PETER D. KEISLER
Assistant Attorney General
McGREGOR W. SCOTT
United States Attorney
THEODORE C. HIRT
Assistant Branch Director
ROBERT J. KATERBERG, D.C. Bar No. 466325
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel.: (202) 616-8298
Fax: (202) 616-8460
Email: Robert.Katerberg@usdoj.gov

Attorneys for Defendants the United States Congress, Peter LeFevre, the United States of America, John William Snow, Henrietta Holsman Fore, and Thomas A. Ferguson

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

CONSTITUTIONAL PROVISIONS, STATUTES, AND OTHER MATERIALS

Defendants the Congress of the United States of America; Peter LeFevre, Law Revision Counsel; the United States of America; John William Snow, Secretary of the Treasury; Henrietta Holsman Fore, Director, United States Mint; and Thomas A. Ferguson, Director, Bureau of Engraving and Printing (collectively, "Federal Defendants") hereby submit their reply memorandum in support of their motion to dismiss. Plaintiff concedes that his core claim – under the Establishment Clause – is barred by Ninth Circuit precedent that is directly on point. See Plaintiff's Response to Federal Defendants' Motion to Dismiss (dkt. no. 38) ("Pl. Mem.") at 2. Moreover, plaintiff has failed to refute defendants' other arguments in favor of dismissal.

I. PLAINTIFF LACKS STANDING

In their opening brief, the Federal Defendants demonstrated that plaintiff lacks standing, either on the basis of concrete, personal injuries or through a theory of taxpayer standing. See Federal Defendants' Memorandum in Support of Motion to Dismiss (dkt. no. 25) ("Defs. Mem.") at 14-25. Plaintiff's opposition fails to rebut these arguments and fails to show any valid form of standing.

To establish standing, plaintiff relies primarily on Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954). See Pl. Mem. at 29-35. Quite simply, Brown has nothing to do with the question whether plaintiff has standing in the instant case. The plaintiffs in Brown were African-American children of elementary school age who were forced by racially discriminatory laws to attend segregated schools. 347 U.S. at 486 n.1, 74 S. Ct. at 687 n.1. While the Supreme Court's opinion declaring segregated schools unconstitutional did not contain any discussion of standing, it seems obvious enough that being forced to attend a segregated school gave rise to a concrete, personal, and particularized injury in fact. Moreover, that injury was clearly traceable to the challenged law that required segregated schools, and was redressable through relief striking down the law.[1]

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[1] Plaintiff relies extensively, perhaps even more than on the Brown decision itself, on an amicus curiae brief submitted by the United States in Brown. The United States' amicus brief spoke of, inter alia, the overwhelming public interest in eradicating racial discrimination and its vestiges. In a case, like Brown, where standing is present due to a personal, concrete, and particularized injury-in-fact to the plaintiff, it is of course appropriate for litigants and amici to

In the instant case, plaintiff alleges no such concrete, personal, and particularized injury in fact. He does not allege – because he cannot – that the national motto and its appearance on coins and currency touches him in any concrete manner remotely comparable to the way that the discriminatory state statutes personally impacted the plaintiffs in Brown. The national motto does not require him to do anything, prohibit him from doing anything, deprive him of any benefit, or affect his opportunities in life. Rather, his injury, at bottom, is that he profoundly disagrees with and feels deeply offended by what the American people, through their elected representatives, have chosen as their national motto. As previously explained, that is not enough to establish a cognizable injury in fact for Article III purposes. See Diamond v. Charles, 476 U.S. 54, 62, 106 S. Ct. 1697, 1703 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."); Allen v. Wright, 468 U.S. 737, 755-56, 104 S. Ct. 3315, 3327 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III standing); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 n.13, 94 S. Ct. 2925, 2933 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury).[2] As the D.C. Circuit

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discuss the greater public interest in addressing whether precedent should be overturned and what remedies should be fashioned for constitutional violations. However, a case never reaches that stage unless standing exists in the first place, as it clearly did in Brown. As such, the considerations urged in the Brown amicus brief in no way suggest that the threshold standing requirements of an injury-in-fact that is traceable to the defendants' conduct and redressable by judicial relief can be dispensed with in this or any other case.

[2] The Federal Defendants cited each of these three cases in their opening brief. The only one of them plaintiff addresses is Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315. See Pl. Mem. at 36 n.44. Plaintiff argues that Allen's teaching that "such [stigmatizing] injury accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct," Allen, 468 U.S. at 755, 104 S. Ct. at 3326, actually cuts in his favor because he has, in fact, been "personally denied equal treatment." This contention rings hollow because the national motto and coin and currency statutes challenged here do not effect any "treatment" of plaintiff at all, equal or unequal. Indeed, the plaintiffs in Allen – parents of African-American schoolchildren who challenged what they alleged to be inadequate policing by the IRS of schools that discriminated racially, ultimately resulting in diminished opportunities to receive an appropriate desegregated education – were affected in an arguably more tangible way by the regulations they challenged, yet the Supreme Court held that even they lacked standing.

has put it, "general emotional harm, no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes." Humane Soc'y of United States v. Babbitt, 46 F.3d 93, 98 (D.C. Cir. 1995).

Contrary to plaintiff's suggestion, Pl. Mem. at 36, these principles apply every bit as much in Establishment Clause cases as in any other case. See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 488, 102 S. Ct. 752, 767 (1982) (rejecting the court of appeals' approach that "enforcement of the Establishment Clause demands special exceptions from the requirement that a plaintiff allege distinct and palpable injury to himself that is likely to be redressed if the requested relief is granted" (internal quotation marks and ellipsis omitted)).[3]

Nor has plaintiff rebutted the Federal Defendants' arguments with regard to the lack of traceability. In our opening brief, we pointed out that the only remotely concrete injuries of which plaintiff complained (e.g., being refused a job by a private hospital; deciding that it would be futile to seek elective office; being the subject of derogatory insults by private individuals) were clearly not traceable to the challenged statutes. Defs' Mem. at 20-21; see Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 42, 96 S. Ct. 1917, 1926 (1976) (rejecting standing theory that challenged federal regulations "encouraged" the actions of private entities that resulted in the injury complained of). Plaintiff claims that "Defendant United States found these same injuries traceable in Brown v. Board of Education" (Pl. Mem. at 36), but this just shows that he misses

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See id. at 755-56, 104 S. Ct. at 3327 (rejecting the notion that all members of group against which the government was alleged to be discriminating possess standing regardless of whether they suffered concrete, personal injury).

[3] Plaintiff misperceives the issue when he caricatures the Federal Defendants' argument as being "that a plaintiff can be the victim of an Establishment Clause violation, yet not have standing." Pl. Mem. at 35. That is not what the Federal Defendants said. Rather, the language from defendants' brief that plaintiff block quotes simply makes the self-evident point that a plaintiff does not satisfy Article III requirements and obviate further inquiry merely by liberally reciting certain phrases in the complaint. See Defs. Mem. at 18-19. Here, of course, as we discuss elsewhere, binding precedent holds that there is no Establishment Clause violation of which one could possibly be a "victim" anyway. See, e.g., Aronow v. United States, 432 F.2d 242 (9th Cir. 1970); Defs. Mem. at Section I; infra at Section III.A.

the point: Again, standing was not disputed in Brown, but if it had been, the traceability requirement no doubt would have been found readily satisfied by the fact that the schoolchildren's injury (having to attend segregated schools) was directly caused by the statute requiring the schoolchildren to attend segregated schools. In contrast, no such causal relationship exists between the challenged statutes and, for instance, the diminished employment prospects or hostile social environment that plaintiff claims to experience.

With respect to redressability, plaintiff appears to concede that the relief he seeks would not prevent him from being exposed to the national motto through contact with coins and currency already in circulation (particularly as regards his numismatic activities, which involve an already-accumulated collection of historical coins, see Compl. ¶ 206). See Defs. Mem. at 22-23. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 107, 118 S. Ct. 1003, 1019 (1998). Plaintiff insists that "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." Pl. Mem. at 37. But the redressability component of Article III standing demands more than a quest for a symbolic statement that plaintiffs hopes will send a message to the public. The federal courts are not, after all, "merely publicly funded forums for the ventilation of public grievances." Valley Forge, 454 U.S. at 473, 102 S. Ct. at 759. Further, plaintiff ignores entirely our separate point that his claims are not redressable against the Legislative Branch defendants for the reasons stated in our opening brief. See Defs. Mem. at 21-22. For all these reasons, plaintiff has not established standing on the basis of a personal, concrete injury to himself that satisfies Article III requirements.[4]

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[4] In a tacit admission that the existing Complaint may not make out an Article III case or controversy, plaintiff promises to provide "[f]urther examples and details of the infringement" in a forthcoming Amended Complaint to be submitted on or before May 9, 2006. Pl. Mem. at 28 n.34. The Federal Defendants object to plaintiff's plan to file an amended complaint after briefing on a motion to dismiss the original complaint has closed and ten days before oral argument. While it is true that plaintiff currently has the ability to amend his complaint as of right under Fed. R. Civ. P. 15(a), that does not mean that after the parties have stipulated to and

Plaintiff's attempt to maintain taxpayer standing fares no better. As previously discussed, taxpayer standing would require, inter alia, (i) that there be an expenditure of taxpayer dollars spent solely on the challenged activity; and (ii) that such expenditure derive from Congress's authority under the Taxing and Spending Clause, U.S. Const. art. I, § 8, cl. 1. See Defs. Mem. at 23-25; Doe v. Madison Sch. Dist. No. 321, 177 F.3d 789, 794 (9th Cir. 1999) (en banc) ("If a plaintiff identifies no public funds that were spent solely on the challenged activity, then the plaintiff has not alleged a taxpayer injury."); Valley Forge, 454 U.S. at 480, 102 S. Ct. at 762 (no taxpayer standing where the challenged government action "was not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8"). Plaintiff admits that he cannot make the first showing at this time, and does not even attempt to make the second.[5] Thus, he lacks taxpayer standing as well.

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the Court has adopted a fair and orderly schedule for the adjudication of a dispositive motion, it is appropriate for plaintiff to time his amendment in a manner that disrupts that schedule and deprives the other parties of the right to be heard in the normal fashion. The Federal Defendants reserve their right to seek appropriate relief with respect to any amended complaint that plaintiff may file without due regard for the briefing schedule the parties stipulated to and the Court adopted.

[5] As to the first issue, plaintiff claims that he needs discovery "to determine precisely what additional funds are spent in adding 'In God We Trust' . . . ." and insists that simply alleging an expenditure that he does not know actually exists sufficiently establishes taxpayer standing to withstand a motion to dismiss. Pl. Mem. at 38. However, "the complaint must stand or fall on its own merits and cannot be used as a vehicle for searching out and discovering a right of action." Fifth Avenue Peace Parade Comm. v. Gray, 480 F.2d 326, 333 (2d Cir. 1973) (internal quotation marks omitted), cert. denied, 415 U.S. 948, 94 S. Ct. 1469 (1974). In particular, "[t]he rules of standing, whether as aspects of the Art. III case-or-controversy requirement or as reflections of prudential considerations defining and limiting the role of the courts, are threshold determinants of the propriety of judicial intervention. It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth v. Seldin, 422 U.S. 490, 517-18, 95 S. Ct. 2197, 2215 (1975). "In other words, the burden is on the plaintiff to allege facts sufficient to support standing." Ward v. Santa Fe Ind. Sch. Dist., 393 F.3d 599, 607 (5th Cir. 2004) (rejecting plaintiffs' taxpayer standing theory and their plea for discovery to find out whether they had suffered an injury). In any event, regardless of his ability to show an expenditure, plaintiff does not even attempt to come to grips with the second and independent problem with his theory: that the statutes prescribing the form and appearance of money are not part of a taxing and spending program, but rather are in pursuance of Congress's separate constitutional authority to coin money, see U.S. Const., art. I, § 8, cl. 5.

Finally, plaintiff also argues that "standing under RFRA is incontrovertible" because it is "specifically granted in the statute," block quoting the first sentence of 42 U.S.C. § 2000bb-1(c). See Pl. Mem. at 27. Plaintiff conveniently overlooks the second sentence of that same subsection, which provides: "Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution." 42 U.S.C. § 2000bb-1(c) (emphasis added). Indeed, the Ninth Circuit has made plain that "[a] federal statute . . . cannot confer standing on plaintiffs who do not meet Article III requirements." Rivas v. Rail Delivery Serv., Inc., 423 F.3d 1079, 1083 (9th Cir. 2005); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 571-78, 112 S. Ct. 2130, 2142-46 (1992) (holding that citizen suit provision in statute does not substitute for or obviate satisfaction of Article III case-or-controversy requirements). Thus, in addition to falling within the class of persons specified in the statute as entitled to relief, plaintiff must meet – and, as discussed supra and in the Federal Defendants' opening brief, fails to meet – the minimum Article III case-or-controversy requirements, i.e., a cognizable injury-in-fact, traceability, and redressability, for his RFRA claim no less than for his constitutional claims. Moreover, as discussed further infra, plaintiff does not have a viable RFRA claim because his religious exercise has not been "substantially burdened" within the meaning of that statute.

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

In their opening brief, the Federal Defendants showed that the Legislative Branch defendants (i.e., Congress and the Law Revision Counsel) are immune from plaintiff's claims under the doctrines of both Speech or Debate Clause immunity and sovereign immunity. Plaintiff fails to overcome the Legislative Branch defendants' immunity. Defs. Mem. at 25-28.[6]

[6] As a threshold matter, we note that these immunity arguments apply only to the Legislative Branch defendants, and that the Administrative Procedure Act provides a limited waiver of the sovereign immunity of Executive Branch officials as necessary to enable constitutional challenges to governmental action to be brought. See 5 U.S.C. § 702; see Defs. Mem. at 28 n.21. Thus, plaintiff's protestation that these immunities "turn[] the Establishment Clause into a nullity" (Pl. Mem. at 42) is without merit. For similar reasons, plaintiff's string cite (Pl. Mem. at 40 n.46) of cases for the uncontroversial proposition that the courts can and do declare Acts of Congress unconstitutional adds nothing to the analysis. In none of the cited

Plaintiff's principal contention, with regard to both forms of immunity, appears to be that "a waiver of congressional immunity must be inherent in the Establishment Clause itself." Pl. Mem. at 41; see also Pl. Mem. at 42 (advocating exception from Speech or Debate Clause immunity because "performing a clearly unconstitutional act cannot, in any way, be considered part of 'the legislative process'"), 43 ("The breach here was of a provision under the Constitution . . . the same Constitution that created the Congress, itself. Thus, the logic of sovereign immunity . . . does not apply."). These arguments have long been rejected. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-11, 95 S. Ct. 1813, 1824-25 (1975) (rejecting argument for inherent First Amendment exception because that approach "ignores the absolute nature of the speech or debate protection"); Arnsberg v. United States, 757 F.2d 971, 980 (9th Cir. 1984) (rejecting argument that sovereign immunity does not apply when the claim is under the Constitution itself), cert. denied, 475 U.S. 1010, 106 S. Ct. 1183 (1986). Indeed, they were specifically rejected by the Ninth Circuit in plaintiff's prior litigation challenging the Pledge of Allegiance. Newdow v. U.S. Congress, 328 F.3d 466, 483 (9th Cir.), cert. denied, 540 U.S. 962, 124 S. Ct. 386 (2003), rev'd on other grounds sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004); see also Defs. Mem. at 27 n.20.[7]

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cases was Congress or the Law Revision Counsel named by the plaintiff as a defendant.

[7] Plaintiff is also wrong to assert that the Law Revision Counsel, an official of the United States Congress, "has no protection under [the] Speech or Debate Clause." Pl. Mem. at 42. Plaintiff cites a case where claims were allowed to proceed against House of Representatives employees alleged to have blocked a Member's entry and cut off his salary. Powell v. McCormack, 395 U.S. 486, 494, 89 S. Ct. 1944, 1949 (1969). A later case of the Supreme Court, however, rejected attempts to rely on Powell for "the simple proposition that immunity was unavailable to congressional or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct that was not entitled to Speech or Debate Clause protection." Gravel v. United States, 408 U.S. 606, 620-21, 92 S. Ct. 2614, 2624-25 (1972). The result in Powell, the Gravel Court explained, was driven by the fact that "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." Id. at 621, 92 S. Ct. at 2625. On the other hand, Gravel clarified, Speech or Debate Clause immunity extends fully to lesser officials for any functions that would enjoy immunity if performed by a Member. Id. at 622, 92 S. Ct. at 2625.

Plaintiff also claims that the Legislative Branch defendants' sovereign immunity is waived by RFRA, 42 U.S.C. § 2000bb-1(c). Pl. Mem. at 39-40. But Congress is not a proper party defendant to a claim alleging that one statute Congress enacted is rendered invalid by RFRA, another statute Congress enacted. Such claims must be directed against the officials who administer and enforce the statute alleged to be invalid. In any event, Congress enjoys independent immunity under the Speech or Debate Clause, which plaintiff does not even contend is withdrawn or otherwise affected by RFRA.[8]

III. PLAINTIFF'S CLAIMS ARE CLEARLY BARRED BY BINDING PRECEDENT AND FAIL ON THE MERITS

A. Plaintiff Concedes That the Establishment Clause Claim Must Be Dismissed

Plaintiff concedes that Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), is directly on point and constitutes binding precedent for this Court to follow with respect to his Establishment Clause claim. Pl. Mem. at 2. As such, we will not belabor the point and will respond only briefly to plaintiff's lengthy but largely gratuitous efforts to discredit Aronow and the many statements in Supreme Court opinions that also bar his claims.

Plaintiff first criticizes Aronow's reliance on Engel v. Vitale, 370 U.S. 421, 82 S. Ct.

In the instant case, the only acts of the Law Revision Counsel challenged are his "preparation and publication of the United States Code" under Congress's direction, Compl. ¶¶ 9, 165, 192, 242-248, a matter undoubtedly well within the "sphere of legitimate legislative activity." Eastland, 421 U.S. at 501, 95 S. Ct. at 1820 (internal quotation marks omitted). Moreover, it can hardly be said that this case does not involve an attack on "the motives or purposes underlying" the challenged statutes. Gravel, 408 U.S. at 421, 92 S. Ct. at 2625; see Compl. ¶¶ 80-103, 117-128, Appendices B, C, D, E. Thus, the Law Revision Counsel is plainly entitled to immunity, and is not a necessary or proper defendant in a case challenging the constitutionality of a federal statute.

[8] While perhaps largely academic in light of the waiver of sovereign immunity of Executive Branch officials contained in the Administrative Procedure Act, see supra note 6, plaintiff is incorrect in asserting that the Little Tucker Act, 28 U.S.C. § 1346(a)(2), waives the sovereign immunity of any party. See Pl. Mem. at 43. As plaintiff is aware from his previous litigation, the Little Tucker Act "has not been construed to waive sovereign immunity for equitable claims," which are the only type of claims in this case. Newdow v. Eagen, 309 F. Supp. 2d 29, 36 n.4 (D.D.C. 2004); see also Richardson v. Morris, 409 U.S. 464, 465, 93 S. Ct. 629, 630-31 (1973) (per curiam) (§ 1346(a)(2) "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States").

1261 (1962), which dismissed the notion that there could be anything unconstitutional about the "many manifestations in our public life of belief in God," id. at 435 n.21, 82 S. Ct. at 1269 n.21. "Such patriotic or ceremonial occasions," including things like recitation of the Declaration of Independence with its reference to a Deity and singing the "officially espoused" National Anthem containing the words "In God is our Trust," "bear no true resemblance to the unquestioned religious exercise" struck down in Engel. Id. According to plaintiff, the reference to a Deity in the Declaration of Independence of 1976, reprinted in U.S.C before 1 U.S.C. § 1, and the words "In God is our Trust" in the National Anthem, 36 U.S.C. § 301, are distinguishable from the words "In God We Trust" in the National Motto, 36 U.S.C. § 302, because only the latter involves "government taking an active role in the establishment of such a belief." This asserted distinction is as unpersuasive today as it no doubt would have seemed to the Aronow Ninth Circuit if argued there.

Plaintiff also denounces Aronow's reasoning as "illogical" by hypothesizing a fictional version of Aronow that, rather than upholding the type of "manifestation[] in our public life of belief in God" that Engel endorsed, id. at 435 n.21, 82 S. Ct. at 1269 n.21, instead purported to uphold the very same school prayer that Engel declared unconstitutional. In such a scenario, plaintiff argues, Engel's observation that "it is not easy to discern any religious significance," as applied to school prayer, would not have made sense. Plaintiff's logic is fundamentally flawed. A judicial precedent cannot be impeached by imagining a hypothetical opinion dealing with a different issue and saying the reasoning in the real-life opinion would not be justified if transferred to the fictitious opinion. Aronow, of course, did not uphold practices struck down by Engel. Rather, it upheld a permissible acknowledgment of religion whose constitutionality Engel itself strongly signaled.

As we explained in our opening brief, the constitutionality of the national motto is affirmed not only in Aronow, but also in repeated statements in Supreme Court opinions in many of its leading Establishment Clause cases. Defs. Mem. at 4-7. Plaintiff contends that the accumulation of these statements amounts to little because the statements conflict with an "overwhelming number of principled statements" in Establishment Clause jurisprudence. Pl.

Mem. at 11, 13-15, 16-18; Appendix M to Compl. But the principled statements to which plaintiff refers are simply general propositions under the Establishment Clause, and many of the Court's statements that governmental acknowledgments of religion, like the national motto, are permissible occur in the same opinions in which those propositions are stated, often as a way of illustrating or qualifying them. In reality, as the Court has explained, there is no conflict or inconsistency between the general principles plaintiff quotes and allowing certain governmental acknowledgments of religion, such as the national motto. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 686-87, 104 S. Ct. 1355, 1366 (1984) (holding that any notion that "public acknowledgment[s] of the religious heritage long officially recognized by the three constitutional branches of government . . . pose a real danger of establishment of a state church is far-fetched indeed" and would be "a crabbed reading of the Clause"); id. at 693, 104 S. Ct. at 1369-70 (O'Connor, J., concurring) ("those practices are not understood as conveying governmental approval of particular religious beliefs").[9]

Plaintiff tries to explain away or minimize one statement in a Supreme Court opinion after another. Among other things, he accuses Justices of "fall[ing] prey to the tendency of people throughout history to use the machinery of the State to practice their beliefs," Pl. Mem. at 11 (internal quotation marks omitted), speculates that they "deviated from [their] own personal sincere views about the law," id. at 13 (internal quotation marks omitted), chides them for "incredibly offensive and insensitive prose," id. at 24, and announces that principles they have adopted "need[] to be challenged," id. at 26. Plaintiff also suggests that the Supreme Court's past statements about "In God We Trust" have suffered from a lack of information because the Justices "did not have a thorough knowledge of the history," id. at 53, and did not have the results of a 1994 telephone survey of 900 households that plaintiff attaches to his Complaint as

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[9] For the same reason, plaintiff's criticism of Aronow as inconsistent with general principles such as "'[W]e will not tolerate either governmentally established religion or government interference with religion,'" Pl. Mem. at 6 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669, 90 S. Ct. 1409, 1412 (1970)), is misplaced. Aronow is, of course, perfectly consistent with that principle: the Court of Appeals found that in light of its "patriotic and ceremonial character," its lack of "theological or ritualistic impact," and other considerations, the national motto did not tend to establish a religion, nor interfere with it. Aronow, 432 F.2d at 243.

Appendix N, id. at 16.[10] None of these attacks detracts from the fact that between 1952 and the present day, the many statements by the Supreme Court and its individual Justices on the matter have all pointed toward the constitutionality of the national motto – a consensus all the more notable for its contrast to what plaintiff concedes were the "extremely fractured" (id. at 13) dispositions of many of the underlying Establishment Clause cases in which that consensus was reflected. See generally Defs. Mem. at 4-8.

Plaintiff's treatment of County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 602-03, 109 S. Ct. 3086, 3106 (1989), where the Court[11] observed that "[o]ur 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," is illustrative of his misinterpretation of what the Justices of the Supreme Court have said. Plaintiff tries to convey an appearance of dissonance over the foregoing proposition by quoting Justice Kennedy's opinion concurring in the judgment in part and dissenting in part, from which plaintiff infers that "[t]here was clearly no uniformity among the justices on the 'In God We Trust' question." Pl. Mem. at 12.

This portrayal is specious. Far from harboring doubts about the constitutionality of the national motto, Justice Kennedy and the three Justices who joined his opinion in County of Allegheny voted to uphold the more controversial display of a creche found unconstitutional by the majority, believing that the majority's "view of the Establishment Clause reflects an unjustified hostility toward religion." County of Allegheny, 492 U.S. at 655, 109 S. Ct. at 3134

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[10] In Gaylor v. United States, 517 U.S. 1211, 116 S. Ct. 1830 (1996), the Supreme Court denied without comment a petition for certiorari based principally on the argument that the lower courts had erred by upholding the constitutionality of "In God We Trust" without allowing plaintiffs to introduce into evidence the same survey that is Appendix N to plaintiff's complaint in this case, see Petition for Writ of Certiorari, Gaylor v. United States, No. 95-1713 (Jan. 1, 1996), available at 1996 WL 33438761.

[11] Plaintiff describes this opinion as "Justice Blackmun's plurality opinion." However, as reflected in plaintiff's own brief, see Pl. Mem. at 13 n.16 (quoting reporter's lineup of opinions), the part of the opinion containing the quoted passage (Part V) was joined by a majority of the Justices and therefore is the opinion of the Court. See 492 U.S. at 577, 109 S. Ct. at 3092-93.

(Kennedy, J., concurring in the judgment in part and dissenting in part). The language discussing the national motto to which plaintiff refers came in the context of Justice Kennedy's criticism of the majority's test for insufficiently accommodating governmental acknowledgments of religion, such as the national motto, the Pledge of Allegiance, and the National Day of Prayer. Id. at 670, 109 S. Ct. at 3142 (Kennedy, J., concurring in the judgment in part and dissenting in part) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause." (emphasis added)).

Thus, in raising questions about whether the constitutional permissibility of such official acknowledgments of religion was sufficiently accounted for by the majority's test, Justice Kennedy was hardly making the groundbreaking claim that such acknowledgments are not, in fact, constitutionally permissible. To the contrary, his point was that if the majority's test led to such aberrational results, it could not possibly be an accurate reading of the Establishment Clause. Of course, the majority, as shown in the language quoted above, was quick to respond to this criticism by clarifying their analysis to repudiate any suggestion that the national motto and the Pledge might be called into question. As the Seventh Circuit aptly put it in a case upholding the Pledge of Allegiance against an Establishment Clause challenge, "[a]n outcry in dissent that one or another holding logically jeopardizes the survival of this tradition always provokes assurance that the majority opinion carries no such portent." Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 447 (7th Cir. 1992) (citing, inter alia, County of Allegheny), cert. denied, 508 U.S. 950, 113 S. Ct. 2439 (1993); see also Defs. Mem. at 6 n.5 (pointing out that the same phenomenon occurred in Engel). And, thus, the majority and dissent in County of Allegheny were united in the premise that the national motto was constitutional, even as they split on the constitutionality of the creche. Plaintiff's suggestions that the Justices were of mixed views and that the question of the national motto's constitutionality remains an open one are wholly without foundation, as are his other attempts to cast aspersions on the repeated statements

of the Supreme Court and its Justices.[12]

Again, though, the Court need not individually parse each of plaintiff's various objections to the precedents that control. Plaintiff concedes at the outset that Aronow is "directly on point" and "controlling," at least with respect to his Establishment Clause claim. Pl. Mem. at 2. Thus, Aronow is "the law of the circuit and can only be overturned by an en banc [Ninth Circuit] court or by the Supreme Court." Padilla v. Lever, 429 F.3d 910, 916 (9th Cir. 2005) (internal quotation marks omitted). As shown below, Aronow also is fatal to plaintiff's other remaining claims.

B. Plaintiff's RFRA Claim Also Fails As a Matter of Law

To be sure, Aronow and the repeated statements of the Supreme Court do not directly reject the claim that the challenged statutes are rendered invalid by RFRA. After all, RFRA was not yet in existence when those decisions were rendered. Nevertheless, for the reasons set forth below, the reasoning in those cases is fatal to plaintiff's RFRA claims as well. In any event, plaintiff's RFRA count fails to state a claim upon which relief may be granted for other reasons

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[12] As but one example of plaintiff's other misstatements, plaintiff says it was "truly disingenuous" for the Federal Defendants to quote the famous proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being." See Pl. Mem. at 46-47. According to plaintiff, when Justice Douglas wrote that phrase in Zorach v. Clauson, 343 U.S. 306, 313, 72 S. Ct. 679, 684 (1952), he must have been talking only about "institutions" other than governmental ones. Plaintiff's speculation collapses upon minimal scrutiny. For one thing, the Federal Defendants cited this language as used in the Court's opinion in Lynch v. Donnelly, 465 U.S. 668, 675, 104 S. Ct. 1355, 1360 (1984), not Zorach. See Defs. Mem. at 29-30. For another, in Lynch and Zorach alike, the context indisputably shows that the authors of those respective decisions had in mind institutions in the normal sense of the word. See Zorach, 343 U.S. at 312-13, 72 S. Ct. at 683 (stressing that "references to the Almighty . . . run through our laws, our public rituals, our ceremonies," citing legislative prayers, executive addresses, and courtroom oaths); id. at 313-14, 72 S. Ct. at 684 ("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." (emphasis added)); Lynch, 465 U.S. at 674-75, 104 S. Ct. at 1360 (quotation about "institutions presuppos[ing] a Supreme Being" occurs in the middle of a paragraph beginning with "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."). See also Van Orden v. Perry, 125 S. Ct. 2854, 2859 (2005) (plurality opinion) ("Our institutions presuppose a Supreme Being, yet these institutions must not press religious observances upon their citizens." (emphasis added)).

as well.[13]

Claims challenging government practices acknowledging religion on the ground that they allegedly "endorse" religion are, not surprisingly, uniformly treated as arising under the Establishment Clause, which, after all, prohibits the government from establishing or tending to establish a religion. See, e.g., Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003), rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301 (2004) (challenge to Pledge of Allegiance); Newdow v. Congress of the United States, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), on appeal, Nos. 05-17257, 05-17344, 06-15093 (9th Cir.) (same); Newdow v. Bush, 355 F. Supp. 2d 265 (D.D.C. 2005) (challenge to inaugural prayer); Newdow v. Eagen, 309 F. Supp. 2d 29 (D.D.C. 2004) (challenge to congressional chaplains). Courts have shown little hesitation in rejecting attempts to alternately plead such "endorsement" claims as infringements of free exercise rights, because the Free Exercise Clause and RFRA focus not on endorsement but rather on the government's regulation of the conduct of individuals. See O'Hair v. Blumenthal, 462 F. Supp. 19, 19 (W.D. Tex. 1978) (rejecting challenge to national motto on Free Exercise Clause as well as Establishment Clause grounds), aff'd on opinion below, 588 F.2d 1144 (5th Cir.), cert. denied, 442 U.S. 930, 99 S. Ct. 2862 (1979); Newdow v. Bush, 355 F. Supp. 2d 265, 290 (D.D.C. 2005) ("Newdow's remaining claims carry little force. He argues that inaugural prayer burdens his rights under the Free Exercise Clause and RFRA. . . . Newdow does not cite a single authority that has even indicated that government-sponsored prayer might not only establish a favored religion (under the Establishment Clause) but also infringe the free exercise rights of adherents to a disfavored religion (under the Free Exercise Clause or RFRA).").

As the Federal Defendants argued in their opening brief, see Defs. Mem. at 11-12, 43-44. plaintiff's RFRA claim is simply a repackaging of his Establishment Clause claim: the gravamen of his RFRA allegations is that the motto "repeatedly forces Newdow to confront a

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[13] It is unclear whether plaintiff continues to maintain a Free Exercise Clause claim independent of his RFRA claim. See Pl. Mem. at 2 ("Plaintiff's Free Exercise claim is likely subsumed by the RFRA claim."), 62. To the extent plaintiff has not abandoned his Free Exercise Clause claim, the same considerations urged in this section generally apply and mandate dismissal of that claim as well.

religious belief he finds offensive," Compl. ¶ 197, and the limitations or burdens that plaintiff claims are placed on his religious exercise all flow from the premise that having "In God We Trust" on the national motto and on coins and currency connotes an endorsement of Christian monotheism. Aronow and the repeated statements of the Supreme Court make that premise invalid as a matter of law. Far from explaining how his RFRA claim can possibly stand independent of that premise, plaintiff's response only serves to reinforce the dependency: plaintiff insists that "the Establishment Clause violations here have pervasive Free Exercise Clause effects," Pl. Mem. at 63 (emphasis added), and that the remedy for his Free Exercise Clause/RFRA claims is "ending the blatant endorsement," Pl. Mem. at 37 n.45 (emphasis added). The converse of these statements is that if there in fact are no Establishment Clause violations, then there are no "Free Exercise Clause effects"; if there is no "endorsement," then there is no Free Exercise Clause or RFRA violation to remedy.[14]

Even if Aronow and other precedents did not control plaintiff's RFRA claim, that claim fails for other reasons as well. As discussed in the Federal Defendants' opening brief, the statutes providing for the national motto and directing the appropriate agencies to include it on coins and currency are not coercive in nature and do not regulate the conduct of citizens. Defs. Mem. at 39-43. Under Bowen v. Roy, 476 U.S. 693, 106 S. Ct. 2147 (1986), and Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 108 S. Ct. 1319 (1988), an individual's simply being aware of or perceiving governmental conduct that one believes is

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[14] It is difficult to turn a page in plaintiff's RFRA/Free Exercise Clause discussion without encountering verbiage that underscores those claims' interdependency with the Establishment Clause claim and that cannot be credited as long as Aronow remains good law. See, e.g., Pl. Mem. at 63 (premise of RFRA/free exercise claim is that motto's appearance on coins and currency is "'purely religious idea'" (quoting Compl.¶ 234)), 65 (premise that the challenged statutes mandate placement of "purely religious dogma"), 69 (premise that "cash and currency carry a religious message"), 70 (premise that "money espouses a religious message", 72 (premise that money is stamped with "purely religious dogma"), 72 (referring to "confrontations with the motto"), 76 (arguing that the national motto does not serve a compelling interest because it "does violence to, if not actually violates, the Establishment Clause"), 77 (asserting that the government "intentionally" and "unequivocally" uses money "in order to espouse a particular religious view"), 37 n.45 (stating that the remedy for the Free Exercise Clause/RFRA claim is to "end[] the blatant endorsement").

insulting to his religious sensibilities does not give rise to a claim under the Free Exercise Clause or RFRA, because "a violation of the Free Exercise Clause is predicated on coercion." Sch. Dist of Abington Township v. Schempp, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572 (1963); see also Pl. Mem. at 58 ("all agree that the Free Exercise Clause protects individuals from forced participation in religious activity" (emphasis added)), 62 ("The coercion test . . . is a measure of a free exercise violation . . . ." (emphasis added)).[15]

When stripped of hyperbole, see Pl. Mem. at 64, 66-67, what is left of plaintiff's discussion of Bowen and Lyng attempts to distinguish those cases as involving government actions that were neutral and generally applicable, whereas the statutes challenged here, according to plaintiff, are "not religiously neutral to anyone." Pl. Mem. at 65. Again, this position is simply incompatible with the teaching of Aronow and other precedent that the national motto "bears no true resemblance to a governmental sponsorship of a religious exercise." Aronow, 432 F.2d at 243. Put differently, as long as Aronow remains good law, a RFRA or Free Exercise Clause claim that has as an essential ingredient the premise that the national motto is not religiously neutral cannot possibly be valid. In any event, the point of Bowen and Roy is that government actions that are non-coercive and non-prescriptive, i.e., do not tell private citizens what they must believe or how they must conduct themselves (or directly or indirectly forbid certain beliefs or conduct), do not violate the Free Exercise Clause regardless of whether plaintiff places a "neutral" or "non-neutral" label on the statutes challenged here.[16]

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[15] Plaintiff chides the government for being "insensitive," relying on the Lyng Court's statement that "[n]othing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen," Lyng, 485 U.S. at 453, 108 S. Ct. at 1328. See Pl. Mem. at 64, 65. The Federal Defendants vigorously dispute that they have been "insensitive" to the "religious needs of any citizen," including plaintiff. But more importantly, the statement in Lyng cannot reasonably be read to create a whole new cause of action under the Free Exercise Clause for "governmental insensitivity" in the absence of the direct or indirect coercion or penalties that Lyng's core holding requires. The Court was merely noting that it is entirely appropriate, and often desirable, for the government, as a voluntary matter, to act with more solicitude to religion than the Free Exercise Clause strictly requires.

[16] Contrary to plaintiff's assertion, Pl. Mem. at 64-65 n.87, RFRA does not change this

(continued...)

Assuming arguendo that RFRA applies, plaintiff's claim would still fail for the various other reasons discussed in the Federal Defendants' opening brief, including that he has not shown the "substantial burden" on his religious exercise that is necessary (but not sufficient) to make out a violation of RFRA. See Defs. Mem. at 43-45. In his response, plaintiff likens this case to Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963), where statutory ineligibility for unemployment benefits caused by the claimant's refusal for religious reasons to work on the Sabbath Day of her faith was held to be a "substantial burden." See Pl. Mem. at 69. The Sherbert court reasoned that for the government to withhold, on account of a citizen's religious beliefs and exercise, a benefit to which the citizen was otherwise entitled was equivalent to "a fine imposed against appellant for her Saturday worship." 374 U.S. at 404, 83 S. Ct. at 1794. Here, the government certainly is not imposing a fine on plaintiff because of his religion. Nor do the challenged statutes deny any form of government benefit or eligibility to plaintiff on account of religious beliefs and exercise in any manner at all, let alone in a manner that could somehow be deemed equivalent to a fine. Hence, plaintiff's comparison misses the mark.[17]

That plaintiff's RFRA claim falls short at every step in the analysis only serves to show that it is little more than a creative exercise in repackaging his barred Establishment Clause claim. The RFRA claim, too, must be dismissed.

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[16](...continued)
analysis. Bowen and Lyng would come out the same way today under RFRA. In enacting RFRA, Congress deliberately carried forward the rule of Bowen and Lyng that non-coercive, non-prescriptive government actions with only a tangential effect on the plaintiff are not subject to strict scrutiny. See S. Rep. No. 103-111, at 8-9 & n.19, 1993 U.S.C.C.A.N. 1892, 1898 & n.19 (citing Bowen and Lyng).

[17] Similarly inapposite are the assertedly "indistinguishable" cases plaintiff relies upon involving the carrying or wearing of religious symbols (see Pl. Mem. at 75). Each of those cases involved challenges to prison regulations directly prohibiting inmates from wearing religiously significant items (e.g., yarmulke, prayer beads, crucifixes). In this case, the challenged statutes, which do not regulate the conduct or beliefs of individuals at all, plainly do not prohibit plaintiff from wearing or carrying any item of religious significance to him. Nor do they mandate that he wear or carry any item at all, let alone an item with religious significance like a yarmulke, prayer beads, or crucifix. Nor do they "indirectly" impose such a prohibition or mandate by withholding or conditioning a government benefit.

CONCLUSION

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

Respectfully Submitted,

PETER D. KEISLER
Assistant Attorney General

McGREGOR W. SCOTT
United States Attorney

THEODORE C. HIRT
Assistant Branch Director

/s/ Robert J. Katerberg
ROBERT J. KATERBERG, D.C. Bar No. 466325
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, D.C. 20044
Tel.: (202) 616-8298
Fax: (202) 616-8460
Email: Robert.Katerberg@usdoj.gov

Attorneys for Defendants the United States Congress, Peter LeFevre, The United States of America, John William Snow, Henrietta Holsman Fore, and Thomas A. Ferguson

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