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' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** Date: June 16, 2006 Time: 10:00 a.m. Judge: Hon. Frank C. Damrell, Jr. Courtroom: No. 2

Pursuant to the Court's Minute Order of May 10, 2006 (dkt. no. 45), the Federal Defendants submit this supplemental memorandum to address the First Amended Complaint (dkt. no. 44) filed by plaintiff on May 9, 2006, after the close of regular briefing on the Federal Defendants' motion to dismiss plaintiff's original Complaint. The legal arguments made in support of the Federal Defendants' motion to dismiss apply with equal force to the First Amended Complaint, which plaintiff himself characterizes as having "no significant substantive changes." Plaintiff's Brief Pursuant to the Court's Order of May 9, 2006 (dkt. no. 46) at 1

(hereinafter "Pl. Supp. Mem."). Accordingly, the Federal Defendants incorporate by reference their previous submissions. In addition, the Federal Defendants will briefly address the new allegations added by plaintiff in the First Amended Complaint, none of which cure the defects in plaintiff's legal theories or alter the outcome of this case.[1]

In the previous briefing, we argued first and foremost that plaintiff's claims challenging the constitutionality of the national motto are barred by Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), as well as by numerous statements in Supreme Court opinions in the Establishment Clause area. We also argued that plaintiff lacked Article III standing to pursue his claims because he has not suffered any cognizable injury-in-fact that is traceable to defendants' actions and redressable through judicial relief against defendants, and that the Legislative Branch defendants are entitled to dismissal on independent grounds of immunity. Finally, we argued that even if this was a case of first impression rather than governed by precedent that is directly on point, plaintiff's claims would clearly fail on de novo analysis of the merits.

Some of the new material appears to have been intended to cure plaintiff's lack of standing, but in fact, it only serves to highlight the absence of an Article III case or controversy. For instance, plaintiff inserts new language alleging that, in addition to a pre-existing allegation that he was told secondhand that unidentified hospitals declined at an unspecified time to hire him "because of the (mis)-perception of his activism," Orig. Compl. ¶ 173 (text same as First Amended Compl. ¶ 188), "[s]imilar losses of employment have apparently recurred since, and are likely to recur in the future as long as the current motto remains," First Amended Compl. ¶

---

[1] While it was plaintiff's prerogative to amend his complaint as he saw fit, it is difficult to see why this amendment was necessary or what it has contributed to development of the issues governing this case, beyond triggering a continuance and additional briefing. Mostly an editorial exercise, the First Amended Complaint adds no new or different claims for relief and, though it provides a few additional details about factual allegations already made, it lacks significant new or different factual allegations; plaintiff describes it as making "no significant substantive changes." Indeed, the amendment (like the original complaint) consists predominantly of legal argument and citations and historical/sociological analysis that belong more appropriately in a motion or brief than a complaint. See Fed. R. Civ. P. 8(a) (complaint is to contain "a short and plain statement of the claim showing that the pleader is entitled to relief").

191. This addition, even if it were not utterly vague, misses the point: that whatever propensity employers may have to hire or not to hire plaintiff, there is no "causal connection . . . [to] the conduct complained of" in this case, i.e., the national motto. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136 (1992); see Federal Defendants' Memorandum in Support of Motion to Dismiss (dkt. no. 25) ("Defs. Mem.") at 19-21. By their own terms, plaintiff's allegations attribute the unspecified "losses of employment" to people's perception (accurate or not) of his activism, i.e., his previous litigation activity. It defies common sense to suppose that the existence of the national motto has anything to do with employers' hiring decisions. Plaintiff is free to pursue any claims he may have against any entities that allegedly denied him employment for what he believes are improper reasons, but these allegations certainly do not make out an actionable case or controversy against the federal government with respect to the national motto.

Nor is it tenable to assert, as another newly added sentence does, that plaintiff's allegedly diminished employment opportunities make him "similar to the plaintiff in Sherbert v. Verner, [374 U.S. 398, 83 S. Ct. 1790 (1963)], having suffered a severe, personalized injury, which occurred largely because of the Defendants' activities," First Amended Compl. ¶ 198. The plaintiff in Sherbert was denied unemployment benefits because of a state law making her ineligible due to refusal to work on the Sabbath Day of her faith, which the Court equated to a "fine imposed against appellant for her Saturday worship." 374 U.S. at 404, 83 S. Ct. 1794. The direct causation in Sherbert – denial of government benefits, due to statute making the plaintiff ineligible for same – is a far cry from plaintiff's theory that the national motto somehow persuades employers or other private actors to act to his personal detriment.[2]

Equally inconsequential are new allegations about the phrase "In God We Trust" having

---

[2] In addition to these asserted injuries not being traceable to the national motto, they also plainly fail to meet the separate redressability requirement for Article III standing. These alleged injuries all flow from the actions of unidentified entities who are not parties to this litigation and against whom any relief in this case would not operate. In addition, plaintiff's speculation that successful invalidation of the national motto would induce people who have a negative perception (accurate or not) of his activism to treat him more favorably is dubious at best.

been used on a bulletin at a church service that plaintiff voluntarily attended. First Amended Compl. ¶¶ 193-196. Plaintiff cannot reasonably be heard to voluntarily attend a religious worship service and then complain about suffering injury from what he observes there, let alone attribute that so-called "injury" to the government. Moreover, whatever use individuals or churches engaged in constitutionally protected religious exercise may make of the words that comprise the national motto – a matter as to which, of course, the government does not and could not have any involvement – has no bearing on whether the motto itself, as it exists in statute and on coins and currency, constitutes an impermissible establishment of religion. For the reasons we have previously explained, see Defs. Mem. at 28-39, it does not.

Plaintiff also provides new details around his contention that his religious exercise is infringed because his unwillingness to use money bearing the national motto sometimes makes it logistically difficult to procure supplies. First Amended Compl. ¶¶ 246-247 (alleging that "FACTS garb . . . at times cannot be purchased"), 248 (alleging that "[t]he FACTS libation – known as 'The Freethink Drink' – at times cannot be formulated in its recommended manner"), 249 (similar allegation re inability to purchase books for church library). Even if plaintiff's argument in this regard could be credited, any such inconveniences plaintiff faces are plainly not the result of any coercion or restriction that the government has imposed upon him. And, as explained in previous briefing, plaintiff's theory that use of United States coins and currency by him is tantamount to "forced evangelism" is flawed in its very premises because, as held by numerous courts, the national motto simply does not represent any government "evangelism" or endorsement of particular religious beliefs in the first place. See Defs. Mem. at 43-44.[3]

Finally, plaintiff attaches three new appendices to his complaint. The first new appendix recounts the details of an immigration case in the early 1950s. First Amended Compl. App. O. The second and third appendices attempt to demonstrate that "American society" and "at least

---

[3] The same flaws undercut plaintiff's new allegations that his "inability" to use cash hindered his religious exercise by preventing him from visiting the Harvard Divinity School or downtown Sacramento libraries (First Amended Compl. ¶¶ 252-254), and from proselytizing street vendors in Mexico (First Amended Compl. ¶ 263).

some members of the current Congress" (Pl. Supp. Mem. at 4), respectively, use "In God We Trust" in a purely religious sense. First Amended Compl. Apps. P, Q. These appendices have no impact on the legal issues in this case. It is not disputed that expressions of trust in God may be imbued with a particular import or motivation, including a sectarian or evangelical one, when used, for example, by ministers during worship services or by authors of religious texts that espouse a particular religious doctrine. Words, of course, can have different meanings depending on the context and setting. Cf. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 26, 124 S. Ct. 2301, 2317 (2004) (Rehnquist, J., concurring in the judgment) (noting that the phrase "under God" in the Pledge of Allegiance "might mean several different things" to different people). In their role as the national motto, the words "In God We Trust" plainly are not being used to carry out a worship service, evangelize, or espouse any particular religious doctrine.[4] To the contrary, they are "purely patriotic or ceremonial expressions," Aronow v. United States, 432 F.2d 242 (9th Cir. 1970) (citing Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962)), that "serve . . . 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 v. Donnelly, 465 U.S. 668, 693, 104 S. Ct. 1355, 1369-70 (1984) (O'Connor, J., concurring), and that are so historical and ubiquitous that they are not understood

---

[4] Moreover, as to plaintiff's contention regarding statements made by "at least some members of the current Congress" (Pl. Supp. Mem. at 4), the quotations from the Congressional Record that plaintiff wrenches from their context and splices together do not have the import plaintiff ascribes to them; they do not remotely suggest that the national motto has "purely religious" significance. First Amended Compl. App. Q. And even if they did, occasional individual statements reflecting attitudes or beliefs of individual, currently-sitting Members of Congress would not be significant to the legal analysis in this case. Cf. Elk Grove, 542 U.S. at 41, 124 S. Ct. at 2325 (O'Connor, J., concurring in the judgment) (even with respect to the Congress that originally enacted statute, and even when contained in the actual legislative history of the statute, the intentions of "some of the legislators" to "attach . . . an overtly religious message" "cannot, on their own, decide the inquiry," because there were also permissible secular objectives for adding the words "under God" to the Pledge of Allegiance). The constitutional analysis in this case must turn on the holdings and principles the Supreme Court, Ninth Circuit, and numerous other courts have clearly and repeatedly articulated, not on sampling or running search queries on the latest edition of the Congressional Record.

as endorsing a particular religious belief, id. at 716, 104 S. Ct. at 1382 (Brennan, J., dissenting). Bibliographic analysis and internet search results about uses of words by churches, authors, businesses, and others in assorted contexts and settings fail to rebut this proposition and provide no basis for disregarding judicial precedent that is directly on point.[5]

CONCLUSION

For the foregoing reasons and those stated in their previous submissions, 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

[*signature block continued on next page*]

[5] The Federal Defendants will also take this opportunity to respond to Plaintiff's Submission of Supplemental Authority, filed May 18, 2006 (dkt. no. 47). Plaintiff cites Harper v. Poway Sch. Dist., No. 04-57037, — F.3d ----, 2006 WL 1043082 (9th Cir. Apr. 20, 2006), in which the Ninth Circuit held that it did not violate the Establishment Clause or the Free Exercise Clause for a school district to bar a student from wearing a shirt bearing a message critical of homosexuality, even though the student claimed to be motivated by religious beliefs. Harper adds nothing material to the analysis in the instant case. The portions of the Court of Appeals' opinion to which plaintiff directs the Court's attention simply recite familiar general principles of Establishment Clause and Free Exercise Clause jurisprudence (e.g., the policy behind those Clauses, the elements of the Lemon test, and so forth). Applying those general principles to the particular facts in Harper, the Ninth Circuit ultimately concluded that the school's actions did not violate either Clause. Similarly, here, as discussed at length in previous submissions, application of those same general principles to the national motto leads to the conclusion that all previous courts have reached: the national motto is fully consistent with the Constitution. See Defs' Mem. at 28-46.

/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

Dated: May 26, 2006