Michael Newdow, in pro per
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-2339-FCD-PAN

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 OPPOSITION TO THE 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.
Court: Courtroom 2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Pursuant to the Court's Minute Order of May 10, 2006,[1] Plaintiff submits this Opposition to the Federal Defendants' Supplemental Memorandum (Document #49) (hereafter "FDSM") in support of their Motion to Dismiss.[2] Plaintiff incorporates by reference his previously filed briefing, and responds now to the "new" arguments raised in Defendants' Supplemental Memorandum.

A. HARPER V. POWAY

In footnote 5 of their Supplemental Memorandum, the Defendants "take this opportunity to respond to Plaintiff's Submission of Supplemental Authority, filed May 18, 2006 (dkt. no. 47)." FDSM at 6 (n. 5). In doing so, they gloss over the "familiar general principles of Establishment Clause and Free Exercise Clause jurisprudence," FDSM at 6:23-25, that they, for the most part, continue to disregard. Accordingly, Plaintiff will first briefly address this authority – Harper v. Poway Sch. Dist.[3] – which provides the proper overview for this circuit's analysis of the Establishment and Free Exercise Clause claims in this case.

(1) Harper shows that Aronow is no longer controlling precedent

Plaintiff previously wrote that "he expects that the Court here will likely feel compelled to follow Aronow."[4] That expectation followed in part from what he perceived as uncertainty as to the choice of Establishment Clause test(s) being used in the Ninth Circuit, especially after the Supreme Court's decision in McCreary County v. ACLU, 125 S. Ct. 2722 (2005).[5] Harper – the first Ninth Circuit Establishment Clause case decided since McCreary –

[1] Document #45.
[2] Documents #24-25.
[3] Harper v. Poway Sch. Dist., No. 04-57037, ___ F.3d ___, 2006 WL 1043082 (9th Cir. Apr. 20, 2006).
[4] Plaintiff's Response to Federal Defendants' Motion to Dismiss (Document #39) at 2(7):30-31, referring to Aronow v. United States, 432 F.2d 242 (9th Cir. 1970).
[5] Certiorari was granted in McCreary to answer, among other questions, "Whether the Lemon test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence." Accessed at http://docket.medill.northwestern.edu/archives/001854.php on May 31, 2006. Although the Supreme Court in McCreary unequivocally reaffirmed what Plaintiff here has steadfastly maintained – i.e., that neutrality is the key issue in the Establishment Clause aspect of the instant case ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'" McCreary, 125 S. Ct. at 2733 (citation omitted)) – and indicated that a demonstrable purpose contrary

ends that uncertainty, and shows without question that this circuit interprets McCreary as calling for the Lemon test to be used primarily in the instant litigation. Application of Lemon, of course, leads immediately to invalidation of the motto and its use on the money, since it is simply impossible to deny that the actual purpose in placing "In God We Trust" onto the coins (and as the nation's motto) was "to endorse" the purely religious notions that (a) there exists a God, and (b) that this nation – as a nation – places its trust in that purely religious entity.[6]

Harper, then, narrows the "hopeless disarray"[7] of the Supreme Court's Establishment Clause jurisprudence in the Ninth Circuit, informing us that McCreary's principled pronouncements – such as "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality." 125 S. Ct. at 2733 – are to be applied. As applied in this case, such pronouncements are clearly irreconcilable with Aronow. Because "where an intervening higher authority has issued an opinion that is clearly irreconcilable with our prior circuit precedent, a panel is free to act disregarding that precedent," United States v. Plouffe, 445 F.3d 1126 (9th Cir. 2006) (citations omitted), Plaintiff withdraws any previous acquiescence to

---

to the principle of neutrality should render a law unconstitutional, id., the endorsement of Lemon was nonetheless somewhat lukewarm. See, e.g., 125 S. Ct. at 2732-33 (describing Lemon's purpose prong – the test's strongest – as a "seldom dispositive, element of our cases").

[6] From the original Christian minister's letter requesting that "the recognition of Almighty God" be placed upon the nation's coins (addressed to the Secretary of the Treasury, and stating, "You are probably a Christian"), First Amended Complaint (Document #44) (hereafter "FAC") at 12:20-23, to the Secretary's assertion in response ("The trust of our people in God should be declared on our national coins," FAC at 13:3-4), to the Mint director's official statement that "We claim to be a Christian nation … [and] should declare our trust in God … 'the King of Kings and Lord of Lords,'" FAC at 14:24-29, the history is incontrovertible: the purpose of placing "In God We Trust" on our money was absolutely, thoroughly and wholly religious. It was meant to do nothing but endorse (Christian) Monotheism.

That the placement of the motto on the money was made for purely religious purposes is also seen by examining its history from the phrase's first use on the 1864 two-cent piece through the Act of 1955 as well. In 1908 – in its report accompanying the first law mandating "In God We Trust" on the coins – the House noted that the subcommittee on the matter was "unanimous" in characterizing the United States as "a Christian nation," and that the republic's perpetuation required "a Christian patriotism, which recognize[s] the universal fatherhood of God." FAC at 18:17-20. Similarly, the proceedings of the House committee that led to the report accompanying the 1955 Act, itself – which classified the motto among the "Religious Inscriptions on Coins in the United States," FAC at 20:6-7 – showed that not a single committee member deemed the motto to be anything but religious.

[7] "[O]ur Establishment Clause jurisprudence is in hopeless disarray." Rosenberger v. University of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring).

the Defendants' contention that Aronow (which was decided before the Lemon test was formulated) is controlling.

The effects of the use of the motto have been purely religious as well. See, at pages 7-8, infra. For this reason as well, Aronow – which never applied any serious analysis to either the purpose or the effects of the motto – should not be followed:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. **An affirmative answer to either question should render the challenged practice invalid.**

Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (emphasis added).

Defendants rely on the fact that "all previous courts have reached [the conclusion that] the national motto is fully consistent with the Constitution," FDSM at 6:27-28, to bolster their argument. Such jurisprudential history, however, is inconsequential in this context. What "all previous courts" have done is allow personal biases and desires to contravene clear constitutional principles. Even if this unfortunate explanation is erroneous, it again must be acknowledged that the Ninth Circuit now reads the Supreme Court's cases as requiring the Lemon test to be used. That being so, there is only one conclusion: Aronow was decided in error, and Plaintiff here must prevail.

(2) Harper's other points also show that Plaintiff must prevail

The other points made by Harper are equally important, and their application to the instant case also shows that the Defendants have violated their constitutional duties.

(i) Not only is a law claiming that "In God We Trust" not one that is "neutral" in terms of religion, but it does "'in a selective manner impose burdens only on conduct motivated by religious belief.'" Supplemental Authority (Harper) (Document #47) (hereafter "SA(H)") at 1(2):7-9.

(ii) Plaintiff has little choice but to use money that states "In God We Trust." Such use – as noted by those responsible for the placement of those words on those monetary instruments – is certainly an "affirmation" of the ideas that God exists and that

Americans trust in that purely religious entity.[8] Thus Defendants have "'compell[ed] affirmation of a repugnant belief.'" SA(H) at 1(2):11.

(iii) Being able to simply use coins in parking meters, or currency notes at thrift stores – especially when those activities are related to the specific exercise of one's religion – are certainly "benefits" that ought to be available to all citizens. Defendants have "condition[ed] the availability of [those] benefits upon [Plaintiff's] willingness to violate a cardinal principle of [his] religious faith." SA(H) at 1(2):13-14.

(iv) The Ninth Circuit in Harper cited the quotation Plaintiff has previously referenced, asserting that the government may not "'lend its power to one or the other side in controversies over religious authority or dogma.'" SA(H) at 1(2):16-19. Again, claiming there exists a god when there are individuals (such as Plaintiff) who hold the completely contrary view is lending power to one side in the purely religious controversy as to whether or not God exists.

(v) According to Harper, "[t]he Constitution does not authorize one group of persons to force its religious views on others." SA(H) at 1(2):20-21. Yet those who believe there is a God in whom Americans trust are forcing their religious views on Plaintiff.

(vi) Having a motto claiming that "In God We Trust" benefits the purely religious notion that there exists a god. In Harper, it was noted that "governmental efforts to *benefit* religion" raise Establishment Clause concerns. SA(H) at 1(2):28-29.

(vii) By having the current purely religious motto, and mandating its use on the money, the Defendants are clearly establishing the religious faith of (Christian) Monotheism. Harper pointed out that this is impermissible. SA(H) at 1(2):30-2(3):1.

(viii) In Harper, import was placed on the fact that the governmental defendants had "an entirely secular and legitimate aim" and "[t]here [wa]s certainly no evidence (or even allegation) that [the government] sought to … encourage [the plaintiff] to participate in some other religion or to adopt some state-supported or other

[8] FAC at ¶¶ 86, 232. See, also, FAC Appendices B, C, E and H. In fact, such activity is actually coerced proselytizing as well. See Plaintiff's Response to Federal Defendants' Motion to Dismiss (Document #39) at 4(9):23-25.

religious faith." SA(H) at 2(3):3-6. In the instant case, the government's aim was entirely religious and illegitimate, and it is clearly alleged that the use of the government's "power, prestige and financial support"[9] in this manner "encourages" everyone – Plaintiff included – to adopt (Christian) Monotheism as a religious faith.

(ix) Plaintiff has made it clear that the Defendants' communication (that there is a God and that Americans trust in "Him") is unwanted, yet he is powerless to avoid it. Harper pointed out that the "recognizable privacy interest in avoiding unwanted communication" is perhaps most important "when persons are powerless to avoid it." SA(H) at 2(3):16-18.

(x) Harper noted that "'[Y]ou don't need an expert witness to figure out' the self-evident effect of certain policies or messages." SA(H) at 2(3):22-23. It is "self-evident" that the effects of the government's pervasive use of the purely religious words "In God We Trust" are purely religious. Furthermore, it is "self-evident" that having such a phrase as the nation's sole motto turn Atheists (such as Plaintiff) into "political outsiders" and casts doubt as to their patriotism.

In view of the foregoing, it is difficult (to say the least) to understand how Defendants can contend that "application of those same general principles to the national motto leads to the conclusion that … the national motto is fully consistent with the Constitution." FDSM at 6:26-28.

B. PLAINTIFF HAS SUFFERED INJURIES SUFFICIENT TO GIVE STANDING

The Federal Defendants point to certain of Plaintiff's allegations – such as his being denied employment, FDSM at 2:16-20,[10] and being confronted with a church bulletin that has

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

[10] Defendants take issue with FAC ¶ 189, in which Plaintiff states that he "is similar to the plaintiff in Sherbert v. Verner." FDSM at 3:13-22. In terms of the legal analysis applied by Defendants, the analogy was, admittedly, lousy, and Plaintiff retracts it at this time. He was merely pointing out that – as was the situation in Sherbert – a private employer refused to employ an individual because of his adherence to his religious ideology, and that the government's actions were ultimately responsible for the financial losses incurred.

Where Sherbert is precisely on point, however, is in regard to the burden on free exercise. That is discussed in Section E, at page 14, infra.

"In God We Trust" on its cover, FDSM at 3:23-4:8 – as comprising injuries too attenuated for standing purposes. Nonetheless, "but-for" Defendants' activities, Plaintiff would never have suffered these harms. Thus, although he recognizes the potential merit of Defendants' position here, Plaintiff would argue that (especially as applied to the church bulletin incident) causation exists. See, e.g., Kennedy v. Ridgefield City, 439 F.3d 1055, 1071-72 (9th Cir. 2006) ("but-for" causation appropriately applied to governmental actor where plaintiff was injured by a third party). See, also, Hartman v. Moore, 126 S.Ct. 1695, 1703-04 (2006) ("but-for" causation to be used in case of retaliatory employment discharge). But, see, DOT v. Pub. Citizen, 541 U.S. 752, 767 (2004) ("but-for" causation insufficient to show "'reasonably close causal relationship'" in matter of environmental law).

The foregoing, of course, does not address the stigmatic injuries Plaintiff continues to suffer. Although Defendants apparently contend that stigmatic injuries are insufficient to support standing,[11] this contention is simply inconsistent with the Supreme Court's opinions:

> [W]e have repeatedly emphasized, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.

Heckler v. Mathews, 465 U.S. 728, 739-40 (1984) (citation omitted). In fact, this notion was reiterated in the very case Defendants repeatedly cite:

> There 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.

Allen v. Wright, 468 U.S. 737, 755 (1984).

What are those circumstances? Those where the plaintiffs assert that they have been "'personally denied equal treatment' by the challenged discriminatory conduct." Id. (citation omitted). The problem for the Allen plaintiffs was that they had alleged no personal injury:

> Respondents' stigmatic injury, though not sufficient for standing in the abstract form in which their complaint asserts it, is judicially cognizable to the extent that respondents are personally subject to discriminatory treatment.

[11] See, e.g., Federal Defendants' Memorandum in Support of Motion to Dismiss (Document #25) at 17(28):14, and at 20(31):4; Federal Defendants' Reply Memorandum in Support of Motion to Dismiss (Document #42) at 2(6):12 and 21-28 (n.2).

Allen, 468 U.S. at 757 n.22. Thus, as framed in their Complaint, the Allen plaintiffs were merely "concerned bystanders:"

> All such persons could claim the same sort of abstract stigmatic injury respondents assert in their first claim of injury. A black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine. Recognition of standing in such circumstances would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders."

486 U.S., at 756 (citation omitted).

In the instant case, Plaintiff has shown that he is not merely a "concerned bystander." He, personally, has been affected by the stigma that has resulted from the Defendant's acts. He, personally, has lost at least one employment opportunity. He, personally, had to confront a brochure with the words "In God We Trust" placed under a Bible, overlying an American Flag. He, personally, has had myriad individuals telling him he should leave the country, etc., because "In God We Trust" is our national motto and on the coins and currency. FAC Appendix I, ¶¶ 9-14, 33-36. He, personally, has had his hopes dashed for attaining public office. FAC Appendix I, ¶ 54.

Defendants apparently miss the point of stigmatic injuries, contending that "[i]t defies common sense to suppose that the existence of the national motto has anything to do with employers' hiring decisions." FDSM at 3:7-8. Do they really believe that our nation's Jim Crow laws were unrelated to the discrimination that existed in housing projects and on golf courses? The Chinese workers who came to California during the Gold Rush days were officially discriminated against in myriad ways. Would the Defendants honestly contend that those legislative acts were not a major cause of the discrimination the Chinese and other Asians faced in the public sector? As the Supreme Court recently noted (speaking of precisely this sort of stigmatic injury, albeit in another context):

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.

Lawrence v. Texas, 539 U.S. 558 (2003). Here, the invitation has been made – and accepted – to subject Atheists to that public and private discrimination.

Plaintiff, personally, has been suffering this discrimination, which results largely from the "power, prestige and financial support of government"[12] being used to claim that "In God We Trust." If need be, he will prove this (as well as the fact that ending the constant governmental claim that "In God We Trust" will put an end to such injuries) at trial.

In relation to the Harper case noted previously, these injuries also demonstrate that the challenged actions have clearly religious effects, and, therefore, that the Defendants have violated the Lemon test's "effects prong." Their contention that "the government does not and could not have any involvement" in such injuries, FDSM at 4:6-7, again reveals a lack of understanding of stigmatic injuries, and the government's role in fostering discrimination when it turns minorities into "outsiders" and second-class citizens. When churches use for their Sunday church services a program with the motto placed below a Bible over the background of an American flag, when 96% of all books using "In God We Trust" in their titles are related to religion, FAC Appendix P, and when the motto is used over and over by Christian groups and organizations for commercial purposes to tout their message concerning belief in God, Id., it is clear that the government has a huge involvement in the religious effects that the (purely religious) words "In God We Trust" bring to bear.

C. DEFENDANTS HAVE IGNORED THE STRONGEST STANDING BASES

Even if the aforementioned injuries were to be deemed too remote to attribute to Defendants' conduct, the other injuries cited by Plaintiff are clearly directly attributable and suffice to support standing. Among these are the daily confrontations Plaintiff must endure in seeing the words, "In God We Trust," on the coins and currency he handles. This is certainly a personalized injury, stemming directly from the Defendants' acts, and which will be redressed once the offensive religious verbiage is removed from the nation's money. Thus, although Defendants write that "[s]ome 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," FDSM at 2:14-15, their argument is contrary to the Supreme Court's advisement: "In many cases the standing question can be answered chiefly by

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

comparing the allegations of the particular complaint to those made in prior standing cases." Allen v. Wright, 468 U.S. 737, 751-52 (1984). As Plaintiff noted (at FAC, ¶ 183):

> Anticipating that Defendants will raise issues of standing, it might be noted that Newdow's confrontations of an offensive religious ideology are far more pervasive, offensive and personalized than those which occurred in such cases as Lynch v. Donnelly, 465 U.S. 668 (1984), Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) and Van Orden v. Perry, 125 S. Ct. 2854, 2864 (2005) ("Texas' placement of the Commandments monument on its capitol grounds is a far more passive use of those texts than was the case in Stone, where the text confronted elementary school students every day.")

The plaintiffs in Lynch, Allegheny County, Van Orden and Stone – none of whom had injuries more personalized, more directly due to the Defendants' acts, nor more redressable than those of Plaintiff here – were apparently all deemed to have standing by the Supreme Court:

> [W]e are required to address the [standing] issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us. The federal courts are under an independent obligation to examine their own jurisdiction, and standing "is perhaps the most important of [the jurisdictional] doctrines."

FW/PBS, Inc. v. Dallas, 493 U.S. 215, 230-231 (1990) (citations omitted).

Defendants give similar short shrift to Plaintiff's evangelism claim, citing their own Memorandum, which referenced nothing in regard to this argument.

> [P]laintiff'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.

FDSM at 4:18-21. In fact, no court has held this to be the case, and it is doubtful that any previous plaintiff raised – or any court even considered – this issue. The fact remains – as documented with citations in Plaintiff's Complaint – that evangelism is precisely what those responsible for mandating "In God We Trust" on the money had in mind. FAC, ¶¶ 230-38.

More importantly, when the challenged activities are facially religious – as is the situation in the case at bar – it isn't what Defendants (or others) believe that is of importance. As the Supreme Court has written, "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." Hernandez v. Commissioner, 490 U.S. 680, 699 (1989). Plaintiff has alleged

that the purely religious phrase, "In God We Trust," causes him to believe that the words have their stated meaning (i.e., that "we" (Americans) trust in God), and that he believes he is furthering that message – which is completely contrary to his religious beliefs – by passing along the coins and currency upon which it is placed. FAC ¶¶ 237-39, 261-62. Especially in a Motion to Dismiss – where "[a]ll allegations of material fact are taken as true and construed in the light most favorable to Plaintif[f]," Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996) – it cannot seriously be suggested that this contention isn't of sufficient merit to warrant denial of the Motion.

Most important of all, is that Plaintiff is essentially forced to personally bear this message. As further support for Plaintiff's argument here, the words of Justice Kennedy should be taken into account:

> 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.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring and dissenting). Similarly, it "borders on sophistry" to suggest that this "reasonable" Atheist doesn't also believe that – in addition to spreading the message that motto exists to declare each time he hands over the monetary instruments upon which it is engraved (especially when spreading that message is exactly what was intended) – his religious choices are denigrated when compelled to keep the contrary message on his person.

Lastly, although Defendants note the new claims in the First Amended Complaint, FDSM at 4:12-15, 26-28, they never discuss how those claims might provide standing under RFRA, a key purpose of which is "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." 42 U.S.C. § 2000bb(b)(2). To be sure, the analysis is still "governed by the general rules of standing under article III of the Constitution," 42 U.S.C. § 2000bb-1(c). However, "[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." Id. "Religious exercise" – as indicated in 42 U.S.C. § 2000bb-2(4) (citing 42 U.S.C. § 2000cc-5(7)) –

"includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Additionally, "[t]he use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."

Plaintiff's "religious exercise" has clearly been burdened under these definitional terms. Thus, he has suffered a concrete and particularized harm, which is personalized, which is directly caused by Defendants' actions, and which will be redressed when the requested relief is granted.

D. PLAINTIFF'S NEW APPENDICES FURTHER DEMONSTRATE THE FLAWS IN DEFENDANTS' ARGUMENTS

Plaintiff has provided three new appendices in his Amended Complaint. Defendants assert that "[t]hese appendices have no impact on the legal issues in this case." FDSM at 5:2-3. Plaintiff takes issue with that statement.

Appendix O details a case where a Federal District Court judge – in a published opinion – denied United States citizenship to a perfectly qualified applicant because that applicant could not, consistent with his religious beliefs, employ the words, "so help me God" in his citizenship oath. Would the Defendants claim that there was no Free Exercise burden in that case? After all, the plaintiff was still free to practice his Atheism.

One certainly hopes not. However, there is – constitutionally – no difference between an Atheist "choosing" not be become a citizen because he refuses to verbalize that there is a God, and one "choosing" not to engage in his church's activities, perform religious research, or proselytize, FDSM at 4:26-28, because he refuses to pass along money making that same claim. (Nor is there a constitutional difference between these injuries and "choosing" not to work on Saturday because that violates an individual's religious tenets. Sherbert v. Verner, 374 U.S. 398 (1963).)

Moreover, although Defendants argue that:

> 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.

FDSM at 5:3-7, the purely religious words, "In God We Trust," were not used in the Appendix O case "during worship services or by authors of religious texts." They were used – in their purely religious sense – **in a Federal District Courthouse**. Thus, included among the key "observations" noted by the District Court judge in justifying his denial of the citizenship application, was "the inscription of 'In God We Trust' upon the Liberty half--dollar and other United States coins." Petition of Plywacki, 107 F. Supp. 593 (D. Haw. 1952), rev'd 205 F. 2d 423 (9th Cir. 1953) (as provided in FAC, Appendix O at 1).

Appendix P – showing that the public use of the motto is virtually exclusively religious – has already been discussed. See at page 8, supra. Far from "hav[ing] no impact on the legal issues in this case," FDSM at 5:2-3, this almost universally religious usage demonstrates (a) that the motto has essentially exclusively religious effects, and (b) that the motto endorses the purely religious idea that there exists a (Christian) God. To place in writing that "the words 'In God We Trust' plainly are not being used to … espouse any particular religious doctrine," FDSM at 5:10-12, is – to Plaintiff – absurd. How can anyone, with any intellectual honesty at all, say that making the claim that God exists is not "espous[ing] any particular religious doctrine?" It is espousing the particular religious doctrine that there exists a God … a particular religious doctrine to which Plaintiff's religious belief system is diametrically opposed.

The third new appendix, FAC Appendix Q, shows how members of the current Congress continue to voice the opinion that the words "In God We Trust" are purely religious. This occurs even though they have had more than thirty years to learn that being truthful and acknowledging that religious import may result in invalidation under the Lemon test.

Defendants' reference to Justice O'Connor's concurrence in Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 41 (2004) (which was not joined by any other justice), FDSM at 5:22-26, does little but demonstrate how individuals – even Supreme Court justices – can cast principle aside as they make decisions to fit within their personal religious zones of comfort. With all due respect to Justice O'Connor, it is difficult to understand what more she would have required in order to show that the intentions of the 83rd Congress were unequivocally religious as it spatchcocked the words, "under God," into the Pledge of Allegiance. The House Report accompanying the bill stated that "The inclusion of God in our pledge therefore

would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator."[13] Quotations showing that the purpose of the bill was unequivocally religious filled eight and a half pages![14] President Eisenhower, in signing the bill into law, stated, "From this day forward, the millions of our school children will daily proclaim … the dedication of our Nation and our people to the Almighty."[15] And the only thing the new law did was interlard the nation's previously secular patriotic oath with the two purely religious words, "under God."

In Elk Grove, Justice O'Connor also wrote, "It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." 542 U.S. at 35-36 (O'Connor, J., concurring). Historically and logically, that statement would make just as much sense if "Jesus Christ" or "Protestantism" were substituted for "divinity." After all, as Justice O'Connor, herself, noted:

> "The vast majority of Americans assumed that theirs was a Christian, i.e. Protestant, country, and they automatically expected that government would uphold the commonly agreed on Protestant ethos and morality."

City of Boerne v. Flores, 521 U.S. 507, 557 (1997) (O'Connor, J., dissenting) (citation omitted). Nonetheless, it is difficult to believe that the Justice would have upheld a Pledge stating we are "one Nation under Jesus" or "one Nation under Protestantism." Certainly, her arguments in Elk Grove are completely contradictory to the principled statements regarding the Religion Clauses that were sprinkled throughout her tenure upon the high court. Appendix 3A. That someone who wrote such noble prose as is given in the Appendix could also write as she did in Elk Grove reveals only that "it is proper to take alarm at the first experiment on our liberties,"[16] and that we all must constantly be on guard against the forces the Religion Clauses were meant to counter.

---

[13] H.R. 1693, 83rd Cong., 2d Sess., reprinted in 1954 U.S. Code Cong. & Ad. News, vol. 2: 2339, 2340. Note that the statement says "**the Creator**," not "a creator." There can be no doubt that it was the (Judeo-) Christian "Creator" which Congress had in mind.

[14] Original Complaint, Appendix B, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004).

[15] 100 Cong. Rec. 7, 8618 (June 22, 1954) (Stmt by President Eisenhower, reported by Sen. Ferguson.)

[16] 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 May 29, 2006, at http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html.

E. DEFENDANTS' ACTS HAVE SUBSTANTIALLY BURDENED PLAINTIFF'S FREE EXERCISE RIGHTS

Defendants pejoratively and dismissively state that the "inconveniences plaintiff faces are plainly not the result of any coercion or restriction that the government has imposed upon him." FDSM at 4:16-17. This argument – made by the Supreme Court of South Carolina in Sherbert – was unequivocally rejected by the United States Supreme Court:

> The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." … We reverse the judgment of the South Carolina Supreme Court.

Sherbert v. Verner, 374 U.S. 398, 401-02 (1963). Inasmuch as RFRA specifically declares: "The purposes of this Act are … to restore the compelling interest test as set forth in Sherbert v. Verner …," 42 U.S.C. § 2000bb(b)(1), Defendants' argument must fail here as well.

Just as Ms. Sherbert's religious scruples prevented her from working on Saturday, Plaintiff's religious scruples prevent him from accepting cash or currency that says "In God We Trust" while passing the plate at his church. FAC ¶ 241. So, too, do they prevent him from accepting such money as donations at his Elk Grove property, FAC ¶¶ 244-45, or as payment for fund-raising items, FAC ¶ 250; from using such money to purchase FACTS garb, FAC ¶ 247, Freethink Drink ingredients, FAC ¶ 248, or church library purchases, FAC ¶ 249; and from using such money to pay for parking when doing church research, FAC ¶¶ 253-54, for tolls when driving elsewhere for FACTS purposes, FAC ¶ 257, for incidentals related to church gatherings, FAC ¶ 258, and for expenses incurred while proselytizing, FAC ¶ 263.

CONCLUSION

Defendants' arguments regarding the differences between the Original Complaint and the First Amended Complaint do not overcome Plaintiff's standing to bring this litigation, or the validity of his claims. The Motion to Dismiss should be denied, and the case should proceed to trial.

Respectfully submitted,

/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 3A

SAMPLING OF JUSTICE O'CONNOR'S PRINCIPLED STATEMENTS[1]

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

"As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion." At 223.

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

"Neutrality, in both form and effect, is one hallmark of the Establishment Clause." At 846.

Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (Concurring opinion)

"[W]hen the reasonable observer would view a government practice as endorsing religion, I believe that it is our duty to hold the practice invalid." At 777.

"The [Establishment] Clause … imposes affirmative obligations that may require a State, in some situations, to take steps to avoid being perceived as supporting or endorsing a private religious message." At 777

Board of Education of Kiryas Joel v. Grumet, 512 U.S. 687, 717 (1994) (Concurring opinion)

"[I]t seems dangerous to validate what appears to me a clear religious preference." At 717.

"The Religion Clauses prohibit the government from favoring religion." At 717.

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

"The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." At 865-66.

"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." At 894

[1] All citations omitted.

Westside Community Bd. of Ed. v. Mergens, 496 U.S. 226 (1990) (Majority opinion)

"[T]here 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." At 250.

Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) (Concurring opinion)

"[T]he essential command of the Establishment Clause [is] that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" At 627.

"If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are outsiders or less than full members of the political community." At 627.

"An Establishment Clause standard that prohibits only 'coercive' practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community." At 627-28.

"Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment." At 630

"[T]he religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others." At 631.

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (U.S. 1988) (Concurring opinion)

"[T]his 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." At 450.

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

"[T]he religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community." At 69.

"The endorsement test … does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." At 70.

"[W]hen [government] acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." At 76.

Lynch v. Donnelly, 465 U.S. 668 (1984) (Concurring opinion)

"The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." At 687.

"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." At 688.

"What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." At 692.

"[C]ourts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." At 694.