No. 06-16344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REV. DR. MICHAEL A. NEWDOW

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

and

PACIFIC JUSTICE INSTITUTE,

Defendant-Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR FEDERAL GOVERNMENT APPELLEES

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STATEMENT OF JURISDICTION

In this action, plaintiff asserts that Congress violated the Establishment Clause and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. 2000bb, by adopting the phrase "In God We Trust" as the national motto, see 36 U.S.C. 302, and by requiring those words to be inscribed on our Nation's coins, see 31 U.S.C. 5112(d)(1), and currency, 31 U.S.C. 5114(b). Plaintiff invoked the district court's jurisdiction under 28 U.S.C. 1331, 1346(a)(2), and 1361, as well as under 42 U.S.C. 2000bb-1(c).

On June 12, 2006, the district court dismissed this action for failure to state a claim upon which relief can be granted. See Excerpts of Record ("ER") 318 (Opinion); id. at 338 (Order). That Order resolved all the claims of all the parties. Plaintiff filed a notice of appeal from that Order on July 21, 2006. See ER 337. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

QUESTIONS PRESENTED

1. Whether plaintiff lacks Article III standing to argue that the statute adopting "In God We Trust" as the national motto and the statutes requiring inclusion of the motto on United States coins and currency violate the Establishment Clause.

2. Whether the motto and its placement on our Nation's coins and currency violate the Establishment Clause.

3. Whether the motto and its placement on our Nation's coins and currency violate the Religious Freedom Restoration Act.

STATEMENT OF THE CASE

In this action, plaintiff claims that Congress's adoption of the phrase "In God We Trust" as the national motto and Congress's requirement that the motto be placed on all United States coins and currency violate the Establishment Clause and the Religious Freedom Restoration Act. The district court held that plaintiff's Establishment Clause claims are foreclosed by Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), which rejected what plaintiff concedes was an "identical" challenge to the same statutes. The district court also held that Aronow requires dismissal of plaintiff's RFRA claims because his assertions regarding how the motto statutes burden his religion are all based on the idea that the motto is an endorsement of religion – a proposition Aronow rejected. Plaintiff challenges these rulings on appeal.

STATEMENT OF FACTS

1. The National Motto and its Inscription on our Nation's Coins and Currency

a. Original Derivation of "In God We Trust"

In 1814, Francis Scott Key, inspired by the American victory over the British at Fort McHenry and the sight of the American Flag flying over the Fort, composed "The Star-Spangled Banner." See http://en.wikipedia.org/wiki/Star-spangled_banner (copy attached as addendum). The fourth verse of that song includes the phrase "And this be our motto, 'In God is our Trust.'" Ibid.

The song immediately became popular, with seventeen newspapers from Georgia to New Hampshire printing it. Its popularity continued to increase during the nineteenth century, where it was performed during public events, such as July 4 celebrations. See http://en.wikipedia.org/wiki/Star-spangled_banner. The Navy made the Star-Spangled Banner the official tune to be played at the raising of the Flag in 1889, and in 1916, President Wilson ordered the song to be played at military and other appropriate occasions. Ibid. Thereafter, on March 3, 1931, President Hoover signed legislation making The Star-Spangled Banner the national anthem. See Act of March 3, 1931, 46 Stat. 1508, currently codified at 36 U.S.C. 301.

b. The National Motto

In 1956, Congress enacted a Joint Resolution adopting the phrase "In God We Trust" as the national motto of the United States. 84 Cong. Ch. 798, July 30, 1956, 70 Stat. 732. As the House Judiciary Committee Report noted, that phrase "has a strong claim as our national motto" because it appears in our national anthem (the Star-Spangled Banner), and because "it has received official recognition for many years," such as by its placement on United States coins. H.R. Rep. No. 1959, 84th Cong., 2d Sess. 1 (Mar. 28, 1956).[1]

[1] The Committee also considered the phrase "E pluribus unum," noting that this phrase "has also received wide usage in the United

In 2002, Congress reaffirmed that "In God We Trust" is the national motto, see Pub. L. No. 107-293, § 3, 116 Stat. 2057, 2060-61 (Nov. 13, 2002), noting that "government acknowledgment of religious heritage of the United States of America is consistent with the meaning of the Establishment Clause . . .." H.R. Rep. No. 107-659, at 4-5, reprinted at 2003 U.S.C.C.A.N. 1304. In the same Act, Congress also observed that the motto is inscribed above the main door of the Senate and behind the Chair of the Speaker of the House of Representatives. See Pub. L. No. 107-293, § 1(10), 116 Stat. 2057.

c. Inscription of the National Motto on our Nation's Coins and Currency

i. Coins

In April, 1864, Congress authorized the Director of the United States Mint and the Secretary of the Treasury to fix "the shape, mottoes, and devices of two-cent coins." Act of Apr. 22, 1864, § 1, 13 Stat. 54, 55, 38th Cong., 1st Sess. Pursuant to this authority, then-Secretary of the Treasury Salmon P. Chase, who subsequently would become Chief Justice of the United States, chose to include the phrase "In God We Trust" on those coins. See http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml (copy attached as addendum). See also H.R. Rep. No. 1106, 60th Cong., 1st Sess. 2-3 (1908).

States." Id. at 2. The Committee found "In God We Trust" to be "a superior and more acceptable motto for the United States." Ibid.

In the following year, Congress authorized the United States Mint, with approval of the Secretary of the Treasury, to include the phrase "In God We Trust" on all gold and silver coins that "shall admit the inscription thereon." See Act of Mar. 3, 1865, Ch. 100, § 5, 13 Stat. 517, 518. Pursuant to that Act, those words were placed on the gold double-eagle coin, the gold eagle coin, and the gold half-eagle coin. Beginning in 1866, those words also were placed on the silver dollar coin, the half-dollar coin, the quarter-dollar coin, and the nickel three-cent coin. See http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml. Congress renewed authorization for placement of the words "In God We Trust" on U.S. coins in 1873. See Act of Feb. 12, 1873, ch. 131, § 18, 17 Stat. 424, 427.

In 1908, Congress enacted legislation requiring inclusion of the phrase "In God We Trust" on all coins on which it had previously appeared. See Act of May 18, 1908, ch. 173, § 1, 35 Stat. 164, 164. Congress enacted this statute in response to numerous petitions that objected to the omission of that phrase from double-eagle gold coin and the eagle gold coin which were placed in circulation in 1907. As the House Report regarding this legislation explains, "[t]hese petitions have covered so wide an area and have so invariably urged the restoration of the motto that the committee believes itself justified in concluding that these requests fairly voice the general sentiment of the nation." H.R.

Rep. No. 1106, 60th Cong., 1st Sess. 1 (1908). Thus, the Committee unanimously recommended passage of the bill, "in confidence that the measure simply reflects the reverent and religious conviction which underlies American citizenship." Ibid. As a result of the Act of 1908, the motto has been in continuous use on the one-cent coin since 1909, and on the ten-cent coin since 1916. It also has appeared on all gold coins[2] and silver dollar coins, half-dollar coins, and quarter-dollar coins struck since July 1, 1908. See http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml.

In 1955, Congress required the inscription of "In God We Trust" on all coins. See Act of July 11, 1955, ch. 303, 60 Stat. 290. That statute was initially codified as part of 31 U.S.C. 324, and was later moved to 31 U.S.C. 5112(d)(1). The House Banking and Currency Committee recommended approval of the Act because it reflects "tersely" and with "dignity" the religious heritage of our Nation and the "spiritual basis of our way of life." H.R. Rep. No. 662, 84th Cong., 1st Sess. 4 (1955). For example, As the Committee Report explains:

> In the early days of the country coins bearing an inscription referring to the Deity are found as early as 1694. The Carolina cent minted in 1694 bore the inscription "God preserve Carolina and the Lords proprietors." The New England token of the same year

[2] Gold coins were discontinued in 1934, pursuant to the Gold Reserve Act of 1934. See H.R. Rep. No. 662, 84th Cong., 1st Sess. 4 (1955).

> bore the inscription "God preserve New England." The Louisiana cent coined in 1721-22 and 1767 bore the inscription "Sit nomen Domini benedictum" – Blessed be the name of the Lord. The Virginia halfpenny of 1774 bore an inscription in Latin which translated meant "George the Third by the grace of God." Utah issued gold pieces in the denominations of $2.50, $5, $10, and $20 in 1849 bearing the inscription "Holiness to the Lord."

Id. at 2. The Committee Report also notes that "[a]lthough the record does not show what, if any, might have been the impact of the words of Francis Scott Key on the motto chosen it may be noted that the Star Spangled Banner does contain the words 'And this be our motto – 'in God is our Trust.' '" Id. at 3.

ii. Currency

The 1955 Act that required inscription of the motto on all United States coins also required inclusion of the motto on United States currency. See Act of July 11, 1955, ch. 303, 60 Stat. 290. That provision, which was originally codified at 31 U.S.C. 324a, is now found at 31 U.S.C. 5114(b). Because inscribing the motto on currency would require changing costly printing plates, Congress allowed the Bureau of Engraving and Printing to convert to the inclusion of "In God We Trust" on the currency gradually. "In God We Trust" was first used on paper money in 1957, when it appeared on the one-dollar silver certificate. The motto was introduced to other dollar denominations (specifically, the $1, $5, $10, $20, $50, and $100 federal reserve notes) between 1964 and 1966. See http://www.treas.gov/education/fact-sheets/currency/in-god-we-trust.shtml.

2. Plaintiff's Complaint

On November 18, 2005, plaintiff Michael Newdow filed the complaint in this action, naming as defendants the Congress of the United States; Peter Lefevre, Law Revision Counsel; John William Snow, Secretary of the Treasury; Henrietta Holsman Fore, Director of the United States Mint[3]; and Thomas A. Ferguson, Director of the Bureau of Engraving and Printing. The district court thereafter allowed the Pacific Justice Institute to intervene as a defendant. See Opinion at 2 (ER 319).

Newdow subsequently filed a First Amended Complaint, which the district court considered in granting defendants' motion to dismiss. The First Amended Complaint asserts claims against the same defendants, alleging that the use of the phrase "In God We Trust" as the national motto and the motto's inscription on United States coins and currency violate the Establishment and Free Exercise Clauses, and Religious Freedom Restoration Act, 42 U.S.C. 2000bb, and the Free Speech and Equal Protection Clauses. See First Amended Complaint (hereinafter, "Complaint") at 183-268 (ER 154-167).

The Complaint alleges that plaintiff Michael Newdow "is an Atheist whose religious beliefs are specifically and explicitly based on the idea that there is no god." Complaint, ¶ 157 (ER 151)

[3] Henrietta Fore has been succeeded as Director of the United States Mint by Edmund Moy.

(citation omitted). Newdow, the Complaint avers, "finds it deeply offensive to have his government and its agents advocating for a religious view [that there is a God] he specifically decries." Id. ¶ 157 (ER 151). He alleges that he has been denied employment as a physician in various hospitals because of his activism, see id. ¶ 188 (ER 155); has been insulted and been made to feel like an outsider because of his views, see id. ¶¶ 192-198 (ER 156-57); is wrongly required to proselytize on behalf of monotheism whenever he wishes to make use of United States coins and currency, see id. at 230-31 (ER 162); and is offended by the motto when he looks at his coin collection. See id. at 225 (ER 161).

The Complaint also alleges that Newdow is an ordained minister, and founder, of the Atheistic church, the "First Amendmist Church of True Science (FACTS)." Complaint, ¶ 7 (ER 121). Plaintiff alleges that he cannot pass the collection plate in his church or on his property because his beliefs preclude the use of coins or currency; see id. ¶ 241 (ER 164), and that his inability to use coins or currency precludes him from purchasing the ingredients for his church's "libation" ("the Freethink Drink"), see id. ¶ 248 (ER 164), "FACTS garb," see id. ¶ 247 (ER 164), and items for the FACTS church library. See id. ¶ 249 (ER 164). He also alleges that his inability to use coins or currency has precluded him from selling items (such as FACTS pens) to raise money; see id. ¶ 250 (ER 165); from traveling to conduct FACTS

research and activities (because he cannot use coins at parking meters or at toll booths), see id. ¶¶ 253-54, 256 (ER 165); and from proselytizing on foreign trips, where he needs to be able to exchange US coins and currency. See ¶¶ 260-63 (ER 166).

Based on the above allegations, the Complaint requests a declaration that the statutes identified above violate the Constitution and RFRA; an injunction barring defendants from continuing to mint coins and print currency bearing the inscription "In God We Trust;" and an injunction barring defendants from including in the U.S. Code any act or law that claims that "In God We Trust." See Complaint (Prayer for Relief), ER 176.

3. District Court Ruling

The government defendants and intervenor Pacific Justice Institute filed separate motions to dismiss the complaint. Newdow opposed those motions, but the district court, based on all the briefs, granted the motions to dismiss. See ER 318.

Preliminarily, the court held that Newdow has standing to bring this suit because he is "necessarily and continuously confronted with the alleged endorsement of religion by the federal government" on United States coins and currency, Opinion at 10 (ER 327), and because a judicial declaration that the motto is unconstitutional "would redress plaintiff's claimed injury that the national motto offends him as an Atheist." Id. at 11 (ER 328).

The district court also held that the Legislative Branch defendants (Congress and the Law Revision Counsel) must be dismissed because those defendants are entitled to immunity under the Speech or Debate Clause of the Constitution. See Opinion at 11 (ER 328). Newdow does not appeal that ruling.

The court held that plaintiff's Establishment Clause claims are foreclosed by Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), which held that "'the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion.'" Opinion at 13 (ER 330) (quoting Aronow). Aronow also bars plaintiff's Free Exercise and RFRA claims, the district court held, because those claims also "arise from his assertion that the motto is blatantly religious," Opinion at 17 (ER 334), and because Aronow held that the motto "' has no theological or ritualistic impact'" and is of a purely secular, 'patriotic,' and 'ceremonial' character." Id. at 16 (ER 333), citing Aronow, 432 F.2d at 243-44. Plaintiff's Free Exercise and RFRA claims also fail, the district court held, because plaintiff has not "set forth a claim that the government's conduct in the continuing use of "In God We Trust" as the national motto and its inscription on coins and currency constitutes a substantial burden on [plaintiff's] religious beliefs." Ibid.[4]

[4] Plaintiff does not appear to be raising any Free Exercise Clause claim on appeal. Even if he were, our arguments regarding his RFRA claims would equally defeat any such claim.

SUMMARY OF ARGUMENT

1. The district court correctly held that plaintiff's Establishment Clause challenge to the national motto and the statutes that require the motto's inclusion on United States coins and currency is foreclosed by Aronow v. United States, 432 F.2d 242 (9th Cir. 1970). Indeed, plaintiff concedes that the Establishment Clause claims he brings here are "essentially identical" to the claims this Court rejected in Aronow, which held that the motto and its use on coins and currency "is of a patriotic or ceremonial character and bears no resemblance to a governmental sponsorship of a religious exercise." 432 F.2d at 243.

Plaintiff contends that Aronow has been undercut by subsequent Supreme Court dicta. The dicta to which plaintiff refers, however, consist only of Establishment Clause principles, stated at a very high level of generality, that the Supreme Court has applied in other contexts (such as school prayer) that are far afield from what is at issue here. The Supreme Court has oft emphasized that its Establishment Clause jurisprudence is highly context-specific, and here, two Supreme Court majority opinions and numerous opinions of individual justices have specifically approved the motto and the statutes requiring its inclusion on coins and currency. Thus, the Supreme Court's post-Aronow jurisprudence reaffirms that the motto is a permissible acknowledgment of our Nation's religious heritage, and not an endorsement of religion.

Although the Court need not reach this issue, plaintiff also lacks standing to challenge the motto and the statutes requiring its inclusion on coins and currency. The only injury plaintiff contends he suffers from the motto is that he is offended by it. It is settled, however, that the psychological injury "produced by observation of conduct with which one disagrees" is not the type of injury that can support Article III standing. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485(1982). And, for the same reason, the fact that plaintiff is offended by the motto does not provide him Article III standing to challenge the motto's inclusion on coins and currency. That allegation of injury also is too generalized to support Article III standing, since to recognize this kind of injury would allow virtually anyone in this country to challenge the design of U.S. coins and currency in federal court.

2. Plaintiff's claims under the Religious Freedom Restoration Act are based on the same erroneous premise as his Establishment Clause claims – that the motto is an endorsement of religion. Since that premise is unfounded, plaintiff cannot demonstrate that the motto statutes burden his free exercise of religion under RFRA, and his RFRA claims also fail for numerous other reasons, as we demonstrate below.

STATEMENT OF THE STANDARD OF REVIEW

This appeal raises legal issues, which are reviewable de novo.

ARGUMENT

I. PLAINTIFF LACKS ARTICLE III STANDING TO ALLEGE THAT THE NATIONAL MOTTO AND ITS INSCRIPTION ON UNITED STATES COINS AND CURRENCY VIOLATE THE ESTABLISHMENT CLAUSE.

In order to invoke the jurisdiction of a federal court, a plaintiff "'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" Daimler-Chrysler Corp. v. Cuno, 126 S. Ct. 1854, 1861 (2006) (citation omitted). The party invoking a federal court's jurisdiction (here, plaintiff) bears the burden of establishing his or her standing under Article III. Ibid. (footnote omitted). As we explain below, the district court erred in holding that plaintiff has Article III standing here based on his alleged "offense" at the national motto and his viewing of coins and currency that display the national motto.

A. Plaintiff Lacks Standing to Argue that the Statute Recognizing "In God We Trust" as the National Motto Violates the Establishment Clause.

36 U.S.C. 302 states that "'In God we trust' is the national motto." Plaintiff seeks a declaratory judgment that 36 U.S.C. 302 violates the Establishment Clause, and an injunction barring defendants from including that law in the U.S. Code. See p. 10, supra (citing Complaint, ER 176). Plaintiff lacks Article III standing to bring this claim in federal court, for a number of reasons.

To begin, plaintiff cannot demonstrate that 36 U.S.C. 302 causes him any injury sufficient to satisfy Article III's rigorous requirements. The statute does not create any program, direct any government or person to take any act or refrain from taking any act, or require or authorize any action. Rather, it merely makes a recitation that, in itself, has no coercive effect or any other prescriptive or operative impact.

Plaintiff alleges he has been injured by 36 U.S.C. 302 because "the national motto degrades him and other Atheists from the 'equal rank' of citizens and turns Atheists into 'political outsiders.'" Opinion at 6 (ER 323). See Complaint, ¶¶ 178 (ER 153). But as the district court correctly observed, "a plaintiff does not sufficiently allege injury-in-fact for the purposes of Article III standing where the only harm is psychological injury 'produced by observation of conduct with which one disagrees.'" Opinion at 8 (ER 325), citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 485 (1982). Accord Allen v. Wright, 468 U.S. 208, 223 n.13 (1984) ("abstract stigmatic injury" insufficient by itself to create Article III injury in fact); Schlesinger v. Reservists Committee to Stop the War, 418 U.S.C. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" insufficient to confer Article III injury). Thus, plaintiff's mere allegation that he is offended by the motto does not give him standing to challenge it.

Plaintiff also contends that he was "recently denied a job because of the misperception of his activism and because of the government's endorsement that 'belief in God is 'good' and disbelief in God is 'bad,'' – a notion reinforced by the national motto." Opinion at 6 (ER 323), citing Complaint, ¶¶ 188-190 (ER 155-56). Similarly, he alleges he "has given up hope of attaining elective office because of the anti-Atheistic bias that the government has perpetuated by the national motto . . .." Ibid., citing Complaint, ¶ 214 (ER 159). As the district court correctly held, these alleged injuries fail to demonstrate Article III standing because they "are not fairly traceable to defendants, but rather to third parties not before this court." Opinion at 7 & n.7 (ER 324). See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 42 (1976) (allegation that federal regulations "encouraged" actions of private parties that resulted in alleged injury insufficient to prove causation prong of standing test); Warth v. Seldin, 422 U.S. 490, 507 (1975) (plaintiffs failed to prove traceability where they relied on "little more than the remote possibility . . . that their situation might have been better had defendants acted otherwise").

For the same reason, these alleged injuries also are not redressable, since a court could not, as relief in this lawsuit, order plaintiff to be given the job he alleges he was denied or be

elected to the office[5] he despairs of being able to attain. Neither could a court order requiring private citizens to refrain from allegedly hurling derogatory remarks at plaintiff because of his Atheism, see Complaint, ¶ 229 (ER 162), and from "castigat[ing] him" by "argu[ing] that he is a hypocrite for using money that has the 'In God We Trust' verbiage." Ibid.

Finally, the Complaint alleges that plaintiff has standing to challenge the motto statute, 36 U.S.C. 302, in his capacity as a federal taxpayer. See Complaint, ¶¶ 215-221 (ER 159-61). This claim fails because plaintiff cannot prove that the United States has spent any tax dollars on the motto statute. That kind of showing is essential to prove that a case falls within the narrow exception to the general rule against taxpayer standing the Supreme Court has authorized in the Establishment Clause context. See Doremus v. Bd. of Educ., 342 U.S. 429, 433-34 (1952); Doe v. Madison Sch. Dist., 177 F.3d 789, 794 (9th Cir. 1999) (en banc).[6] See generally Flast v. Cohen, 392 U.S. 83 (1968).

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[5] Plaintiff's allegations regarding elective office also fail to prove Article III standing because he has not demonstrated that he has ever sought elective office. Moreover, there is no bar against an Atheist seeking elective office. Indeed, any such bar would be unconstitutional. See McDaniel v. Paty, 435 U.S. 618 (1978).

[6] While Doremus and Doe involved issues of state or local, as opposed to federal, taxpayer standing, the principles those cases announced bear even greater weight in the context of federal taxpayer standing, which is narrower than state or local taxpayer standing. See Hoohuli v. Ariyoshi, 741 F.2d 1169, 1190 (9th cir. 1984).

B. Plaintiff Also Lacks Standing to Allege that the Statutes Requiring Inclusion of "In God We Trust" on United States Coins and Currency Violate the Establishment Clause.

1. The Complaint contends plaintiff has standing to challenge the statutes that require inclusion of the words "In God We Trust" on United States coins and currency because "he is repeatedly forced to confront a 'religious belief' (the national motto) which he finds offensive both when he inspects coins during his normal purchasing activities and when he inspects his coin collection." Opinion at 6 (ER 323), citing Complaint, ¶¶ 223-224. This contention fails to establish the kind of particularized injury that will support Article III standing.

"[S]tanding to sue may not be predicated upon an interest of the kind . . . which is held in common by all members of the public . . . ." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 220 (1974). Thus, a plaintiff who seeks relief that "no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy." Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). Accord, Warth v. Seldin, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm along normally does not warrant exercise of jurisdiction").

Coins and currency are ubiquitous in everyday life. They are the most basic and fundamental monetary instruments used in our economy, and are regularly viewed, handled, and exchanged by millions of Americans on a daily basis. Thus, plaintiff's encounters with the national motto when he uses, or has the opportunity to use, coins and currency to purchase goods or services are not particularized, but common to all Americans. Claims of that sort lie outside the jurisdiction of the federal courts because they are too generalized to provide the kind of historic "case or controversy" the framers had in mind when they approved Article III. See p. 18, supra, citing Lujan, 504 U.S. at 573-74; Warth, 422 U.S. at 499, and Schlesigner, 418 U.S. at 220.

Plaintiff's contention that he is a coin collector does not require a different analysis. He contends that he "not infrequently pulls out portions of his collection to admire the uniqueness and beauty of many of his specimens." Complaint, ¶ 224 (ER 161).[7] For Article III standing purposes, therefore, his alleged activity as a coin collector involves nothing more than the same kind of activity he engages in as a prospective purchaser of goods and services – looking at coins. For the reasons we have already explained, therefore, plaintiff's coin-collector activities do not provide him with Article III standing to challenge the motto's inclusion on coins.

[7] Plaintiff does not contend that he collects paper currency.

Plaintiff's argument that he is exposed to the words "In God We Trust" on coins and currency also fails to establish Article III standing because he cannot prove redressability. Plaintiff requests that defendants be enjoined from "continuing to mint coins and print currency on which is engraved 'In God We Trust,'" Complaint (ER 176). This relief, however, which plaintiff has no standing to seek for other reasons, see pp. 18-19, supra, would still leave untouched vast quantities of United States coins and currency that are already in circulation, including the present contents of plaintiff's own coin collection. Thus, banning the inscription of "In God We Trust" on future coins and currency would not appreciably reduce plaintiff's exposure to that phrase in the future. Cf. Lujan, 504 U.S. at 571 (plaintiff failed to demonstrate redressability where funding plaintiffs sought to enjoin constituted only a small fraction of the funding for projects plaintiffs alleged caused them injury).

Plaintiff's status as a federal taxpayer also does not give him standing to challenge the federal statues that require inscription of "In God We Trust" on coins and currency. To have Establishment Clause taxpayer standing, a plaintiff must show that the challenged government action is an "exercise[] of congressional power under the taxing and spending clause . . .." Flast v. Cohen, 392 U.S. 83, 102-03 (1968).

The Supreme Court takes this requirement seriously. Thus, in Valley Forge, supra, the Court held that plaintiffs lacked taxpayer standing to challenge, on Establishment Clause grounds, a federal agency's transfer of surplus military property (a hospital complex) to a private religious college. Establishment Clause taxpayer standing did not exist, the Court held, because the transfer was authorized by the Constitution's Property Clause. See 454 U.S. at 480.

The statutes challenged here are plainly enacted in exercise of Congress's authority "[t]o coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." U.S. Const. art I, § 8, cl. 5. Thus, pursuant to Valley Forge and Flast itself, where the Supreme Court first announced the doctrine of Establishment Clause taxpayer standing, plaintiff cannot challenge the statutes that require inclusion of the motto on United States coins and currency.

2. The district court held that plaintiff has Article III standing to challenge the statutes requiring inscription of the motto on coins and currency because, as an Atheist, he is "particularly affected" by the use of that phrase. Opinion at 10 (ER 327). This was error. The basis of his alleged injury, as we have explained, is that he must view coins and currency in order to purchase certain goods and services, and to enjoy his coin collection. See pp. 14-19, supra.

As we have demonstrated, that alleged injury is not sufficiently particularized to support Article III standing. Thus, as we have explained, if plaintiff has standing here, millions of Americans would also would have standing to object to the appearance of coins and currency – a result completely at odds with the requirement that an alleged injury be particularized.

For example, in Valley Forge, the Supreme Court held that the plaintiff's exposure to the government's transfer of surplus military property to a private religious college was insufficiently particularized to satisfy Article III requirements because the plaintiff learned about the transfer through a news release. See 454 U.S. at 486-87. The exposure to the news release gave the plaintiff a personal connection to the transfer, but only a generalized one, since millions of Americans also could have seen the news release. See also Aronow v. United States, 432 F.2d 242, 243 (9th Cir. 1970) (noting that the district court had dismissed a plaintiff's Establishment Clause challenge to the statutes adopting "In God We Trust" as the national motto and requiring its inscription on coins and currency for lack of standing).

Indeed, plaintiff should be considered collaterally estopped from arguing that his mere viewing of coins and currency provides him a particularized injury for Article III standing purposes. In Newdow v Bush, 2004 WL 334438 (9th Cir. 2004), this Court held that Newdow lacked Article III standing to challenge the prayers that

were delivered at the 2001 presidential inauguration.[8] In that action, Newdow alleged that the inclusion of prayers made him feel like an outsider when he watched the inauguration on television. See Newdow v. Bush, 391 F. Supp. 2d 95, 100 (D.D.C. 2005) (citing the complaint in Newdow, 2004 WL 334438). Defendants contended that this kind of exposure did not provide him with the kind of particularized injury Article III requires, relying on the Supreme Court's decision in Valley Forge, discussed above. See Brief for Appellee, Newdow v. Bush, 9th Cir. No. 02-16327, 2003 WL 22670028 *13 (9th Cir.). This Court agreed, holding that Newdow "lacks standing to bring this action because he does not allege a sufficiently concrete and specific injury." Newdow, 2004 WL 334438 *1.

This Court's decision in the Newdow inaugural prayer case meets all the standards for collateral estoppel with respect to his claims here. See generally Allen v. McCurry, 449 U.S. 90, 94 (1980) (setting forth standards for holding that a decision precludes relitigation of an issue previously decided in another

[8] This Court's decision in the Newdow inaugural prayer case was unpublished. Pursuant to Ninth Circuit Rule 36-3, it is permissible to cite that decision to this Court, and for this Court to cite that decision in any opinion in this case, to demonstrate that, or to discuss whether, that decision should be afforded collateral estoppel effect here. See CA9 Rule 36-3 (providing that unpublished decisions of this Court "may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case, res judicata, or collateral estoppel").

suit against a party involved in both suits). Newdow is the named plaintiff in both this case and this Court's Newdow inaugural prayer suit; this Court in that case rejected his argument that exposure to material he finds offensive by means that are shared by millions of other Americans can provide the kind of particularized injury Article III requires; and it would not be unfair to Newdow for any reason to conclude that he is bound by this Court's prior rejection of this argument. See Allen, 449 U.S. at 94. For all the above reasons, therefore, this Court should hold that plaintiff Newdow lacks Article III standing to bring the Establishment Clause claims he alleges in this action.

II. THE STATUTES ADOPTING THE NATIONAL MOTTO AND REQUIRING ITS INSCRIPTION ON UNITED STATES COINS AND CURRENCY ARE CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

Because plaintiff lacks Article III standing to argue that the statutes setting forth the national motto and requiring the motto to be inscribed on United States coins and currency violate the Establishment Clause, the Court need not address the merits of that argument. See Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93-102 (1998).

If the Court chooses to address plaintiff's Establishment Clause allegations, it should affirm the district court's ruling that Aronow v. United States, 432 F.2d 242 (9th Cir. 1970), precludes those claims. Moreover, even if Aronow were not controlling, plaintiff's Establishment Clause claims would fail

because the Supreme Court has consistently held that the motto is a permissible acknowledgment of our Nation's religious history and traditions, similar to numerous other similar acknowledgments. Finally, the motto is consistent with every test the Supreme Court has applied in Establishment Clause cases, and plaintiff's contentions to the contrary have no merit.

A. Plaintiff's Challenge to "In God We Trust" as the National Motto and the Statutes that Require Inclusion of the Motto on United States Coins and Currency is Foreclosed by Aronow v. United States.

1. In Aronow, an individual plaintiff challenged the same statutes plaintiff challenges in this case – the statute adopting the words "In God We Trust" as the national motto, and the statutes requiring the inscription of those words on all United States coins and currency. See 432 F.2d at 243. The district court dismissed the case for lack of Article III standing, and this Court affirmed, on the ground that the claims were so insubstantial that the Court did not need to consider the question of standing. See ibid. (referring to plaintiff's Establishment Clause claims as "insignifican[t]").

"It is quite obvious," this Court opined, "that the national motto and the slogan on coins 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."

432 F.2d at 243. This conclusion was required, this Court noted, by Engel v. Vitale, 370 U.S. 421 (1962), which held that "patriotic and ceremonial" references to God are permissible. 432 F.2d at 243.[9] Aronow concluded that Congress's adoption of the statutes at issue effectuated "secular uses of the motto," and that the motto "has no theological or ritualistic impact" that would trigger Establishment Clause concerns. Ibid. To the contrary, the motto "has 'spiritual and psychological value' and 'inspirational quality,'" id. at 244, citing S. Rep. No. 637, 1956 U.S. Code Cong. & Admin. News 3720, and does not have the purpose of using the state's coercive power to aid religion. See 432 F.2d at 244.

Plaintiff concedes that the claim in Aronow is "essentially identical to the Establishment Clause challenge brought here," Appellant's Br. at 46, but contends that Aronow has been overtaken by contrary Supreme Court authority. Notably, however, plaintiff cites no Supreme Court decision or opinion disapproving of the

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[9] In support of the conclusion recited in the text above, Aronow included the following quotation from Engel:

> 'There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God.

432 F.2d at 243, quoting Engel, 370 U.S. at 435 n.21.

motto. Instead, he argues that the motto conflicts with various "tests" the Supreme Court has used in applying the Establishment Clause in a number of different contexts. See id. at 47-48, citing Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that a panel of this Court may ignore prior binding circuit precedent if a later-decided Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are irreconcilable").

In the Miller case, however, this Court emphasized that a panel may ignore binding Circuit precedent only when a subsequent decision of higher authority is "closely on point." 335 F.3d at 899, citing Galbriath v. County of Santa Clara, 307 F.3d 1119, 1123 (9th Cir. 2002); United States v. Lancellotti, 761 F.2d 1363, 1366 (9th Cir. 1985). This important qualification defeats plaintiff's argument that Aronow has been overtaken by later-decided Supreme Court cases. As we explain later, none of the post-Aronow Supreme Court cases plaintiff cites involved a challenge to the motto or announced any principle that remotely conflicts with Aronow. See pp. 44-49, infra.

Indeed, the Supreme Court's post-Aronow jurisprudence specifically confirms Aronow's holding that the motto and the statutes that require its inclusion on coins and currency are constitutional. As we demonstrate below, two majority opinions and numerous other opinions of individual justices have concluded that

the motto, like numerous other ceremonial and patriotic references to God that exist in our culture, are completely consistent with the Establishment Clause. See pp. 32-35, infra. Even if this Court for some reason were not to consider those opinions binding precedent regarding the motto, however, they clearly show, contrary to plaintiff's suggestion, that Aronow has not been "overtaken" by subsequent higher authority, and thus remains binding circuit precedent.

2. Plaintiff also contends that "new facts" which have arisen since Aronow was decided prove that the motto is unconstitutional. Appellant's Br. at 48. Those "facts" consist principally of a Resolution the United States Senate passed in 2006 and a Proclamation the President issued in the same year, both of which commemorate the 50th anniversary of the motto's adoption. See Appellant's Br. at 48-51.[10]

The Resolution and the Proclamation, however, both emphasize the secular and patriotic purposes the motto serves in our culture. For example, Senate Resolution recites much of the historical background regarding the motto that we mentioned above, including the antecedent use of a similar phrase ("In God is our Trust") in

[10] Plaintiff also relies on a 2003 report issued by the Director of the United States Mint concerning the history of the motto, which notes, among other things, that the motto reflects values that all Americans share. See Appellant's Br. at 50. All Americans can share an appreciation for the religious heritage and traditions of this country, which is what the motto stands for.

the Star-Spangled Banner, see pp. 2-8, supra, and celebrates the motto as "a phrase that is central to the hopes and vision of the Founding Fathers for the perpetuity of the United States." S. Cong. Res. 96, 109th Cong., 2d Sess., 152 Cong. Rec. 90, S7443-44 (July 12, 2006). Similarly, the Proclamation merely notes, in language that calls to mind similar statements in the Gettysburg Address, President Washington's First Inaugural Address, and the Declaration of Independence, that the motto reflects "the blessings of the Creator" and "His great gift of liberty." Appellant's Br. at 49 (citation omitted).[11]

Plaintiff also contends that Aronow is not controlling because the district court in Aronow ruled that the plaintiff there lacked standing to challenge the motto statutes. See Appellant's Br. at 55-56, citing Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). This Court, however, reached the merits of the argument in Aronow, and its ruling is binding precedent. Plaintiff may not escape that precedent – or its controlling nature – by arguing that this Court erred in reaching the merits.

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[11] Plaintiff also cannot employ the 2006 Senate resolution and the presidential proclamation discussed above as grounds for distinguishing Aronow because, as he concedes, see Appellant's Br. at 49, those new "facts" occurred after the district court issued its ruling in this case. The record for purposes of an appeal consists only of the facts that were before the district court. See, e.g., United States v. Sanchez-Lopez, 879 F.2d 541, 548 (9th Cir. 1989).

In any event, this Court did not err by reaching the merits in Aronow. In Steel Co., the Supreme Court held that a court may reject a claim on merits before addressing Article III standing where the plaintiff's claim is "'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" 523 U.S. at 89 (citation omitted). That is precisely how this Court in Aronow described the plaintiff's challenge to the motto in that case. See 432 F.2d at 243.

Finally, plaintiff suggests the Court should remand this case so he can present evidence to the district court supporting his claim that motto statutes violate the Establishment Clause. See Appellant's Br. at 54-55. The question of whether the motto violates the Establishment Clause is a legal one, however, not a factual issue. See Gaylor v. United States, 74 F.3d 214, 217 (10th Cir.) (rejecting "plaintiff's insistence upon further factfinding at the trial level, including the introduction of expert testimony and polling data," because the motto's constitutionality depends on how the objective reasonable observer would view it, and not on "whether some people might be offended" by it), cert. denied, 517 U.S. 1211 (1996). On that legal issue, Aronow is controlling. New historical "evidence" cannot provide grounds for ignoring controlling precedent.

Moreover, the "evidence" to which plaintiff refers was all before the district court (in the form of hundreds of pages in the complaint, numerous "appendices" to the complaint, and motion papers, see ER 111-308), and none of that evidence demonstrates that the motto is anything other than what Aronow found it to be – a patriotic acknowledgment of this Nation's religious history and traditions.

For the same reasons, plaintiff is wrong to suggest that the district court erred by failing to accept all the well-pled allegations of his complaint as true. See Appellant's Br. at 55. The allegations to which plaintiff refers – such as the "allegation" that the motto is not religiously neutral – are in fact legal conclusions, which the district court need not accept in ruling on a 12(b)(6) motion to dismiss. See Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (noting that Establishment Clause issues are "in large part a legal question to be answered on the basis of judicial interpretation of social facts"); Hickey v. O'Bannon, 287 F.3d 656, 658 (7th Cir. 2002) (on motion to dismiss, court need not and should not "accept as true legal conclusions"). For all the above reasons, therefore, the district court correctly held that Aronow forecloses plaintiff's Establishment Clause claims.

B. Plaintiff's Establishment Clause Claims Also Are Foreclosed by Controlling Supreme Court Precedent.

As we demonstrate below, the Supreme Court, in two majority opinions and in numerous opinions of individual justices, has unanimously and consistently held that Congress's adoption of the national motto and requirement that the motto be placed on coins and currency is consistent with the Establishment Clause. Those opinions constitute binding precedent.

1. In Lynch v. Donnelly, 465 U.S. 668 (1984), the Supreme Court held that the Establishment Clause permits a city to include a nativity scene as part of its Christmas display. The Court reasoned that the creche permissibly "depicts the historical origins of this traditional event long recognized as a National Holiday," id. at 680, and noted that similar "examples of reference to our religious heritage are found," among other places, "in the statutorily prescribed national motto 'In God We Trust,' which Congress and the President mandated for our currency." Id. at 686 (citations omitted). The words "In God We Trust" in the motto, the Court explained, are an "acknowledgment of our religious heritage" similar to the "official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers" that are "replete" in our nation's history. Id. at 675-677.

The dissenting justices in Lynch also expressly approved of the motto. "[S]uch practices as the designation of 'In God We Trust' as our national motto," the dissenters concluded, "are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases." 465 U.S. at 717 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting).

The Supreme Court reiterated its support for the motto several years later in County of Allegheny v. American Civil Liberties Union, 492 U.S. 577 (1989). There, the Court sustained the inclusion of a Menorah as part of a holiday display, but invalidated a different display that involved a creche. In so holding, the Court reaffirmed Lynch's approval of the reference to God in the national motto, noting that all of the Justices in Lynch viewed the motto as "consistent with the proposition that government may not communicate an endorsement of religious belief." Id. at 602-03 (citations omitted). The Court then used the motto and the general holiday display approved in Lynch as benchmarks for what the Establishment Clause permits, ibid., and concluded that the display of the creche was unconstitutional because, unlike the motto, it gave "praise to God in [sectarian] Christian terms." Id. at 598; see id. at 603.

As the above discussion makes clear, the references to the motto in Lynch and County of Allegheny were not mere obiter dicta, but rather components of the "well-established rationale upon which the [Supreme] Court based the results of [those decisions.]" Seminole Tribe v. Florida, 517 U.S. 44, 66-67 (1996). As such, they constitute binding precedent regarding the motto's constitutionality, and bar any claim to the contrary by plaintiff in this case. As the Supreme Court explained in Seminole Tribe, "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound." Id. at 67. See also Sherman v. Community Consol. Sch. Dist., 980 F.2d 437, 448 (7th Cir. 1992) (noting that "[i]f the [Supreme] Court proclaims that a practice is consistent with the Establishment Clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so"), cert. denied, 508 U.S. 950 (1993).

The opinions of individual Supreme Court Justices also have uniformly approved of the words "In God We Trust" in the motto. For example, in Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1 (2004), Chief Justice Rehnquist and Justices O'Connor and Thomas recited the history of Congress's adoption of the motto and requirement that the motto be inscribed on coins and currency, and concluded that "all of these events strongly suggest that our national culture allows public recognition of our Nation's

religious history and character." Id. at 29 (Rehnquist, CJ., O'Connor & Thomas, JJ., concurring in the judgment). In a separate concurring opinion, Justice O'Connor likewise observed that "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths." Id. at 36. "Eradicating such references," Justice O'Connor noted, "would sever ties to a history that sustains this Nation even today." Ibid. (noting that in County of Alleghney, the Court "declin[ed] to draw lines that would 'sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens'")(citation omitted). See also Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (noting that the words of the motto have become "interwoven . . . so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits"). See generally McCreary County v. ACLU, 125 S. Ct. 2722, 2750 (2005) (Scalia, J., Rehnquist, CJ, & Thomas, JJ., dissenting) (approving the motto); Marsh v. Chambers, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting) (same); Engel v. Vitale, 370 U.S. 421, 449 (1962) (Stewart, J., dissenting) (same). For all the above reasons, therefore, plaintiff's Establishment Clause challenge to the motto is plainly foreclosed by controlling Supreme Court precedent.

2. Decisions from other circuit courts of appeals also hold that the motto and its inscription on coins and currency do not violate the First Amendment. In Gaylor v. United States, 74 F.3d 214 (10th Cir. 1996), for example, the Tenth Circuit rejected an Establishment Clause challenge to statutes adopting national motto and requiring its inscription on coins and currency, noting that the national motto "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." The Fifth Circuit followed the same course in O'Hair v. Blumenthal, 462 F. Supp. 19 (W.D. Tex. 1978), by affirming the district court's holding there that "it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion." 462 F. Supp. at 20, aff'd on opinion below, 588 F.2d 1144 (5th Cir.), cert. denied, 442 U.S. 930 (1979). See also Lambeth v. Board of Comm'rs of Davidson County, 407 F.3d 266 (4th Cir.) (rejecting challenge to inscription of "In God We Trust' on facade of a county building"), cert. denied, 126 S. Ct. 647 (2005); Sherman v. Community Consol. Sch. Dist., 980 F.2d at 437 (observing that the motto on coinage is consistent with the founders' tradition of ceremonial references to a deity).[12]

[12] The district court's dismissal of plaintiff's Establishment Clause claims here is not inconsistent with another district court's recent holding that the Establishment Clause forbids a public school from leading willing students in reciting the Pledge of Allegiance. See Newdow v. Congress, 383 F. Supp. 2d 1229 (E.D.

3. The decisions specifically approving the motto discussed above are consistent with, and supported by, the history of the Establishment Clause and of our Nation. As the Supreme Court has duly noted, "religion has been closely identified with our history and government." School Dist. of Abington Township v. Schempp, 374 U.S. 203, 212 (1963). Thus, many of this Nation's earliest European settlers came here seeking refuge from religious persecution and a home where they could practice their faith. See Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2322 (2004) (O'Connor, J., concurring in the judgment) (describing "a Nation founded by religious refugees and dedicated to religious freedom"). In 1620, before embarking for America, the Pilgrims signed the Mayflower Compact, in which they announced that their voyage was undertaken "for the Glory of God." See Act of Nov. 13, 2002, Pub. L. No. 107-293, § 1, 116 Stat. 2057. Settlers established many of the original thirteen colonies for the specific purpose of securing religious liberty for their inhabitants. See Engel v. Vitale, 370 U.S. 421, 427, 434 (1962).

Cal. 2005), appeal pending, Nos. 05-17344, 06-15093, 05-17257 (9th Cir.) That decision rested on what the district court, in reliance on a previous decision of this Court that was reversed by the Supreme Court for lack of standing, had held was the coercive environment of a public school. See id. at 1242, citing Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir. 2003). This case does not involve school children or the school environment.

The Framers' deep-seated faith provided the philosophical groundwork for the governmental structure they adopted. See Lynch v. Donnelly, 465 U.S. 668, 675 (1984) ("'[w]e are a religious people whose institutions presuppose a Supreme Being'") (citation omitted) (emphasis added). In "perhaps their most important contribution," the Framers "conceived of a Federal Government directly responsible to the people . . . and chosen directly . . . by the people." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 821 (1995). That system of government was a direct outgrowth of the Framers' conviction that each individual was entitled to certain fundamental rights "endowed by their Creator," as most famously expressed in the Declaration of Independence. See Declaration of Independence of 1776 ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."). Indeed, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." Schempp, 374 U.S. at 213.

It is no surprise, therefore, that the Framers considered references to God in official acknowledgments of the role of religion in the history and public life of the Country to be consistent with the First Amendment. The Constitution itself

refers to the "Year of Our Lord" and excepts Sundays from the ten-day period for exercise of the presidential veto. See U.S. Const. art. I, § 7; id. art. VII. And the First Congress, which wrote the Establishment Clause, adopted a policy of selecting a paid chaplain to open each session of Congress with a legislative prayer. See Marsh v. Chambers, 463 U.S. 783, 787-88 (1983).

Indeed, the day after proposing the Establishment Clause, the First Congress urged President Washington "to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God.'" Lynch, 465 U.S. at 675 n.2 (citation omitted). The President responded by proclaiming November 26, 1789, a day of thanksgiving to "offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." Id. (citation omitted). President Washington also included a reference to God in his first inaugural address, stating: "'it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe . . . that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.'" Newdow v. Bush, 355 F. Supp. 2d 265, 287 (D.D.C. 2005) (quoting compilation of inaugural addresses).

This "tradition [of the Founders] has endured." Sherman v. Community Consol. Sch. Dist. 21, 980 F.2d 437, 446 (7th Cir. 1992), cert. denied, 508 U.S. 950 (1993). Beginning with President Washington, references to God or a Higher Power have been a "characteristic feature" of presidential inaugural addresses, see Lee v. Weisman, 505 U.S. 577, 633 (1992) (Scalia, J., dissenting); Newdow, 355 F. Supp. 2d at 266-68 (tracing history of such references in inaugural addresses), and almost every President, beginning with Washington, has issued Thanksgiving proclamations, see Elk Grove, 124 S. Ct. at 2317 (Rehnquist, C.J., concurring in the judgment). Since the time of Chief Justice Marshall, moreover, the Supreme Court has opened its sessions with "'God save the United States and this Honorable Court.'" Engel, 370 U.S. at 446 (Stewart, J., dissenting).

Other examples abound. President Lincoln referred to a "nation[] under God" in his historic Gettysburg Address. See Elk Grove, 124 S. Ct. at 2317-18 (Rehnquist, C.J., concurring in the judgment). In 1931, Congress adopted as the National Anthem "The Star-Spangled Banner," the fourth verse of which reads: "Blest with victory and peace, may the heav'n rescued land Praise the Pow'r that hath made and preserved us a nation! Then conquer we must, when our cause it is just, And this be our motto 'In God is our Trust.'" Engel, 370 U.S. at 449 (Stewart, J., dissenting). Like the Constitution of the United States, see U.S. Const. art.

VII, the Constitutions of all 50 States also include express references to God. See Appendix B to Brief for the United States as Respondent Supporting Petitioners in Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624 (S. Ct.), available at 2003 WL 23051994 (listing citations). Since 1954, and as reaffirmed by Congress in 2002, the Pledge of Allegiance has read: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U.S.C. § 4; Pub. L. No. 107-293, 116 Stat. 2057 (2002).

Given this "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," Lynch, 465 U.S. at 674, the Supreme Court and individual Justices, time and again, have affirmed the proposition that official acknowledgments of the Nation's religious heritage and character are constitutional. Such official acknowledgments of religion are consistent with the Establishment Clause because they do not "establish[] a religion or religious faith, or tend[] to do so." Lynch, 465 U.S. at 678; see also Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970) (Establishment Clause forbids "sponsorship, financial support, and active involvement of the sovereign in religious activity").

As with other "public acknowledgment[s] of the religious heritage long officially recognized by the three constitutional

branches of government," any notion that the "In God We Trust" motto "pose[s] a real danger of establishment of a state church is far-fetched indeed." Lynch, 465 U.S. at 686. The motto is undeniably historical and ubiquitous to the point where it is not understood as endorsing a particular religious belief. Lynch, 465 U.S. at 716 (Brennan, J., dissenting). Indeed, it no more "establishes a religion or religious faith, or tends to do so," Lynch, 465 U.S. at 678, than do, for example, the National Anthem's inclusion of nearly identical language, the reference to a "Creator" in the Declaration of Independence, express references to God in the United States Constitution and the Constitutions of all 50 States, the government's declaration of holidays that originated with religious significance, the swearing of oaths with the phrase "So help me God," or the opening of court sessions with the exclamation, "God save the United States and this Honorable Court." Simply put, no reasonable observer could understand the "In God We Trust" motto as "conveying an endorsement of particular religious briefs." County of Allegheny, 492 U.S. at 625 (O'Connor, J., concurring in part and concurring in the judgment).

C. The Motto is Consistent with the General Principles of Establishment Clause Jurisprudence Upon Which Plaintiff Relies.

Plaintiff studiously ignores the Supreme Court's repeated, specific approval of the motto, arguing instead that the motto conflicts with various general principles the Court has used to

apply the Establishment Clause in various contexts. As the Supreme Court has frequently emphasized, however, Establishment Clause jurisprudence is highly context-specific. See, e.g., Lynch, 465 U.S. at 679 (noting that the focus of the Court's inquiry "must be on the creche in the context of the Christmas season"); Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) (O'Connor, J., concurring) (noting that "there are different categories of Establishment Clause cases, which may call for different approaches").

Thus, the most reliable guide to evaluating the motto's constitutionality under Establishment Clause is to ascertain what the courts have said about that particular issue. See, e.g., Newdow v. Eagen, 309 F. Supp. 2d 29, 40-41 (D.D.C.) (rejecting similar attempt by Newdow to rely on general Establishment Clause "tests" to urge overruling of Marsh v. Chambers), appeal dismissed, 2004 WL 1701043 (D.C. Cir. 2004). See also Agostini v. Felton, 521 U.S. 203, 217 (1997) (lower court may not assume the Supreme Court will overrule existing precedent that is directly on point).

As we have explained, Supreme Court and Ninth Circuit jurisprudence speak with one voice regarding the motto, concluding that it is fully consistent with the Establishment Clause. Those specific references to the motto thus control over plaintiff's reliance on various general Establishment Clause principles that the Court has articulated in contexts, such as school prayer, that

raise different concerns than are presented here. Moreover, as the cases discussed above demonstrate, the controlling Establishment Clause "test" here is whether the reference to religion at issue is a ceremonial acknowledgment of the Nation's religious history and character. Since the motto clearly passes that test, there is no need to consult any of the other Establishment Clause principles to which plaintiff refers. In any event, however, as we demonstrate below, the motto is in fact consistent with all the general principles upon which plaintiff relies.

1. The Motto is Consistent with the Neutrality Principle.

Plaintiff contends that the motto favors religion over atheism because it mentions God. See Appellant's Br. at 33. This argument, however, ignores the fact that the motto is not an endorsement of religion, or a statement of disrespect for atheism, but a permissible acknowledgment of the religious history and traditions of this Nation. See pp. 25-26, 32-35, supra. While plaintiff erroneously views these words as an endorsement of religion, the constitutionality of federal action cannot, and does not, turn on misinterpretations of government conduct. See, e.g., Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990) ("mistaken inference of endorsement" of religion cannot support a valid Establishment Clause claim).

2. The Motto is Consistent with the Lemon Test.

The Lemon test asks whether the government has acted with the purpose or effect of advancing religion. See Agostini v. Felton, 521 U.S. 203, 222-23 (1997). As we have explained, the Supreme Court and this Court have held that the motto serves the permissible secular purpose of acknowledging the religious heritage and character of our Nation, and of inspiring commitment to our Nation "in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases." Lynch, 465 U.S. at 717 (Brennan, Marshall, Blackmun, & Stevens, JJ., dissenting). See also Aronow, 432 F.2d at 244 (observing that the motto "has 'spiritual and psychological value' and 'inspirational quality'"); Gaylor, 74 F.3d at 216 (noting that the motto "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future").

Plaintiff argues that the motto statutes were enacted out of religious motivations. See Appellant's Br. at 34-36. The relevant history, however, is not as plaintiff portrays it. For example, the House Committee Report regarding the statute adopting "In God We Trust" as the motto stated that the phrase "has a strong claim as our national motto" because it appears in our national anthem (the Star-Spangled Banner), and because "it has received official recognition for many years," such as by its placement on United

States coins. H.R. Rep. No. 1959, 84th Cong., 2d Sess. 1 (Mar. 28, 1956). Similarly, the House Committee Report concerning the statute that requires the inscription of the motto on all coins and currency recommended approval of the Act because it reflects "tersely" and with "dignity" the religious heritage of our Nation and the "spiritual basis of our way of life." H.R. Rep. No. 662, 84th Cong., 1st Sess. 4 (1955). The Committee Report also notes that "[a]lthough the record does not show what, if any, might have been the impact of the words of Francis Scott Key on the motto chosen it may be noted that the Star Spangled Banner does contain the words 'And this be our motto – 'in God is our Trust.' '" Id. at 3.[13] These materials, which are the best guide to evaluating Congress's collective intent in enacting the motto statutes, confirm, as the Supreme Court and this Court have held, that the motto statutes serve the valid, secular purpose of acknowledging the religious heritage and character of our Nation.[14]

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[13] The Committee Report also noted the historical basis for the motto, reciting the experience of various colonies with placing similar mottos on coins and currency issued by them. See pp. 6-7, supra.

[14] By contrast, how certain individual legislators or citizens may have articulated their own, personal understanding of the need for the motto statutes is entitled to no significant weight. "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." United States v. O'Brien, 391 U.S. 367, 384 (1968). Moreover, the legislative purpose determination is not, as plaintiff would have it, a search for the subjective motivations of the lawmakers in question, but for the objective purpose of the statute. See, e.g., Mergens, 496 U.S. 226, 249 (1990).

Moreover, as we also have already explained, see p. 4, supra, Congress in 2002 reaffirmed that the national motto serves precisely the secular purposes noted above. See H.R. Rep. No. 107-659, at 4-5, reprinted at 2003 U.S.C.C.A.N. 1304 (reaffirming that the motto reflects the "accepted legal principle that government acknowledgment of religious heritage of the United States of America is consistent with the meaning of the Establishment Clause"). Since plaintiff challenges the current use of the motto, Congress's 2002 reaffirmation of the motto ought to be the controlling statement of legislative intent.[15]

The motto statutes at issue have the secular effect of carrying out the secular purposes identified above – promoting unity, patriotism, and an appreciation for the values that define the Nation. Cf. Elk Grove, 542 U.S. at 6 (concluding that reciting the Pledge of Allegiance "is a patriotic exercise designed to foster national unity and pride in those principles" on which the Nation was founded, including its "proud traditions 'of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations'") (emphasis added) (citation omitted).

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[15] Plaintiff also argues that the "plain language" of the motto shows it has a religious purpose. Appellant's Br. at 37. As we have explained, however, the government is permitted under the Establishment Clause to use religious language for secular purposes, such as, in this context, to serve the ends of patriotism. See pp. 25-27, 32-36, supra (discussing relevant Supreme Court and Ninth Circuit cases).

Citing voluminous pages of legal arguments that are attached to the First Amended Complaint as "appendices," plaintiff contends that the motto has the impermissible effect of accentuating bias against atheists in our culture and that many people consider the words "In God We Trust" to have religious meaning. See Appellant's Br. at 38-40. As we have explained, however, the motto evidences no bias against atheists, but merely recognizes the indisputable fact that our nation, which was "founded by religious refugees and dedicated to religious freedom," Elk Grove, 542 U.S. at 36 (O'Connor, J., concurring), has a "religious history and character." Id. at 29 (Rehnquist, CJ., O'Connor & Thomas, JJ., concurring in the judgment).

3. The Motto is not an Endorsement of Religion or a Violation of the "Outsider" Test, and Does Not Place the Government's "Imprimatur" of Approval on Religion.

The "relevant question" in analyzing whether government action is an endorsement of religion, treats a person as an "outsider" for Establishment Clause purposes, or puts the government's stamp of approval on religion is "whether an objective observer, acquainted with the text, legislative history, and implementation of the [policy,] would perceive it as a state endorsement of [religion.]" Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000). For the reasons we have already explained, an informed reasonable observer would not perceive the motto as endorsing religion.

4. The Motto Does Not Coerce Anyone to Engage in the Exercise of Religion.

In Lee v. Weisman, 505 U.S. 577 (1992), the Supreme Court held that the government violates the Establishment Clause by coercing people to engage in unwanted religious activity. Plaintiff contends that the motto statute violates this principle because "the use of money in today's world is . . . 'in a fair and real sense' obligatory . . .." Appellant's Br. at 45. Plaintiff's invocation of the coercion principle fails because using coins and currency is not reasonably deemed an endorsement of the motto by the user. Moreover, in Lee, the Supreme Court held that the Establishment Clause forbids prayer at secondary school graduations. See 505 U.S. at 599. What made those prayers unconstitutionally coercive was that they constituted a pure "religious exercise." Id. at 587. Using coins and currency is not a religious exercise. For all the above reasons, therefore, the district court correctly dismissed plaintiff's Establishment Clause challenge to each of the motto statutes at issue.

III. THE STATUTE ADOPTING "IN GOD WE TRUST" AS THE MOTTO AND THE STATUTES REQUIRING THE MOTTO'S INSCRIPTION ON COINS AND CURRENCY DO NOT VIOLATE PLAINTIFF'S RIGHTS UNDER THE RELIGIOUS FREEDOM RESTORATION ACT.

RFRA provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless "it demonstrates that application of the burden to the person – (1) is in furtherance of

a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. 2000bb-1.

Congress enacted RFRA 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." 42 U.S.C. 2000bb-(b)(1).[16] Congress determined that the compelling interest test "needed to be 'restored'" because the Supreme Court, in Employment Div. v. Smith, 494 U.S. 872 (1990), had "virtually eliminated the requirement that government justify burdens on religious exercise imposed by laws [that are] neutral toward religion." 42 U.S.C. 2000bb-2(a)(2). In applying RFRA, therefore, courts should "look to free exercise of religion cases decided prior to Smith for guidance." H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993).

The district court rejected plaintiff's RFRA claim because it is based on the same essential premise as his Establishment Clause claim – that the words "In God We Trust" in the national motto and on United States coins and currency are a religious statement,

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[16] The Supreme Court held RFRA unconstitutional as applied to the states in City of Boerne v. Flores, 521 U.S. 507 (1997). All the courts of appeals to have addressed the question, including this Court, have held that RFRA is constitutional as applied to the federal government. See, e.g., Guam v. Guererro, 290 F.3d 120 (9th Cir. 2002).

rather than a patriotic one. See Opinion at 16 (ER 333). The court was correct to so rule. Moreover, although this Court need not reach these questions, plaintiff also cannot state a claim under RFRA because he cannot otherwise prove a substantial burden on his free exercise of religion and because, even if he could, the motto statutes serve compelling government interests.

1. Plaintiff's RFRA Claim Fails Because the Motto Statutes do Not "Burden" His Free Exercise of Religion.

As the Supreme Court held in Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985), a case decided prior to Smith, "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." Id. at 303. Applying that principle, the Court rejected a claim that being required to receive the minimum wage "would violate the religious convictions" of volunteers of a religious organization who objected to receiving a cash wage (rather than just benefits), because the labor statute, as its definition of "wage" established, "does not require the payment of cash wages." Id. at 303-04. See also id. at 304 n.27 (rejecting additional free exercise claim, that imposing the statute's recordkeeping requirement would burden the volunteers' religion, because that claim "rests on a misreading of the Act," which imposed no such requirement on the volunteers).

Plaintiff's RFRA attack on the motto statutes at issue here fails for similar reasons. As the district court correctly observed, see Opinion at 16 (ER 333), all of the religious burdens plaintiff contends the motto statutes place upon him rest on a single premise – that the national motto and its placement on coins and currency is an endorsement of religion. For example, plaintiff contends that defendants have burdened his free exercise of religion by "essentially compell[ing] him to bear on his person items that make a purely religious claim with which he fervidly disagrees." Appellant's Br. at 15 (citation omitted). Likewise, he alleges, the motto and its presence on coins and currency "force[s] him to advocate for Monotheism" as the "price to pay for carrying and spending his nation's money." Id. at 19. Both these allegations, which sum up all the ways in which he alleges the motto statutes burden his religion, are based on the notion that the motto is a religious statement, as opposed to a patriotic statement, as the Supreme Court and this Court have held. Thus, the district court was correct to hold that plaintiff's RFRA claims fail for the same reasons his Establishment Clause claims fail.

2. Plaintiff Cannot Otherwise Prove a Substantial Burden on His Free Exercise of Religion.

a. The Statute Adopting In God We Trust as National Motto Is Not a "Substantial" Burden on Plaintiff's Exercise of Religion.

Plaintiff cannot demonstrate that the statute that adopts "In God We Trust" as the national motto substantially burdens his free

exercise of religion because Congress's adoption of "In God We Trust" as the motto does not impair plaintiff's ability to believe, express, and exercise his religion as he sees fit, or coerce or compel him in any way to take any action, or to refrain from taking any action, that is motivated by his religion.

Thus, his claims fail for the same reasons the Supreme Court held that a plaintiff could not prove a substantial burden on his free exercise of religion in Bowen v. Roy, 476 U.S. 693 (1986). In Bowen, a parent objected on religious grounds to a statute that required states to use the social security numbers of recipients in administering a public benefit program. He claimed that the requirement violated his and his daughter's religious freedom because it would "rob the spirit" of his daughter. See id. at 697. The Supreme Court rejected the claim, holding that the parent had not articulated a substantial burden on his free exercise of religion because the requirement did not "in itself in any degree impair Roy's 'freedom to believe, express, and exercise'" his religion, id. at 688-700, but rather concerned only the government's own "internal" procedures relating to the administration of the benefit program at issue. Id. at 699. As the Court explained, the First Amendment does not require "the Government itself to behave in ways that the individual believes will further his or her spiritual development . . .." Ibid. (emphasis in original).

Applying that analysis here, plaintiff cannot show that the motto substantially burdens his free exercise of religion because the content of the motto is a purely internal matter that can have no coercive impact on plaintiff or anyone else. As a result, plaintiff has no right under RFRA to dictate to Congress what shall be the motto for the United States. See, e.g., Bowen, 476 U.S. at 700 (Free Exercise Clause only affords protection "from certain forms of governmental compulsion"); Grove v. Mead Sch. Dist., 753 F.2d 1528, 1533 (9th Cir.) (same), cert. denied, 474 U.S. 826 (1985).

b. The Statutes Requiring Inclusion of the Motto on Coins and Currency Do not "Substantially" Burden Plaintiff's Free Exercise of Religion.

In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Supreme Court employed the same analysis it had used in Bowen v. Roy in rejecting a free exercise claim that is similar to the one plaintiff raises here. The plaintiffs in Lyng contested a plan by the Forest Service to permit timber harvesting and road construction in an area of a national forest that three Indian tribes had used for religious purposes. See id. at 442. Even though the government's plans would virtually destroy the Indians' ability to practice their religion, id. at 451, the Supreme Court held there was no substantial burden because the government "simply could not operate if it were required to satisfy every citizen's religious needs and desires," id. at 452, and

because "[w]hatever rights the Indians may have to the use of the area . . ., those rights do not divest the Government of the right to use what is, after all, its land." Id. at 453 (emphasis in original). See also ibid. (noting that the tribes did not have the free exercise right to place a "religious servitude" on government land).

The same points defeat plaintiff's argument that the presence of the national motto on United States coins and currency substantially burdens his free exercise of religion. Although plaintiff finds the motto "deeply offensive" and "incompatible with [his] own search for spiritual fulfillment and with the tenets of [his] religion," Lyng, 485 U.S. at 452, that does not give him a "veto over [a] public program[]" that only indirectly implicates his own religious beliefs. Ibid. Thus, just as the plaintiffs in Lyng had no free exercise right to divest the government of the right to use its own land, see id. at 453, plaintiff has no such right to appoint himself Chief Designer of all official United States legal tender. Congress has meticulously prescribed the appearance of U.S. coins and currency, and the issuance of those forms of money is in many other ways highly regulated. See, e.g., 31 U.S.C. 5111-5115.[17]

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[17] For example, the Secretary of the Treasury is authorized by statute to redeem coins and currency, see 31 U.S.C. 5119, and Congress has made it a criminal offense to deface U.S. coins or currency. See 18 U.S.C. 332, 333. See also U.S. Const. Art. I, § 8 (giving Congress the power to "coin Money [and] regulate the

Moreover, the particular disabilities plaintiff alleges he sustains because of the presence of the motto on coins and currency fall far short of the kind of pressure the Supreme Court has held can constitute a substantial burden on religion. The Supreme Court has held that the inability to collect unemployment compensation because of a person's religion qualifies as a free exercise substantial burden, because of the undeniable importance of that benefit. See, e.g., Sherbert v. Verner, 374 U.S. at 496. But the Court has never held that the denial of any other kind of government benefit under a facially neutral government program constitutes a substantial burden on religion. Plaintiff's professed inability to buy garments at thrift stores, use parking meters, buy vegetables at farmers markets, etc, see ER 164-166, pales in comparison to the loss of basic subsistence benefits.

Plaintiff also alleges that the appearance of the motto on U.S. coins and currency substantially burdens his free exercise of religion by compelling him to become an evangelist for monotheism whenever he would use those forms of money. See Complaint, ¶¶ 230-31 (ER 162). In Wooley v. Maynard, 430 U.S. 705 (1977), however, the Supreme Court rejected such a claim brought under the Free Speech Clause, holding that "[t]he bearer of currency is . . . not required to publicly advertise the national motto." Id. at 717 n.15. That holding forecloses plaintiff's "compelled evangelist"

Value thereof").

claim here. See, e.g., Otero v. State Election Bd.,975 F.2d 738, 741 (10th Cir. 1992) (rejecting claim that use of church building as polling place required voters, by entering the building, to "attest to the nature of [their] religious beliefs), cert. denied, 507 U.S. 977 (1993); Murray v. City of Austin, 947 F.2d 147, 152 (5th Cir. 1991) (rejecting claim that city insignia containing a Latin Cross violated the Free Exercise Clause by creating "'subtle coercion for the plaintiffs to adhere to the majoritarian faith symbolized by the cross in the seal'"), cert. denied, 505 U.S. 1219 (1992).

3. Congress's Adoption of the Motto and Requirement that the Motto be Included on All United States Coins and Currency is the Least Restrictive Means to Further a Compelling Interest.

Since, for the reasons stated above, plaintiff cannot meet his initial burden of proving a substantial burden on his free exercise of religion, his RFRA claim fails at the outset, and there is no need for the Court to address whether the government can satisfy RFRA's compelling interest test. But as the Tenth Circuit held in Gaylor, supra, there 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. 74 F.3d at 216.

Moreover, any argument that there might be less restrictive means of satisfying this compelling government interest would amount to, essentially, a proposal for a different, alternative national motto. See Compl. ¶ 291 (ER 171) (listing twelve proposed "candidates" for a replacement national motto). It would contradict the very concept of a national motto to allow such a "heckler's veto" over the overwhelming will of the citizenry as expressed through the political process. Cf. Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001) ("We decline to employ Establishment Clause jurisprudence using a modified heckler's veto . . . .").

CONCLUSION

For the foregoing reasons, the order dismissing plaintiff's complaint should be summarily affirmed.

Respectfully submitted,

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NOVEMBER 2006

STATEMENT OF RELATED CASES

Counsel for Appellee are aware of no related cases within the meaning of Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I hereby certify that, according to the word count provided in Corel Wordperfect, the foregoing brief contains 13,818 words. The text of the brief is composed in monospaced, 12-point Courier typeface, which has 10 characters per inch.

_____
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2006, I filed the foregoing Brief for Federal Appellees by causing an original and 15 copies of the Brief to be delivered to Federal Express for next-day delivery to the Clerk, United States Court of Appeals for the Ninth Circuit. I also served the foregoing Brief upon the following counsel by causing two copies of the Brief to be delivered to Federal Express for next-day delivery:

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ADDENDA

1. http://en.wikipedia.org/wiki/Star-spangled_banner

2. http://www.treasury.gov/education/fact-sheets/currency/in-god-we-trust.shtml