CASE NO. 06-16344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REV. DR. MICHAEL A. NEWDOW,

***Plaintiff-Appellant, pro se*,**

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA; PETER LEFEVRE, Law Revision Counsel; UNITED STATES OF AMERICA; JOHN W. SNOW, Secretary of the Treasury; HENRIETTA HOLSMAN FORE, Director, United States Mint; THOMAS A. FERGUSON, Director, Bureau of Engraving and Printing,

***Defendants-Appellees*,**

PACIFIC JUSTICE INSTITUTE,

Defendant-Intervenor-Appellee

On Appeal from the United States District Court
for the Eastern District of California
(District Court #2:05-cv-02339)

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

I. District Court's Jurisdiction

This is a civil action claiming violations of 42 U.S.C. § 2000bb *et seq*. (Religious Freedom Restoration Act (RFRA)). As such, the District Court had subject matter jurisdiction under 42 U.S.C. § 2000bb-1(c) and 28 U.S.C. § 1331. Additionally, violations of the First and Fifth Amendments to the Constitution of the United States of America are claimed. The District Court had subject matter jurisdiction of those claims under 28 U.S.C. § 1331.

II. Court of Appeals' Jurisdiction and Timeliness of the Appeal

This appeal stems from a final order that disposed of all parties' claims, rendered by the District Court for the Eastern District of California. Specifically, on June 12, 2006, the District Court entered an Order and Judgment Granting Defendants' Motion to Dismiss, under Fed. R. Civ. P. Rule 12(b)(6). This Court of Appeals has jurisdiction under 28 U.S.C. § 1291. Plaintiff-Appellant's timely Notice of Appeal was filed on July 21, 2006.

STANDARD OF REVIEW

"A dismissal for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Furthermore, "[a]ll factual allegations of the complaint are accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party," *Johnson v. California*, 207 F.3d 650, 653 (9th Cir. Cal. 2000), with a "rule of liberal construction [being] 'particularly important in civil rights cases.'" *Id*. (citation omitted). In other words, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

INTRODUCTION

This appeal relates to the national motto, "In God we trust."[1] Specifically, the issues on appeal are whether Plaintiff's statutory (42 U.S.C. § 2000bb *et seq.*, the Religious Freedom Restoration Act (RFRA)) and constitutional (Establishment Clause) challenges were properly dismissed on a Fed. R. Civ. P. Rule 12(b)(6) motion.

RFRA was Congress's response to *Employment Div. v. Smith*, 494 U.S. 872 (1990), in which the Supreme Court significantly diminished the protections previously afforded individuals under the Free Exercise Clause of the First Amendment.[2] Wishing to restore those protections, Congress imposed on government a special duty to avoid substantially burdening any individual's exercise of religion.

RFRA was chiefly meant to apply to "rule[s] of general applicability," 42 U.S.C. § 2000bb-1(a) – i.e., religion-neutral laws that burden religious exercise incidentally. The instant case involves three laws which are not "general" laws at all. On the contrary, they are specifically religious in nature:

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[1] 36 U.S.C. § 302: "'In God we trust' is the national motto."

[2] The First Amendment begins with two religion clauses, The Establishment Clause and the Free Exercise Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ..."

(i) 36 U.S.C. § 302 ("'In God we trust' is the national motto.");

(ii) 31 U.S.C. § 5112(d)(1) ("United States coins shall have the inscription 'In God We Trust'."); and

(iii) 31 U.S.C. § 5114(b) ("United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate.")[3]

These laws promote a particular religious belief system – Monotheism – which is completely contrary to the religious beliefs held by Atheistic Americans.

Plaintiff is one such American. Although he uses credit cards and checks whenever possible, the necessity of using the nation's coins and currency occurs with sufficient frequency that he is essentially compelled to carry that legal tender on his person and to use it in commerce. As will be demonstrated, this – alone – imposes substantial burdens on his religious exercise.

Those burdens are exacerbated, however, because Plaintiff is a minister in an Atheistic church. It is sacrilegious for him and his church to accept or use monetary instruments that declare "In God We Trust," especially when engaging in church-related activities. Certainly, it is a substantial burden on his exercise of religion to place him in the position where, while serving as a minister, he must either violate the basic tenets of his religion or relinquish the ability and convenience of using the nation's sole official legal tender.

[3] The different capitalizations of the motto in 36 U.S.C. § 302 as opposed to 31 U.S.C. § 5112(d)(1) and 31 U.S.C. § 5114(b) are as given in the U.S. Code.

In addition to the RFRA violation, the challenged statutes violate the Establishment Clause. Over the past three-plus decades, the Supreme Court has repeatedly stated that government may not favor Monotheism[4] over Atheism.[5] Thus – as will be corroborated by the application of any of the Court's numerous tests developed since the early 1970s – claiming "In God we trust" as the nation's sole official motto, and placing that purely religious phrase on every coin and currency bill, does not comport with the Establishment Clause's mandate.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred in granting Defendants' Motion to Dismiss Plaintiff's RFRA claim.

II. Whether the District Court erred in granting Defendants' Motion to Dismiss Plaintiff's Establishment Clause claim.

[4] Monotheism is usually phrased as "religion."
[5] Atheism is usually phrased as "irreligion" or "nonreligion."

STATEMENT OF THE CASE

I. Nature of the Case

In 1993, Congress passed 42 U.S.C. § 2000bb *et seq*. (Religious Freedom Restoration Act (RFRA)). Its purposes are stated in the statute, itself:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. § 2000bb (b). According to the statute:

> The term "religious exercise" includes **any** exercise of religion, whether or not compelled by, or central to, a system of religious belief.

42 U.S.C. § 2000bb-2(4) (referencing § 2000cc–5(7)(A)) (emphasis added). Also, in § 2000bb–3(a), RFRA specifically notes that:

> This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

In 1955, Congress mandated that all United States coins and currency bear the words, "In God We Trust." EOR 32.[6] Plaintiff – a minister in an Atheistic church, EOR 151 – specifically rejects this purely religious claim. His church teaches that there is no "God," and vigorously denies value in trusting in "Him." *Id*. Plaintiff, therefore, cannot use the coins and currency of the United States consistent with the teachings of his church. This is especially so when the associated commerce pertains to church activities – such as fundraising, purchasing ingredients for the church libation, purchasing religious attire, proselytizing and doing church research, EOR 164-65 – for such use is truly sacrilegious. EOR 239. Because Congress's acts have placed Plaintiff in a situation where he has only two options: (i) use the money (and thus violate his religious principles) or (ii) not fully enjoy the religious liberty to which he is entitled – and because there is no compelling interest for Congress to have done this – RFRA has been violated.

Plaintiff's rights under the Establishment Clause have also been infringed. That clause places upon government an obligation to be neutral in terms of religion. In other words, government must treat the religious views of all individuals with equal respect. Clearly, when the federal government alleges that "In God We Trust," the views of those who deny there is a "God" are not being

[6] "EOR" will be used throughout this brief as the abbreviation for "Excerpts of Record."

respected equally. This turns those individuals into "political outsiders" and inflicts a marked stigmatic injury. Under the Establishment Clause, Government may do neither.

II. Course of the Proceedings

Plaintiff first filed this action against the Federal Defendants on November 18, 2005. EOR 346 (Document #1). Defendant-Intervenor Pacific Justice Institute (hereafter, "PJI") was granted leave to intervene on January 6, 2006. EOR 346 (Document #15).

On March 27, 2006, the Federal Defendants filed a Motion to Dismiss "under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure." EOR 40-41, EOR 347 (Document #24). Four days later, a Motion to Dismiss was also filed by Defendant-Intervenor PJI, EOR 348 (Document #34), which simultaneously joined the Federal Defendants' motion. EOR 348 (Document #36).

Plaintiff's Response to the Motions to Dismiss was filed on April 18, 2006. EOR 349 (Document #39). Replies to the Response were filed on April 27, 2006. EOR 349 (Documents #42 and #43). On May 9, 2006, an Amended Complaint was filed. EOR 349 (Document #44).

III. Disposition Below

On June 6, 2006, a Memorandum and Order was filed by the District Court, granting the Motions to Dismiss and closing the case. EOR 350 (Document #52).[7] Plaintiff filed his Notice of Appeal on July 21, 2006. EOR 350 (Document #54).

STATEMENT OF THE FACTS

Plaintiff is a minister in a church that specifically denies the existence of any "God." EOR 151, 232. In following his religious precepts, he is forbidden from carrying and/or utilizing items or symbols claiming that there is a "God" or – even more disrespectfully – that **he** trusts in "God." Yet – due to the "ubiquity of coins and currency in everyday life," EOR 43, 327, the Defendants have made it virtually impossible for him to avoid doing these things. Additionally, because he considers it absolute sacrilege to carry and/or utilize these items or symbols when working for his church, he is often foreclosed from performing that valuable work and advancing his church's religious ideology. EOR 163-67.

For instance, due to the placement of the purely religious phrase, "In God We Trust," on the coins and currency, Plaintiff's ability to raise money by "passing

[7] The District Court wrote, "Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. See E.D. Cal. L.R. 78-230(h)." EOR 318.

the plate" at his church is severely infringed. EOR 164, 235. So, too, is his ability to accept money as donations at his Elk Grove property, or as payment for fund-raising items. EOR 164. He often cannot purchase church attire, ingredients for the libation used at church services, or church library materials. *Id*. Defendants' actions have, at times, foreclosed Plaintiff's opportunities to do church research and to meet with others for church purposes, EOR 165-66. Additionally, there have been impediments to purchases related to church gatherings, as well as to proselytizing. EOR 166-67.[8]

The other facts of this case are historical, and set forth in Plaintiff-Appellant's Complaint.[9] Basically, "In God We Trust" is purely religious text that was first placed on the nation's money in 1864. EOR 135. The decision to place it there was unquestionably made for purely religious reasons. EOR 132-35. The text is a pure declaration of Monotheism, and the phrase has had the purely Monotheistic religious effects that were intended by its selection. EOR 218-224, 272-77, 282. *See also* EOR 203-217 and 306-08, as well as Appendices A and B accompanying this Opening Brief.

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[8] To avoid using coins or currency bills, Plaintiff uses checks and credit cards whenever he can. Nonetheless, there are times when those options are simply unavailable, and he has to forgo church activities. *See*, *e.g.*, EOR 165, 234-35.

[9] To keep from needlessly adding to the bulk of the Excerpts of Record, only Plaintiff's First Amended Complaint (hereafter "FAC") has been provided. EOR 111-308.

SUMMARY OF THE ARGUMENT

Consider the following:

(i) Jews, if they wish to hold fundraising events at their synagogues, have to wear crosses;
(ii) Muslims, if they wish to travel to a nearby mosque, have to use tokens stamped with Stars of David;
(iii) Protestants, if they wish to send mail through the U.S. Postal service, have to use stamps that state, "Jesus is a myth;" or
(iv) Catholics, if they wish to have their children attend public school, have to accept that only the King James version of the Bible will be read.

Clearly, government may not impose any of these conditions upon those religious groups. Yet the equivalent of all of these constitutional infringements has been imposed upon Atheists.

The last of the foregoing examples was not hypothetical. In 1844, the Philadelphia Bible Riots took place, where rows of buildings were burned to the ground and numerous people killed.[10] It seems that the Protestant majority – in control of the school board – allowed only its preferred "King James" version of the Bible to be used in class:

> [T]he major force in shaping the pattern of education in this country was the conflict between Protestants and Catholics. The Catholics logically argued that a public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools.

[10] Accessed at http://www.pbs.org/kcet/publicschool/photo_gallery/photo2.html on September 1, 2006.

Lemon v. Kurtzman, 403 U.S. 602, 629 (1971) (Douglas, J., concurring). Thus, the [Protestant] Grand Jury investigating the Philadelphia incident ascribed it to "the efforts of [the Catholics] to exclude the Bible from our Public Schools."[11]

The religious imposition there was relatively minor: the King James version of the Bible is simply a different translation of the same work upon which the Catholic (Douay-Rheims) Bible is based. Accordingly, the battle resulted from far less religious disrespect than that shown towards Atheists today. The religious doctrine infused in the nation's sole official motto – found at the highest levels of national government, as well as minted and engraved on every coin and currency bill – is not only inconsistent with, but completely contradictory to, Atheistic belief.

Such disregard for a minority religious viewpoint was precisely what RFRA was intended to address. Senator Orrin Hatch specifically noted that the act was important "particularly [for] those whose religious beliefs and practices differ from the religious majority in our country." 139 Cong. Rec. 4924 (March 11, 1993). Rep. Hoyer noted how Congress sought to "restore this sacred right for every American." 139 Cong. Rec. 9685 (May 11, 1993). That "religious minorities ...

[11] Accessed at http://www.hsp.org/files/catholiclayctizensfinal.pdf on September 13, 2006.

have been placed at a tremendous disadvantage" by the *Smith* decision was specifically highlighted by Rep. Nadler. *Id*. at 9684.

RFRA, therefore, was implemented to protect all religious views. Congress chose to force government "to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest [which] is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Government may not otherwise substantially burden "**any** exercise of religion, whether or not compelled by, or central to, a system of religious belief," 42 U.S.C. § 2000cc–5(7)(A) (emphasis added).

The religious exercise of Plaintiff has been substantially burdened without such a demonstration. In fact, if "[t]he government may not ... lend its power to one or the other side in controversies over religious ... dogma," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), then it has no valid interest at all, much less one that is "compelling." Government may not claim (as the nation's motto, no less) that "we" (Americans) trust in God when there are millions of citizens who – like Plaintiff – specifically reject that religious notion. Surely, to do so is to "lend its power to one or the other side" in the quintessential religious controversy: Does God exist?

This leads to the other issue in this case – that of the Establishment Clause. Under that clause, the compelling interest is **the avoidance** of making this (or any)

religious claim. By taking a position on a debated religious concept, Defendants have not only violated RFRA, they have violated the Establishment Clause as well. This can perhaps best be recognized by adding two other considerations to the four listed above:

(v) Non-Christian Americans, if they wish to use the nation's only official legal tender, have to carry money claiming, "In Jesus We Trust;" or
(vi) Monotheistic Americans, if they wish to use the nation's only official legal tender, have to carry money claiming, "God is a Myth."

Those, obviously, would be recognized as clear Establishment Clause violations. Constitutionally, how is "In God We Trust" any different?

It is essential to note that this case comes to this Court of Appeals from a Fed. R. Civ. P. Rule 12(b)(6) Motion to Dismiss. Plaintiff argues that the facts presented in his Complaint compel a ruling in his favor even at this stage of the litigation. At the very least, they surely suffice to defeat a Rule 12(b)(6) Motion, where "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

ARGUMENT

I. "In God We Trust" on the nation's money violates RFRA

(A) "In God We Trust" on the money substantially burdens Plaintiff's religious exercise

Plaintiff – a minister in a church whose tenets are explicitly based on the denial of the existence of any god, EOR 151 – has had his religious exercise substantially burdened in numerous ways. To begin with, Defendants have essentially compelled him to bear on his person items that make a purely religious claim with which he fervidly disagrees. EOR 162. If the free exercise of religion includes the right to bear items that have religious significance to a person ("[P]ossession of ... personal property relating to religious observance, such as ... a crucifix, is surely protected by the Free Exercise Clause of the First Amendment." *Hudson v. Palmer*, 468 U.S. 517, 547 n.13 (1985) (Stevens, J., dissenting)), then (as with other First Amendment freedoms), it necessarily includes the negative of that right. *Cf. West Virginia Board of Education v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all."); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate.").

A very pertinent example of this idea can be found in the discussions leading to RFRA's passage. *See* 139 Cong. Rec. 9680 *et seq* (May 11, 1993). The right of the Amish to not bear lights on their buggies was repeatedly referenced as one of the injuries Congress sought to address. If the legislature intended for that religious minority to be free from lights on their vehicles (where there is clearly the compelling interest of traffic safety), then an Atheist certainly must have the right to be free from bearing "In God We Trust" claims on his person (where there is no compelling interest at all). And just as no one would tell an Amish person he or she needn't ride in a buggy at dusk, it is formalistic in the extreme to suggest that Plaintiff need not carry any of the nation's official coins and currency.[12]

In addition to the substantial burdens upon his personal religious activities, there are substantial burdens on Plaintiff's ministry and church-related activities. Defendants' acts have effectively precluded him from collecting coins or currency while passing the plate at his church, EOR 164 (FAC ¶ 241), a key means of attaining financial solvency. They have prevented him from accepting coins or

[12] *See*, *e.g.,* Federal Defendants' *Memorandum in Support of Motion to Dismiss*, EOR 43 (acknowledging "the ubiquity of coins and currency in everyday life.") Defendants argued that, "plaintiff's exposure is 'undifferentiated from that of all other' residents of the United States who have a similar degree of daily contact with United States coins and currency in their daily business." That's absolutely correct. And if government-imposed, unwarranted religious dogma contrary to their religious precepts interfered with their religious exercise rights, they, too, would have RFRA claims.

currency as donations at his Elk Grove property,[13] *id*. (FAC ¶¶ 244-45), or as payment for fund-raising items, EOR 165 (FAC ¶ 250). At times (in establishments where credit cards are not accepted at all, or where there is a minimum amount that must be met), Plaintiff is unable to purchase church attire, EOR 164 (FAC ¶ 247), ingredients for his church libation, *Id*. (FAC ¶ 248),[14] incidentals related to church gatherings, EOR 166 (FAC ¶ 258), or books for his church library. EOR 164 (FAC ¶ 249). On multiple occasions, he has had to forgo church research because there was no available parking that took anything but coins and/or currency. EOR 165 (FAC ¶¶ 253-54). Likewise, if there are toll booths – especially at bridges (where there are no alternative driving routes) – cash is often the only manner of payment. Thus, church-related trips to San Francisco, for instance, are severely impeded. EOR 165-66 (FAC ¶ 257).

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[13] "The 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." 42 U.S.C. § 2000cc–5(7)(B).

[14] It might be recalled that Congress enacted RFRA specifically in response to *Employment Div. v. Smith*. *Smith* involved plaintiffs who – while employed as drug rehabilitation counselors – were ingesting peyote, an illegal, hallucinogenic substance, banned by the Food and Drug Administration. If – by enacting RFRA – Congress intended to keep government from interfering with those plaintiffs' rights to ingest that illegal, hallucinogenic, controlled substance, then surely it also meant to keep government from interfering with Plaintiff's right to ingest wholesome fruit. EOR 234-35. *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006) (RFRA protects religious sect seeking to import hallucinogenic tea banned under Controlled Substances Act).

Plaintiff certainly considers himself to be as American as any of his fellow citizens, and feels that he most assuredly belongs among the "We" in any national motto using that pronoun. That being so, he feels he is, in essence, affirming that there is a God, and that he trusts in that God, whenever he carries money inscribed with "In God We Trust." This is contrary to his religious beliefs. "Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship." *Barnette*, 319 U.S. at 646 (Murphy, J., concurring).

Plaintiff also engages in proselytizing.[15] He does so regularly in Mexico, where American money is not only freely taken, but highly desirable. Because that money states "In God We Trust," however, Plaintiff refuses to use it for this purpose. Thus, he must take the time to exchange his money, accepting the loss of value (due to exchange rates). Furthermore, because his religious tenets prevent him from exchanging money with "In God We Trust" for this purpose, using a credit card is the only viable way to make the exchange. The one time he tried this, he incurred significant transaction costs. EOR 166, 235.

[15] "[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions." *McDaniel v. Paty*, 435 U.S. 618, 626 (1978). *See also Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1104 (9th Cir. 2000) ("[P]roselytizing, no less than prayer, is a religious practice."). As he advocates for his church, EOR 166 (FAC ¶ 263), Plaintiff – were he to use American money – would actually be advocating for trust in God ... a religious notion he and his church explicitly and affirmatively deny.

Of note is that the government – from the time it first mandated "In God We Trust" on every coin and currency bill through the present – has recognized and intended for the nation's money to transmit its Monotheistic message to people of other nations. As a key figure on the House Banking and Currency Committee noted in 1955 (referring to the "In God We Trust" motto):

> [T]he American dollar travels all over the world, into every country of the world, and frequently gets behind the Iron Curtain, and if it carries this message in that way I think it would be very good. I think that is one of the most compelling reasons why we should put it on our currency.

EOR 162. Similarly (also specifically mentioning "In God We Trust"), Defendant Mint Director Fore stated in her 2003 Mint Director's Report that, "United States coins ... serve as ambassadors of American values and ideals." EOR 150.

In view of the foregoing, it is clear that – as a price to pay for carrying and spending his nation's money – Plaintiff is, in essence, forced to advocate for Monotheism, a religious belief system he expressly repudiates. This surely substantially burdens his religious exercise rights:

> A system which secures the right to proselytize **religious**, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.

Wooley v. Maynard, 430 U.S. 705, 714 (1977) (emphasis added). Yet, the only way Plaintiff can so decline is to relinquish his right to carry, receive and spend United States coins and currency.

That this is a "substantial burden" is proven by the relevant case law. Starting with Supreme Court's jurisprudence, the two cases specifically alluded to in RFRA can be reviewed. In *Sherbert v. Verner*, 374 U.S. 398 (1963), the issue was whether the South Carolina Employment Security Commission could constitutionally deny unemployment compensation benefits to a person who – for religious reasons – refused to work on Saturdays. The court below (i.e., the South Carolina State Supreme Court) took the identical position argued by Defendants here, ruling that those benefits could be denied because:

> [O]ur Unemployment Compensation Act, as is hereinbefore construed, 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.

Sherbert v. Verner, 240 S.C. 286, 303-04 (1962). The United States Supreme Court reversed, 374 U.S. at 406, explicitly rejecting the state Supreme Court argument:

> [T]o condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Plaintiff here has the free exercise of his constitutional liberties effectively penalized as well. Just as the *Sherbert* plaintiff felt constrained by her religious beliefs (i.e., that it is forbidden to work on Saturday), Plaintiff here feels constrained by his religious beliefs (i.e., that it is forbidden to carry on his person a

statement attesting to the existence of God). And unlike Ms. Sherbert, who lost a benefit (unemployment compensation) that is obtained by a very limited number of persons under a special state statute that South Carolina was under no obligation to enact at all, Plaintiff here has lost a benefit (the ability to freely use the nation's only official legal tender[16]) that is available to everyone in society, under federal statutes that are essential to the nation's commerce.

Recalling that Congress specifically cited *Sherbert* in enacting RFRA, it is noteworthy that the government's (and, for that matter, the mill's) policy in that case had nothing to do with religion. The issue for both was simply to have secular rules regarding employment. In the instant action, the issue has nothing to do with anything **but** religion. Government has chosen to have purely religious dogma used as the nation's motto and placed on the nation's money. Thus, the statutes in this litigation are not "general laws" with incidental burdens on religion. They are religiously-based laws, adding to the infringement of Free Exercise liberties.

Another important point is that the benefits denied to Ms. Sherbert were not earmarked for her religious exercise. Here, Plaintiff has alleged multiple instances where the benefit being denied – i.e., the ability to engage in basic commerce – is

[16] Monetary instruments claiming "In God We Trust" are the only legal tender Defendants provide. 31 U.S.C. § 5103 ("United States coins and currency ... are legal tender for all debts, public charges, taxes, and dues.").

specifically to be used in his church-related activities. EOR 163-67. Thus, the RFRA claim in the case at bar is even stronger than one that could have been made by Ms. Sherbert, were the statute available in 1963.

The other case Congress referenced in RFRA was *Wisconsin v. Yoder*, 406 U.S. 205 (1972). *Yoder* involved Amish parents arguing that their Free Exercise rights were abridged when the state forced them to send their children to school beyond the eighth grade. Again, like the statute challenged in *Sherbert* (and unlike the ones challenged here), the regulation challenged in *Yoder* was neutral in terms of religion. Furthermore, *Yoder* involved an exceedingly strong state interest: the education of children, for which there is no counterpart in the instant matter. Nonetheless, the Supreme Court held that – at least beyond the eighth grade – the education of children was not a strong enough interest to override the plaintiffs' religious tenet of having a "life aloof from the world and its values." 406 U.S. at 210. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Id*. at 215.

In its Report on RFRA, the Senate stated that "the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. No. 111, 103rd Cong. 1st Sess. 4 (July 27, 1993).

> In its 1990 decision in *Employment Division v. Smith*, a closely divided Court abruptly abandoned the compelling interest standard and dramatically weakened the constitutional protection for freedom of religion.

Id. at 5. Restoring that protection was the essence of RFRA. "[T]he Religious Freedom Restoration Act of 1993 (RFRA) ... adopts a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1216 (2006). Thus, it is by looking at the Supreme Court's pre-*Smith* Free Exercise cases that RFRA is understood.

Included in this understanding is that even "indirect coercion" suffices to prevail on a RFRA claim. "[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." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988).[17] Thus, placing an individual in the position where he either alters his behavior or violates his beliefs – as is the case for Plaintiff here – is precisely the sort of injury RFRA is intended to remedy:

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

[17] Although *Lyng* resulted in a ruling against the plaintiffs, the case involved government doing as it will with its own land, under its exclusive control. This is quite different from the case at bar. Furthermore, *Lyng* was decided as the Supreme Court was transitioning to the rule it made in *Smith*, and – unlike *Sherbert* and *Yoder* – was **not** cited for support when Congress enacted RFRA.

> compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Board, Ind. Empl. Sec. Div., 450 U.S. 707, 717-18 (1981).

The Ninth Circuit follows this approach. In *Warsoldier v. Woodford*, 418 F.3d 989, 995 (2005), for example, the Circuit specifically rejected the notion that a "policy is not a substantial burden [just] because [an individual] may practice his religion." Citing *Sherbert*, 374 U.S. 398, 404 (1963), *Warsoldier* noted that:

> Forcing someone "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand . . . . puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

418 F.3d at 996. Thus – as in *Sherbert – Warsoldier* is analogous to the situation at bar. Billy Warsoldier was forced to decide between violating a key tenet of his faith (not cutting his hair) and losing his assignment to particular duties and phone rights (among other benefits). Plaintiff here has to choose between violating a key tenet of his faith (not personally carrying and furthering an offensive religious message) and losing his ability to obtain contributions, make sales, purchase religious garb, ingredients and library materials, do research, meet with others, or proselytize ... all of which are activities directly related not only to his religion, but to his ministry. These are clearly substantial burdens as defined by RFRA.

It must be recalled that the rights of Free Exercise with which RFRA is concerned are distinct from those arising under the Establishment Clause. Thus, the District Court's grant of Defendants' Motion to Dismiss Plaintiff's Free Exercise (RFRA) claims occurred by its conflating those two separate matters:

> [P]laintiff's Free Exercise and RFRA claims appear to simply restate his Establishment Clause claim in an effort to elude Ninth Circuit binding precedent.

EOR 332. To be sure, this case is unique inasmuch as government rarely engages in such flagrant Establishment Clause transgressions as are present here. *Yoder* and *Sherbert*, for example, involved no Establishment Clause issues. Had there been such involvement, however – say, the Qu'ran was being taught in 10th grade in *Yoder*, or South Carolina forced textile workers to read Bible passages before work – the plaintiffs' Free Exercise claims would not have evaporated or in any way have diminished merely because an Establishment Clause claim also had arisen.

Along these same lines, the District Court's reliance upon *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) – a pure Establishment Clause case that had nothing to do with Free Exercise matters – was also mistaken. Whether or not that case is binding in terms of its curious determination that "In God we trust" "has nothing whatsoever to do with the establishment of religion[,] ... is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise," *id*. at 243, that Establishment Clause conclusion has no

bearing on the RFRA claim. The statutes in *Sherbert* and *Yoder* surely bore "no true resemblance to a governmental sponsorship of a religious exercise." In regard to the Free Exercise claims upon which those plaintiffs prevailed, however, that fact was of no consequence.

The erroneous view of the District Court is perhaps best seen in its belief that, "*Aronow* held that the national motto is excluded from First Amendment significance." EOR 333. That is breathtakingly broader than is warranted. Even if good law, *Aronow* would exclude the motto only from Establishment Clause, not Free Exercise, significance.

This need to distinguish between Establishment Clause matters and Free Exercise Clause matters is critical. The two clauses are separate and distinct – so much so that they can actually be diametrically opposed to one another. *See*, *e.g.*, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 27 (1989) (Blackmun, J., concurring) ("The Free Exercise Clause suggests that a special exemption for religious books is required. The Establishment Clause suggests that a special exemption for religious books is forbidden."). In the instant case, the pertinent Establishment Clause issue is the religious opinion expressed by the government. Neutrality demands that government have no opinion on religious controversies, which is why its claim that "In God we trust" – under the Establishment Clause – is unconstitutional.

For RFRA purposes, however, the Establishment Clause is irrelevant. It is the individual's opinion – not the government's – that is of concern. *See*, *e.g.*, *Sherbert*, 374 U.S. at 406 (focusing on "**appellant's** willingness to violate a cardinal principle of her religious faith") (emphasis added). Government may not intrude itself into the formation of that opinion. Thus, it may not tell a Christian she is wrong in her beliefs about the Cross around her neck, or tell a Jew that she is wrong about her Star of David. Similarly, in the instant case, it may not tell Plaintiff that he is wrong in his religious opinions regarding the significance of the "In God We Trust" phrase on the money he has in his pocket.[18]

Subjective views of religious obligations are the crux of Free Exercise claims. RFRA (which was not even considered until a full two decades after *Aronow* was decided) specifically assumes laws "of general applicability" – i.e., free of Establishment Clause concerns. The District Court's melding of Plaintiff's two claims was wrong as a matter of law. Therefore, its dismissal of his RFRA action on the basis of the Establishment Clause determination cannot be sustained.

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[18] The more apt Judeo-Christian analogy would be a Jew forced to bear a Cross, or a Christian forced to bear a Star of David. Government could not tell those individuals that they are wrong about their beliefs regarding those religious symbols they didn't want to carry in the first place.

Incidentally, Congress specifically addressed infringements on Free Exercise related to the carrying of religious symbols during its RFRA deliberations. *See*, *e.g.*, 139 Cong. Rec. 2362 (May 11, 1993 statement of Rep. Lowey (NY), discussing "wearing yarmulkes, crosses, or rosaries.").

(B) Defendants have no compelling interest to justify the substantial burden upon Plaintiff's religious exercise

Under RFRA, "'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation.'" *Sherbert*, 374 U.S. at 406 (citation omitted). Thus, "[t]he state may justify a limitation on religious liberty [only] by showing that it is essential to accomplish an overriding governmental interest." *United States v. Lee*, 455 U.S. 252, 257 (1982) (citations omitted).

There is surely no "grav[e] abuse" or "overriding governmental interest" involved in having a purely religious claim as the national motto. In fact – inasmuch as what the government seeks to do is what is prohibited under the Establishment Clause (i.e., allowing "a majority [to] use the machinery of the State to practice its beliefs," *Abington School District v. Schempp*, 374 U.S. 203, 226 (1963)) – there is no valid interest at all.

Despite this, Defendants cite *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211 (1996) for the proposition that:

> [T]here is undoubtedly a compelling governmental interest in maintaining a national motto that "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future," and in having coins and currency reflect that national motto.

Obviously, this contention is false. To whatever extent a motto is necessary at all – much less to perform these functions – the nation did fine for the 167 years prior to

the codification of "In God we trust."[19] Similarly, our coinage adequately served its purposes from 1789 through 1864 without that phrase ever being used, EOR 135, and "[t]he first paper currency bearing the motto entered circulation on October 1, 1957," ninety-five years after United States currency was first introduced in 1862.[20] Thus, our nation's currency notes functioned without the motto twice as long as they have functioned with it. It follows that there is nothing "compelling" about using "In God We Trust" at this time.

(C) "In God We Trust" on the money is not the least restrictive means of furthering any alleged compelling governmental interest

Even if there were a compelling interest in having "In God We Trust" as the motto and on the money, that still would not justify the substantial burden upon Plaintiff's Free Exercise rights. Under RFRA, the given activity must also be "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b)(2). Dissecting the *Gaylor* criteria provided by Defendants, it can immediately be appreciated that this test cannot be met.

There are five criteria:

(i) symbolizing the historical role of religion in our society,
(ii) formalizing our medium of exchange,

[19] Act of July 30, 1956, ch. 795, 70 Stat. 732.
[20] *Facts About $1 Notes*, accessed on August 30, 2006, at http://www.bep.treas.gov/document.cfm/18/2230.

(iii) fostering patriotism,
(iv) expressing confidence in the future, and
(v) having coins and currency reflect that national motto.

Working backwards, it is readily seen that having "In God we trust" is not the least restrictive means of reflecting the national motto, since – whatever the motto is – putting it on the money serves that interest. Thus, it surely doesn't have to be a motto with a Monotheistic message.

As for "expressing confidence in the future," it has been noted that "appeals to patriotism, moments of silence, and any number of other approaches would be as effective." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part).

The notion that patriotism can only be fostered by expressing "trust" in a deity is also countered by Justice Kennedy's *Allegheny* quotation (as it is by merely contemplating the meaning – if not the existence – of the Establishment Clause).

As was the case for "having coins and currency reflect that national motto," virtually any motto or design can serve the function of "formalizing our medium of exchange."

Accordingly, only one criterion is left: "symbolizing the historical role of religion in our society." Why that is any more compelling than symbolizing the historical role of "race in our society" or "gender in our society" has yet to be

explained. Similarly, why isn't the historical role of exploration or artistry or education "compelling." More to the point, why not the historical role of equality – a principle that (unlike Monotheism) serves as a guide for all who understand and revere the Constitution. Either way, although "In God We Trust" may be the least restrictive means of serving the historical role of Monotheism (which, again, would be anything but a "compelling" interest), it certainly isn't the least restrictive means of serving the historical role of "religion." That role – which of necessity includes respect for the diversity of all religious views – can be served in a far less restrictive manner by a motto such as "In Religious Freedom we trust," not "In God we trust."

Again, the point must be made that this case comes to the Court on Rule 12(b)(6) Motion to Dismiss. Thus – if this Court puts any credence in Defendants' claims – the case should be remanded to the District Court, where "it would plainly be incumbent upon [them] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights." *Sherbert*, 374 U.S. at 407. "When a plausible, less restrictive alternative is offered . . . , it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *United States v. Playboy Entm't Group*, 529 U.S. 803, 816 (2000). Plaintiff has offered numerous plausible less restrictive alternatives. EOR 171 (FAC ¶ 291). Defendants have yet to meet their obligation.

II. "In God We Trust" violates the Establishment Clause

(A) "In God we trust" as the national motto violates every Supreme Court Establishment Clause test and enunciated principle

Although it is often difficult to find the correct standard to use in following the Supreme Court's Establishment Clause jurisprudence, that difficulty is of no consequence in this case. Applying any of the Court's enunciated principles results in the same conclusion: choosing the purely religious claim, "In God we trust," to be the national motto, and placing that phrase on every coin and currency bill, violates the Clause.

1. The Neutrality Test is violated

Any analysis ought to start with what was just last year deemed to be the "touchstone" of Establishment Clause jurisprudence: neutrality.

> 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 County v. ACLU, 125 S. Ct. 2722, 2733 (2005) (citation omitted). In fact, this principle has been adhered to with remarkable consistency. Appendix C (providing quotations from the majority opinions of thirty Religion Clause cases). Thus, if there is any fixed star in the Court's Establishment Clause constellation, it is that the government must remain neutral in its approach to religious beliefs.

As *McCreary* makes clear, this neutrality is required not only "between religion and religion, [but] between religion and nonreligion." In other words, Atheism is to be respected just as much as Monotheism. Clearly, when the government not only states, but uses as the nation's motto, the phrase "In God we trust," it is not being neutral in its respect for Atheism and Monotheism.

This requirement for equal respect between Atheism and Monotheism – i.e., between "religion and nonreligion" – has been enunciated time and again by the high court. *See*, *e.g.*, *Board of Education of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause [is] that government should not prefer one religion to another, **or religion to irreligion**."); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 610 (1989) ("A secular state establishes **neither atheism nor religion** as its official creed."); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8 (1989) ("[G]overnment ... **may not place its prestige**, coercive authority, or resources **behind a ... religious belief in general**, ..."); *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) ("[G]overnment [must] maintain a course of neutrality among religions, and **between religion and nonreligion**."); *Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985) (footnotes omitted) ("[T]he individual freedom of conscience protected by the First Amendment embraces the right to select **any religious faith or none at all**."); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S.

756, 771 (1973) ("[A] law may be one 'respecting an establishment of religion' **even though ... [it] merely benefits all religions alike**." (citations omitted).[21]

Even if the neutrality principle is ignored, however – which, of course (in view of *McCreary*) a Circuit Court may not do – application of any of the other Supreme Court Establishment Clause tests would result in the same conclusion. As noted previously, "[t]he government may not ... lend its power to one or the other side in controversies over religious ... dogma," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). It cannot be denied that it is lending its power to the side that says God exists in having a national motto that claims, "In God we trust." The various other tests corroborate this fact.

2. The *Lemon* test is violated

The *Lemon* test – which the Ninth Circuit just recently reaffirmed in *Harper v. Poway Unified School District*, 445 F.3d 1166, 1191 (9th Cir. 2006) – also requires a decision in Plaintiff's favor. *Lemon* has three "prongs," two of which are applicable to the case at bar.[22] The first is *Lemon*'s "purpose" prong:

> Lemon's "purpose" requirement aims at preventing the relevant governmental decisionmaker -- in this case, Congress -- from abandoning neutrality and acting with

[21] All emphases added.
[22] *Lemon*'s third prong – "entanglement" – does not apply in this case.

> the intent of promoting a particular point of view in religious matters.

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987). In his Complaint, Plaintiff has shown unambiguously that the "intent of promoting a particular point of view in religious matters" was precisely what every official involved in the placement of "In God We Trust" on the coins (and making that phrase the nation's motto) had in mind.[23]

Among the indicators of this is the original action that led to this constitutional infirmity: a Christian minister's letter seeking "the recognition of Almighty God," and suggesting to the Secretary of the Treasury that, "You are probably a Christian." EOR 132. The Secretary asserted in response, "The trust of our people in God should be declared on our national coins." EOR 133. The Mint Director added to the evidence: "We claim to be a Christian nation ... [and] should declare our trust in God ... 'the King of Kings and Lord of Lords.'" EOR 134.

In 1908, the first law was passed mandating "In God We Trust" on the coins. The House subcommittee on the matter was "unanimous" in characterizing the United States as "a Christian nation," and that the republic's perpetuation required

[23] As is detailed in Plaintiff's Complaint, the "In God We Trust" phrase was first placed on the coins in 1864. EOR 131-35. It wasn't codified as the motto until 1956, long after that usage on the coinage had become "ubiquit[ous]." EOR 144-47, 326.

"a Christian patriotism, which recognize[s] the universal fatherhood of God." EOR 138. Similar purely religious sentiments emanated from the House committee that led to the report accompanying the 1955 Act. There, the motto was classified among the "**Religious Inscriptions** on Coins in the United States," EOR 140 (emphasis added); not a single committee member deemed the motto to be anything but religious. EOR 140-44.

Of course, one doesn't need this legislative history to rule in this case.

> We have "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." When the statutory "language is plain, the sole function of the courts--at least where the disposition required by the text is not absurd--is to enforce it according to its terms."

Arlington Central v. Murphy, 126 S. Ct. 2455, 2459 (2006) (citations omitted). *See also Zedner v. United States*, 126 S. Ct. 1976, 1991 (2006) (Scalia, J., concurring) ("[W]hen the language of the statute is plain, legislative history is irrelevant.") The language of the statute couldn't be any plainer: "'In God we trust' is the national motto." 36 U.S.C. § 302. "In God we trust" plainly means that "we" (Americans) trust in God, and trusting in God is about as purely religious as can be. Congress's choice to have the government claim that the nation trusts in God – as its sole official motto, and on every single coin and currency bill – therefore, violates *Lemon*'s purpose inquiry.

The claim that these words were chosen to reference our "religious history" ought also be addressed while discussing the "plain" language. The word used is "trust" – in its present tense. Had Congress intended to speak of our history, the legislators would have stated, "In God we trusted." Or, alternatively, "Our history is one of trust in God."[24] Neither, however, is what they decided upon. Rather, they used the grammar that expressed precisely what it was that they meant to convey: We Americans – today, now, at this time – trust in God.

Also, the fact that it is our national motto deserves attention. A motto is "a ... phrase ... inscribed on something ... indicative of its character" or "a short expression of a guiding principle." EOR 171. Thus, "according to its terms," § 302 was meant to declare that the "character" of this nation – and its "guiding principle" – is that we trust in God. That is a purely religious statement, and – as the nation's motto – it surely wasn't chosen to have only temporary relevance.

[24] Had Congress done that, it still would have been suspect under the Establishment Clause. Government may not single out Monotheism as the one aspect of our history worthy of preeminence. There are myriad other aspects of our history – e.g., our being the first constitutional democracy, our ingenuity, our benevolence, our compassion, our achievements in the arts and sciences, our placing a premium on equality (except, it seems, in religion), and on and on – that are at least as worthy. *Cf. McCreary County v. ACLU*, 125 S. Ct. 2722, 2739 (2005) (Ten Commandments display invalidated, since, "When the government initiates an effort to place this statement alone in public view, a religious object is unmistakable."); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (invalidating creche display, situated alone in county courthouse building).

With the first prong of *Lemon* so clearly transgressed, this case should end immediately, since "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose." *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). Nonetheless, for the purposes of completeness, *Lemon*'s "effects prong" can also be examined.

> For a law to have forbidden "effects" under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence."

Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987). Obviously, when "the government itself" chooses the purely religious claim that "In God we trust" to use as the national motto, and then places that purely religious motto on the tens of billions of coins and currency notes it manufactures each year, EOR 85, it "has advanced religion through its own activities and influence."

Support for this conclusion is overwhelmingly provided in the Complaint. *See*, *e.g.*, EOR 218-224 ("The Current Sectarian Motto Continues to Foster and Accentuate the Governmental Endorsement of Monotheism and Disapproval of Atheism"); EOR 272-77 ("1994 Survey on American Views of the Motto" (showing that the vast majority of Americans believe that "In God We Trust" is religious, endorses a belief in God, and endorses "religion" over atheism)); EOR 278-92 (*Petition of Plywacki*, 107 F. Supp. 593 (D. Haw. 1952) (Chief Federal

District Court judge, highlighting "In God We Trust" on the money, denies citizenship to an Atheist); EOR 203-217 (Congressional Record entries, with a virtual explosion of marked (Christian) Monotheism); EOR 293-305 (demonstrating that the overwhelming uses of "In God We Trust" by the private sector is purely religious). *See also* the National Day of Prayer proclamations of President Reagan ("Our Nation's motto -- 'In God We Trust' -- was not chosen lightly. It reflects a basic recognition that there is a divine authority in the universe to which this nation owes homage."[25]) and of President Clinton (noting that the motto "is a fitting testimony to the prayers offered up by American women and men through the centuries, and that such prayers "reaffirm annually our dependence on Almighty God."[26]); as well as President Bush's Proclamation commemorating the motto's 50th anniversary ("[W]e reflect on these words that ... recognize the blessings of the Creator"[27]).

As in the past, the current statements of Defendant (the Congress) reveal that the motto has religious effects. The House Chaplain, for instance – after addressing "Loving God," "Your divine providence," and "Lord" – ended his prayer just last

[25] http://www.presidency.ucsb.edu/ws/index.php?pid=61699 (from March 19, 1981, accessed on September 15, 2006).
[26] http://www.presidency.ucsb.edu/ws/index.php?pid=54013 (from April 18, 1997, accessed at on September 15, 2006).
[27] http://www.whitehouse.gov/news/releases/2006/07/20060727-12.html (from July 27, 2006, accessed on September 16, 2006).

July with, "For this Chamber proclaims what America prays: 'In God we trust' now and forever. Amen." Appendix A. Similarly, the congressmen, themselves, continue to reference those four words in purely devotional, Monotheistic terms. EOR 306-08. *See also* this Opening Brief's Appendix B.

At the very least – with this abundance of indicators showing a violation of the "effects prong" – Plaintiff deserves a hearing before the grant of a Motion to Dismiss. *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003) (motion to dismiss may be granted only if "it appears beyond doubt that [Plaintiff] can prove no set of facts to support [his] claims.").

3. The Endorsement Test is violated

Another Supreme Court test is "endorsement:"

> [T]he prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."

Allegheny County, 492 U.S. at 593 (citation omitted). Clearly, the message that the particular religious belief that there exists a God in whom Americans trust is conveyed in a motto that states, "In God we trust." If a mechanistic approach to the endorsement test is preferred, however, looking to the given statute's "text, legislative history, and implementation," *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring), has been recommended.

The text is as purely religious as four words can be. It is a basic sentence, with a subject ("we"), a verb ("trust") and a prepositional phrase ("In God"). It doesn't say anything about history, patriotism, heritage or anything else. All it speaks about is religion.

The legislative history – detailed in the Complaint, EOR 131-47 – shows an unequivocal desire and intent, by all who spoke on the matter, to advance the particular religious view that there exists a "God," and to assert that Americans place their trust in that God. This, too, is purely religious, as (again) is also corroborated by the Congressional Record excerpts robustly demonstrating the Monotheistic bent of the 1950s Congress. EOR 203-217.

The last of the three endorsement factors – implementation –indicates little in terms of whether or not there was a religious thrust behind that purely religious phrase. However, overall – with two exceedingly strong positive indicators of endorsement, and one neutral – the use of "In God we trust" as the nation's motto clearly fails the endorsement test. That this is the commonsense of the matter is corroborated in by the scientific survey commissioned by the *Gaylor* plaintiffs, showing that Americans overwhelmingly believe that "In God We Trust" as the motto is an "endorsement" of Monotheistic religious belief. EOR 272-77 (Complaint Appendix N).

In short, if 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," *Wallace v. Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring), then it is clearly impermissible to have "In God we trust" as our motto and on all our money.

4. The Outsider Test is violated

Justice Kennedy has noted that "it borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full membe[r] of the political community'" as a result of "our national motto, 'In God we trust,' 36 U.S.C. § 186, which is prominently engraved in the wall above the Speaker's dias [sic] 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)." *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring and dissenting) (multiple quotation marks eliminated). In addition, Plaintiff provided a wealth of data in his Complaint showing that Atheists are "outsiders," EOR 191-97,[28] and has alleged that this "outsider" status stems largely from the repeated messages of government that, "In God We Trust." *See*, *e.g.*, EOR 158.

[28] *See also*, EOR 184-190, 198-224.

Once more, on this Rule 12(b)(6) Motion to Dismiss, that inference "must be drawn in [his] favor." *See*, Standard of Review, *supra*, page 2.

5. The Imprimatur Test is violated

Whether government is "perceived as conferring the imprimatur of the State on religious doctrine or practice as a result of [the given] policy," *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 264 (1990) (Marshall, J., concurring), is another "test" found in the Supreme Court's Establishment Clause jurisprudence. When this occurs, "it conveys a message of exclusion to all those who do not adhere to the favored beliefs." *Lee v. Weisman*, 505 U.S. 577, 606 (1992) (Blackmun, J., concurring). The Supreme Court's words in *Allegheny*, 492 U.S. at 599-600, make the point most clearly:

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus ... government sends an unmistakable message that it supports and promotes the ... religious message.

When the government has only one official motto, whatever is chosen has "the imprimatur of the State." When that motto is also placed on every coin and currency bill, that imprimatur – along with the "message of exclusion" – is only intensified.

6. The Coercion Test is violated

The last test is the "coercion" test, which formed the basis of the Supreme Court's opinion in *Lee v. Weisman*, 505 U.S. at 587-88. Where coercion exists, the Establishment Clause has been so violated that the given government action has extended into the Free Exercise realm:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.

Engel v. Vitale, 370 U.S. 421, 430 (1962). Thus:

> [A]lthough proof of government coercion is not necessary to prove an Establishment Clause violation, it is sufficient. Government pressure to participate in a religious activity is an obvious indication that the government is endorsing or promoting religion.

Lee v. Weisman, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring).

In *Lee*, the coercion test involved a student and her father attending a high school graduation. Although "[t]he parties stipulate[d] that attendance at graduation ceremonies is voluntary," *id*. at 583, the Court determined that:

> Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

Id. at 586. Certainly, the use of money in today's world is at least as much "in a fair and real sense obligatory" as attending a high school graduation. And the exposure to and furthering of Monotheism – on every coin and currency bill for all time and at virtually every location in American society – far exceeds what the plaintiffs endured for the one minute or so they heard a nonsectarian prayer. Furthermore, the Weismans didn't have to bear on their persons and in their homes the offensive religious words. Plaintiff here has to do that ... virtually every day for his entire life. Thus, to whatever degree Deborah and Daniel Weisman were coerced, Plaintiff here is coerced multiple times over.

In short, having "In God we trust" as the national motto, and placing those purely religious words on every single coin and currency bill, fails every single Establishment Clause test now in use. Thus, in addition to the clear RFRA violation, the Establishment Clause is violated as well by the Defendants' challenged acts.

(B) *Aronow* is not binding precedent

In *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970), "the use of expressions of trust in God by the United States Government on its coinage, currency, official documents and publications" was unsuccessfully challenged.

Because that claim is essentially identical to the Establishment Clause challenge brought here, Defendants argued that *Aronow* "is dispositive of Plaintiff's claims in this case." EOR 38. The District Court agreed, holding that "this court must and does, here, follow Ninth Circuit precedent." EOR 331.

Inasmuch as RFRA wasn't implemented until 1993, *Aronow* has nothing to do with that claim. Moreover – for the reasons that follow – it isn't binding for the Establishment Clause claim, either.

The essence of the *Aronow* decision is found in the following:

> [T]he national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

Aronow, 432 F.2d at 243. Perhaps this was a tenable view in 1970. However, with the enormous changes in Establishment Clause jurisprudence since that time, the *Aronow* opinion cannot reasonably still be considered good law.

Three years ago, this Circuit noted in *Miller v. Grammie*, 335 F.3d 889, 893 (9th Cir. 2003) that:

> [W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled.

Inasmuch as an extraordinary amount of "intervening higher authority" has accumulated since 1970 – all "clearly irreconcilable with the reasoning or theory" just noted from *Aronow* – that case has been "effectively overruled."

(1) The reasoning and theory of *Aronow* is "clearly irreconcilable" with all of the current Supreme Court Establishment Clause tests.

Plaintiff has already demonstrated how "In God we trust" is incompatible with every current Establishment Clause test. All of those tests, of course, either originated or matured greatly over the thirty-six years since *Aronow*.

The *Lemon* test, for instance, didn't arise until 1971. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Endorsement was formalized by Justice O'Connor in 1984. *Lynch v. Donnelly*, 465 U.S. 668, 690-92 (1984) (O'Connor, J., concurring), where she also gave preeminence to the "outsider" analysis. *Id*. at 688. The imprimatur idea was expanded upon in 1990 in *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226 (1990) (Marshall, J., concurring). Although coercion had been discussed previously, the doctrine matured in 1992 with *Lee v. Weisman*, 505 U.S. 577 (1992). And – as noted in Appendix C – neutrality has become cemented into Establishment Clause jurisprudence since *Aronow*, so that it was decreed to be the "touchstone" of the Court's analysis just last year. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005).

If, as this Circuit has noted:

> A lower federal court cannot responsibly decline to follow a principle directly and explicitly stated by the Supreme Court as a ground of decision and subsequently applied by the Supreme Court as an integral part of a systematic development of constitutional doctrine,

United States v. Underwood, 717 F.2d 482, 486 (9th Cir. 1983), then surely the Court "cannot responsibly decline to follow [the] principle[s] directly and explicitly stated by the Supreme Court" since the *Aronow* decision.

(2) The reasoning and theory of *Aronow* is clearly irreconcilable with declarations of Congress and the President issued since the District Court's June 12 ruling.

In addition to the higher judicial authority that demands invalidation of *Aronow*, new facts have arisen that are "clearly irreconcilable" with the *Aronow* Court's reasoning and theory. These facts actually arose after the District Court's June 12, 2006 Order granting the Defendants' Motion to Dismiss, as a result of the motto's 50th anniversary.[29] To commemorate the occasion, both the legislature and the President issued proclamations, making it clear that the phrase "In God we trust" is precisely what is facially apparent: it is religious, and not "patriotic" nor "ceremonial."

[29] President Eisenhower signed the bill into law on July 30, 1956. EOR 147.

On July 12, 2006, the Senate passed S. Con Res. 96, "to commemorate, celebrate and reaffirm the national motto of the United States on the 50th anniversary of the formal adoption." 109th Cong. 2nd Sess., 152 Cong. Rec. 90, S7443-44 (July 12, 2006). That resolution – which stated that, "[F]rom the colonial beginnings of the United States, citizens of the Nation have officially acknowledged their dependence on God" – was formulated to "reaffirm the concept embodied in that motto that (1) ... [Americans] are endowed by their Creator with certain unalienable Rights; and (2) the success of civil government relies firmly on the protection of divine Providence." Thus, it was resolved that Congress, "celebrates the national motto as ... a fundamental aspect of the national life of the citizens of the United States, and ... reaffirms today that the substance of the national motto is no less vital to the future success of the Nation." No mention was made of patriotism or ceremony.

This was also true of President Bush's proclamation. It began:

> On the 50th anniversary of our national motto, "In God We Trust," we reflect on these words that guide millions of Americans, recognize the blessings of the Creator, and offer our thanks for His great gift of liberty.[30]

[30] Accessed at http://www.whitehouse.gov/news/releases/2006/07/20060727-12.html on July 28, 2006.

That certainly reflects a religious, as opposed to a "patriotic" or "ceremonial," view. So, too, does the President's opinion that "[a]s we ... remember with thanksgiving God's mercies throughout our history, we recognize a divine plan that stands above all human plans and continue to seek His will."[31] Thus, the *Aronow* Court's conclusion that having "In God we trust" as the nation's motto "bears no true resemblance to a governmental sponsorship of a religious exercise" is no longer tenable. Remembering God's mercies, recognizing a divine plan and seeking "His" will are each classic examples of a governmental sponsorship of a religious exercise.

(3) The reasoning and theory of *Aronow* is clearly irreconcilable with the claims of Defendants, themselves.

Also "clearly irreconcilable with the reasoning or theory" of *Aronow* is the admission of Defendant United States Mint Director Fore. Writing in her Annual Report for the year 2003,[32] she declared, "Wherever United States coins travel, they serve as reminders of the **values that all Americans share**." EOR 149-50.[33]

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[31] *Id*.

[32] Accessed at on August 31, 2006 at http://www.usmint.gov/downloads/about/annual_report/2003AnnualReport.pdf.

[33] All emphases in this section's quotations are added.

This was followed by her proclamation that "In God We Trust" is among "[t]he words and symbols that **define us as Americans**," and among the "declarations of **our beliefs**," which "showcase **how we see ourselves** and **our sense of sovereign identity**." Finally, she noted that our coins – with the "In God We Trust" phrase – "serve as ambassadors of **American values and ideals**." *Id*.

Unless one is willing to contend that "declarations of our beliefs" have no real meaning, and that "Liberty" and "*E Pluribus Unum*" also are merely "of a patriotic or ceremonial character," then "In God We Trust" means what it says: i.e., that **we Americans trust in God**, and that the government believes this is an extraordinarily important characteristic.

That the motto is merely "patriotic or ceremonial" is also belied by the involvement in this case of Defendant-Intervenor PJI. In its original filings, PJI referred to "**America's dependence on God**," EOR 4, as if the existence of that (or any) deity were a factually proven matter. Its claim that this purely religious belief "is an invaluable and unique expression of our nation's history and heritage," *id*., demonstrates rather conclusively that support for Monotheism is the purpose of PJI's participation. As the District Court found, "PJI's mission and function is to represent the interests of **people of faith**." EOR 22 & 27.

Similarly, *amicus curiae* American Center for Law and Justice (ACLJ) – along with 47 United States congressmen – wrote that it is an "**undeniable truth**

that our freedoms come from God." EOR 33. Again, this is an undeniably Monotheistic, purely religious expression of faith. In fact, ACLJ, itself, referenced the motto as a "religious expression." EOR 32, 33, 37 & 38. ACLJ also wrote:

> Congress codified "In God We Trust" as our national motto for the express purpose of reaffirming America's unique history and **understanding of this truth**, and **to distinguish America from atheistic nations who recognize no higher authority than the State**.

EOR 38. If that's not a sign of a 100% actively religious – and not "patriotic or ceremonial" – view of the motto, nothing is:

> "Concepts concerning God or a supreme being of some sort are manifestly religious . . . . These concepts do not shed that religiosity merely because they are presented as a philosophy."

Edwards v. Aguillard, 482 U.S. 578, 599 (1987) (O'Connor, J., concurring) (citation to District Court opinion omitted).

The Thomas More Law Center (TMLC), the other *amicus curiae* supporting Defendants, further corroborated the wholly religious nature of the "In God we trust" claim. TMLC described itself as "dedicated to **defending and promoting the religious freedom of Christians**," EOR 47 – as if there will be some abrogation of Christian freedom if the nation's sole official motto no longer espouses their religious philosophy. Even though TMLC actually included the *Aronow* quote in its brief, EOR 51 – it openly contradicted its foundation:

> The phrase "In God We Trust" ... acknowledges ... **the undeniably religious belief** regarding God-given Freedom.

EOR 48 & 52.[34] Additionally, TMLC claims that the motto is related to the notion that "man was created in God's image and likeness, as stated in Genesis 1:26-27 ... [and] the Biblical affirmation of man's inherent worth;" that "Americans ... subscribe to a central, unifying idea, a principle, a creed—our God-given rights;" that "[t]he idea of God-given freedom ... should never be prevented. It should be reinforced among the citizenry at every opportunity;" and that "[t]he phrase 'In God We Trust' serves to remind us, as citizens, of our own gift of ... God-given freedom." EOR 52-53. Perhaps most pernicious of all to Defendants' claims, TMLC admits that having "In God we trust" as the national motto is a "public acknowledgement of God." EOR 53. "Certainly," says this defender of Christian religious freedom, "the phrase 'In God We Trust' has religious connotations as it acknowledges the existence of a Supreme Being." EOR 55.

[34] TMLC's complete oblivion with regard to Atheistic Americans is also noteworthy: "[O]ur national motto provides an ongoing acknowledgment of **our unifying religious** heritage." EOR 48. If our motto were "unifying," it would not keep getting challenged. *See*, *e.g.*, *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266 (4th Cir. 2005); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *O'Hair v. Murray,* 588 F.2d 1144 (5th Cir. 1979); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970); *Stevens v. Summerfield*, 103 U.S. App. D.C. 201 (D.C. Cir. 1958); *Schmidt v. Cline,* 127 F. Supp. 2d 1169 (D. Kan. 2000).

The totality of these statements – by those **defending** the *Aronow* Court's assertion that the motto "is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise" – shows how anachronistic is the Ninth Circuit's 1970 holding. Again – combined with the principles consistently enunciated by the Supreme Court in its subsequent Establishment Clause cases – *Aronow* certainly has been "effectively overruled."

Even if the Court finds this is not the case, however, it yet again must be emphasized that the District Court's Order was in response to a Rule 12(b)(6) Motion to Dismiss. "[A] Rule 12(b) motion to dismiss on the pleadings ... presumes that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Thus, even if the "specific facts" pled by Plaintiff are insufficient to support his claim – which seems highly unlikely – the arguments are far too compelling to uphold the District Court's Order without providing Plaintiff with an opportunity to support his allegations with evidence. In addition to demonstrating that "In God We Trust" on the nation's only official legal tender substantially burdens Plaintiff's exercise of religion, Plaintiff will – if needed – provide evidence that:

(a) "In God we trust" is not neutral with respect to religious belief;

(b) Congress acted with a purely religious purpose in passing the laws making "In God we trust" the national motto, and mandating the use of that phrase on every coin and currency bill;

(c) Those laws have a primarily religious effect;

(d) "In God we trust" endorses the religious belief that there is a God in whom "we trust;"

(e) Congress has turned Plaintiff into a "political outsider" by exalting a religious belief that is completely incompatible with the one to which he subscribes;

(f) "In God we trust" places government's "imprimatur" on Monotheism, a particular religious belief; and

(g) Plaintiff is coerced not only to countenance, but also to promote purely religious dogma with which he emphatically disagrees.

Each of the above – declared by the Supreme Court to be relevant to the statutory or constitutional inquiry – is a separate claim that involves questions of fact. If "[a]ll factual allegations of the complaint are accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party," and "liberal construction is 'particularly important in civil rights cases,'" then it is simply impossible to uphold the District Court's Order of Dismissal under Fed. R. Civ. P. Rule 12(b)(6).

(4) The District Court in *Aronow* explicitly ruled that the plaintiff there lacked standing. Thus, the *Aronow* Court was without jurisdiction to rule on the merits.

There is another reason to find that *Aronow* has no precedential value. This stems from the fact that "[t]he District Court ruled that plaintiff, as a taxpayer and citizen, lacked standing to challenge the validity of the statutes." *Aronow*, 432 F.2d

at 243. With that being the case, the District Court was required to dismiss the case. "[I]t is improper for the federal courts to entertain a claim by a plaintiff [who lacks standing]." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004).[35] This is crucial, so that the judicial branch can "avoid deciding questions of broad social import where no individual rights would be vindicated and [can] limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 99-100 (1979).

> [W]e are required to address the issue [of standing] 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, 230-31 (1990) (citations omitted). Thus, in view of the *Aronow* District Court's unequivocal standing determination, the Ninth Circuit was first required to reverse that finding if it wished to rule on the merits.

The *Aronow* panel, however, did not do this. On the contrary, the Court wrote, "Inasmuch as we agree on the insignificance of the charge of

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[35] This lack of Article III standing (as distinct from prudential standing) immediately terminates subject matter jurisdiction, and withdraws from the Court any authority to rule on the merits. "When a court lacks Article III standing, there is no jurisdiction because there is no case or controversy within the meaning of the Constitution. A federal court, however, may reach the merits when only prudential standing is in dispute." *Newdow v. Cong. of the United States*, 383 F. Supp. 2d 1229, 1241 (E.D. Cal. 2005).

unconstitutionality, we do not reach the question of standing." *Aronow*, 432 F.2d at 243. Obviously, that is procedurally backwards.

In a challenge to "In God we trust," where it is clear that "there would be intense opposition to the abandonment of that motto," *School Dist. v. Schempp*, 374 U.S. 203, 303 (Brennan, J., concurring), it is imperative to have a plaintiff who will "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and will "ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986). This is especially the case where the rights of a disenfranchised minority (such as Atheists) are at stake:

> We have previously pointed to the importance of a searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities.

Minersville School District v. Gobitis, 310 U.S. 586, 606 (1940) (Stone, J., dissenting).

It is certainly possible (if not probable) that the *Aronow* plaintiff did not present the detailed history provided by Plaintiff here, proving the clearly religious motivations behind the "In God We Trust" phrase. EOR 132-47. Similarly, the

Aronow Court may not have been apprised of the universal agreement among the Framers – even prior to the First Amendment – that the federal government had no power at all to legislate in religious matters. EOR 123-28. That the very first statute of the government of the United States involved the First Federal Congress's decision to affirmatively remove the two references to God in their own oath of office, EOR 126-27; that President Adams – with the unanimous consent of the Senate – included as part of the "supreme law of the land" that "the government of the United States is not in any sense founded on the Christian religion," EOR 129; and that Congress – in the 1830s – concluded that "the line cannot be too strongly drawn between Church and State" (when it decided to recommend increasing, not decreasing, Sunday hours for the Post Office), EOR 130; are also relevant facts that the *Aronow* plaintiff doubtfully presented.

For these reasons, too, *Aronow* is not binding precedent.

CONCLUSION

"God is a myth" is the national motto.

If this were the current codification of 36 U.S.C. § 302, it is hard to imagine this would be a difficult case. The substantial burden on members of the Christian, Jewish or Muslim clergy who could not in good conscience carry such a claim on their persons would be readily recognized if those words were written on all of the legal tender they needed to use for their religious work. No one would seriously contend that such a motto "bears no true resemblance to a governmental sponsorship of a religious" ideology. Most importantly, Congress would never pass such a law.

"In God we trust" is no less constitutionally infirm. It violates Plaintiff's rights under both RFRA and the Establishment Clause. Accordingly, the District Court's Order granting Defendants' Motion to Dismiss should be reversed and the motto should be invalidated.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is composed in 14-point Times New Roman type

STATEMENT OF RELATED CASES

Plaintiff-Appellant is aware of one related case pending in this Circuit.

In the instant case, the precedential value of *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) – in which the plaintiff was determined to lack (Article III) standing – is at issue.

In *Newdow v. Carey*, Cases No. 05-17257, 05-17344, 06-15093 (consolidated), the precedential value of *Newdow v. United States Congress*, 328 F.3d 466 (9th Cir. 2002) (amended opinion, filed 2/28/2003), *rev'd on standing grounds, Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) – in which the plaintiff was determined to lack (prudential) standing – is at issue.

SIGNATURE PAGE
Case No. 06-16344

September 19, 2006 _____

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains no more than 14,000 words.

According to Microsoft Word's "Statistics," this document – excluding the Cover Page, Table of Contents, Table of Citations, Statement of Jurisdiction, Standard of Review, Certificate of Type Size and Style, Statement of Related Cases, Signature Page, Appendices, (this) Certificate of Compliance, and Certificate of Service – contains 13,237 words.

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APPENDIX A

HOUSE CHAPLAIN REVEREND DANIEL P. COUGHLIN'S JULY 25, 2005 PRAYER[†]

Loving God, bless all those who work for the U.S. House of Representatives.

May all House Members and all who serve as their staff be instruments of consultation and wisdom to accomplish the legislative work of the American people.

Renew this Nation in its trust of Your divine providence and in the honest trust of human relationships.

Without trust there can be no open society.

Trust allows us to seek knowledge, experience, and personal wisdom from others.

Trust builds strong partnerships in business and in government.

Trust helps us take down walls, remove barriers, and eliminate friction.

Lord, make us a people who are trustworthy and skilled in building trust.

For this Chamber proclaims what America prays: ''In God we trust'' now and forever. Amen.

[†] 151 Cong. Rec. H6385-86.

APPENDIX B

SAMPLING OF CONGRESSIONAL STATEMENTS DEMONSTRATING THAT "IN GOD WE TRUST" IS RELIGIOUS (I.E., MONOTHEISTIC)

(1) 152 Cong. Rec. H6022 (July 28, 2006 statement of Sen. Poe (TX)):

> Mr. Speaker, we must and shall preserve, believe and uphold America's motto, ''In God We Trust.''
>
> And that's just the way it is.

(2) 152 Cong. Rec. H5845 (July 25, 2006 statement of Sen. Bartlett (MD)):

> Mr. Speaker, never state or assume that the rights that you have come from your government. These rights come from God.

(3) 152 Cong. Rec. H5410 (July 19, 2006 statement of Rep. Blunt (MO)):

> All of our documents, our coins, our institutions, the Constitution, the Declaration of Independence, all have recognized a being superior to ourselves.

(4) 152 Cong. Rec. H5301 (July 18, 2006 statement of Rep. Pence (IN)):

> Several millennia ago the words were written that a man should leave his father and mother and cleave to his wife and the two shall become one flesh. It was not our idea; it was God's idea. And I say that unashamedly on the floor where the words ''In God We Trust'' appear above your chair, Mr. Speaker.

(5) 152 Cong. Rec. S6150 (June 20, 2006 statement of Sen. Shelby (AL)):

> Our motto is ''In God We Trust.'' It is enshrined on our currency.
>
> We simply cannot divest God from our country. Our country has no foundation without a basic recognition that God invests us at birth with basic individual rights that we all enjoy as Americans. In fact, our Government and our laws are based on Judeo-Christian values and a recognition of God as our Creator.
>
> I have introduced the Constitution Restoration Act. This legislation recognizes the rights of the States ... to acknowledge God.

(6) 152 Cong. Rec. H442 (Feb. 28, 2006 statement of Rep. Price (NC)):

> I think one of the things that is incumbent upon us as leaders is to make certain ... that we ... openly make certain that everyone understands and appreciates the importance of the Almighty.

(7) 151 Cong. Rec. S12562 (Nov. 9, 2005 statement of Sen. Brownback (KS)):

> As I sat as Presiding Officer, I looked at the door opposite me. Right above it, on our mantlepiece, we have ''In God We Trust,'' as we have on our coinage and in our beliefs and hearts.
>
> [There is] an attempt by the hard left in America to have a naked public square, to have no recognition of a divine authority, to have no recognition of seeking a divine authority or guidance.
>
> This is important. It is one of those things, as we try to stop this onslaught of the removal of religious liberty, which is what the move is about and what the Senator from Oklahoma is trying to prevent, the removal of religious liberties, to allow the robust practice of religion, nondenominational, nonsectarian, yet seeking that God in whom we trust.

(8) 151 Cong. Rec. S10104 (Sep. 15, 2005 statement of Sen. DeMint (SC)):

> We are a great nation, but we are also one nation under God. ...
>
> Reciting that the United States is one nation under God is a statement of humility, a way of acknowledging that even as a world superpower, we recognize there is something bigger than we are, that our freedoms in this country come from God—not from Government.

(9) 151 Cong. Rec. H6908 (July 27, 2005 statement of Rep. Beauprez (CO)):

> It says right up there, ''In God We Trust,'' and we ask God to bless us, and God has blessed this Nation.

(10) 151 Cong. Rec. H4762 (June 20, 2005 statement of Rep. Hefley (CO)):

> But it also recognizes the importance of the spiritual side of our lives and does not try to scrub religion from public life in America. There are some who would like to do that. We are looking up here at ''In God We Trust'' over the Speaker's rostrum. We open each day with a prayer. We do not want to scrub religion or faith from all public life.

(11) 151 Cong. Rec. S5540 (May 19, 2005, statement of Sen. Alexander (TN)):

> The National Motto ''In God We Trust,'' which appears on all our coins and dollar bills, ... is a fundamental statement of the religious character of the American people.

(12) 151 Cong. Rec. H2727 (April 28, 2005 statement of Rep. Gohmert (TX)):

> I had never looked above the Speaker's head. And as I looked above his head, it kind of choked me up. Because above the Speaker's head are the words ''In God We Trust.'' And that goes back to the beginning of this Nation and to the fact that God has truly blessed America.

(13) 151 Cong. Rec. H991-92 (March 8, 2005 statement of Rep. Stearns (FL)):

> Over the Speaker's rostrum it is posted, ''In God we Trust.''
>
> There are statues and representations of religious figures scattered throughout the Capitol and House buildings. ... Certainly a reminder of God's law would be appropriate as we consider the Nation's laws.

(14) 151 Cong. Rec. H828 (March 1, 2005 statement of Rep. Gohmert (TX)):

> As it says above the Speaker's head, ''In God We Trust.'' And we need to make use of the trust that God has given us.

APPENDIX C

UNITED STATES SUPREME COURT MAJORITY OPINIONS DEMONSTRATING MANDATE FOR RELIGIOUS NEUTRALITY[36]

(1) *Van Orden v. Perry*, 125 S. Ct. 2854, 2860 (2005) (discussing "'the very neutrality the Establishment Clause requires'")
(2) *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005) ("The touchstone for our analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.'")
(3) *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (courts "must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths")
(4) *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion ... the program is not readily subject to challenge under the Establishment Clause.")
(5) *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("[W]e have held that 'a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.'")
(6) *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality.")
(7) *Agostini v. Felton*, 521 U.S. 203, 234 (1997) ("We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause ...")
(8) *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.");
(9) *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) ("'A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.'")

[36] All internal citations omitted in this listing.

(10) *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.")
(11) *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.")
(12) *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) ("[T]he total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral.")
(13) *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251 (1990) (Government act is constitutional if it "evinces neutrality toward, rather than endorsement of, religious speech.")
(14) *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384 (1990) (noting "'the constitutional requirement for governmental neutrality.'")
(15) *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 (1989) (referencing "'the policy of neutrality'")
(16) *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (recognizing the requirement that "the challenged statute appears to be neutral on its face.")
(17) *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("Lemon's "purpose" requirement aims at preventing the relevant governmental decisionmaker -- in this case, Congress -- from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.")
(18) *School Dist. v. Ball*, 473 U.S. 373, 382 (1985) ("The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.")
(19) *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (recognizing "the established principle that the government must pursue a course of complete neutrality toward religion.")
(20) *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) ("a program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.")
(21) *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (upholding "policy ... founded on a 'neutral, secular basis.'")

(22) *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("This principle of denominational neutrality has been restated on many occasions.")
(23) *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (denying challenge because "the University's policy is one of neutrality toward religion.")
(24) *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (noting "the governmental obligation of neutrality in the face of religious differences.")
(25) *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (noting the Establishment Clause's "command of neutrality.")
(26) *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (requiring "that auxiliary teachers remain religiously neutral, as the Constitution demands.")
(27) *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.")
(28) *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (approving of "facilities that are themselves religiously neutral.")
(29) *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) (recognizing the mandate for "remaining religiously neutral.")
(30) *Gillette v. United States*, 401 U.S. 437, 449 (1971) ("the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn.").

CERTIFICATE OF SERVICE

CASE NO. 06-16344

I HEREBY CERTIFY that on this 19th day of September, 2006, true and correct copies of the BRIEF OF APPELLANT and the EXCERPTS OF RECORD were delivered by e-mail to the following individuals:

Lowell Sturgill (lowell.sturgill@usdoj.gov)
Theodore Charles Hirt (theodore.hirt@usdoj.gov)
Autumn Owens (autumn.owens@doj.ca.gov)
Robert Katerberg (Robert.katerberg@usdoj.gov)

Kevin Snider (kevinsnider@pacificjustice.org)
Brad Dacus (braddacus@pacificjustice.org)

Pursuant to Ninth Circuit Rule 25-3.3, the undersigned has received a completed and signed Form 13 (Consent to Electronic Service) from counsel for each of the parties.

September 19, 2006

Michael Newdow, in pro per
CA SBN: 220444
PO Box 233345
Sacramento, CA 95823

Phone: (916) 427-6669
Fax: (916) 392-7382

E-mail: NewdowLaw@cs.com

(New, 12-01-02)

Form 13.
Consent to Electronic Service
Pursuant to Ninth Circuit Rule 25-3.3

I agree that Michael Newdow,
(law firm or name of unrepresented litigant)
who represents himself, in pro per may electronically serve me
(name of party)
with copies of all documents filed with the court.

Electronic service shall be accomplished by *(check all that apply)*:

_____ facsimile transmission to _____ (facsimile number)

X electronic mail at Lowell.Sturgill@usdoj.gov (electronic mail address) limited to documents created in the following word proceeding formats: Adobe Acrobat 6.0

_____ both facsimile transmission to _____ (facsimile number) and electronic mail at _____ (electronic mail address) limited to documents created in the following word processing formats

_____

_____ Electronic service must be accompanied by simultaneous service by mail or commercial carrier of a paper copy of the electronically served document

DATED: 9-13-06 _____
Attorney for An Actual Defendant
(name of party)
or Pro Se Litigant

(New, 12-01-02)

Form 13.
Consent to Electronic Service
Pursuant to Ninth Circuit Rule 25-3.3

I agree that Michael Newdow, in pro per,
(law firm or name of unrepresented litigant)
who represents Rev. Dr. Michael Newdow may electronically serve me
(name of party)
with copies of all documents filed with the court.

Electronic service shall be accomplished by *(check all that apply)*:

_____ facsimile transmission to _____ (facsimile number)

X electronic mail at kevinsnider@pacificjustice.org
limited to documents created in the following word proceeding formats: MS Word (or any format which Word can convert) or Adobe 6.0 (or greater)

_____ both facsimile transmission to _____ (facsimile number) and electronic mail at _____ (electronic mail address) limited to documents created in the following word processing formats

_____

_____ Electronic service must be accompanied by simultaneous service by mail or commercial carrier of a paper copy of the electronically served document

DATED: 08/21/2006 _____
Attorney for Pacific Justice Institute
(name of party)
or Pro Se Litigant