffs in December, 2000 in Kansas. Schmidt v. Cline, 127 F. Supp. 2d 1169 (D. Kan. 2000). That District Court case – which apparently was not appealed – will not be analyzed.

Plaintiff's use.[13] Then, because the overwhelming majority of people believe in God, the overwhelming odds are that the judges will be Monotheists, either incapable of seeing (or admitting to) the religious effects, or else willing to claim that those effects are overshadowed by the "secular and patriotic connotations," 407 F.3d, at 272, that have somehow materialized out of a 100% religious phrase. As a result, it's virtually impossible to get to trial to prove the religious effects, and – like the "purpose prong" – Lemon's "effects prong" is unavailable as well. Accordingly, unless the challenge is to a federal defendant, the deck is simply too deeply stacked against any plaintiff challenging "In God We Trust".[14]

In fact, the Lambeth Court made it clear that unless a plaintiff alleges that the defendant's claim of a patriotic purpose is pretextual, the lawsuit is virtually certain to be dismissed:

> [T]he Complaint fails to allege that the Board's discussion of the phrase "In God We Trust" as the national motto was a pretext for its religious motivations, and thereby fails to allege that there was no legitimate secular purpose to the Board's approval of the display.

407 F.3d, at 270. Accordingly, largely because the plaintiffs did not make such an allegation, the Lambeth Court granted the defendant's Motion to Dismiss.

(3) All Principled Supreme Court Dicta Support Plaintiff's Claim

The Federal Defendants contend that "one constant that has emerged time and again as a point of agreement among the Justices is the constitutionality of the national motto." FDM,

[13] The Lambeth Court, in essence, demonstrated how simple it is for defendants to pass muster under Lemon's purpose prong. It even brought up Stone v. Graham, 449 U.S. 39, 41 (1980) ("The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."). 407 F.3d, at 270. Isn't the motto "undeniably [religious] text?" So how did a legislative recitation of a supposed secular purpose blind the Fourth Circuit to that fact?

[14] This reality should be reason for the courts to have heightened, not diminished, sensitivity to such claims. A key reason for the Establishment Clause is so that the majority faith does not become incorporated into government, for that "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." Madison J. Memorial and Remonstrance, The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43, The University of Chicago Press, citing The Papers of James Madison. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--). Accessed on April 13, 2006 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

at 4:25-26. That's an overstatement, to say the least. Rarely – as an aside and without a shred of briefing on the issue – a Justice has merely suggested that this might be the case. If "a constitutional **rule** announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument," Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 572 (1993) (Souter, J., concurring) (emphasis added), then a mere allusion to a practice without any discussion whatever or any delving into the facts deserves virtually no deference at all. This is especially true when twenty-eight of thirty justices have written principled statements that are completely at odds with government ever making the purely religious claim that "In God We Trust." Complaint, Appendix L. In fact, there is literally a mountain of Supreme Court dicta – based on principle – that runs contrary to the Federal Defendants' contention. Complaint, Appendix M. Thus, the real "constant … point of agreement among the Justices" is the noble one: that our nation's government shall be eternally vigilant in ensuring that all religious views – including those of Atheistic American citizens (such as Plaintiff here) – will be treated with equal respect. As Thomas Jefferson stated of his famous Virginia Bill for Establishing Religious Freedom, our federal constitution's "protection of opinion was meant to be universal."[15]

The Supreme Court dicta to which the Federal Defendants allude is nothing more than an assortment of statements in which individual justices have, at times, fallen prey to the tendency of people throughout history to "use the machinery of the State to practice [their] beliefs." Abington School District v. Schempp, 374 U.S. 203, 226 (1963). It is that tendency – which one finds among Supreme Court Justices just as it is found among others – that the Establishment Clause exists to counter.

Even with this reality, "[t]he landmarks of the Supreme Court's Establishment Clause jurisprudence over the last fifty years" are **not**, as the Defendants claim "indelibly etched with specific and repeated indications that the national motto and its inclusion on United States money comport with the Establishment Clause." FDM, at 4:21-24. In fact, the "etchings" are quite few and barely legible, and none comport with the overwhelming number of principled statements that conflict with Defendants' claim. Thus, even were it correct that a majority of the Justices might have indicated that they would rule that the motto is constitutional – which

[15] *The Writings of Thomas Jefferson*, Memorial Edition (Lipscomb and Bergh, editors) 20 Vols. (Washington, D. C.: Issued under the auspices of the Thomas Jefferson Memorial

is definitely not the case – those rare statements would find no support within any framework that the Court has applied in its Establishment Clause jurisprudence. In such situations, even when holdings are involved, the principles the Justices have enunciated are those the lower courts should follow: As Defendants, themselves, note, FDM, at 8:14-18, this circuit has made it clear that:

> 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.

United States v. Underwood. 717 F.2d 482, 486 (9th Cir. 1983), cert. denied , 465 U.S. 1036 (1984) (emphasis added). What principle – except that the Constitution can be trampled upon at will – is being followed when purely religious text, instituted for purely religious purposes, with purely religious effects, is imposed by government? The contention that the words "In God We Trust" can pass as the national motto for a country that prides itself on religious liberty is inane.

The main dictum that holds the Defendants' attention is found in Justice Blackmun's plurality opinion in County of Allegheny v. ACLU, 492 U.S. 573 (1989). There, the Justice wrote, "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," Id., at 602-03. In regard to this sentence, it first bears noting that it came as a counter to Justice Kennedy's claim that:

> It borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," 36 U.S.C. § 186, which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, 31 U.S.C. §§ 5112(d)(1), 5114(b), must have the same effect.

Thus, the Defendants' reference to Brown v. United States, 329 F.3d 664 (9th Cir.), cert. denied, 540 U.S. 878 (2003), is quite inapposite, inasmuch as that latter case specifically depended upon "dicta uniform among Justices." 329 F.3d at 681. There was clearly no uniformity among the justices on the "In God We Trust" question … in Allegheny or in any

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Association of the United States; 1903-04), 1:67.

other Supreme Court case. Furthermore, Brown highlighted that the Supreme Court dicta under consideration in that case were not made "'casually and without analysis.'" Id. at 680 (citation omitted). "Casually and without analysis" is the perfect description of the dictum of Justice Blackmun, whose "analysis" consisted merely of references to other opinions where the question was also never analyzed. The fact is that there is little evidence that any of the Justices – much less a majority – in Allegheny would have ruled that the motto is constitutional had they been briefed and seen the incredibly (Christian) Monotheistic history and current effects.

Of particular note in that case was the fact that the Court was extremely fractured.[16] Justice Blackmun may well have determined that it was necessary to "deviate from [his] personal sincere views about the law to secure the most desirable collective decision possible."[17] This is especially true since his statement was at complete odds with all of the others he'd made throughout his distinguished career – including those in Allegheny itself:

> Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."
> 492 U.S., at 590

> [T]his Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine.
> 492 U.S., at 590

[16] The description as given in Findlaw is: "BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined, post, p. 623. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined, post, p. 637. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, post, p. 646. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined, post, p. 655."

[17] "In certain contexts, a rational judge will deviate from her personal sincere views about the law to secure the most desirable collective decision possible." Caminker, Sincere and Strategic Voting Norms on Multimember Courts, 97 Mich. L. Rev. 2297, 2299 (1999.

> [A] statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect.

492 U.S., at 592

> [Endorsement] has been noted that the prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." Wallace v. Jaffree, 472 U.S., at 70. (O'CONNOR, J., concurring in judgment) (emphasis added). Accord, Texas Monthly, Inc. v. Bullock, 489 U.S., at 27, 28 (separate opinion concurring in judgment) (reaffirming that "government may not favor religious belief over disbelief" or adopt a "preference for the dissemination of religious ideas"); Edwards v. Aguillard, 482 U.S., at 593 ("preference" for particular religious beliefs constitutes an endorsement of religion); Abington School District v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion").

492 U.S., at 592

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

492 U.S., at 593-94 (citation omitted)

> [W]hen evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

492 U.S., at 597 (citation omitted)

> [W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion.

492 U.S., at 605.

> [T]he bedrock Establishment Clause principle [is] that, regardless of history, government may not demonstrate a preference for a particular faith.

492 U.S., at 605.

> Our cases, however, impose no such burden on demonstrating that the government has favored a particular sect or creed. On the contrary, we have expressly required "strict scrutiny" of practices suggesting "a denominational preference," in keeping with "`the unwavering vigilance that the Constitution requires'" against any violation of the Establishment Clause. ("[T]he myriad, subtle ways in which Establishment Clause values can be eroded" necessitates "careful judicial scrutiny" of "[g]overnment

practices that purport to celebrate or acknowledge events with religious significance"). Thus, when all is said and done, JUSTICE KENNEDY'S effort to abandon the "endorsement" inquiry in favor of his "proselytization" test seems nothing more than an attempt to lower considerably the level of scrutiny in Establishment Clause cases. We choose, however, to adhere to the vigilance the Court has managed to maintain thus far, and to the endorsement inquiry that reflects our vigilance.
492 U.S., at 608-609 (citations omitted)

[T]he Constitution mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths.
492 U.S., at 610.

It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state.
492 U.S., at 611

[O]nce the judgment has been made that a particular proclamation of Christian belief, when disseminated from a particular location on government property, has the effect of demonstrating the government's endorsement of Christian faith, then it necessarily follows that the practice must be enjoined to protect the constitutional rights of those citizens who follow some creed other than Christianity.
492 U.S., at 612

Lynch v. Donnelly confirms, and in no way repudiates, the longstanding constitutional principle that government may not engage in a practice that has the effect of promoting or endorsing religious beliefs.
492 U.S., at 621

[T]his kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.
492 U.S., at 601 (n.51)

[T]he availability or unavailability of secular alternatives is an obvious factor to be considered in deciding whether the government's use of a religious symbol amounts to an endorsement of religious faith.
492 U.S., at 618 (n.67)

In fact, when one realizes that Justice Blackmun specifically noted in Allegheny (in regard to the National Day of Prayer) that “as this practice is not before us, we express no judgment about its constitutionality,” 492 U.S., at 603 (n.52), it seems clear that his dictum about dicta cannot merit significant deference at all.

Finally, the Supreme Court has noted that courts need "the benefit of a full argument before dealing with [a] question," Ladner v. United States, 358 U.S. 169, 173 (1958), and that "[c]onstitutional rights are not defined by inferences from opinions which did not address the question at issue," Texas v. Cobb, 532 U.S. 162 (2001). It is extremely doubtful that Justice Blackmun – or any Justice, for that matter – is fully aware of the history of the passage of the Act of 1956 (as provided in the instant Complaint) or of the survey results that have been presented. Complaint, Appendix N. Certainly, that survey and that history – with its repeated demonstrations that the motto was chosen specifically for its (Christian) Monotheistic message – reveal that the phrase "In God We Trust" is completely **inconsistent** "with the proposition that government may not communicate an endorsement of religious belief."

If one is to look for dicta which are to be controlling, it would be wisest to seek those based on principles rather than political or judicial expediency. Thus, the Court might wish to consider some of the following, in contrast to what the Defendants have offered:

> Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government.

Reynolds v. U.S., 98 U.S. 145, 163 (1878) (citation omitted).

> 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 politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)

> Th[e First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers.

Everson v. Board of Education, 330 U.S. 1, 18 (1947)

> [T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.

McCollum v. Board of Education, 333 U.S. 203, 212 (1948)

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception: the prohibition is absolute.

Zorach v. Clausen, 343 U.S. 306, 312 (1952)

> We repeat and again affirm that neither a State nor the Federal Government … can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961)

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and degrade religion.

Engel v. Vitale, 370 U.S. 421, 431 (1962)

> [The Court] has consistently held that the [Establishment] clause withdrew all legislative power respecting religious belief or the expression thereof.

Abington School District v. Schempp, 374 U.S. 203, 222 (1963)

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion.

Walz v. Tax Commission, 397 U.S. 664, 669 (1970)

> The history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Lemon v. Kurtzman, 403 U.S. 602, 622-623 (1971)

> [T]he State is constitutionally compelled to assure that the state-sponsored activity is not being used for religious indoctrination.

Levitt v. Committee for Public Education, 413 U.S. 472, 480 (1973)

> [T]he core rationale underlying the Establishment Clause is preventing "a fusion of governmental and religious functions."

Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)

> For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion.

Grand Rapids School District v. Ball, 473 U.S. 373, 382 (1985)

> [T]he established principle [is] that the government must pursue a course of complete neutrality toward religion.

Wallace v. Jaffree, 472 U.S. 38, 60 (1985)

> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Lee v. Weisman, 505 U.S. 577, 589 (1992)

> To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993)

> The general principle that civil power must be exercised in a manner neutral to religion … is well grounded in our case law.

Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 704 (1994)

> [G]iving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995)

> A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.

Rosenberger v. University of Virginia, 515 U.S. 819, 839 (1995)

> As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion.

Agostini v. Felton, 521 U.S. 203, 223 (1997)

> The mechanism encourages divisiveness along religious lines … a result at odds with the Establishment Clause.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)

(4) There is Nothing Patriotic About Government Making the Purely Religious Claims that There Exists a God and that "In God We Trust"

Reciting a nation's motto is certainly "patriotic or ceremonial." FDM at 5:11. After all, a motto is "a … phrase … inscribed on something as appropriate to or indicative of its

character or use," or "a short expression of a guiding principle."[18] Thus, Plaintiff agrees that to recite the nation's "guiding principle" is patriotic and ceremonial.

This, however, does not end the analysis, in which the Supreme Court has never fully engaged. To be permissible, the "guiding principle" chosen as the motto must not violate the Constitution. "In White Superiority We Trust," "In Male Dominion We Trust," "In Jesus We Trust," and "In Protestantism We Trust" could all also – on the same "historical" basis as "In God We Trust" – have been chosen as our national motto. And then, after such a choice, they would become "patriotic." Surely that sequence of events isn't all that is required in deeming such phrases "constitutional."

Defendants' attempts to bolster their argument that the motto is "historical" and "patriotic" are exceedingly weak. Despite the admonition that "[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion," Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring), Defendants make the standard references to activities that have little, if any, relationship to the issue in the instant litigation. For instance, they refer to recitations of the Declaration of Independence and the singing of the national anthem, which the Supreme Court indicated were constitutional[19] in Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962). FDM at 5:11-17. Those approvals – with which Plaintiff, incidentally, is in agreement – are irrelevant to the case at bar.

The Declaration of Independence is a historical document, and to recite that history is no different from reciting any other history. For instance, in the Declaration it also refers to Native Americans as "savages."[20] Would Defendants argue that a motto, "One Nation taken from Native American Savages" is "patriotic" and "ceremonial? How about the Constitution, itself, with its "three fifths" clause, Article I, section 2, or its "not exceeding ten dollars for each Person" term in Article I, section 9. Would "One Nation Where Blacks Are Imported at a Maximum Duty of Ten Dollars Apiece" be justified by Engel v. Vitale because the

[18] Merriam-Webster OnLine, accessed at http://www.m-w.com/dictionary/motto on April 10, 2006.
[19] Again, with no analysis.
[20] Among the charges listed against King George III was, "He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions." Accessed on April 10, 2006 at http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html.

Constitution, too, is recited in schools? Again, the government doesn't get to enunciate whatever constitutionally-impermissible prose it chooses by turning it into the nation's motto and then simply labeling it "patriotic" or "ceremonial."

Furthermore, the Declaration of Independence – like the Star Spangled Banner – is a complex document that has myriad components. To prevent the recitation or singing of either because there is a solitary reference to some religious idea would be hostility to religion, which Plaintiff has never called for in any manner whatsoever. Especially in the national anthem, which has the religious verbiage buried in its fourth stanza,[21] the argument that such a use is comparable to a motto with only one statement – the purely religious claim that "In God We Trust" – is ludicrous.

Under our Constitution, "[t]he government may not … lend its power to one or the other side in controversies over religious … dogma." Employment Div. v. Smith, 494 U.S. 872, 877 (1990). The current motto unequivocally violates that constitutional mandate. Reciting a **valid** national motto is "patriotic" and "ceremonial." Reciting one that controverts the fundamental principles embodied in the Constitution is anything but.

(5) Alluding to Other Constitutional Violations is Not a Proper Means of Excusing the Violation in the Case at Bar

In 1954, numerous locales had laws requiring that black and white Americans use different water fountains, cafeterias, motels, theaters, railroad cars and so on. Would it not have been ridiculous for the Defendants in Brown v. Board of Education, 347 U.S. 483 (1954) to have contended that those constitutional violations justified the continued segregation in the public schools? Yet – referring to governmental practices which are precisely as unprincipled – the Defendants here attempt to make the exact same argument.

That this methodology is flawed can be seen in the very opinion Defendants first cite. Justice Douglas – in Engel v. Vitale – gave his list of "'"aids" to religion,'" Engel, 370 U.S. at 437 (Douglas, J., concurring), which were permitted in 1962. Yet "compulsory chapel at the

[21] According to a Harris interactive poll, 61% of Americans can't recite the words of the first stanza. http://www.tnap.org/factsheet.html, accessed on April 13, 2006. (That the poll involved only the first

service academies," id., was ruled unconstitutional a decade later in Anderson v. Laird, 466 F.2d 283 (D.C. Cir. 1972), and "Bible-reading in the schools of the District of Columbia," 370 U.S. at 437, was ruled unconstitutional the very next year. Abington School District v. Schempp, 374 U.S. 203 (1963). To be sure, it is getting more and more difficult to uphold the principles underlying the Religion Clauses as these violations are compounded by added transgressions of increasing duration. Madison, in fact, foresaw just this problem in his famous *Memorial and Remonstrance*:

> The free men of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it.[22]

Thus, the Supreme Court's recognition that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it," Walz v. Tax Commission, 397 U.S. 664, 678 (1970), ought to be taken to heart, especially for the "first freedom." It is time to rule that having a purely religious claim as the nation's sole motto is as unconstitutional as it is ridiculous.

(6) The Phrase "In God We Trust" is Not a Mere "Reference" or "Acknowledgement"

That the motto is a mere "reference" to or "acknowledgement" of our history is another argument which Defendants attempt to make. See, e.g., FDM, at 5:24 and 26. This is totally disingenuous. It is the nation's motto – the "guiding principle" – and it is written in a form that attributes a purely religious belief to all Americans, including those who (such as Plaintiff here) explicitly deny the religious belief which is being asserted. "[W]hen [government] acts it should do so without endorsing a particular religious belief or practice

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stanza was confirmed in an April 12, 2006, e-mail from Earl T. Hurrey, Assistant Executive Director, MENC: The National Association for Music Education, on file with Plaintiff.)

[22] Madison J. *Memorial and Remonstrance*, The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43, The University of Chicago Press, citing *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77

that all citizens do not share." Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

Referring to incidental dicta from Zorach v. Clauson, 343 U.S. 306 (1952), Defendants write that "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.'" FDM at 5:27-28. In reality, there is an enormous amount to distinguish these latter activities – which are questionable in their own right – from the one being challenged. First of all, "So help me God" is used by the individual citizen, not by the government, and it is governmental activity that is the focus of the Establishment Clause. Turning "In God We Trust" into the national motto and placing that phrase on the money is governmental activity. Additionally, "so help me God" is optional. Torcaso v. Watkins, 367 U.S. 488 (1961). There is no individual choice regarding our nation's motto … it is the one Congress decrees, and people who disagree with it are stuck.[23]

As for the use of "God save the United States and this Honorable Court" – the constitutionality of which has never been considered – there are also marked differences. For one thing, this statement is limited only to the given Court, and doesn't project its claim, stating that **we** – referring to all Americans – trust in God. Furthermore, unlike "In God We Trust" – which wasn't placed on any coin or currency until 1864,[24] and which wasn't turned into our national motto until 1956[25] – the opening of the Court stems from an "unambiguous and unbroken history of more than 200 years." Marsh v. Chambers, 463 U.S. 783, 792 (1983).[26]

(vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--). Accessed on May 28, 2005 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

[23] To be sure, if a citizen disagrees with the government over some general policy or philosophical matter, that's just too bad. But that disagreement takes on a whole different meaning when pertains to religion:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[24] See, H.R. Rep. No. 662, 84th Cong., 1st Sess. 3 (1955).

[25] Act of July 30, 1956, ch. 795, 70 Stat. 732.

[26] Of course, in view of the Supreme Court's pronouncement that "the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer." Santa Fe Independent School District v. Doe, 530 U.S. 290, 313 (2000), the continued

(7) "In God We Trust" is Unequivocally Religious

To no small degree, the Defendants rely on the notion that "In God We Trust" is not religious. This is simply nonsensical. It says we trust in **God**.

Referencing Justice Brennan's opinion in Abington, FDM at 6:5-11, for instance, Defendants gloss over the fact that the Justice's discussion is voiced entirely in the subjunctive. "[The motto] **may** not offend the [Establishment] clause … [and] its present use **may** well not present that type of involvement which the First Amendment prohibits," Abington, 374 U.S. at 303 (among others) (emphases added). This hardly suffices to permit what is otherwise an obvious constitutional violation.

Perhaps Defendants took their cue from Justice Brennan's making his comments regarding the motto under the heading, "*Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.*" If judicial notice can't be taken that the motto has purely religious meaning to the vast majority of Americans and that it is, in fact, the motto's religious meaning that fuels the Defendants' objections to Plaintiff's claims, then the Court may simply look to the materials submitted by the Intervenor Pacific Justice Institute ("PJI," which openly admits immediately that "the national motto [is] religious," PJI Memorandum at 4:14) or the *amicus curiae* Thomas More Center ("which describes itself as "dedicated to defending and promoting **the religious freedom of Christians**." Unopposed Motion by the Thomas More Law Center for Leave to File *Amicus Curiae* Brief at 2:9-10 (emphasis added)). Alternatively, the Court can look to Plaintiff's Complaint Appendix N (showing that – by a two to one margin – Americans believe the motto is religious, and that – by a nearly three to one margin – Americans believe that the motto endorses a belief in God). If these facts – along with Complaint Appendices F, G and H, and the 2003 report of the United States Mint[27] (calling the motto a "declaration[n] of our beliefs") – still do not suffice to demonstrate that

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validity of Marsh is questionable. See, also, 3 Wm. & Mary Q. 534, 558 (E. Fleet ed. 1946) (giving the words of the "Father of the Constitution" – James Madison – who wrote that "[t]he establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles."). And even if it is still valid, Marsh remains "[t]he one exception to th[e] consistent application of the Lemon test," Edwards v. Aguillard, 482 U.S. 578, 597 n.1 (1987) (Powell, J., concurring), and in "a special nook -- a narrow space tightly sealed off from otherwise applicable first amendment doctrine." Kurtz v. Baker, 829 F.2d 1133, 1147 (1987) (R.B. Ginsburg, J., dissenting).

[27] United States Mint Annual Report for the year 2003, accessed on May 8, 2005, at http://www.usmint.gov/downloads/about/annual_report/2003AnnualReport.pdf.

the motto has not lost its religious meaning, then Plaintiff will certainly be able to prove this fact at trial.

(8) Justice O'Connor's "only ways" Dictum has had Only One Proponent: Justice O'Connor

The Defendants refer also to Justice O'Connor's dictum in Lynch v. Donnelly, 465 U.S. 668, 693, stating that "government acknowledgements of religion," such as the motto, "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 all that is worthy of appreciation in society." FDM, at 6:17-22. With all due respect to Justice O'Connor, this incredibly offensive and insensitive prose highlights the myopia that even Supreme Court justices can demonstrate when matters of religion are involved. Would she tell a Jew that "acknowledgements" of Jesus Christ are "the only ways reasonably possible in our culture … of solemnizing public occasions." Would a Catholic be expected to agree that reading the King James version of the Bible is "the only way reasonably possible in our culture … of expressing confidence in the future?" To an Atheist such as Plaintiff, "acknowledging" a myth equivalent in his mind to the Easter Bunny or the Tooth Fairy ridicules and makes a mockery of any serious public occasion. Rather than expressing confidence in the future, it serves as a reminder of a loathsome past, where persecution and ignorance reigned, and where what he believes is pure nonsense was allowed to supersede common sense and reason. Encourage the recognition of all that is worthy of appreciation in society? Perhaps that is the effect for Justice O'Connor and her Monotheistic compatriots. For Newdow and his religious brethren, however, "acknowledgement" of God does nothing but denigrate what is worthy of appreciation in society, and the idea that a judicial officer in this nation can decree that her own religious view is the correct one, blinding herself to the fact that – especially in religion – there are viewpoints diametrically opposed to her own, does nothing but give further testimony to the need to scrupulously uphold the mandates of the Religion Clauses.

It might be noted that the only Justice to ever cite this passage for its essential meaning has been Justice O'Connor, herself, Elk Grove Unified Sch. Dist. v. Newdow, 542

U.S. 1, 36 (2004) (O'Connor, J., concurring); County of Allegheny v. ACLU, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 78 (1985) (O'Connor, J., concurring); and – on at least one occasion – its claims have been openly dismissed:

> It has been argued that "[these] 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." Lynch, supra, at 693 (O'CONNOR, J., concurring). I fail to see why prayer is the only way to convey these messages; appeals to patriotism, moments of silence, and any number of other approaches would be as effective, were the only purposes at issue the ones described by the Lynch concurrence. Nor is it clear to me why "encouraging the recognition of what is worthy of appreciation in society" can be characterized as a purely secular purpose, if it can be achieved only through religious prayer. No doubt prayer is "worthy of appreciation," but that is most assuredly not because it is secular. Even accepting the secular-solemnization explanation at face value, moreover, it seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.

County of Allegheny, 492 U.S. at 673-74 (Kennedy, J., concurring in part and dissenting in part).

(9) "Ceremonial Deism" – to the Extent that it Applies – is an Admission of a Religious Establishment

In their further attempts to find support for the bizarre claim that "In God We Trust" doesn't hold religious meaning, Defendants return to Justice Brennan, alluding to his introduction of the term "ceremonial deism." Lynch, 465 U.S. at 716 (Brennan, J., dissenting). There, Justice Brennan again signals that his words are anything but dispositive, prefacing his comments by stating that "I remain uncertain about these questions." Id. After that preface, he proposes that the motto – as well as the words, "under God" in the Pledge of Allegiance – might be a form a "ceremonial deism" … a term he apparently found in a book review,[28] in which the reviewer was quoting a third individual "from my memory of his spoken words, I hope correctly."[29] According to the reviewer, "ceremonial deism" applies to church-state

[28] "Sutherland, Book Review, 40 Ind.L.J. 83, 86 (1964) (quoting Dean Rostow's 1962 Meiklejohn Lecture delivered at Brown University)." Lynch, 465 U.S. 668 (1984) at note 24 (Brennan, J., dissenting).
[29] 40 Ind.L.J. 83, 86.

problems that "can be accepted as so conventional and uncontroversial as to be constitutional."[30] The fact that unrelated plaintiffs have been offended to such a degree as to have repeatedly filed lawsuits challenging the motto[31] and the Pledge[32] – as well as the public outcry and congressional activity that followed the removal of the motto from the Saint-Gaudens twenty dollar gold coin, Complaint ¶¶ 67-79, and the 2002 Pledge of Allegiance ruling by the Ninth Circuit,[33] show that these governmental acts are anything but "conventional and uncontroversial." Similarly, they have not – as Justice Brennan required for "ceremonial deism" to apply – "lost through rote repetition any significant religious content." Lynch, 465 U.S. at 716 (Brennan, J., dissenting).

Furthermore, the entire notion of "ceremonial deism" needs to be challenged. Placing a polysyllabic adjective in front of what is impermissible doesn't suddenly serve to imbue the offense with constitutionality. "Ceremonial deism" is no more constitutional than "ceremonial racism" or "ceremonial gender bias." If anything, that this infraction has become so accepted that the Defendants are willing to call it "ceremonial" appears as exceedingly strong evidence for the notion that Monotheism has already become the "established" religion of America, in no small part due to the government's use of "In God We Trust."

[30] Id.
[31] Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970); O'Hair v. Blumenthal, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978), cert. denied, 442 U.S. 930 (1979); Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996); Lambeth v. Bd. of Comm'rs, 407 F.3d 266 (4th Cir. 2005). Other cases stemming from objections to the motto have occurred as well. See, e.g., Stevens v. Summerfield, 151 F. Supp. 343 (D.D.C. 1957), aff'd 103 U.S. App. D.C. 201 (D.C. Cir. 1958) (Objection on Establishment Clause ground to motto on postage stamp).
[32] Lewis v. Allen, 159 N.Y.S.2d 807 (1957); Smith v. Denny, 280 F.Supp. 651 (1968); Sherman v. Consolidated School Board, 980 F.2d 437 (7th Cir. 1992); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).
[33] See Complaint, Appendix G.

II. PLAINTIFF HAS STANDING

A. Standing, Under RFRA, is Statutory

That Plaintiff has standing under RFRA is incontrovertible. Standing is specifically granted in the statute, under 42 U.S.C. § 2000bb-1(c)

> A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

"RFRA does apply to any 'person's' exercise of religion, 42 U.S.C. § 2000bb-1, which arguably suggests coverage of all individuals subject to the government's jurisdiction." United States v. Antoine, 318 F.3d 919, 921 n.1 (9th Cir. 2003).

B. Plaintiff has Standing to Assert His Challenges Under the First Amendment's Religion Clauses

(1) Plaintiff's Injuries are Particularized

Defendants initiate their standing discussion by citing numerous cases for the proposition that a generalized grievance does not suffice to provide Article III standing. FDM, at 15:18-16:15. This point is absolutely correct … and irrelevant. Defendants confuse the concept of a generalized grievance – in which a multitude of individuals are affected in nonspecific ways – with a particularized injury that affects many, but in a concrete way. "The fact that other citizens or groups of citizens might make the same complaint … does not lessen appellants' asserted injury." Public Citizen v. Department of Justice, 491 U.S. 440, 449-50 (1989); "[S]tanding is not to be denied simply because many people suffer the same injury." United States v. SCRAP, 412 U.S. 669, 687 (1973). Plaintiff has alleged numerous concrete, particularized, injuries that are real and actual, that stem directly from the governmental acts being challenged, and that will be redressed by a favorable decision from the Court.

Defendants' argument ignores the fact that a "generalized" act of government may have individualized effects. The whole concept of protecting "discrete and insular minorities"

United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), stems from the realization that general laws can inflict specific injuries to subsets of the population. There is nothing to suggest that those minorities can't be affected in a different manner from an act that has other, non-injurious, effects on the majority. See, e.g., Minersville School District v. Gobitis, 310 U.S. 586 (1940) and West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (where pledging allegiance to the flag – a practice engaged in by all students – was found to be a particularized injury to those who found it "offensive."). Thus, although Defendants pejoratively characterize the Plaintiff's being forced by government to confront (and carry, and have attributed to him) a religious message that he finds offensive by writing:

> 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.

FDM, at 18:9-13, the fact remains that being forced by government to suffer an indignity – such as constantly confronting an offensive religious message, attributed to all citizens – is precisely the sort of particularized harm that gives standing.

(2) Plaintiff has Standing Due to the Violation of Equal Protection

In addition to the other harms provided in the Complaint (and those additional harms that will be included in an Amended Complaint[34]), the loss of equal protection engendered by the challenged governmental acts also gives Plaintiff standing. The Establishment Clause is, in reality, the first Equal Protection Clause, applied to religion. This can be recognized by looking at what has been called "the most important document explaining the Founders'

[34] Further examples and details of the infringements will be provided in an Amended Complaint, which shall be submitted to the Court on or before May 9, 2006. (The Court's Order of February 10, 2006 (Docket #21) stated, "Any supplement to the Joint Status Report filed January 25, 2006 may be filed on or before May 9, 2006." Inasmuch as the only "supplement" anticipated in the Joint Status Report (Docket #20) was that given paragraph (d) (stating that Plaintiff was "contemplating amending his Complaint"), it is assumed that this Amended Complaint is not unexpected by the Court or the parties. In any event, Plaintiff – as of right – may amend his Complaint as planned. Fed. R. Civ. P. Rule 15(a).)

conception of religious freedom:"[35] James Madison's famous *Memorial and Remonstrance*.[36] In that document – a mere five pages in length – the concept of equality is referenced fourteen times! Why was Patrick Henry's Bill (against which Madison was remonstrating) improper? Because, said Madison "the Bill violates **that equality** which ought to be the basis of every law," because "we cannot deny **an equal freedom** to those whose minds have not yet yielded to the evidence which has convinced us," and because the Bill "degrades from **the equal rank of Citizens** all those whose opinions in Religion do not bend to those of the Legislative authority."[37] This focus on equality has not gone unnoticed by the Supreme Court. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 853 (1995) (Thomas, J. concurring) ("[S]everal of the objections expressed in Madison's Memorial and Remonstrance Against Religious Assessments … focus clearly on the bill's violation of the principle of 'equality,' or evenhandedness.").

Thus, in addition to the other particularized and concrete harms in this case, there is the violation of equal protection identical to that in any other civil rights case where equal protection has been denied. The discrimination against Plaintiff and his religious brethren – albeit not as manifest (because one can't tell an Atheist by physical appearance) – is just as real as it was for the Plaintiff Linda Brown and her racial brethren in Brown v. Board of Education, 347 U.S. 483 (1954). In fact, even during the time of Brown, when racial prejudice was far in excess of that seen today, the societal animus towards atheists exceeded that which existed towards blacks. See, e.g., Complaint Appendix F, at 6 (citing a Gallup poll showing that while 53% of the population wouldn't vote for a black candidate in 1958, a whopping 77% wouldn't vote for an Atheist.) Additionally, at least it was ostensible equality in the "separate but equal" doctrine under which the racially segregated schools of Brown existed. No one can contend that the religious views of Atheists are accorded equal respect as

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[35] McConnell M. *New Directions in Religious Liberty: "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age.* 1993 B.Y.U.L. Rev. 163, 169 (1993).
[36] The *Memorial and Remonstrance* has been cited approvingly in thirty-two separate opinions, in thirty-one separate Supreme Court cases, by fifteen separate Justices. Appendix 2C.
[37] Madison J. *Memorial and Remonstrance*, The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43, The University of Chicago Press, citing *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--). Accessed on April 14, 2006 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html (emphases added).

compared with the religious views of Monotheists in a nation that has as its motto, "In God We Trust," and which places that purely (Christian) Monotheistic dogma on thirty-seven million currency notes[38] and twenty-eight billion coins[39] every year.

While discussing Brown, it might be worthwhile to consider the extraordinarily different approach Defendant United States has taken in this civil rights case as opposed to the one from half a century ago. In that earlier case, the United States wrote:

> In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or **religion**, or color, or land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."

Brief for *amicus curiae* United States at 2, Brown v. Board of Education, 347 U.S. 483 (1954) (hereafter "US1952 Brown brief") (citing President Truman's Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2). One need not wonder long which approach to the Constitution – that which the United States took in Brown or the one it has take in the instant litigation – is the one which makes Americans proud.

The United States, in Brown, didn't end its noble prose there. On the contrary, inspiring statements pervaded its *amicus* Brief in that seminal case:

> Recognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy, even though differences of opinion may exist as to the need for particular legislative or executive action. Few Americans believe that government should pursue a *laissez-faire* policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties. Instead, there is general acceptance of an affirmative government obligation to insure respect for fundamental human rights.[40]

> The constitutional right invoked in these cases is the basic right, secured to all Americans, to equal treatment before the law. The cases at bar do not involve isolated acts of … discrimination by private individuals or groups. On the

[38] http://www.ustreas.gov/education/faq/currency/production.shtml, accessed on April 14, 2006.
[39] http://www.ustreas.gov/education/faq/coins/production.shtml, accessed on April 14, 2006.
[40] US1952 Brown brief, at 2.

> contrary, it is contended in these cases that [the government] unconstitutionally discriminate[s] against [Atheists] solely because of [religion].[41]
>
> This contention raises questions of the first importance in our society. For [religious] discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law – an indispensable condition to a civilized society – under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American*, and not as a member of a particular group classified on the basis of [religion] or some other constitutional irrelevancy. The color of a man's skin – **like his religious beliefs** or his political attachments, or the country from which he or his ancestors came to the United States – does not diminish or alter his legal status or constitutional rights. "Our Constitution is [religion-]blind, and neither knows nor tolerates classes among citizens."[42]

Interestingly, Defendant United States then, in its Brown *amicus* brief, noted that "[t]he problem of … discrimination is particularly acute in the District of Columbia, the nation's capital. This city is the window through which the world looks into our house." US1952 Brown brief, at 4. This "particularly acute" status certainly applies in as much force to the fact that the sectarian religious phrase, "In God We Trust," is our nation's motto and on each coin and currency bill, through which the billions of people who don't travel to our shores also, "loo[k] into our house." Defendant continued, quoting the President in stating that the District of Columbia, "should be a true symbol of American Freedom and democracy for our own people, and for the people of the world." Id. (citing President Truman's Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 5). Shouldn't our motto and our money be the same?

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[41] Id., at 3. [Plaintiff has obviously changed (in brackets) the references to race to those pertaining to religion, which – according to the Constitution – is treated in a like manner. "Under our Constitution distinctions sanctioned by law between citizens because of race, ancestry, color or religion 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" Bell v. Maryland, 378 U.S. 226, 288 (Goldberg, J., concurring) (citation omitted).]

[42] Id., at 3 (italicized emphasis in original; bold emphasis added). [Again, to prove his point, Plaintiff has changed (in brackets) the original racial verbiage to religious verbiage.] The quote is footnoted as: "Mr. Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 559. Regrettably, he was speaking only for himself, in dissent." And regrettably, the government is speaking for itself in this case, in complete contradistinction to its words in Brown.

Along these lines, the United States also pointed out how, for "dark-skinned foreign visitors," segregation was "of considerable embarrassment." Id., at 5. Why is it that Defendant United States shows no such consideration for Atheistic foreign visitors who are at risk of confronting the phrase "In God We Trust" virtually every time they go to make a purchase during their visits. If:

> The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.[43]

then why isn't the flaw that places – as the nation's motto – government's imprimatur upon a purely religious concept that excludes people due to their religious beliefs one that Defendant United States also seeks to remedy? "When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs." Lee v. Weisman, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring) (footnote omitted). It was certainly appropriate for the United States to acknowledge that there was a view, "that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country." US1952 Brown brief, at 7 (citing the Secretary of State's "Letter to the Attorney General, dated December 2, 1952."). Why not acknowledge that the hypocrisy is no less when – while holding itself out to the world as the model of religious freedom – it chooses for its motto (out of the virtually endless other possibilities) a phrase that is purely religious and exclusionary?

The United States also cited from the Secretary of State's Letter that:

> Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words.

Id., at 8. Where is the desire for that sincerity when the question is religious belief, rather than race?

In its Brown brief, Defendant United States made much of the issue that the "separate but equal" doctrine didn't apply because there were unchallenged "findings of inequality in those cases [that] make it unnecessary to go further in order to establish that plaintiffs'

constitutional rights have been violated." US1952 Brown brief, at 11. Is that inequality any less evident when the government claims there is a God in a nation with both theistic and Atheistic inhabitants?

Defendants might try to argue that Brown – because it involved children – is not applicable in the instant case. Besides being a claim that has no basis in the Constitution, it should be noted that Defendant United States – arguing in Brown that Plessy v. Ferguson, 163 U.S. 537 (1896) was wrongly decided – impliedly indicated the opposite (inasmuch as Homer Plessy was an adult). US1952 Brown brief, at 13-14. Moreover, it explicitly indicated the opposite as well:

> To be sure, those cases involved university graduate and professional schools, but nothing in the language or history of the Fourteenth Amendment could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other.

US1952 Brown brief, at 18-19.

The notion of equality – which seems to mean little to Defendant in the case at bar – was emphasized by the United States in Brown: "The constitutional requirement is that of equality, not merely in one sense of the word but in every sense." Id., at 17-18. Quoting Shelley v. Kraemer, 334 U.S. 1, 23 (1948), Defendant highlighted:

> Whatever else the framers sought to achieve, it **is** clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States …

US1952 Brown brief, at 22.

What is particularly noteworthy is the fact that the "history" argument proffered by the United States is precisely the one they argued against in Brown:

> "Separate but equal" is sometimes described as an "ancient" doctrine of constitutional law. But its antiquity dates not from the adoption of the Fourteenth Amendment in 1866 but from a judicial expression which did not make its appearance in the reports of this court until 1896.

US1952 Brown brief, at 22. A thirty-three year delay, then, is significant because " 'the history of the times when they were adopted, and the general objects they plainly sought to accomplish' may have become blurred by the passage of time." Id., at 22-23. Yet the

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[43] US1952 Brown brief, at 6.

"antiquity" of "In God We Trust" dates not from the adoption of the First Amendment in 1791, but from its first use on the coins in 1864, a seventy-three year delay. And its designation as the motto took place in 1956 – a delay of 155 years. One would think that a lot more "blurring" is likely to have occurred with these greater time intervals.

Perhaps most encouraging to read is the United States' agreement with Plaintiff's contention that the "power, prestige and financial support of government" really does make a (traceable) difference. See Complaint at ¶¶ 183, 184, 278, 279. Although it is argued now that Plaintiff lacks standing (see, e.g., FDM at 18:15-19 (contending that being degraded and turned into "political outsiders" isn't a significant injury); FDM at 19:9-21:1 (contending that Plaintiff's injuries aren't traceable to the government's use of "In God We Trust" as the motto and on the money); and FDM 21:2-23:6 (contending that Plaintiff's injuries wouldn't be redressed by a favorable decision)), that was hardly the United States' contention in Brown:

> Although legislation may not be able to "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual elimination of racial prejudice; or it can, on the other hand, strengthen and enhance it. As the Supreme Court of California has said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension," Even if statutes cannot in themselves remove racial antagonisms, they cannot constitutionally exacerbate such antagonisms by giving the sanction of law to what would otherwise be private acts of discrimination.

US1952 Brown brief, at 24 (citing Peres v. Sharp, 32 Cal. 2d 711, 725 (1948)). The goal, wrote the United States, is:

> "to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights." Wolf v. Colorado, 338 U.S. 25, 27. * * * "… the provisions of the Constitution … [have] significance [which] is vital not formal. …" Gompers v. United States, 233 U.S. 604, 610.
>
> In sum, the doctrine … is an unwarranted departure, based on dubious assumptions of fact combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law. The rule of *stare decisis* does not give it immunity from reexamination and rejection.

US1952 Brown brief, at 25-26.

The foregoing makes one wonder about Defendants' discussion of Justice O'Connor's "outsider" test. FDM, at 18:14-19:8. Is being branded a "political outsider" a significantly different harm than being branded "inferior," which the United States recognized as an injury in its Brown *amicus* brief:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group.

US1952 Brown brief, at 12 (citing District Court decision);

> The very fact that colored people are singled out * * * is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id., at 21 (citing Strauder v. W. Va., 100 U.S. 303, 308 (1880)).

Also puzzling is Defendants' apparent suggestion that a plaintiff can be the victim of an Establishment Clause violation, yet not have standing:

> 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." As plaintiff acknowledges, Justice O'Connor has used similar language to explain in general terms what may constitute a violation of the Establishment Clause.

FDM, at 18:14-19. This seems especially bizarre in view of the fact that at least one commentator has recognized that, under Justice O'Connor's analysis:

> A person who perceives that a law endorses a religious belief which he does not accept, and who thus feels like an "outsider," has suffered precisely the kind of injury that the establishment clause, in O'Connor's view, is designed to prevent; and he should therefore have standing to challenge the law.

Smith SD. *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich.L.Rev. 268, 300 (1987).

In any event, Defendants seem to miss the point. It is not that a plaintiff has a "generally available grievance about government." FDM, at 15:22; has an "injury to one's

feelings," Id., at 17:1; or "feels like a political outsider." Id., at 19:3. It's that the government causes those feelings on the basis of its endorsing a particular religious belief. The First Amendment – in setting aside religion as a subject different from all others – demonstrates that the Framers intended to treat that one realm of human thought and opinion differently:

> The First Amendment protects speech and religion by quite different mechanisms. … The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs, with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that, in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

Lee v. Weisman, 505 U.S. 577, 591-92 (1992) (citation omitted).

(3) Plaintiff's Injuries are Traceable to the Challenged Conduct

In regard to Defendants' contention that the injuries alleged are not sufficiently traceable to their conduct, this Circuit has made it clear that "to prove an injury in fact under Article III of the Constitution, the plaintiff need only allege an injury that is 'fairly traceable' to the wrongful conduct." Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 793 (9th Cir. 1999) (en banc). Plaintiff will again point out (as just done at page 34, supra) that Defendant United States found these same injuries traceable in Brown v. Bd. of Educ.[44] Additionally –

[44] Arguing contrary to their own claims in Brown, Defendants – in their footnote 15 (FDM, at 21:19-26) – cite to Allen v. Wright, 468 U.S. 737 (1984). This is totally misplaced, inasmuch as Allen specifically refers to the "stigmatizing injury often caused by racial discrimination [and that t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." 468 U.S., at 755(citation omitted). Plaintiff here is clearly one who is personally denied that equal treatment.

As for the contention that Plaintiff's Complaint "portrays the cause-and-effect relationship as running in the opposite direction," FDM, at 21:23-25, Plaintiff would recommend that Defendants review their history books. The whole issue of church-state melding is that the biases and prejudices of the one reinforce the biases and prejudices of the other. The Crusades, the Inquisition, the St. Bartholomew's Day Massacre, the Thirty Years War – none would have occurred had the

besides being made to feel like a "political outsider" on the basis of religious belief – it is clear that being forced to carry the (Christian) Monotheistic motto on his person, to proselytize for (Christian) Monotheism, to be forced to confront (Christian) Monotheism while engaged in numismatics, and to suffer all the other listed infringements of the Establishment and Free Exercise Clauses (individually and as a minister) are all directly traceable to the government's decision to place "In God We Trust" on the coins and currency.

(4) Plaintiff's Injuries Will be Redressed by the Appropriate Court Order

Obviously, all of the above injuries will cease once Defendants' espousal of (Christian) Monotheism is terminated.[45] Along these lines, it might be appropriate here to note that Plaintiff is agreeable to having Defendants simply change the dies and plates so that only the new coins and currency notes are (Christian) Monotheism-free, and to allow those currently in circulation to simply disappear by attrition. Although Plaintiff believes a case can be made for requiring the immediate replacement of all coins and currency in circulation, just letting the public know that the religious views of Atheists (and Buddhists, Pantheists, etc.) are being respected would go a long way towards creating the equality which Plaintiff seeks. Of course, sufficient numbers of (Christian) Monotheism-free coins and currency will be immediately required so that Plaintiff and his ministry will no longer have to countenance the extreme free-exercise burdens now present.

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governmental leaders not followed – and led – the cries of the people. Anti-Catholic bias virtually defined the founding of our nation, and it persisted until finally (with a very charismatic John Kennedy eking out a victory over Richard Nixon) "the power, prestige and financial support of government" began sending the message that Catholics aren't all that bad, after all. The results can be seen in the Gallup polls referenced in Complaint Appendix F. In 1958, after two hundred years, 22% of the population still wouldn't vote for a Catholic. Before the century was out – after President Kennedy's remarkable popularity – the number fell to 4%. (The same phenomenon occurred with Blacks when the government put an end to segregation.) Plaintiff simply wants that same "level playing field" for those not espousing (Christian) Monotheism.

[45] Defendants, in their footnote #28, FDM, at 42:17-21, speak of the "typical remedy for a viable Free Exercise or RFRA claim." Plaintiff agrees that this case is not typical – except for these governmental acts endorsing (Christian) Monotheism, government never so blatantly violates the religion clauses. That is why the remedy in this case – ending the blatant endorsement – is different from a "typical" Free Exercise or RFRA claim.

(5) Plaintiff has Taxpayer Standing

Plaintiff continues to assert a taxpayer basis for his claims. Not totally familiar with all of the processes and procedures of the Defendants, discovery is necessary to determine precisely what additional funds are spent in adding "In God We Trust" to the money as well as in preparing the various documents that contain that religious phrase. Nonetheless, it has been reasonably alleged that tax dollars – raised and distributed pursuant to Article I, section 8's taxing and spending clause – are used in furthering the religious message that "In God We Trust."

Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789 (9th Cir. 1999) (en banc) – employed by Defendants to indicate that Plaintiff does not have taxpayer standing – actually supports his claim. In Doe, as Defendants note, the plaintiff did not claim that there were specific expenditures for the challenged action. Plaintiff here does: tax money is spent for the specific act of placing "In God We Trust" on the coins and currency, and for the specific acts of placing those words on governmental documents. He intends to show that governmental agents spend specific hours on those specific tasks. That is all that Doe requires. "To establish such a challenge, a plaintiff must demonstrate that the 'activity … adds any sum whatever to the cost" of the given activity." 177 F.3d, at 793-94. Plaintiff is alleging he will demonstrate exactly that.

III. THE DEFENDANTS' CONSTITUTIONAL AND STATUTORY VIOLATIONS ARE NOT SHIELDED BY CLAIMS OF IMMUNITY

A. Sovereign Immunity Has Been Explicitly Waived in Plaintiff's RFRA Claim

After providing citations to five cases, all of which explicitly state that sovereign immunity does not exist when it is waived – United States v. Mitchell, 445 U.S. 535, 538 (1980) ("It is elementary that '[the] United States, as sovereign, is immune from suit save as it consents to be sued'") (citation omitted); Kaiser v. Blue Cross of Cal., 347 F.3d 1107, 1117 (9th Cir. 2003) ("The United States, including its agencies and its employees, can be sued only to the extent that it has expressly waived its sovereign immunity."); Lane v. Pena, 518 U.S. 187, 192 (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 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."); Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987), cert. denied, 487 U.S. 1204 (1988) ("The United States can be sued only to the extent that it has waived its sovereign immunity.") – Defendants write that "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." FDM, at 28:14-15. Inasmuch as RFRA explicitly waives immunity, Defendants' argument seems to ring quite hollow.

42 U.S.C. § 2000bb-1(c) specifically states, "A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb (b)(1) makes it clear that the statute applies to "all" relevant cases: "The purposes of this chapter are to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in **all** cases where free exercise of religion is substantially burdened." (emphasis added). 42 U.S.C. § 2000bb (b)(2) gives a second purpose: "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." "Government" is defined in 42 U.S.C. § 2000bb-2, and includes the unequivocal statement that, "the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." That Plaintiff may sue Defendants – seeking, as he

has, equitable relief – is, therefore, not in question. Webman v. Fed. Bureau of Prisons, No. 05-5031 (D.C. Cir. Decided March 28, 2006).

B. Defendants are Not Protected by Immunity in the Constitutional Claims

Although legislative and sovereign immunity are both fundamental components of our governmental framework, it must be recalled that, as James Madison stated:

> If we advert to the nature of Republican Government, we shall find that the censorial power is in the people over the Government, and not in the Government over the people.

Gravel v. United States, 408 U.S. 606, 641 (1972) (Douglas, J., dissenting) (quoting Brant, The Madison Heritage, 35 N. Y. U. L. Rev. 882, 900 (1960)). Consequently, the federal courts reign in the legislative branch's constitutional transgressions virtually every term.[46]

It should also be appreciated that Establishment Clause cases are quite unique in regard to immunity issues. Normally, Congress's extra-constitutional acts can be challenged by naming an "inferior" agency or official. With the Establishment Clause, however, the situation is quite different, since Congress can blatantly violate the Constitution without the interposition of any additional actor, merely by its declarations and/or its internal practices. As Justice Brennan noted in Marsh:

[46] See, e.g., United States v. Booker, 543 U.S. 220 (2005) (Congress's federal sentencing guidelines violated Sixth Amendment's protections for criminal defendants); McConnell v. FEC, 540 U.S. 93 (2003) (Portions of Bipartisan Campaign Reform Act held unconstitutional); United States v. Morrison, 529 U.S. 598 (2001) (Congress exceeded its authority under the Commerce Clause and Section 5 of the Fourteenth Amendment with the passage of its Violence Against Women Act); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2000) (Clause in Rescissions and Appropriations Act violated the First Amendment); Greater New Orleans Broad. Ass'n v. United States, 527 U.S. 173 (1999) (Federal broadcasting restriction violated First Amendment); Clinton v. City of New York, 524 U.S. 417 (1998) (Line Item Veto Act violated the Constitution's Presentment Clause); City of Boerne v. Flores, 521 U.S. 507 (1997) (Religious Freedom Restoration Act exceeded Congress's powers under Section 5 of the Fourteenth Amendment and unlawfully infringes on the separation of powers); United States v. National Treasury Emples. Union, 513 U.S. 454 (1995) (Congress's ban on governmental employees' acceptance of honoraria violated First Amendment); New York v. United States, 505 U.S. 144 (1992) (Radioactive Waste Policy Act violated Tenth Amendment); Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252 (1991) (Airports Act violated separation of powers doctrine); etc. In fact, the Supreme Court has felt it appropriate to declare unconstitutional laws where **both** of the other two arms of government have deemed the challenged enactment valid. See, e.g., Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

> Most of the provisions of the Bill of Rights, even if they are not generally enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of government in the society that we have shaped for ourselves in this land.

463 U.S. at 802 (Brennan, J., dissenting). Thus – unless we are to assume that when the Framers wrote that "Congress shall make no law respecting an establishment of religion" they meant for Congress to be able to make any law they wish respecting an establishment of religion – a waiver of congressional immunity must be inherent in the Establishment Clause itself.

To illustrate this, consider the prototypical Establishment Clause violation: "We, the Congress of the United States, do hereby establish Protestantism to be the official religion of the Nation." If the Establishment Clause was intended by the Framers to be effective in preventing that which it forbids, then it makes no sense to say that there is no recourse when what it forbids occurs:

> It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Marbury v. Madison, 5 U.S. at 178. This sentiment has been stated alternatively in other cases:

> [A] court's power to enjoin invasion of constitutionally protected interests derives directly from the Constitution.

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404 (1971) (Harlan, J., concurring); and

> [W]hen the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan -- the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers.

Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, C.J., dissenting). Obviously, turning the Establishment Clause into a nullity does not give that provision "the full effect intended by the Framers."

(1) Defendants are Not Protected by Speech or Debate Clause Immunity

It should first be noted that Defendants Snow, Fore and Ferguson are Executive branch employees, and, therefore, congressional Speech or Debate immunity is not applicable to them. Nor does it apply to the United States.

In considering the immunity that accrues to Congress, the statement that, "[l]egislative immunity does not, of course, bar all judicial review of legislative acts" should immediately be kept in mind. Powell v. McCormack, 395 U.S. 486, 503 (1969). Thus, although "[t]he Speech or Debate Clause has been read 'broadly to effectuate its purposes'" (Doe v. McMillan, 412 U.S. 306 (1973) (citation omitted)), its purpose is to preclude "prosecutions that directly impinge upon or threaten the legislative process" (Gravel v. United States, 408 U.S. 606, 616 (1972)), or interfere with Congress "in relation to the business before it" (Kilbourn v. Thompson, 103 U.S. 168, 204 (1881)). Performing a clearly unconstitutional act cannot, in any way, be considered part of "the legislative process" or related to "the business before" the House or Senate. Furthermore, even when the act is "clearly legislative in nature," it is only the legislators who are granted the immunity. The illicit acts are still subject to judicial review:

> In Kilbourn, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest.

Doe v. McMillan, 412 U.S. 306, 316 (1973) (note 9). Were this not the case, judicial review would be meaningless.

In any event, whether or not Congress, itself, is protected, Defendant LeFevre has no protection under Speech or Debate Clause:

> Freedom of legislative activity and the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending

> themselves. In Kilbourn and Dombrowski we thus dismissed the action against members of Congress but did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued. Similarly, though this action may be dismissed against the Congressmen **petitioners are entitled to maintain their action against House employees and to judicial review.**

Id., at 505-506 (footnote omitted) (emphasis added).

(2) Defendants are Not Protected by Sovereign Immunity

Sovereign immunity, as it relates to the Establishment Clause, must be carefully considered. To be sure, it is a rule of law that the sovereign cannot be sued without its consent:

> The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.

Nevada v. Hall, 440 U.S. 410, 414 (1979). However,

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Congress did not "mak[e] the law on which the right depends" in this case. The breach here was of a provision under the Constitution ... the same Constitution that created the Congress, itself. Thus, the logic of sovereign immunity – as it is stated in Kawananakoa – does not apply.

Finally, with respect to The United States as a defendant, Plaintiff points to 28 U.S.C. § 1346(a)(2): "The district courts shall have original jurisdiction ... of ... any ... civil action or claim against the United States, not exceeding $10,000 in amount, founded ... upon the Constitution." By its text, this is a clear waiver of sovereign immunity.

IV. PLAINTIFF'S RELIGION CLAUSE AND RFRA CLAIMS MANDATE A RULING IN HIS FAVOR

A. Defendants have Violated the Establishment Clause

Defendants properly note that "every other court to have considered the matter has upheld the constitutionality of the national motto and its inscription on coins and currency," FDM, at 29:4-6, a fact that would normally merit significant deference. However, as already demonstrated,[47] the reality is that no court has ever provided any appreciable analysis of the issues. Rather – starting nearly four decades ago in this Circuit – a deeply flawed and superficial house of cards has been built. Basic human liberties, specifically sought to be protected by the Constitution, cannot be trampled upon in so flimsy and disrespectful a manner.

(1) "In God We Trust" is not an "Acknowledgment of the Nation's Religious History and Character"

Defendants begin their analysis of the motto's alleged validity under the Establishment Clause by quoting from Abington School District v. Schempp, 374 U.S. 203, 212 (1963): "[R]eligion has been closely identified with our history and government." What they leave out, of course, are the words of the next paragraph:

> This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated … in the Federal Constitution.

Id., at 214 (citation and footnotes omitted). Defendants then go the usual route in these arguments, justifying the exclusion of Atheists today by alluding to the historical fact that our early settlers acted in the name of God. FDM, at 29 et seq. Because this is our history, they argue, it is justifiable to proclaim the message of that history today.

This argument, of course, is specious. It is not "history" which those who wish to maintain "In God We Trust" seek to uphold. It's the specific message which they use carefully-selected snippets of history to justify, that is the object of their so-called patriotism. Those same Pilgrims who signed the Mayflower Compact "for the Glory of God," FDM, at 29:20, engaged in horrific acts of persecution against those who held different religious views. Why are there no calls to have government infuse **that history** throughout our society? There was extraordinary anti-Catholic bias in every single state that sent delegates to the Philadelphia convention.[48] Why aren't these people pushing for "In Protestantism We Trust?" Myriad religious infractions were capital offenses.[49] Why not "In the Death Penalty We Trust for Those Not Attending Church?" Those mottos, also, would be faithful to our past. How about "recognizing" the history of the abuse suffered by certain sects? "In Hanging of Quakers We Trust"[50] would certainly fit the bill.

Likewise, our history is at least as full of the espousal of the wonders of Christianity as it is of the wonders of God – why not "In Jesus We Trust?" At least that one has a constitutional basis, inasmuch as the document – which is otherwise completely devoid of references to God, and which specifically excludes religious tests[51] – is signed "in the year of our Lord one thousand seven hundred and eighty seven."[52]

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[47] See at pages 3-10, supra.

[48] A typical example might be Massachusetts, where – in 1647 – Catholic priests were prohibited from entering the colony. If one did so, he would be banished, and – upon return – subject to the death penalty. *American State Papers on Freedom in Religion*. 4th Revised Edition (First Edition Compiled by William Addison Blakely, of the Chicago Bar. (1890)). (The Religious Liberty Association: Washington, D.C.; 1949), pages 32-33. See, also, generally, O'Neill JM. *Catholicism and American Freedom* (Harper & Brothers: New York; 1952), pages 3-16.

[49] In fact, the death penalty was available for a whole host of religious infractions. See, generally, *American State Papers on Freedom in Religion*. 4th Revised Edition (First Edition Compiled by William Addison Blakely, of the Chicago Bar. (1890)). (The Religious Liberty Association: Washington, D.C.; 1949). In addition to being a potential penalty for not going to church on the appointed day (p. 17), capital punishment could be imposed for blasphemy (p. 19), for idolatry, infidelity, witchcraft (p. 26), for working, traveling, participating in sports or recreation on Sunday (p. 26-27), worshipping another God (p. 31), and more.

[50] Defendants undoubtedly know of the case of Mary Dyer, hung in Boston on June 1, 1660, for refusing to accept the majority religious belief. Accessed at http://www.loc.gov/exhibits/religion/rel01-2.html on April 16, 2006.

[51] "[N]o religious test shall ever be required as a qualification to any office or public trust under the United States." United States Constitution, Article VI, cl. 3.

[52] Defendants note this phrase as well. FDM, at 30:15. What precedent will have been established when – after the courts uphold "In God We Trust" as the motto, the next Congress changes it to "In Jesus We Trust?" (Judicial notice may be taken that the only "Lord" alleged to have been born 1787

The fact is that our "history" is replete with innumerable facts and events that could be utilized in our nation's motto – some wonderful (e.g., "In Liberty We Trust" or "In Equality We Trust") and some abhorrent ("In Slavery We Trust" or "In the Subjugation of Women We Trust"). And although the democratic process permits the majority to choose the motto it desires, there are limitations set out by "the supreme law of the land."[53] One of those limitations exists in the Establishment Clause, which forbids government from "lend[ing] its power to one or the other side in controversies over religious … dogma." Employment Div. v. Smith, 494 U.S. 872, 877 (1990). Government violates that edict just as strongly when it chooses "In God We Trust" as its motto as when it chooses "In Jesus We Trust" or any other purely religious statement that makes a claim purporting to describe the religious beliefs of our diverse citizenry.

(2) Justice Douglas's Zorach Opinion Supports Plaintiff's Position, Not That of the Government

Also standard in the arguments offered by those trying to maintain this religious avowal is the allusion to Justice Douglas's sentence in Zorach v. Clauson, 343 U.S. 306, 311 (1952), that "We are a religious people whose institutions presuppose a Supreme Being." FDM, at 29:26-28.[54] Defendants even underline "whose institutions." But, in doing so, they fail to address which institutions may permissibly make that presupposition.

To suggest that Justice Douglas intended to include the institutions of government among those "institutions" referenced in his famous quotation is to not read his opinion. Throughout Zorach, Justice Douglas made it clear that government has to stay out of the religion business:

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as

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years earlier was Jesus Christ.) And what will be the explanation when the Congress after that changes it to "In Protestantism We Trust." Madison warned about this very problem: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" *Memorial and Remonstrance*, as cited as the conclusion of the majority opinion in Engel v. Vitale, 370 U.S. 421, 436 (1962).

[53] United States Constitution, Article VI, cl. 2.

[54] Defendants provide this quotation through its use in Lynch v. Donnelly, 465 U.S. 668, 675 (1984), with the "citation omitted."

> interference with the 'free exercise' of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception: the prohibition is absolute. 343 U.S., at 312.
>
> We sponsor an attitude on the part of government that shows no partiality to any one group. Id., at 313.
>
> The government must be neutral when it comes to competition between sects. Id., at 314.
>
> Government may not ...use secular institutions to force one or some religion on any person. Id.
>
> Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State." Id.

Thus, it can be readily seen that the use of the "We are a religious people …" quote in the manner it seems to always be used is truly disingenuous. In fact, Justice Douglas – apparently disturbed by repeated citations to his words without understanding his meaning – made this especially clear a decade later in McGowan v. Maryland, 366 U.S. 420, 563 (1961). It is true, he wrote – **dissenting** in McGowan – that "[w]e are a religious people whose institutions presuppose a Supreme Being." However, he continued:

> [I]f a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, **not by the Government**. This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others.

Id. (italicized emphasis in original; bold emphasis added). Additionally, this statement from Justice Douglas's Zorach opinion – which is probably more on-point than any other – ought to be kept in mind: "Government may not ...use secular institutions to force one or some religion on any person." Zorach v. Clausen, 343 U.S. 306, 314 (1952).

(3) Intervenor and Amici Highlight the Problems

As if to demonstrate to the Court how the opinions of past statesmen can be twisted to serve whatever end one desires, Intervenor Pacific Justice Institute (hereafter "PJI") and *amicus curiae* Thomas More Law Center (hereafter "TMLC") – like Defendants (and a multitude of others before them) – also include Justice Douglas's quote without disclosing the

information just presented. PJIMemo, at 11:21-12:2; BriefTMLC, at 8:4-6. *Amicus curiae* American Center for Law and Justice (hereafter "ACLJ") does include some of Justice Douglas's additional prose, but only so that the line, "*That would be preferring those who believe in no religion over those who do believe*." can be highlighted. BriefACLJ, at 7:21-22. This brings up another markedly erroneous and misleading argument, as more of Justice Douglas's words are misconstrued..

> The entire passage, as provided by the ACLJ, is the following:
>
> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. *That would be preferring those who believe in no religion over those who do believe*.

BriefACLJ, at 7:16-22, citing Zorach, 343 U.S., at 313-14 (emphasis added by *amicus* ACLJ). That line, of course, has nothing to do with what Plaintiff is seeking. Rather, it follows the ludicrous argument made over and over by those who are inured and accustomed to the fact that their (Christian) Monotheism has been established in this nation. Such individuals and groups are unable to comprehend that ending favoritism for one faction is not the same as favoring another. *Amicus* TMLC shows this inability in its brief, writing:

> Failing to continue that recognition and respect for the impact of religious belief on our government will have consequences far beyond simple neutrality (or even hostility) toward religion. Rather, it will effectively impose an official atheism on an essentially religious people.

BriefTMLC, at 8:6-9. That's odd. For 167 years the nation didn't have "In God We Trust" as the national motto, and no one ever suggested that "an official atheism" was being imposed. How can it be imposing an official atheism now to return to that previous neutral state?

To show how inane is this argument, one can consider the current motto: "In God We Trust." Would anyone say that it is imposing "an official Judaism" on the land? Obviously

not. But imagine Congress – emboldened by the judiciary's upholding of the current motto – taking the next obvious step in a year or two, and voting to make "In Jesus We Trust" the national motto. Will the TMLC be arguing fifty years later – when the Jews get tired of the established Christianity – that returning the motto to "In God We Trust" is "imposing an official Judaism?" That's the argument they're making here.

Under TMLC's construct, an Establishment Clause violation can never be remedied, for it will always be "imposing" the view of those who were previously ignored. "A prime part of the history of our Constitution … is the story of the extension of constitutional rights and protections to people once ignored or excluded." United States v. Va., 518 U.S. 515, 557 (1996). What is being "imposed" is the neutrality that the Constitution demands. No one is asking for a motto that says, "We Deny God's Existence," for that would violate constitutional principles just as much as the current motto does now. Whatever religious group is favored by government, history teaches that the result is always the same. Thus, it isn't that Atheism leads to totalitarianism, as suggested by *amicus* TMLC, as it openly exposes its vile and offensive prejudice:

> The amicus curiae submits that it is not a coincidence that the societies that have officially eschewed God and embraced atheism (for example, the Soviet Union and its Eastern European satellite nations, the People's Republic of China, North Korea, and Cuba) have been among the most totalitarian and oppressive in the modern history of the world.

BriefTMLC, at 8:13-17. (Have they really never heard of the Crusades? The Inquisitions? The Taliban?) It's that societies where government "lend[s] its power to one or the other side in controversies over religious … dogma," Employment Div. v. Smith, 494 U.S. 872, 877 (1990), are fertile grounds for totalitarianism.

In fact, one needs go no further than this case to see the cunabula of the process that leads to Crusades and other religious despotisms. The lessons Madison sought to teach in his famous *Memorial and Remonstrance*:

> Distant as it may be in its present form from the Inquisition, it differs from it only in degree. The one is the first step, the other the last in the career of intolerance; and

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of Citizens,[55]

should be kept in mind as the Court examines the naked arrogance exhibited in some of what has been submitted. TMLC, for example, repeatedly speaks of our "God-given freedom" and "God-given rights" in ways that completely ignore that Atheists such as Plaintiff even exist:

> Unlike the citizens of most other nations, Americans are not a people because we simply share a common tract of land or a language or a bloodline. Rather, we are a people because we subscribe to a central, unifying idea, a principle, a creed—our God-given rights, including, most essentially, our liberty.

BriefTMLC, at 4:3-7. That's precisely how it all begins. These people don't even consider those with different religious beliefs as belonging to the nation. This is what governmental proclamations such as "In God We Trust" breeds. And TLMC doesn't even see that as it admits to the very fact:

> The phrase "In God We Trust" serves to remind us, as citizens, of our own gift of freedom, as well as the foundation of our nation and of our government in that God-given freedom.

BriefTMLC, at 4:11-13. Even as they, themselves, participate in this lawsuit, where they are opposing someone who is crying out because he's been turned into an outsider, TMLC – demonstrating the degree to which myopia can build in religious affairs – writes:

> The movement to divorce all public reference to God, including our historic religious heritage, is dangerous because it has the effect of undermining our nation's unifying principle, belief in our God-given freedom.

BriefTMLC, at 7:5-8. "[O]ur nation's unifying principle?" It's truly extraordinary. Well, at least TMLC – unlike so many others – is honest in admitting that the motto isn't merely a "reference" to our "history:"

> Certainly the phrase "In God We Trust" has religious connotations as it acknowledges the existence of a Supreme Being.

BriefTMLC, at 6:20-22. See, also, BriefTMLC, at 9:6-10 (claiming that the notion that our liberties come from God "must be continually reasserted and reaffirmed in the minds of the

[55] Madison J. *Memorial and Remonstrance*, The Founders' Constitution, Volume 5, Amendment I (Religion), Document 43, The University of Chicago Press, citing *The Papers of James Madison*. Edited by William T. Hutchinson et al. Chicago and London: University of Chicago Press, 1962--77 (vols. 1--10); Charlottesville: University Press of Virginia, 1977--(vols. 11--). Accessed on April 17, 2006 at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

American citizenry. Our national motto is one method by which we accomplish this noble purpose."). Perhaps, in view of the foregoing, if those at the TMLC would read the Establishment Clause without removing the words, "respecting an," and adding the article, "a," they would understand the error of their contention that "[t]he phrase 'In God We Trust' poses no danger of establishing a state religion." BriefTMLC, at 7:1-2.

The history of the world – of which the Framers were acutely aware – is filled with episodes of horrors that began with small steps. In pondering the effects of "In God WE Trust" as our motto and on our money, it would be wise to bear in mind that, "the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings." West Virginia Board of Education v. Barnette, 319 U.S. 624, 641 (1943).

Amicus PJI adds some interesting notions, too. For instance, they suggest that "the government [cannot] engage in meaningful ceremony or other solemnizing acts without reference to a common heritage of religion. BriefPJI, at 15:25-16:1. This is a reflection of Justice O'Connor's "only ways" claim from Lynch, discussed at pages 24-25, supra. The comments there won't be repeated here. Suffice it to say that there are innumerable "ceremonies" and "solemnizing acts" that don't reference God, that take place day in and day out in venues all across this nation. This claim is nothing but further evidence of the arrogance and blindness that so frequently arises in religious affairs.[56]

Another aspect of the PJI Memorandum that deserves mention is its multiple references to the "historical ubiquity" of acknowledgments of God. In fact, all of the briefs and memoranda cite this. Plaintiff understands that what is going on in society can shed some light on the Constitution's meaning, but he would point out that – as these parties continually reference these countless items – they rarely seem to look at the document under consideration. The original Constitution – with its limitation to "enumerated powers" has "not a shadow" of verbiage giving power to the government to take religious positions. And, in the Bill of Rights, there are only restrictions placed on the government. Why – if all these men were so gung-ho on having references to God appear in the midst of our government that they would want "In God We Trust" as our nation's motto – didn't they put such a reference in the document the created? They certainly had enough templates around … including the

[56] PJI's brazen statement that, "[t]hese may be perfectly fine ceremonial or solemnizing acts in other nations. But in this country, …" PJIMemo, at 16:2-4, can stand (or fall) on its own.

Constitution of Pennsylvania, the state wherein they were meeting. That Constitution required its legislators to take an oath that began, "I do believe in one God, the creator and governor of the universe."[57] Why didn't they use that, instead of the completely opposite "no religious test shall ever be required as a qualification to any office or public trust under the United States?" United States Constitution, Article VI, cl. 3.

Lastly, in regard to the PJI Memorandum, is the argument regarding sectarianism. PJI asserts:

> [B]elief 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.

PJIM 7:24-27. Complaint Appendix J:1, citing the United States Census Bureau data, reveals that approximately 77% of the population is Christian. Although reliable data are difficult to find,[58] it is likely that the percentage of Monotheists is somewhere around 93%. Is there really a difference constitutionally between an "expanse of religions" that embraces 77% of the population as opposed to 93% of the population? The pie charts in Complaint Appendix K make it clear that people are excluded and turned into outsiders in either case. Semantics shouldn't determine fundamental constitutional rights. There's a principle here, and the principle is to not divide or exclude people based on religious belief. The constitutional definition of a sect must be any group of individuals united by any common religious belief.

If that weren't the proper definition, then there would be a conundrum. Christianity is surely a "sect" under the PJI's definition. But what about "Protestantism." Like "Monotheism, that's not a "sect" under normal terminology, either. If a "sect," constitutionally, is to have the same meaning as the colloquial term, then beliefs limited to Protestantism – a subset of Christianity – would not be sectarian, while beliefs of the larger set – Christianity – would be sectarian. Obviously, that cannot be the case.

Finally, there is the *amicus* brief of the ACLJ. The most extraordinary assertion there is the one stating:

> One fundamental flaw in Plaintiff's understanding of the Establishment Clause is that he appears to conflate religious exercises and patriotic exercises.

[57] Accessed on April 17, 2006, at http://www.yale.edu/lawweb/avalon/states/pa08.htm.
[58] The breakdown by the Census bureau is inadequate to make the determination.

BriefACLJ, at 8:3-5. It is Plaintiff who keeps emphasizing that putting religious notions into patriotic venues conflates the two. "In God We Trust" becomes no more "patriotic" set in the motto than it would be "arithmetical" set in a multiplication table. "Two times two, in God we trust, equals four," could easily become the norm in our society were government to place its "power, prestige and financial support," in our mathematics classes. Engel v. Vitale, 370 U.S. 421, 431 (1962). One doubts that such a situation would improve math achievement test resluts.

Nor would making a motto out of the anti-Catholicism, slavery, subjugation of women, or any other "historical" fact turn those notions "patriotic" just because they had been placed in that setting. The relevant "history" of our nation pertain to the principles – such as "equality" – that are enshrined in the Constitution. Ideas that are completely contrary to such principles have no place as the nation's motto (i.e., it's "guiding principle").

One other point in the ACLJ brief that Plaintiff will address is the reference to the "mere shadow" quote of Justice Goldberg in Abington School District v. Schempp, 374 U.S. 203, 308 (1963)(Goldberg, J., concurring). BriefACLJ, at 8:17-21. First of all, Justice Goldberg, we can assume, did not have a thorough knowledge of the history of the "In God We Trust" phrase. Second, Abington was decided in 1963, when the nation was still in the throes of the "atheistic commie" mentality, so it's unlikely that Justice Goldberg had much contact with atheists, either. Accordingly, he likely had little idea of the effects that the pervasive (Christian) Monotheism might have had on the lives of non-believers. Perhaps most importantly, do we really want judges and justices determining how much of a harm a religious minority feels. The fact is that "In God We Trust" is purely religious, is meant to be purely religions, and is interpreted by almost all as being purely religious. To have our judicial officers telling individuals – in a milieu where people claim that someone rose from the dead two thousand years ago, or that rivers parted, or that the entire earth was covered by water, or whatever – how much harm they are experiencing when the government acts in ways clearly contrary to the principles of equality and liberty is misguided at best.

Finally, in regard to Justice Godlberg's statement that the danger is "mere shadow," it must be appreciated that the Justice never had the opportunity to read the TMLC *amicus* brief in this case.

(4) Our History is One of Equality and Religious Liberty

Each of the standard arguments given by Defendants can be countered. Yes, Congress "adopted a policy of selecting a paid chaplain to open each session of Congress with prayer." FDM, at 30:17-18. But the "Father of the Constitution" wrote that "The establishment of the chaplainship to Congs is a palpable violation of equal rights, as well as of Constitutional principles." 3 Wm. & Mary Q. 534, 558 (E. Fleet ed. 1946). And, besides, "like other politicians, [the Framers] could raise constitutional ideals one day and turn their backs on them the next." Lee v. Weisman, 505 U.S. 577, 626 (1992) (Souter, J., concurring). Yes, Washington "proclaim[ed] 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.'" FDM, at 30:24-26 (citation omitted). George Washington also used to shuffle his black slaves out of Philadelphia during his second term of office so that they wouldn't acquire residency status and have a claim to freedom.[59] Why – if it's "history" that is the point – don't we hear calls for that being espoused? In any event Washington was revered, and could have gotten away with just about anything. When John Adams, however, tried a similar move in 1798 – declaring a day of National Fasting and Prayer[60] (which began, "AS the safety and prosperity of nations ultimately and essentially depend on the protection and blessing of Almighty God; and the national acknowledgment of this truth is … an indispensable duty which the people owe to Him") – the results were disastrous. As he wrote:

> The national fast recommended by me turned me out of office. ... This principle is at the bottom of the unpopularity of national fasts and thanksgivings. Nothing is more dreaded than the national government meddling with religion.[61]

Thus, Adams became the only one of the first five presidents to fail in his bid for a second term of office.

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[59] Accessed at http://www.ushistory.org/presidentshouse/history/briefhistory.htm on April 16, 2006.
[60] Accessed at http://www.wallbuilders.com/resources/search/detail.php?ResourceID=112 on April 15, 2006.
[61] Letter of John Adams to Benjamin Rush, June 12, 1812, as cited in *The Spur of Fame*. Schutz JA and Adair D, eds. (The Huntington Library: San Marino, CA; 1966), at 224.

As one reads Defendants' myriad examples of politicians expressing their (Christian) Monotheistic beliefs and engaging in (Christian) Monotheistic activities, it should be noted that they keep looking everywhere except at the words of the Constitution, and that they especially avoid the Establishment Clause. As noted in the Complaint, ¶¶ 14-28,[62] the Constitution – unlike virtually every other document of its day – does **not** reference Almighty God. Thus, Defendants strain to make relatively inconsequential verbiage – such as the formalistic "year of our Lord" dating, or the "Sundays excepted" phrase – into determinative findings. These are trivialities, that have no bearing on the "freedom of conscience" that was so integral to the document.

The most one can say in regard to Defendants' arguments is that "the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition." Abington School District v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring). Thus, it is the underlying principles that ought to guide the Court. And the principle of equality – and equal respect for all religious views – is clearly the one the Framers had in mind. Again, the words of Justice Thomas ought to be heeded:

> [T]he strength of those universal principles of equality and liberty provide the means of resolving contradictions between principle and practice."[63]

What principle are Defendants seeking to uphold?

(5) Defendants Have Already Established Monotheism as the National Religion

Imagine if Congress were to pass the following law: "We hereby declare that Protestantism is the official established religion of the United States of America." Such a law – which would be no less true to our "history" than is the Act of 1956[64] - would clearly violate the Establishment Clause. This would be the case even if there were no coercion to follow Protestant beliefs or any tax dollars used for Protestant purposes. What, then, would be the harm?

[62] Some further evidence will be provided in the Amended Complaint.
[63] See at footnote 3, supra.
[64] See Complaint, at ¶¶ 130-31.

The harm would be precisely that which Madison enunciated in his *Memorial and Remonstrance* – namely, that such a law "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority."[65] In other words, it "sends a message to nonadherents that they are outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Certainly, there is no other harm that accrues, and it wouldn't be reasonable to interpret the Constitution as forbidding a law that causes no harm.

In fact, this was precisely what existed in the colonial days. Even without the myriad constitutional and statutory provisions denying to "Papists" the right to hold office or testify or even have "the free exercise of their religion,"[66] they were second-class citizens for much of our founding history. Thus, the colonists could well have written, "In Protestantism We Trust," and had a Pledge of Allegiance to "one Nation under Protestantism, etc. … all to distinguish themselves, of course, from those "papist Frenchmen" whom they despised. Would that law – then or now – be "patriotic?"

What exists in the United States today is, essentially, the equivalent of Congress having passed a law that states, "We hereby declare that Monotheism is the official established religion of the United States of America." And – to the extent that one might argue that "Monotheism" isn't generally considered "a religion" – it should be recalled that the Establishment Clause doesn't forbid only laws that establish "a religion." In fact, it doesn't even require an establishment. What it prohibits are laws "respecting an establishment," and it's of "religion" generally, not "a religion." The article, "a," was considered and rejected during the deliberations over the Bill of Rights.[67]

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[65] See at page 29, supra, discussing Madison's *Memorial and Remonstrance.*

[66] As a not atypical example of the rampant anti-Catholicism that existed throughout the colonies, Georgia's Charter of 1732 can be gleaned: "there shall be a liberty of conscience allowed in the worship of God, to all persons inhabiting, or which shall inhabit or be resident within our said provinces and that all such persons, **except papists**, shall have a free exercise of their religion." Accessed at http://www.yale.edu/lawweb/avalon/states/ga01.htm on April 17, 2006.

[67] For an excellent discussion of the sequence of proposals that led to the ultimate wording of the Religion Clauses, see Lee v. Weisman, 505 U.S. 577, 612-15 (1992) (Souter, J., concurring) ("What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of 'a religion,' 'a national religion,' 'one religious sect,' or specific 'articles of faith.' The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general." At 614-15 (footnote omitted)).

Furthermore, "Protestantism" isn't "a religion," either. Rather, like "Monotheism," it is an approach to religious belief that has adherents and non-adherents, and, thus, is subject to engendering the divisiveness and conflict that occurs whenever government "lend[s] its power to one or the other side in controversies over religious … dogma." Employment Div. v. Smith, 494 U.S. 872, 877 (1990). In other words, recognizing that "our use of the history of [the Framers'] time must limit itself to broad purposes, not specific practices," Abington School District v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring), an establishment of Monotheism is no different from an establishment of any other religious ideology.

Thus – with the foregoing in mind – it is instructive to consider Defendants' claims that "any notion that the "In God We Trust" motto "pose[s] a real danger of establishment of a state church is far-fetched indeed." FDM, at 33:19-20 (citation omitted). Unless one is "to impose a crabbed reading of the Clause on the country," Lynch v. Donnelly, 465 U.S. 668, 687 (1984), and contend that a "church" is limited only to specific, organized groups of individuals (rather than groups of individuals who simply hold the same sectarian religious beliefs), then the danger is not only real … it has already occurred. Especially when one adds the myriad other governmental endorsements of (Christian) monotheistic belief – such as each house of Congress starting every session with a prayer to God;[68] the Chief Justice of the Supreme Court altering the constitutionally-prescribed oath of office to include homage to God at every Presidential inauguration;[69] each president invoking God's name in his inaugural address;[70] each inauguration having (Christian) ministers leading all in prayers to God;[71] Congress directing the President to "issue each year a proclamation designating … a National

[68] "During the past two hundred and seven years, all sessions of the Senate have been opened with prayer, strongly affirming the Senate's faith in God as Sovereign Lord of our Nation." (http://www.senate.gov/reference/office/chaplain.htm); "The formal prayer before each legislative session … calls forth a nation to stand with its leaders and say in unison: 'In God we Trust.'" (http://chaplain.house.gov/index.php).

[69] See, e.g., 151 Cong. Rec. S103 (Jan. 20, 2005).

[70] See, e.g., 151 Cong. Rec. S104 (Jan. 20, 2005) (Second inaugural address of George W. Bush, ending with "May God bless you, and may He watch over the United States of America.").
100 Cong. Rec. 2, 1700 (Feb. 12, 1954) (Statement of Rep. Louis C. Rabaut, sponsor of the House resolution to insert the words "under God" into the previously secular Pledge of Allegiance)

[71] See, e.g., 151 Cong. Rec. S102 (Jan. 20, 2005) (Prayer of Rev. Dr. Luis Leon, beginning, "Most gracious and eternal God," and ending, "All this we ask in Your most holy name. Amen."); 151 Cong. Rec. S104-05 (Jan. 20, 2005) (Prayer of Pastor KirbyJon Caldwell, beginning, "O Lord God Almighty, the supply and supplier of faith and freedom," and ending, "I humbly submit this prayer in the name of Jesus Christ. Amen.").

Day of Prayer on which the people of the United States may turn to God …;"[72] the Supreme Court starting its proceedings with "God save the United States and this Honorable Court;"[73] having Thanksgiving and Christmas (honoring God and Jesus, respectively) as national holidays;[74] having avowals of faith in God in virtually every state constitution;[75] and having the nation's sole Pledge of Allegiance needlessly interlarded with the words "under God"[76] – it would take an extreme dose of denial to allege that Monotheism isn't already "established" in this land of so-called religious liberty. To deny that "In God We Trust" as our national motto[77] and that the engraving of those religious words on every coin[78] and on all currency[79] doesn't further cement this establishment is to truly be guided by one's desired conclusion.

Yet Defendants do just that. They provide most of this litany of Monotheistic endorsements, FDM, at 33:23-34:8, and then say, "See! There's no establishment here." What, then, does it take? If all agree that the Free Exercise Clause protects individuals from forced participation in religious activity, then why have an Establishment Clause at all?

"We interpret statutes so as to avoid making any phrase meaningless or unnecessary" United States v. Hovsepian, 359 F.3d 1144, 1160 (9th Cir. 2004) (en banc). Accordingly, the Establishment Clause must be there for some reason. We never hear from Defendants what that is. What other harm is there except the government advocating for a given religious view and turning people into "outsiders" and second-class citizens? To be sure, financial support is a form of "establishment," but – if that were all the Framers intended – they surely would have used verbiage simply forbidding financial support.

In any event, when Congress proclaimed that "In God We Trust," it might just as well have passed a law stating, "We hereby declare that Monotheism[80] is the official established religion of the United States of America."

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[72] 36 U.S.C. § 119.
[73] 1 C. Warren, The Supreme Court in United States History 469 (1922).
[74] 5 U.S.C. § 6103(a).
[75] *Br. for the United States*, at 33 (referencing its App. B).
[76] Act of June 14, 1954, Pub. L. No. 396, 68 Stat. 249 (now codified as 4 U.S.C. § 4).
[77] 36 U.S.C. § 302.
[78] 31 U.S.C. § 5112(d)(1).
[79] 31 U.S.C. § 5114(b).
[80] Or Protestantism, or anything other religious ideology that is exclusionary.

(6) The Proper Focus of Inquiry is the Individual, Not the Government Nor the Majority

> The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) At 894.

> [T]he speaker and the audience, not the government, assess the value of the information presented.

Thompson v. W. States Med. Ctr., 535 U.S. 357, 367 (2002)

Defendants would have the Court accept that in this nation – where just over a third of the population can even recite the words of the first stanza of the national anthem,[81] and seniors at the nation's "top 55 liberal arts colleges and research universities" do worse than chance in answering questions about basic American history[82] – it is the public's concern for an "acknowledgement" of the role of religion in our history that is behind the outcries against attempts to restore the Pledge of Allegiance to its original secular state, or to remove the purely religious phrase, "In God We Trust," from the coins and currency. FDM, at 32:2-35:4. Plaintiff stands by his original characterization of that claim – it's "bogus" – and will be more than happy to prove this point at trial if that is really necessary. Meanwhile, he would respectfully point out that the Court is required to "accept [the allegations in the Complaint] as true and construe [them] in the light most favorable to the plaintiff." Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). Plaintiff alleges that the phrase "In God We Trust" is not a mere "acknowledgment" or "reference" or anything other than a purely religious statement, intended to be a purely religious statement, and accepted as a purely religious statement by

[81] See footnote 21, supra. This is the case even though it's been sung in public schools since it was codified 75 years ago, Mar. 3, 1931, ch. 436, 46 Stat. 1508, it's sung before virtually every baseball game, is played repeatedly during the Olympics, etc.

[82] Losing America's Memory: Historical Illiteracy in the 21st Century. American Council of Trustees and Alumni (ACTA) (Feb. 16, 2000). 99% of the respondents knew Beavis and Butthead are cartoon characters, (page 2), and 98% knew Snoop Doggy Dogg (page 5), but only 23% knew that James Madison was the "Father of the Constitution (page 6), and 22% knew that "Government of the people, by the people, for the people" came from the Gettysburg Address (page 6). It should be noted that this was a multiple choice test with four answers per question. Thus, random chance should have ended up with a 25% success rate per question. Again, these were seniors of the most elite colleges and universities!

everyone except politicians, attorneys and others seeking to impose their religious beliefs on the rest of society.

Of course, this entire discussion assumes that the government's or the public's interpretation is the one that is of importance. Perhaps this is appropriate when the issue is something that is not inherently religious, such as the pre-1954 Pledge of Allegiance.[83] See, e.g., West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (decided on Free Speech grounds, although brought as a Free Exercise case). But see, Gobitis v. Minersville School Dist., 24 F. Supp. 271, 274 (1938), rev'd by 310 U.S. 586 (1940), overruled by West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) ("[I]t is not for this court to say that since the act has no religious significance to us it can have no such significance to them."). But for the government to tell citizens that their interpretation of purely religious words is **not** religious is completely backward. "The Government's argument gives insufficient recognition to the real conflict of conscience. … The essence of the Government's position is that … it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples. … This turns conventional First Amendment analysis on its head." Lee v. Weisman, 505 U.S. 577, 596 (1992) (wording pertaining to youth and ceremony removed).

(7) The Motto Fails Every Establishment Clause Test

Usually, determining which of the Supreme Court's many tests is the proper one to use is a key issue in Establishment Clause jurisprudence. In this case, applying any test shows that Plaintiff should prevail.

Plaintiff has already detailed the history of "In God We Trust" on the money and as the motto. Inasmuch as all the legislative activity took place at least fifteen years before the test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), they weren't aware that they shouldn't speak honestly. Thus, they made it clear that "In God We Trust" was chosen

[83] Prior to 1954, the Pledge of Allegiance was purely secular. In 1954, Congress added the two purely religious words, "under God." "Section 7 of [the Act of June 22, 1942] contains the pledge of allegiance to the flag; and it is the purpose of this proposed legislation to amend that pledge by adding the words 'under God' so as to make it read, in appropriate part, 'one Nation under God, indivisible,'." H.R. 1693, 83rd Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Ad. News, vol. 2: 2339, 2340.

specifically for religious purposes. Complaint, paragraphs 43-131. Thus, there can be no realistic dispute about Lemon's first (purpose) prong.

As the congressmen also made clear, "In God We Trust" was intended to have religious effects. That, alone, ought to be determinative, although there are plenty of other ways to show this. For instance, the fact that Plaintiff – and others like him – have felt the need to end this religious favoritism is strong evidence, as are the results of the poll furnished in Complaint Appendix N. The fact that numerous strangers have hurled the, "Look, it's on the coins and currency! If you don't like it, leave" line at Plaintiff[84] is also probative, showing that many people see in the motto the purely religious notion that America, as a country, believes in God. All this is strong evidence of a religious effect, far outweighing anything the Defendants have provided. Further evidence can be brought to trial if that is necessary.

The endorsement test – which looks to "the text, legislative history, and implementation of the statute," Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) – cannot possibly be thought by any honest individual to not weigh in favor of Plaintiff as well. After all, this test is really nothing more than a modification of Lemon's "effects prong," and – as has been shown – there is virtually no evidence that the motto has anything but religious effects.[85] The whole notion that "In God We Trust" does not endorse the purely religious idea that "In God We Trust" is bizarre, indeed. Plaintiff points again to the Complaint, Appendix N, which scientifically supports his contention here.

The neutrality test – a cousin of the equality test – is obviously violated. There are (for the purposes of this case) two views: one that says there is a God, and another that says there isn't. The government has taken the former view. It is not permitted – within the confines of neutrality or equality – to take either view, and it certainly cannot turn it into the nation's motto, and put it on the literally tens of billions of coins and tens of millions of currency bills that it produces each year.

The "imprimatur test" is clearly violated as well. Once government places its imprimatur upon a religious notion, it has violated the neutrality/equality it is mandated to

[84] This has also occurred with others. Plaintiff intends to give evidence of this in his Amended Complaint.

[85] Defendants call these religious effects "history" and "patriotism," but they have provided no proof whatsoever that those are the actual effects outside of legal briefs.

follow. Government has obviously placed its imprimatur upon the notion that there is a God, and that we (Americans) trust in that supernatural entity.

Plaintiff has already noted – both in his Complaint and in this Response – that he feels like an "outsider" due to the actions challenged in this litigation. Again, on a Motion to dismiss, that must be accepted as true. (Of course, it would be fairly difficult to argue that someone has not been made to feel like an outsider when the "insiders" all attach exceptional value to a religious notion that the "outsiders" explicitly reject.)

The coercion test – which is actually a measure of a free exercise violation[86] – is sufficient, but not necessary to prove an Establishment Clause violation. "Although our precedents make clear that proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring). Inasmuch as Plaintiff has no choice but to carry money, see, e.g., FDM, at 17:18 (acknowledging "ubiquity of coins and currency in everyday life"), coercion, too, is failed by Defendants in this case. Plaintiff is forced to confront this purely religious verbiage – attributed to himself, no less – many times each day. If this isn't coercion, nothing is.

B. Defendants have Unequivocally Violated the Free Exercise Clause and RFRA

Inasmuch as all of Plaintiff's claims are against federal entities under which RFRA applies, and since it is expected that the Court will follow "the canon of constitutional avoidance" and analyze the case under RFRA's "strict scrutiny" standard, there does not appear to be any reason to discuss the Free Exercise Clause and RFRA claims separately. Accordingly, Plaintiff will discuss them together.

[86] Defendants apparently concur that the coercion test is a measure of a Free Exercise Clause (and not an Establishment Clause) violation, inasmuch as they locate it in their memorandum in the section discussing "the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), and other constitutional provisions." FDM, at 39:8-9 (with immediate citations to two cases speaking of "compulsion" and one case speaking of "coercion.").

(1) Free Exercise and Establishment Clause Violations are Often Mixed

The Defendants misconstrue the relationship between the Establishment Clause and the Free Exercise Clause, FDM 11:18-13:10 (suggesting that Plaintiff is "restyling his objections to "In God We Trust" as something other than an Establishment Clause claim."). This is understandable, since the government usually doesn't violate the Establishment Clause in so blatant a manner as to set out as the nation's motto a purely religious claim which obviously excludes individuals who adhere to contrary religious beliefs. However, if "the Free Exercise Clause requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people," Cutter v. Wilkinson, 161 L. Ed. 2d 1020 (2005), the actions challenged in this case certainly involve a Free Exercise Clause violation.

In fact, the Establishment Clause violations here have pervasive Free Exercise Clause effects, and the Defendants' denial of those effects – whether due to Monotheistic bias or for other reasons – does nothing to mitigate the constitutional injuries. As a minister of an Atheistic church and a devout devotee of an Atheistic religion – which explicitly denies the existence of God – Plaintiff's ability to "exercise" his religion has been markedly impaired.

Plaintiff has already detailed numerous infringements in his Complaint, and summarized most of them in its paragraph #234:

> [H]e has been forced to evangelize and proselytize for a religious belief that is directly contrary to those of his church, his ability to raise funds generally for his church has been severely impeded, he has been forced to pay tax dollars for the support of a purely religious idea that is the antithesis of his personal religious beliefs, his ability to purchase items related to his religious beliefs has been infringed upon, his plans to assemble for worship have been negatively impacted upon, and his use of his real property for raising funds for his church has been severely impeded.

Clearly, these harms comprise substantial burdens to Plaintiff's free exercise of religion. As the Supreme Court has noted:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 171-18 (1981)

(2) Defendants' Approach to Free Exercise Violations is Inconsistent with Supreme Court Precedent

In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) – one of the key Free Exercise Clause cases cited by Defendants – the Supreme Court stated that, "this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." Id., at 450. Moreover, said the Court, "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen." Id., at 453.

That view might be contrasted with the approach advocated by Defendants in their Memorandum, where Free Exercise infringements occur only when laws "regulate the conduct of citizens," FDM, at 39:20-21, "require the nation's citizens to espouse [a belief]," Id., at 21-22, "dictate or forbid any beliefs or conduct," Id., at 22, or "require plaintiff[s] to do anything, [o]r prohibit [them] from doing anything," Id., at 24-25. Such an approach in no way follows the lead of the Supreme Court as it has attempted to secure the liberty enshrined in the First Amendment. Rather, Defendants' views are reminiscent of the Soviet regime, by which the 1950-era "God laws" were supposed to distinguish us from that tyranny of our Cold War rivals. One shudders to think that this might be the "freedom" envisioned by our representatives.

The citations that Defendants use to justify their despotic approach shows them failing to understand another key point in religion clause jurisprudence. Bowen v. Roy, 476 U.S. 693 (1986), like Lyng, involved neutral laws that had no religious meaning to anyone except the plaintiffs. Whether those cases would pass muster under the strict scrutiny standard now required by RFRA is certainly questionable, but – under the standard that was utilized by the Supreme Court at the time (which was a precursor to its less-than-strict-scrutiny ruling in Employment Div. v. Smith, 494 U.S. 872 (1990)) – the critical point in both cases was that the given governmental act was neutral in regard to religion.[87] That was the key in Smith as

[87] Although the acts in Lyng (putting in a road to harvest timber) and Bowen (assigning a number with which to provide benefits) were religiously neutral to the government (and most everyone else in society), the government's act was not religiously neutral to the plaintiffs in those cases. Thus, under

well: "[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and **neutral law** of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Smith, 494 U.S. at 879 (citation omitted) (emphasis added). In Bowen, the Court phrased it as "The statutory requirement that applicants provide a Social Security number is **wholly neutral in religious terms** and uniformly applicable." 476 U.S., at 703 (emphasis added). Although Lyng did not specifically speak in terms of "neutrality," it did point out that the governmental activity in question – which involved harvesting timber – would not "den[y] any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S., at 449.

Clearly, that is not the case in the instant litigation. Other citizens are not forced to carry around money that espouses a religious view contrary to their own. Nor do they have problems engaging in the simple act of making purchases to further their religious goals, or collecting money for their religious institutions.

In view of Lyng's call for sensitivity to the religious needs of our people, one might ask, "How much less sensitive can a government be than one which chooses – out of all the possibilities – a motto that expresses a purely religious claim, known to be exclusionary?" Plaintiff can answer that: markedly less sensitive. A government could take that purely religious dogma and mandate its placement on every coin and currency note so that nonadherents are not only forced to carry, confront, and transmit its (offensive-to-them) religious message, but they are forced to use that money even when they are explicitly engaging in their desired form of religious belief and worship.

Lyng is actually an excellent case to demonstrate the absurdity of the government's position. Before making its decision to continue road building, "the Forest Service commissioned a comprehensive study of the effects that the project would have on the cultural and religious value of the Chimney Rock area. The resulting 423-page report was so sympathetic to the Indians' interests that it has constituted the principal piece of evidence

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RFRA, the government would now have to show a compelling interest with narrowly tailored laws to serve that interest in each case. Under the approach used in Lyng, Bowen, and Smith, that strict scrutiny standard did not have to be met. That analysis, however, assumed laws that were religiously neutral to all (except the plaintiffs). In the case at bar, the challenged act – using "In God We Trust" as the nation's motto and on its money – is not religiously neutral to anyone.

relied on by respondents' throughout this litigation." Id., at 454. The Forest Service then adjusted its construction in numerous ways, leading the Court to remark that, "[e]xcept for abandoning its project entirely, and thereby leaving the two existing segments of road to deadend in the middle of a National Forest, it is difficult to see how the Government could have been more solicitous." Id.

Now one can picture Lyng under a Defendants' suggested approach. First, the Forest service determines that the Soviets have been favoring their aboriginal Eurasians. Thus, to distinguish the United States from those "Native-loving commies," the Forest Service decides to build roads in wilderness areas. After all, say our congressmen, our history was built upon going into the forests and trampling on the rights of the Natives. Heck, we took their land as part of the Mayflower Compact, and fighting Native Americans has been part and parcel of our history ever since. George Washington fought Native Americans. Abe Lincoln's log cabin was built on what was once Native American land. Look, they now have less than one percent of what they started with. That proves that this is our history.

Not only is it our history – it's patriotic! After all, our Congress starts off every session with some settler's descendant – paid with tax dollars – telling the congressmen of how his ancestor fought and killed Native Americans. Our Chief Justice has altered the Constitutionally-prescribed Presidential oath of office so that it now ends, "in the name of the white man." Our Pledge of Allegiance – since 1954 – has had the words "one nation against Indians," and we have a National Day of Prayer to White Dominion. With our national motto "In White Man's Expansion We Trust" and those words on every coin and currency bill, who could object?

So, Native American Lyng plaintiffs, what exactly are you complaining about? So what if we aim our roads directly at your ancestral homes? You don't **have to** worship there. Never mind the fact that the roads we're building are not being used for anything. They perpetuate our "historic" and "patriotic" notions (that "White Men Count and Indians are Trash.").

What's that? You have an endless stream of quotes from the Congressional Record demonstrating that the congressmen who passed these laws did so with the expressed purpose

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Plaintiff is uncertain as to Defendants' point in their footnote 27, FDM, at 41:22-28, but – if it is to suggest that "In God We Trust" is a "neutral law of general applicability," then Plaintiff knows not

of continuing to foster the belief that intrusions by settlers upon native lands is a great thing? And there is a quote that "A Native American American is a contradiction in terms?"[88] Well, that doesn't have anything to do with anything. Don't you understand? "In White Man's Expansion We Trust" is our national motto. There's a whole lot of history behind that, and – again – it's our motto. *Ergo*, it's patriotic. Just keep carrying that message on all your wampum, and get out of the way, will you? What's that? Something about a constitutional amendment and a statute that demands strict what? Sorry, I can't hear you. That darn bulldozer is just too loud.[89]

(3) Plaintiff has been substantially burdened in numerous ways

Plaintiff agrees with Defendants that "the threshold concept of 'substantial burden' is coextensive" in the Free Exercise and the RFRA contexts. FDM, at 42:14-15. He will clarify how he is "substantially burdened" in this section. In doing so, it should be noted that 42 U.S.C. § 2000bb–2(4) states, "the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5." Under 42 U.S.C. § 2000cc-5(7)(A) is stated, "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

First, Plaintiff does a great deal of traveling, and, therefore, is "evangelizing" as he spends his money in different locales. Defendants may trivialize the argument now, but it should be recalled that they were the ones who used that argument as one of the key justifications for mandating "In God We Trust" on the currency to begin with. See footnotes 4-6, at page 4, supra).

Additionally, to the extent that there isn't much "evangelism" occurring during domestic travel, the fact is that Plaintiff frequently engages in foreign travel – specifically to spread the word about his Church. In view of the fact that the United States Mint, itself – in

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how to respond.

[88] See Complaint, ¶ 119, noting Rep. Louis C. Rabaut's entry into the Congressional Record that "An atheistic American … is a contradiction in terms."

[89] Plaintiff apologizes for any deviation from standard legal writing in the foregoing. However, he felt it might assist in making the point as to how ridiculous and bogus – to him, at least – are the

addition to the congressional committee that recommended the inclusion of the motto on the currency and the man responsible for getting that subcommittee to consider the matter– has explicitly stated that this was one of the purposes for placing the motto, it's rather strange to hear the government now saying that they were just making that up. Just three years ago, after nearly fifty years of having "In God We Trust" on the currency, the Mint wrote:

> Wherever United States coins travel, they serve as reminders of the values that all Americans share. The words and symbols that define us as Americans have a permanent place in our coins: "Liberty" … "In God We Trust" … E Pluribus Unum" … … Our coins are small declarations of our beliefs. They showcase how we see ourselves and our sense of sovereign identity. And they serve as ambassadors of American values and ideals.[90]

Surely they are estopped from arguing now – for the purposes of a lawsuit – that a minister of a church with religious beliefs contrary to those it states are being declared takes its words seriously.

Because the argument probably results largely from the trivialization of Atheistic belief (that resulted in the established Monotheism that grew wild in the 1950s), perhaps an analogy to a more "respectable" religion is in order. Imagine a Catholic Priest who is given sacramental wine to use in his church. On its label is written "Jesus is a hoax," or, perhaps, "In Protestantism We Trust." Of course this stems from the "anti-Popery" that has been present in this country since the first English colonies took root, and it's now mandated by the government to reflect that history. Would that not be a free Exercise violation? Would Defendants here be telling that Priest that it's no big deal to use that wine? That it's not a "substantial burden" on his right to exercise his religion as he sees fit? Would they not see that it doesn't matter how small or "insignificant" is the lettering. That the Priest would know, inside, and have a moral and ethical choice to make, irrespective of the government's opinion of how major or minor is the burden?

Plaintiff submits that such a situation would be outrageous, and never tolerated in this country. He submits also, that – except for the fact that the wine burden in the hypothetical is

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arguments being made by the Defendants. However, every single one of the statements given in this fictional narrative has a perfect parallel in our current (Christian) Monotheistic reality.

[90] Accessed at http:// www.usmint.gov/downloads/about/annual_report/2003AnnualReport.pdf on May 8, 2005.

not nearly as oppressive as the money burden is in the case at bar – the two states are essentially identical.

Religion is a matter of the heart and mind. It's internal. And it isn't for the government to say how serious or "substantial" is an imposition that requires that individual to act contrary to his or her religious belief system. This is especially the case when the government is, simultaneously, claiming that the imposition exists to "serve as reminders of the values that all Americans share" – thus doubling the injury by not only forcing the individual to confront the offensive dogma, but turning him further into an outsider by alleging that the dogma is shared by "all Americans."

Plaintiff has alleged that this substantially burdens the exercise of his religion, and he certainly has demonstrated how and why that occurs. That's all he needs to do, for "[c]ourt[s] cannot determine the truth of the underlying [religious] beliefs … and accordingly cannot weigh the adverse [religious] effects." Lyng, 485 U.S. at 449. In fact, that's what RFRA is all about.

Plaintiff engages in numerous activities in relation to his church. Almost all require the spending of money, and frequently there is no way to do that except by using the cash and currency that carries a religious message that he finds offensive. As a result, he has – on numerous occasions – refused to exercise his religion, for the other "choice" is to use a monetary instrument with the words, "In God We Trust" to further his ministry, which absolutely denies there is a God. He has every right to be offended, and he has every right to refuse to use such coins or currency on the basis of his religious beliefs. This burden is at least as "substantial" on Plaintiff's religious exercise as was the law denying unemployment benefits on Adeil Sherbert's religious exercise. Sherbert v. Verner, 374 U.S. 398 (1963). "[T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." 374 U.S., at 406. Inasmuch as Sherbert was the very case upon which the strict scrutiny standard now embraced within RFRA was based,[91] it is untenable for Defendants to now say that Plaintiff's free exercise rights are not "substantially burdened."

[91] 42 U.S.C. § 2000bb(b)(1) specifically mentions Sherbert, stating as one of RFRA's purposes: "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened."

It isn't just spending money for his religion that is burdened. Plaintiff also attempts to collect money, and that is burdened as well. As was noted in the Complaint, Plaintiff passes a collection plate during his church meetings. Unable to (consistently with his faith) accept coins or currency that states, "In God We Trust," it's very difficult to take in an appreciable amount. In fact, so far the total is zero, because the only monetary instruments that his parishioners have had all say "In God We Trust."[92]

The situation is worse when he chooses to have fund-raising activities. These are done in public, and he has no control over the pedestrians who might be willing to donate. Due exclusively to Defendant's policies, Plaintiff has two "choices." He can either accept money that espouses a religious message that he deplores, or he cannot raise funds for his church. Being placed in that situation is certainly a "substantial burden."

(4) Wooley v. Maynard Supports Plaintiff's Claim

Defendants – in responding to Plaintiff's citation to Wooley v. Maynard, 430 U.S. 705 (1977) – state that "Wooley itself disavows the proposition for which plaintiff cites it." FDM, at 45:20-21. This is not quite correct. What Wooley actually says is:

> It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, 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.

Id., at 717 n.15. That's hardly dispositive. To begin with, "The First Amendment protects speech and religion by quite different mechanisms." Lee v. Weisman, 505 U.S. 577, 591 (1992). Thus, the special protections that apply to religion were not taken into account in Wooley. Second, it is unlikely that Chief Justice Burger was aware that the Mint holds the

[92] Certainly, there are ways around this – using credit card payments, or asking for checks. However, most people don't remember to bring checks, and it would be a substantial burden for Newdow to have to call all potential parishioners prior to each meeting. And arranging to take credit card payments is no small matter. More importantly, no other church – as far as Plaintiff is aware – needs to endure that "substantial burden."

opinion that "United States coins … serve as reminders of the values that all Americans share, and that … [they] are small declarations of our beliefs." See at page 68, supra.

Then, too, whether or not the money is displayed to others involves two different processes. Even if Defendants can deny what the Mint unequivocally proclaimed (in terms of being declarations of our beliefs), there are the feelings that individuals harbor within. Just as a picture hidden in a wallet can have enormous emotional value, an offensive item one is forced to carry or wear – although not exposed – can be extraordinarily offensive. In fact, certain governmental regulations require that the free exercise right of carrying or wearing religious symbols be kept hidden. See, e.g., Bd. of Educ. v. Grumet, 512 U.S. 687, 726 (1994)Kennedy, J., concurring) (citing Dept. of Air Force, Reg. 35-10, P2-28(b)(2) (Apr. 1989), stating that "Religious head coverings may be worn underneath military headgear"); Alameen v. Coughlin, 892 F. Supp. 440, 442 (D.N.Y. 1995) (citing Department of Correctional Services directive stating, "All approved religious medals, crucifixes, and crosses shall not be visible and shall be worn underneath clothing at all times"). Again, especially in terms of religion, it is the belief and the feelings of the individual – irrespective of what he or she exposes to others – that determines the free exercise burdens of a governmental activity.

Finally, RFRA involves a whole different aspect of the First Amendment, for which a statutorily-enforced strict scrutiny standard is broadly applied. That wasn't the case in Wooley. Nonetheless, it is wise to consider the principles behind Wooley's holding, especially as it applies to the First Amendment rights of individuals to not be oppressed by majoritarian desires: "A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U.S., at 714.

(5) Defendants' Citations to Otero, Berman, and Murray are all Inapposite

Defendants' citations to the case law in this regard are just as inapposite as were the citations to Lyng and Bowen. Otero v. State Election Board of Okl., 975 F.2d 738, 741 (10th Cir. 1992), cert. denied, 507 U.S. 977 (1993); Berman v. Bd. of Elections, 420 F.2d 684, 686

(2d Cir. 1969), cert. denied, 397 U.S. 1065 (1970); and Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) all had four major distinguishing features from the instant case.

First of all, the government never suggested that it was intentionally using the churches as polling places (Otero and Berman) or the cross on the insignia (Murray) in order to espouse a particular religious view. Here, that espousal was unequivocally made, and it would deny the reality of human nature to suggest that this is unimportant. Context – especially in religious affairs – is often of the utmost importance. One may be willing to ignore a given imposition in one circumstance, but not willing to do so in another. A religious Jew, for instance, might be willing to accept a non-Kosher food item in order not to offend a host, yet might choose to literally starve to death if the same item were offered by an anti-Semite. A Catholic might be against birth control, but choose to use it when the family finances simply can't accommodate another child. There are all sorts of reasons and effects that influence how individuals view their religious obligations, and it is not for the State to determine when those are or are not sufficiently "substantial." Plaintiff's beliefs are as sincerely held and *bona fide* as the most fervid Christian fundamentalist, and he has every right to refuse to use money that is stamped – however unobtrusively – with purely religious dogma contrary to his beliefs.

The second difference between the case at bar and the cases cited by Defendants is that the litigants in the other cases were not involved in religious undertakings when they were forced to confront the given offensive religious item. On the contrary, each of those cases involved individuals who claimed Free Exercise burdens while going about normal secular activities. Plaintiff's confrontations with the motto take place not only during his secular activities, but whenever he endeavors to exercise his faith, as well. Again, context matters. A minister who stops by at the local police station and hears officers using "the Lord's name" in vain, might not have much of a problem countenancing that activity. However, were those same officers using the identical language in that minister's church he or she would likely have a markedly different reaction. If the government told the Berman and Otero plaintiffs that they could only worship their religions in the churches they found offensive, or the plaintiff in Murray that he had to place a Christian cross nearby whenever he contemplated the lack of God, those cases would undoubtedly have been decided differently.

The third distinguishing feature between the three cited cases and the instant case is that those others involved symbols. Plaintiff is not arguing that symbols can't be as offensive – or even more offensive – than words. But an individual has more choice in how to interpret the meaning of a symbol.[93] The written words, "In God We Trust" – except, perhaps, for those who wish to evade constitutional commands – mean "In God We Trust," and there is no way, at least for this Plaintiff, to interpret them in any other manner.

The last difference is that the cited cases involved intermittent exposures – voting, or receiving monthly utility bills. For Plaintiff, the exposure is daily, and usually multiple times per day. That certainly makes the burden far more substantial.

(6) It's the Motto, the Whole Motto, and Nothing But the Motto

If the point hasn't yet been sufficiently considered, Plaintiff would highlight again that this is the nation's motto that is being discussed. Despite Defendants' attempts to characterize it as some insignificant statement, FDM, at 44:11-13, it is an aphoristic representation of Plaintiff's homeland and the beliefs of the 300 million people – supposedly including himself and his church – that live under its Constitution. Plaintiff is certainly allowed to take its meaning seriously.[94] Of all that America stands for – our ingenuity, our generosity, our nobility, our pride, our consideration, our sense of fairness – and on and on … of all those things, our government has chosen a sectarian, purely religious idea to serve as the motto.

Not only that, but it's the entire motto. It isn't like the Declaration of Independence or the national anthem, which have assorted sections, only one of which relates to Monotheism. That's all there is. It's (Christian) Monotheism and nothing else. That's oppressive for those who hold different religious beliefs, and it shows remarkable disrespect, bordering on

[93] A good example is the controversy that took place in South Carolina in 2000, when there were supporters and opponents of the Confederate flag flying at the State Capitol. http://www.pbs.org/newshour/extra/features/jan-june00/flag.html. The debate surely would have been different if the various interpretations were placed in words. For instance, not an eye would likely have turned had ether been a flag saying, "Lovely Plantation Homes." Similarly, it is doubtful that a flag with, "Blacks Are Inferior Beings" would have been flown for more than a second.

[94] As, apparently, do the many who have held up their dollars to tell him that "In God We Trust!" See Complaint, Appendix I.

antipathy. Of course that – i.e., the antipathy towards atheists – really **is** our history, and it's time for the government to work to end it, just as it has with blacks and women.

If "In the Caucasian Race We Trust" or "In the Superiority of Males We Trust" were chosen as the essence of the country, distilled down into one short phrase, it is doubtful that racial minorities or women would allow Defendants to simply say: "Hey, the motto is small, and the money is hidden in your pocket. Plus, no reasonable person assumes you're vouching for the words. We've decided its not a substantial problem for you." Nor would Defendants make those statements, since it's out of vogue to be prejudiced on the basis of race or gender. But on the basis of belief in God, that's not only not out of vogue, but it's so pervasive that those who perpetuate the bias don't see how "substantial" a burden their oppressions can impose.

(7) The Motto is "In God WE Trust"

The message Plaintiff is forced to carry says, "In God **We** Trust." Thus, he is affirming that belief when he carries money. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship." West Virginia Board of Education v. Barnette, 319 U.S. 624, 646 (1943) (Murphy, J., concurring). Recognizing the "ubiquity of coins and currency in everyday life," FDM, at 17:18, it must again be emphasized that it is virtually impossible to live in this day and age without carrying some of those coins and currency. Accordingly, even if no one else knows, and if no one else is affected, Plaintiff knows that he is carrying on his person a purely religious message that he finds offensive and contrary to his religious being. No Jew can be forced – against his or her will – to wear a Christian crucifix. No Catholic can be forced – against his or her will – to wear a Muslim crescent moon and star. Plaintiff cannot cite cases on-point with these hypotheticals because the government would never compel such behaviors upon Monotheists. It is only Atheists whose beliefs are so wantonly disregarded in American society that government has no compunction about trampling upon their religious liberties.

There have, however, been free exercise infringements in terms of prohibitions (as opposed to compulsions) of carrying or wearing religious symbols, and these Free Exercise

burdens, constitutionally, are indistinguishable. See, e.g., Hudson v. Palmer, 468 U.S. 517, 547 (1987) (Stevens, J., dissenting) ("[P]ossession of other types of personal property relating to religious observance, such as … a crucifix, is surely protected by the Free Exercise Clause of the First Amendment."); Young v. Lane, 922 F.2d 370 (7th Cir. 1991) (Jewish plaintiffs prohibited from wearing yarmulke); Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir. 1996) (Christians prohibited from wearing crucifixes); Alameen v. Coughlin, 892 F. Supp. 440 (D.N.Y. 1995) (Muslims forbidden from carrying dhikr (prayer) beads.). Plaintiff's Free Exercise rights are no less infringed upon by being forced to carry money with "In God We Trust" than is the Jew being forbidden from wearing a yarmulke, a Christian being forbidden from wearing his crucifix, or a Muslim forbidden from carrying his beads.

(8) There is no Compelling Interest

Just last year, in Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005), this Circuit examined the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 et seq, which is actually "less sweeping than RFRA." Cutter v. Wilkinson, 125 S. Ct. 2113, 2118 (2005). Nonetheless, "Congress carried over from RFRA the 'compelling governmental interest'/'least restrictive means' standard," Id., at 2119, so the Ninth Circuit's analysis in Warsoldier is applicable to the instant action.

> [The plaintiff] bears the initial burden of going forward with evidence to demonstrate a prima facie claim that [the government's acts] constitute a substantial burden on the exercise of his religious beliefs. If [the plaintiff] establishes the prima facie existence of such a substantial burden, on which he bears the burden of persuasion, the [government] shall bear the burden of persuasion to prove that any substantial burden on [the plaintiff's] exercise of his religious beliefs is *both* "in furtherance of a compelling governmental interest" *and* the "least restrictive means of furthering that compelling governmental interest."

418 F.3d, at 994-95. Plaintiff has shown the substantial burdens. The issue now is whether or not Defendants have a compelling interest, and – if so – whether or not "In God We Trust" is the least restrictive means of furthering that interest.

Plaintiff can see no compelling interest in having an official national motto. Until 1956, we didn't have one, and it's questionable as to its value. Nor can he see a compelling

interest in putting that motto on the coins and currency. Both functioned well without those words for many years. However, assuming, *arguendo*, that there is some compelling interest in having a motto, and to have that motto placed on the coins and currency, the question is whether or not using "In God We Trust" as that motto is the least restrictive way to serve that interest.

Obviously, it is not. To begin with, it does violence to, if not actually violates, the Establishment Clause, and it's doubtful that either could ever be an interest that is compelling. Furthermore, if a motto serves to unite, this motto serves to divide. If a motto serves to respect equality, this motto serves to create inequity. If a motto serves to be inspiring to the entire nation, this motto serves to limit its inspirations to one religious subset of the population.

The "least restrictive means" of serving whatever interest is deemed compelling is to choose any of the myriad potential mottos that don't turn Plaintiff into a second-class citizen and burden his exercise of religion. Plaintiff suggested a number of mottos that would serve the purposes of a national motto, none of which involve espousing a sectarian religious ideal. Complaint, ¶ 270. He , personally, would recommend the motto that served as such in a *de facto* manner since July 4, 1776, when it was created by a committee comprised of Thomas Jefferson, John Adams and Benjamin Franklin: "*E Pluribus unum* – "Out of Many, One." Complaint, ¶¶ 265-65. It's beautiful, historic, inspiring, and unites us all not only figuratively, but literally in terms of the prose.

CONCLUSION

The Court might wish to contrast the dedication to equality and liberty found in Defendants' Memorandum in this case, with that displayed in the *amicus curiae* brief Defendant United States filed half a century ago in Brown v. Bd. of Educ. Believing he can't improve upon the words of that brief's conclusion, Plaintiff presents them now[95] in the hope that the civil rights case at bar will be decided in a manner similar to Brown:

> The subordinate position occupied by [Atheists] in this country as a result of governmental discriminations ("second-class citizenship," as it is sometimes called) presents an unsolved problem for American democracy, an inescapable challenge to the sincerity of our espousal of the democratic faith.
>
> In these days when the free world must conserve and fortify the moral as well as the material sources of its strength, it is especially important to affirm that the Constitution of the United States places no limitation, express or implied, on the principle of the equality of all men before the law. Mr. Justice Harlan said in his dissent in the *Plessy* case (163 U.S. at 562) :
>
> > We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of […] degradation upon a large class of our fellow-citizens, our equals before the law.
>
> The government and people of the United States must prove by their actions that the ideals expressed in the Bill of Rights are living realities, not literary abstractions. As the President has stated:
>
> > If we wish to inspire the people of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.
> >
> > We know the way. We need only the will.[96]

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[95] With the obvious substitution made as appropriate.

[96] US1952 Brown brief, at 31-32 (citing President Truman's Message to Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2).

Respectfully submitted,

April 17, 2006 /s/ - Michael Newdow

Michael Newdow, in pro per
First Amendmist Church of True Science
PO Box 233345
Sacramento, CA 95823

Phone: (916) 427-6669
Fax: (916) 392-7382
E-mail:NewdowLaw@cs.com

APPENDIX 2A

IN THE UNITED STATES DISTRICT COURT
FOR [redacted]
Judge Daniel B. Sparr

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
NOV 2 5 1994
JAMES R. MANSPEAKER
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BY

Civil Action No. 94-S-1345

ANNE N. GAYLOR, et al.,
Plaintiffs,
v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on the Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), filed August 29, 1994. The court has reviewed the motion, the Plaintiffs' response, the entire case file, and the applicable law and is fully advised in the premises. The court has determined that oral argument will not materially assist resolution of this matter.

Plaintiffs are individual taxpayers, citizens of the United States, and members of The Freedom From Religion Foundation, Inc., a nonprofit corporation with one of its "primary objectives" being "to promote the constitutional principle of separation of church and state." Plaintiffs allege that the national motto of the United States, "In God We Trust," as established by 36 U.S.C. § 186, and the statutes requiring printing of that motto on United States coins and currency, 31 U.S.C. § 5112(d)(1), as amended October 6, 1992, and 31 U.S.C. § 5114(b), are unconstitutional violations of the Establishment Clause of the First Amendment to the U.S. Constitution.[1] Defendants move to dismiss this civil action because the law is clear that the national motto and these two statutes do not violate the Establishment Clause.

Applying Rule 12(b)(6), the court should not dismiss this cause of action for failure to state a claim unless the court determines that the Plaintiffs can prove no set of facts that would entitle

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[1] The sections regarding coins and currency were formerly codified at 31 U.S.C. §§ 324 and 324a, respectively, but were recodified to their present sections in 1982.

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them to relief. Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n., 908 F.2d 578, 582 (10th Cir. 1990). The court must liberally construe all of the Plaintiffs' pleadings, must accept all factual allegations as true, and must draw all reasonable inferences in favor of the Plaintiffs. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Grider v. Texas Oil & Gas Crop., 868 F.2d 1147, 1148 (10th Cir.), *cert. denied,* 110 S.Ct. 76 (1989); Swanson v. Bixler, 750 F.2d 810, 813 (10th Cir. 1984). So long as the Plaintiffs offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. Hiatt v. Schreiber, 599 F. Supp. 1142, 1145 (D. Colo. 1984).

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion . . . ." The Supreme Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989), citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Edwards v. Aguillard, 482 U.S. 578, 582-83 (1987), citing Lemon, 403 U.S. at 612-13.

First, the legislation must have a secular purpose. The secular purpose prong asks whether government's actual purpose is to endorse or disapprove of religion. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), *reh'g. denied,* 466 U.S. 994. A governmental purpose to promote religion may be evidenced by promotion of religion in general or by advancement of a particular religious belief. Edwards, 482 U.S. at 585 (citations omitted). The Supreme Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. Lynch, 465 U.S. at 680 (citations omitted). The purpose need not be exclusively secular, Lynch, 465 U.S. at 681 n. 6, but the purpose may not be to endorse or disapprove of religion. Lynch, 465 U.S. at 691 (O'Connor, J., concurring).

Second, the legislation's primary effect must be one that neither advances nor inhibits

religion in its principal or primary effect. In decisions subsequent to Lemon, 403 U.S. at 602, the Supreme Court has refined the definition of governmental action that unconstitutionally advances religion. The Court has paid particular attention to whether the challenged governmental practice has either the purpose or effect of "endorsing" religion. Allegheny, 492 U.S. at 592-93 (citations omitted). The prohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. Allegheny, 492 U.S. at 593 (citations omitted). At the very least, the Establishment Clause prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community. Allegheny, 492 U.S. at 593-94, citing Lynch, 465 U.S. at 687 (O'Connor. J., concurring).

Third, the legislation must not result in an excessive entanglement with religion. In order to determine whether government entanglement with religion is excessive, the court must "examine the character and purposes of the institutions that are benefitted, . . . , and the resulting relationship between the government and the religious authority." Lemon, 403 U.S. at 614-15.

In every Establishment Clause case, the courts "must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, . . . total separation of the two is not possible." Lynch, 465 U.S. at 672. The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any. Lynch, 465 U.S. at 673 (citations omitted). The Supreme Court has refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." Lynch, 465 U.S. at 678, citing Walz v. Tax Comm'n., 397 U.S. 664, 671 (1970).

In the national public life, there are many manifestations of a belief in a Supreme Being which do not violate the First Amendment. *See* School District of Abington Township, Pa. v. Schempp, 374 U.S. 203, 303-04 (1963). There is an 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. Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Lynch, 465 U.S. at 675. The Government has long recognized holidays with religious significance, the reference to God in the Pledge of Allegiance, the exhibition of religious art in government-supported museums, and religious emblems in public buildings, among other things. Lynch, 465 U.S. at 676-78; Jager v. Douglas County School Dist., 862 F.2d 824, 839 (11th Cir.), *cert. denied,* 490 U.S. 1090 (1989).

Consistent with the Supreme Court's three-pronged analysis, numerous courts have found that the placement of the national motto on U.S. currency and coins does not violate the Establishment Clause of the First Amendment. In Aronow v. United States, the Ninth Circuit did not "discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust'. . . ." 432 F.2d 242, 243 (9th Cir. 1970). The Ninth Circuit considered the national motto excluded from First Amendment significance because it has no theological or ritualistic impact. Aronow, 432 F.2d at 243. Citing McGowan v. Maryland, 366 U.S. 420 (1961), the Ninth Circuit concluded that the national motto did not implicate any coercive governmental power to aid religion. Aronow, 432 F.2d at 244.

In O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Texas 1978), *aff'd.* 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979), the court dismissed the claim that the national motto and the statutes mandating the imprinting of the motto on the coin and currency of the United States violated the First Amendment. The court concluded that the motto on coin and currency did not

have the effect of advancing religion and that "it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion." O'Hair, 462 F. Supp. at 19. The motto "In God We Trust" has been interwoven 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." O'Hair, 462 F. Supp. at 20, citing Schempp, 374 U.S. at 303.

References to the Deity in our ceremonies and on our coinage do not violate the Establishment Clause because they merely reflect the history of this nation and no longer have any potentially entangling theological significance. Hall v. Bradshaw, 630 F.2d 1018, 1023 (4th Cir. 1980), *cert. denied,* 450 U.S. 965 (1981). Certain references to God, such as the words "In God We Trust" on American coinage, can best be understood as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Sherman by Sherman v. Community Consolidated School District 21 of Wheeling Township, 1993 WL 57522 at *3 (N.D. Ill. 1993), *aff'd.*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied,* 114 S.Ct. 2109 (1994). Government acknowledgments of religion in American life, such as the printing of "In God We Trust" on our coins and currency, serve secular purposes and are not understood as conveying an endorsement of particular religious beliefs. Allegheny, 492 U.S. at 625 (O'Connor, J., concurring).

The law appears clear enough that the challenged use of the national motto on our coins and currency is not unconstitutional. Assuming, without deciding, that the Plaintiffs have standing to assert their claim, the court concludes that the national motto has been determined to be historic, patriotic, or ceremonial in nature, rather than religious in significance, and does not offend the Establishment Clause of the First Amendment.

Accordingly, IT IS ORDERED:

1. The hearing scheduled Thursday December 15, 1994 at 9:00 a.m. is hereby VACATED.

2. The Defendants' Motion to Dismiss is GRANTED.

3. This civil action is DISMISSED.

4. Each party shall bear his, her, or its own costs and fees.

DATED at Denver, Colorado, this 25th day of December, 1994.

BY THE COURT:

Daniel B. Sparr
United States District Judge

APPENDIX 2B

TIME ARCHIVE
1923 to the Present

Religion

God's Country

Monday, May. 04, 1953

Wladyslaw Plywacki, 24, had passed all his tests for U.S. citizenship with flying colors. Imprisoned for five years by the Nazis in his native Poland before he escaped to the U.S., he had served a hitch in Japan for his adopted country. He was an Air Force corporal stationed at Hickam Field, Honolulu when he came up before Federal Judge J. Frank McLaughlin to take the official oath and become an American:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty . . . that I will support and defend the Constitution and laws of the United States of America . . . and that I take this obligation freely without any mental reservation or purpose of evasion..." But here Corporal Plywacki boggled. The next words were "So help me God." Wladyslaw Plywacki explained that he was an atheist, therefore could not in honesty use those words.

Judge McLaughlin directed Plywacki to take a coin out of his pocket. "What does it say on the back?" he demanded. When Plywacki had read the legend, "In God We Trust", Judge McLaughlin made a little speech.

"Our Government is founded on a belief in God. You are asking for the privilege of being part of the Government, but you are apparently seeking admission on your own terms. If you are not willing to take the oath in good faith, the oath prescribed by the Congress of the United States, I cannot grant your petition."

The court immigration officer, surprised that the judge had not merely substituted an affirmation of allegiance permitted for those who object to oath-taking, suggested that, since Plywacki was about to leave for the States, the whole matter could be settled on the mainland. But Judge McLaughlin, a Roman Catholic, had his principles, too. He ruled Plywacki ineligible for citizenship.

Plywacki appealed to the ninth circuit court of appeals in San Francisco. His argument: "If a native-born citizen is entitled to freedom of religion, which would include the right not to believe in God, then a petitioner for naturalization has the same right." Last week the Justice Department in Washington told its office in Honolulu to "confess error", indicating that it would not support Judge McLaughlin's ruling in the appeals court. But Immigration Service lawyers have so far been unable to find a single direct precedent for a case like Plywacki's, and there remains the possibility that the court will be required to make a historic decision.

Judge McLaughlin, meanwhile, is sticking to his spiritual guns. "I appreciate the right of a person to be an atheist," he says. "But if you join an organization that has principles based on the existence of a Supreme

Being—from the Declaration of Independence on down to the latest pronouncements by President Eisenhower on the importance of religion—you must abide by the rules of that organization."

A bill to insert the words "under God" in the U.S. pledge of allegiance to the flag was introduced in the House of Representatives last week by Democratic Congressman Louis C. Rabaut of Michigan. Congressman Rabaut's amended pledge would 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." "Our country was born under God," said Rabaut, "and only [under God] will it live as a citadel of freedom."

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2 of 3 DOCUMENTS

Petition of PLYWACKI.

No. 12393.

United States District Court for the District Hawaii.

107 F. Supp. 593; 1952 U.S. Dist. LEXIS 3850

October 17, 1952.

OPINIONBY: [**1]

MCLAUGHLIN

OPINION: [*593]

McLAUGHLIN, Chief Judge.

This petitioner for naturalization is a native and citizen of Poland. Petitioner was in the United States Air Force and prior to discharge in continental United States had been sent to Hawaii from the Far East for naturalization under Section 724(a) of Title 8, United States Code Annotated.

A few moments before the Naturalization Examiner was to present his petition to the Court with a favorable recommendation, the petitioner notified the Examiner that as an atheist he could not and would not take the oath of allegiance prescribed by Section 735 of Title 8, United States Code Annotated. Petitioner offered to take an alternative oath — not the one sanctioned by Section 735 supra designed for conscientious objectors by one composed by himself, as follows:

I Hereby Declare, and affirm in honor and sincerity, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of United States of America against all enemies, foreign and domestic; [**2] that I will bear true faith and allegiance to same; and that I take this obligation freely and without any mental reservations or purpose of evasion. In acknowledgement whereof I have hereunto affixed my signature.

Upon the convening of court and after petitioner hesitatingly, but with all others in the class, appeared to have taken a voir dire oath to answer truthfully all questions touching his petition for naturalization, the Examiner called the Court's attention to the fact that the petitioner as an atheist declined to take a prescribed oath of allegiance, and therefore the Examiner was not making any recommendation to the Court but merely inviting the Court's attention to the situation.

The Court called the petitioner forward and questioned him. From his frank answers it clearly appeared that as an atheist he could not take the prescribed oath and he, of course, would not attempt to deceive the Court by taking the oath falsely.

Observing (a) the Declaration of Independence; (b) the inscription of "In God We Trust" upon the Liberty half–dollar and other United States coins; (c) decisions of the Supreme Court of the United States, such as *United States v. Macintosh, 283 U.S.* [**3] *605 at page 626, 51 S. Ct. 570, 75 L.Ed. 1302*, and United States v. Bland, 283 U.S.636, 51 *S.Ct. 569,75 L.Ed. 1319*, holding that courts may not make bargains with those who seek the privilege of citizenship but must adhere to the precise terms of the legislative mandate; (d) that no constitutional question of freedom of religion is even remotely involved by an alien atheist seeking naturalization, and the sole question is whether the petitioner believes in all of the principles which delicately support our free government; and (e) that as recently as April 1952 the Supreme Court in *Zorach v. Clauson, 343 U.S. 306 at page 313, 72 S.Ct. 679, at page 684*, has not deemed it to be old fashioned to declare "We are a religious people whose institutions presuppose a Supreme Being", Wladyslaw Plywacki's petition for naturalization as a citizen of the United States must be and the same hereby is denied because of his inability to subscribe to a statutory oath of allegiance.

1 of 3 DOCUMENTS

Wladyslaw PLYWACKI, Appellant, v. UNITED STATES of America, Appellee.

No. 13650.

United States Court of Appeals Ninth Circuit.

205 F.2d 423; 1953 U.S. App. LEXIS 2600

June 26, 1953.

COUNSEL: [**1]

Lawrence Speiser, of San Francisco, Cal., and Thomas P. Gill, of Honolulu, Hawaii, for appellant.

A. William Barlow, U.S. Atty., and Winston C. Ingman, Asst. U.S. Atty., both of Honolulu, Hawaii, for appellee.

OPINION: [*423]

Before DENMAN, HEALY and ORR, Circuit Judges.

PER CURIAM.

On confession by the appellee of error herein, it is ordered that the judgment of the District Court in this cause be reversed, *107 F.Supp. 593*, that a judgment be filed and entered accordingly, and that the mandate of this court in this cause issue forthwith.

1 of 3 DOCUMENTS

Petition of PLYWACKI

No. 12393

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

115 F. Supp. 613; 1953 U.S. Dist. LEXIS 2456

October 23, 1953

COUNSEL: [**1]

John J. Kelleher, Naturalization Examiner, for the Government.

OPINIONBY:

McLAUGHLIN

OPINION:

[*613]

Heretofore this petition was denied because of the petitioner's refusal as an atheist to take the oath of allegiance prescribed by Congress. *Petition of Plywacki, D.C. 1952, 107 F.Supp. 593.*

An appeal was taken by petitioner to the Ninth Circuit Court of Appeals, with the assistance of the American Civil Liberties Union of Northern California. Although the Attorney General had not previously appeared and taken a position in this case, he did the astounding thing of appearing in the Court of Appeals and confessing error. Not noting that the Attorney General had nothing to confess as having induced error below, the Court of Appeals automatically reversed without examining the merits. *Plywacki v. United States, 1953, 205 F.2d 423.*

Before the reversal by the Court of Appeals, petitioner moved to Oregon and there attended Oregon State College. On May 26, 1953, petitioner executed a Form N–455, 'Application for Transfer of Petition for Naturalization', which on its face said that the petitioner had subscribed and sworn to his representations therein made before Edity Buckingham, [**2] a notary public of the State of Oregon, at Corvallis, Oregon, to wit:

Subscribed and sworn to before me by the above named petitioner at Corvallis, Oregon, this Twenty–sixth day of May, 1953.

Edith Buckingham (Signed) (Seal)

Notary Public for Oregon

My Commission Expires Apr. 7, 1957

This not being the first time that the petitioner ostensibly had taken an oath [*614] to preliminary or collateral matter while still professing atheism, noting again petitioner's inconsistency, the Court ordered the Immigration and Naturalization Service to investigate and report. On or about September 18, 1953, it did so, but as the notary had not been interviewed, a further investigation and report was ordered. From the two reports of August 20, 1953, and September 18, 1953, as supplemented October 5, 1953, it appears that the petitioner advised the investigator that he did not swear to his transfer application and the notary concurred. Indeed, the notary asserted that she never takes a person's oath as she 'figures it is up to them' and hence just observes the subscription.

Without withdrawing the pending transfer application under date of October 6, 1953, petitioner executed a new or [**3] second Form N–455 application, at the end of which he stated he 'subscribed and affirmed' the statements therein made before the same notary, and she signed her name, stated the term of her commission, and affixed her notarial seal. Appended is a separate statement reading:

I, Wladyslaw Plywacki, do solemnly affirm that the information provided by me on the Application for Transfer of Petition for Naturalization, Number 12393, on this sixth day of October, 1953, is the truth, the whole truth, and nothing but the truth.

Wladyslaw Plywacki (Signed)

Below this statement the notary again signed her name and affixed the date, her seal, and extent of her commission.

This second application for transfer comes to me approved October 9, 1953, be District Director Elmer E. Poston, for he has found petitioner does in fact have a bona fide residence in Oregon.

Opinion

Obviously petitioner's second transfer application does not comply with the Immigration and Naturalization Services's Regulation No. 334.17(a), Federal Register, December 19, 1952, which under *8 U.S.C. § 727,* Sec. 327 of the Nationality Act of 1940, n1 has the force and effect of law. Indeed, petitioner's position as to [**4] this application has the same congenital defect as has his position upon his pending petition for citizenship. To affirm by nothing that the truth is being asserted adds up in law, also, to nothing. Few realize that an affirmation is allowed in lieu of an oath — a swearing — in deference to a person's religious beliefs and concludes by affirming by reference to a Supreme Being — witness the Society of Friends and Jehovah's Witnesses. See *28 U.S.C. §§ 453,* 951, and *5 U.S.C. §§ 16,* 21 and 21a and 21b. An affirmation by Wladyslaw Plywacki, a human being, that he is stating the truth provides no guarantee of veracity nor basis for a remedy in the event of falsity. Indeed, as before stated the atheist philosophy upon which petitioner predicates his position demonstrates a lack of attachment to the United States Government's first principle: a belief in a Creator, from whom the Founders proclaimed come man's unalienable rights subsequently guaranteed by the Constitution.

Despite petitioner's trifling with the legal process by today ostensibly taking an oath and then saying, in effect: 'I didn't mean it — I didn't do it — See, I affirm, by myself', being advised [**5] by District Director Poston that the petitioner in fact now resides in Oregon, the Court upon its own motion in the public interest will transfer the petition to the Oregon Federal court if it will accept the same.

It is obviously in the public interest to have judicially determined as speedily as possible whether by a quiet confession of error by the Executive the American philosophy of government has been materially changed.

The common good will be subserved also by having a different judge come to grips with the legal problems arising from this record. As they touch our national fundamentals, I would like to suggest [*615] that the Federal court in Oregon invite the Attorney General to appear, to file a brief, and present argument in defense of his position taken in the Circuit Court of Appeals for the Ninth Circuit — if he still adheres to it. Too, the size, shape and shadows of this case would seem to call for invited amicus help from the American Bar Association.

Should the ultimate result be that the Federal court in Oregon also decline to admit petitioner to citizenship either by a denial of his petition for lack of attachment to the principles of our Nation, [**6] or by its refusal to administer an oath or affirmation unknown to the law, petitioner then may utilize available appellate review procedures and thus obtain a decision on the merits by a higher court.

If, perchance, the result be otherwise, there is always the next case which may provide the appellate vehicle for a timely decision to repair the national damage, and in which the hope can be expressed that the lower court of appeals and that such court will look for itself beyond any confessed error into the merits of the controversy.

Order.

For the reasons above given, upon the Court's own motion it is hereby ordered and decreed that the petition for naturalization filed in this Court, being No. 12393, shall upon approval of such transfer by the United States District Court for the District of Oregon, be transferred to said court.

n1. See Immigration and Nationality Act, Sect. 332, *8 U.S.C.A. § 1443.*

APPENDIX 2C

United States Supreme Court

Citations to James Madison's Memorial and Remonstrance

"[T]he most important document explaining the Founders' conception of religious freedom."[1]

Separate Opinions	**33**
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Rutledge	1
Scalia	1
Stevens	1
Waite	1

[1] McConnell M. *New Directions in Religious Liberty: "God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age.* 1993 B.Y.U.L. Rev. 163, 169 (1993).

United States Supreme Court

Citations to James Madison's Memorial and Remonstrance

(1) Van Orden v. Perry, 125 S. Ct. 2854, 2892 (2005) (Souter, J., dissenting)
(2) McCreary County v. ACLU, 125 S. Ct. 2722, 2754 (Scalia, J., dissenting)
(3) McCreary County v. ACLU, 125 S. Ct. 2722, 2746, 2747, (O'Connor, J., concurring)
(4) Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2332 (2004) (Thomas, J., concurring)
(5) Locke v. Davey, 540 U.S. 712, 722 (2004) (Rehnquist, C.J., majority)
(6) Zelman v. Simmons-Harris, 536 U.S. 639, 711 (2002) (Souter, J., dissenting)
(7) Mitchell v. Helms, 530 U.S. 793, 871 (2000) (Souter, J., dissenting)
(8) City of Boerne v. Flores, 521 U.S. 507, 560-61 (1997) (O'Connor, J., dissenting)
(9) Agostini v. Felton, 521 U.S. 203, 243 (1997) (Souter, J., dissenting)
(10) Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 853 (1995) (Thomas, J., concurring)
(11) Lee v. Weisman, 505 U.S. 577, 590 (1992) (Kennedy, J., majority)
(12) Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring)
(13) Edwards v. Aguillard, 482 U.S. 578, 605-606 (1987) (Powell, J., concurring)
(14) Wallace v. Jaffree, 472 U.S. 38, 55 n.38 (1985) (Stevens, J., majority)
(15) Marsh v. Chambers, 463 U.S. 783, 804 (1983) (Brennan, J., dissenting)
(16) Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 502 (1982) (Brennan, J., dissenting)
(17) Meek v. Pittenger, 421 U.S. 349, 383 (1975) (Brennan, J., dissenting)
(18) Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760, 772, 783, 798 (1973) (Powell, J., majority)
(19) Lemon v. Kurtzman, 411 U.S. 192, 209 (1973) (Douglas, J., dissenting)
(20) Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (Burger, C.J., majority)
(21) Lemon v. Kurtzman, 403 U.S. 602, 633 (1971) (Douglas, J., concurring)
(22) Tilton v. Richardson, 403 U.S. 672, 696 (1971) (Douglas, J., dissenting)
(23) Walz v. Tax Com. of New York, 397 U.S. 664, 675 n.3 (1970) (Burger, J., majority)
(24) Flast v. Cohen, 392 U.S. 83, 103 (1968) (Warren, C.J., majority)
(25) Board of Education v. Allen, 392 U.S. 236, 266 (1968) (Douglas, J., dissenting)
(26) School Dist. v. Schempp, 374 U.S. 203, 213, 225 (1963) (Clark, J., majority)
(27) Engel v. Vitale, 370 U.S. 421, 433 n.13, n.15, 436 n.22 (1962) (Black, J., majority)
(28) Torcaso v. Watkins, 367 U.S. 488, 491 (1961) (Black, J., majority)
(29) McGowan v. Maryland, 366 U.S. 420, 431 n.7 (1961) (Warren, C.J., majority)
(30) Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 214, 216 (1948) (Black, J., majority)
(31) Everson v. Board of Education, 330 U.S. 1, 12, 13 n.12 (1947) (Black, J., majority)
(32) Everson v. Board of Education, 330 U.S. 1, 12, 13 n.12 (1947) (extensive discussion in Justice Rutledge's dissent)
(33) Reynolds v. United States, 98 U.S. 145, 163 (1878) (Waite, C.J., majority)