**CASE NO. 06-16344**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**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***

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

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# PLAINTIFF-APPELLANT'S REPLY BRIEF

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## INTRODUCTION

God – a purely religious entity – is trusted in by some individuals. Others deny God exists. These two groups obviously hold divergent views that reflect two particular religious beliefs. Yet the Federal Defendants contend that "[t]he motto is ... not understood as endorsing a particular religious belief." *Brief for Federal Government Appellees* (hereafter "*Br. FGA*") at 42.

"In God We Trust" clearly endorses the particular religious belief that there is a God in whom Americans trust. Thus, in the controversy over God's existence, the United States government has lent its power to support the dogma of one side. This conflicts directly with the Supreme Court's edict that "[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).

To argue their position, Defendants contort the plain meanings of words. What is unquestionably and purely religious becomes "nonreligious." What are blatant endorsements become "acknowledgements." Setting forth the naked quotations of those responsible for choosing "In God We Trust" is labeled "misinterpretation." And violating the neutrality that the Supreme Court has deemed "the touchstone" of its Establishment Clause jurisprudence, *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005), becomes "tradition."

We hold our nation out to the rest of the world as "a beacon of religious freedom,"[1] proudly pointing to the glory of our federal Constitution. More importantly, we cherish that document for ourselves, relying upon its purity and principles "to effect [our] Safety and Happiness."[2] We will be neither safe nor happy if – as Defendants urge – we make a mockery of its words and trample upon its ideals.

[1] July 27, 2006 Proclamation of President George W. Bush. Incredibly, this claim was made while extolling the virtues of our nation using – as its sole national motto – the particular religious belief that "In God We Trust." Accessed at http://www.whitehouse.gov/news/releases/2006/07/20060727-12.html on December 2, 2006.

[2] *Declaration of Independence* (1776), ¶ 2. Defendants and their *amici* make repeated allusions to the Declaration's four references to God. Yet this Court is sworn to uphold the Constitution (which has zero such references), not the Declaration. As is evidenced by the fact that Thomas Jefferson's *Bill for Religious Freedom* was defeated in Virginia in 1779, but passed in 1786, there was a huge change in thinking about the relationship between government and religion from when the Declaration was signed to when the Constitution was ratified.

## ARGUMENT

## I. DEFENDANTS' RFRA CONTENTIONS ARE UNAVAILING

### (A) Individuals, not governments, determine religious burdens

Defendants[3] attempt to counter Plaintiff's RFRA claim by arguing that he is wrong to view the purely religious phrase, "In God We Trust," as being religious:

> [Plaintiff] alleges the motto statutes burden his religion, ... 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.

*Br. FGA* at 52. Even accepting this silly "'In God We Trust' is not religious" argument (which, incidentally, the Supreme Court has never held, and which even PJI specifically denies[4]), a RFRA claim hinges on the individual's, not the government's, view of the given activity. *United States v. Antoine*, 318 F.3d 919 (9th Cir. 2003). In *Antoine* – a RFRA case involving a Canadian Indian who wished to sell and barter eagle parts – the Ninth Circuit specifically noted that, "what matters is its significance to [the plaintiff], not to others." *Id*., at 921 (n.2). *See also*, *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

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[3] Interestingly, in the *Brief of Intervenor-Appellee Pacific Justice Institute* (hereafter "*Br. PJI*"), not a word is written regarding Plaintiff's RFRA claim.
[4] "It is PJI's position that the national motto [is] religious." *Br. PJI* at 3.

The Establishment Clause determination made in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) has no bearing on the RFRA claim brought here. Accordingly, Defendants (and the District Court, which wrote that Plaintiff's RFRA claim fails "[b]ecause the national motto has been held to be secular in nature." *EOR* 334:24-25) are wrong as a matter of law.

### (B) This case involves substantial burdens upon Plaintiff's free exercise rights

In this Circuit, it is a substantial burden upon religion to interfere with a Canadian Indian's ability to obtain money (**not** earmarked for religious purposes) in a for-profit venture. *Antoine*, 318 F.3d at 923. Surely, then, interfering with a minister's ability to obtain money (specifically to be used for church activities) while passing the plate during religious services[5] is a substantial burden upon religion as well. Other case law also supports Plaintiff's claim. *See*, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 208 (1972) (substantial burden in children's "attendance at high school"); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 711 (1981) (substantial burden in "contributing to the production of arms"); *United States v. Lee*, 455 U.S. 252, 257 (1982) (substantial burden in "payment and receipt of social security benefits"); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir.

[5] To avoid needless repetition, the myriad other substantial burdens that have been mentioned in the Complaint and the Opening Brief will not be addressed here.

1994) (substantial burden in "name change"); *Warsoldier v. Woodford*, 418 F.3d 989, 992 (9th Cir. 2005) (substantial burden in "maintain[ing] his hair long"); *May v. Baldwin*, 109 F.3d 557, 562 (9th Cir. 1997) (substantial burden in "unbraiding dreadlocks").

Perhaps most on point is *Cheema v. Thompson*, 67 F.3d 883 (9th Cir. 1995), which involved Khalsa Sikh children intent on wearing a kirpan[6] while attending public school. The panel was unanimous in finding that restrictions on this practice substantially burdened the children's exercise of religion. *Id*., at 885, 889 (Wiggins, J., dissenting). This right of the *Cheema* children (to personally bear their kirpans) is certainly no more protected than Plaintiff's right here to not personally bear the patently religious phrase "In God We Trust."

Defendants' citations in opposition are misplaced. For instance, in neither *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985), nor *Grove v. Mead School Dist.*, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 474 U.S. 826 (1985), did the challenged acts "actually interfere with the exercise of religion." *Id*., at 1543.

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[6] "A central tenet of [the plaintiffs'] religion requires them to wear at all times ... a 'kirpan.'" 67 F.3d at 884. "A kirpan has a curved, steel blade and is worn in a sheath." *Id*., at 884 (n.1). "As far as the school district was concerned, there was nothing left to discuss; a kirpan was unquestionably a knife, and as such it fell squarely within the absolute ban." *Id*., at 884.

Reliance on *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), and *Bowen v. Roy*, 476 U.S. 693 (1986) is similarly misguided. Unlike government creation of a logging road to service its own forest land (*Lyng*) or institution of an identification scheme for use in its own computers (*Roy*), government here has not created a motto for its own use. On the contrary, it is for public reflection and for the public to bear while using the money. To claim that "the content of the motto is a purely internal matter," *Br. FGA* at 54, is simply incorrect.

Another difference is that the governmental actions in *Alamo*, *Grove*, *Lyng* and *Roy* were all "wholly neutral in religious terms." *Roy*, 476 U.S. at 703. Here, as Defendants' own information makes clear, the motto exists because "[t]he trust of our people in God should be declared." *Br. FGA*, *Appendix* (Treasury Fact Sheet) at 1. Thus, claiming the motto "only indirectly implicates [Plaintiff's] own religious beliefs," *Br. FGA* at 55, is also erroneous.

### (C) There is no compelling state interest to counter the burden upon Plaintiff's free exercise rights

RFRA is not violated if there is a compelling state interest sufficient to offset the substantial burden placed upon a plaintiff's free exercise rights. 42 U.S.C. § 2000bb-1(b)(1). In this regard, Defendants simply repeat the Tenth Circuit's verbiage in *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), *Br. FGA* at 57,

without responding to Plaintiff's demonstration that those interests are not compelling at all. *Appellant's Opening Brief* (hereafter "*AOB*") at 28-29.

The true compelling interest is in avoiding government advocacy for any religious view, and "In God We Trust" should be invalidated on that Establishment Clause ground alone. But even accepting, *arguendo*, that the *Gaylor* claims have some validity, they are in no way compelling. That the nation and its commerce did fine without "In God We Trust" on any coins until 1864, *EOR* 135:10, or on any currency until 1957[7] demonstrates this. So does the government's eleven year delay in completing its task. *Br. FGA* at 7. Similarly, despite Defendants' repeated mentions of "history," "tradition," and "heritage," the fact remains that the 1792 Congress chose not to place any divine references upon our coins. On the contrary, "Liberty," not God, was selected. *EOR* 131:21-22 ("[T]here shall be an impression emblematic of liberty, with an inscription of the word Liberty." *Coinage Act of 1792*.).

Finally, relying on *Gaylor*, Defendants claim that the compelling interest in having "In God We Trust" as our motto and on our money is to "foste[r] patriotism." *Br. FGA* at 57. Not only does this suggestion (that patriotism in the

[7] "The first paper currency bearing the motto entered circulation on October 1, 1957." Accessed on December 10, 2006 at http://treasury.gov/education/fact-sheets/currency/in-god-we-trust.shtml.

United States of America is related to religious belief) offend our most fundamental values, its mere contention by Defendants ought to decide this case. To claim that trust in God – or even an "acknowledgment" that others trust in God – is part and parcel of patriotism shows clearly that 36 U.S.C. § 302 is a "law respecting an establishment of religion." Moreover, Defendants are wrong. "[P]atriotism ... is not essential to the maintenance of effective government and orderly society." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

**(D) Even if "patriotism" or "history," etc., were compelling interests, "In God We Trust" is not the least restrictive means of serving them**

Defendants argue that allowing a less restrictive means of serving the alleged compelling interest would create a "'heckler's veto.'" *Br. FGA* at 58. Of course, those who demand that our elected representatives abide by the Constitution (judges and justices included) are "hecklers" by definition. More importantly, Defendants' argument is no rejoinder to a statutory requirement. Plaintiff has demonstrated that less restrictive means exist to serve the interests that Defendants claim are "compelling." Pursuant to 42 U.S.C. § 2000bb-1(b)(2), therefore, RFRA is violated.

**(E) *Wooley v. Maynard* also supports Plaintiff's claim**

Regarding Plaintiff's evangelism objection, Defendants contend that "the Supreme Court rejected such a claim" in *Wooley v. Maynard*, 430 U.S. 705 (1977). *Br. FGA* at 56. This is a fantastic characterization of a footnote responding to an ancillary point raised by a dissenter ... especially when the footnote in no way "rejected" that claim at all.

To begin with, *Wooley* clearly supports Plaintiff's arguments: "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." 430 U.S. at 714 (emphasis added). As for the motto, which was not before the Court, the opinion merely stated that money, unlike license plates, "need not be displayed to the public." *Id*. That says nothing about the significance of personally bearing religious messages, whether or not they are displayed to the public. *Cf. Bd. of Educ. v. Grumet*, 512 U.S. 687, 726 (1994) (Kennedy, J., concurring) (citing Air Force regulation stating that "Religious head coverings may be worn underneath military headgear"); *Alameen v. Coughlin*, 892 F. Supp. 440, 442 (D.N.Y. 1995) (citing Department of Correctional Services directive stating, "All approved religious medals, crucifixes, and crosses shall not be visible and shall be worn underneath clothing at all times.").

Nor did the *Wooley* dictum address the effects of passing money during commerce. "Our coins ... serve as ambassadors of American values and ideals." *EOR* 150. *See also EOR* 162 (carrying the motto's religious message is "one of the most compelling reasons why we should put it on our currency."). Thus, *Wooley* never "rejected" Plaintiff's claim at all. On the contrary, it specifically held that "the State's interest ... to disseminate an ideology ... cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." 430 U.S. at 717.

## II. "IN GOD WE TRUST" VIOLATES THE ESTABLISHMENT CLAUSE

### (A) Words in statutes are to be "interpreted in accordance with their ordinary meaning"

While this Brief was being written, the Supreme Court yet again instructed the lower courts that, "Unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *BP America Production Co. v. Burton*, No. 05-669, slip op. at 5 (U.S. December 11, 2006). "In God We Trust" says nothing about history, tradition, heritage, patriotism or anything else. It's "ordinary meaning" is that "We" (Americans) trust in God.

### (B) The Constitution's only "express reference" to a deity is to Jesus

Using a term of art, the Framers signed the Constitution "in the Year of our Lord one thousand seven hundred and Eighty seven." Defendants refer to this as an "express referenc[e] to God." *Br. FGA* at 41. Actually, it is an express reference to Jesus Christ. Will they argue that "In Jesus We Trust" is also nonreligious (and, therefore, a permissible motto)? Surely there is no constitutional distinction.

Along these lines, PJI's reference to "perfectly fine ceremonial or solemnizing acts in other nations," *Br. PJI* at 15, deserves mention. The whole point is that we are not like "other nations." The British may base their ceremonies on the Church of England, and Iran can solemnize occasions via Islamic worship. "In this country," *id.*, such religion-based activities are expressly forbidden.

**(C) The basic premise underlying *Aronow* is no longer tenable**

Defendants – like the lower Court – rely upon the contention in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) "that the motto '"'has no theological ... impact.'"'" *Br. FGA* at 11. In addition to the fact that this statement is facially at odds with the motto's words (and, therefore, at odds with the myriad Supreme Court cases demanding that statutes be interpreted as written), it is also at odds with reality, common sense, and the legal developments of the past thirty-six years.

Before proceeding, Plaintiff again highlights the Supreme Court's "insistence that jurisdictional issues be resolved first," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 108 n.9 (1998) - a rule that is "'inflexible and without exception.'" *Id*., at 95 (citation omitted).[8] With the *Aronow* plaintiff deemed to lack Article III standing, the entire *Aronow* opinion was extra-jurisdictional. "If the plaintiffs lack standing to bring [a] suit, the courts lack jurisdiction to consider it." *Grove v. Mead School Dist.*, *supra*, 753 F.2d at 1531.

Even ignoring *Aronow*'s standing issue, a precedent should be disregarded if "it is clearly erroneous and would work a manifest injustice." *Arizona v. California*, 460 U.S. 605, 619 n.8 (1983). This is especially true in the First

[8] Defendants' use of *Steel Co.*, *Br. FGA* at 30, is extremely disingenuous. The claim in *Aronow* was certainly not among those envisioned by *Steel Co*. as being "devoid of merit."

Amendment setting, since "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring). Additionally, *stare decisis* is inappropriate if "a *substantial* change in relevant circumstances has occurred." *United States v. Antoine*, 318 F.3d 919, 922 (9th Cir. 2003) (emphasis in original).

There has clearly been a "substantial change" in Establishment Clause jurisprudence, with the neutrality, *Lemon*, endorsement, outsider, coercion and other tests arising or maturing in ways that simply were unforeseeable in 1970. Surely the information Plaintiff has included in his Complaint – detailing the purpose and effect of placing "In God We Trust" on the money and of choosing that phrase as the national motto – is critically important for a decision under this new jurisprudence. This information reveals unequivocally that claiming "the national motto has no ... purpose, either in Congressional intent or practical impact on society" to "aid religion," *Aronow*, 432 F.2d at 244, is erroneous.

In fact, the *Aronow* Court's contention that "the motto has no theological or ritualistic impact," *id*., at 243, has been directly refuted by at least four of the current Supreme Court's justices. *See Van Orden v. Perry*, 125 S. Ct. 2854, 2866-67 (2005) (Thomas, J., concurring) ("[W]ords such as 'God' have religious significance."); *McCreary County*, 125 S. Ct. 2722, 2728 (2005) (Souter, J.,

majority opinion) (describing the motto as "having a religious theme."); *id*., at 2748-50 (Scalia, J., dissenting) (opining that the motto is "religious," and "governmental affirmation of the society's belief in God."); *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573, 673 (1989) (Kennedy, J., concurring in part and dissenting in part) (describing the motto as being among a variety of "religious references," and noting 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 the motto's use.). *Aronow*'s reasoning is totally incompatible with these more recent and authoritative statements.

**(D) The Supreme Court has <u>never</u> "specifically approved the motto." On the contrary, its case law clearly supports Plaintiff's claim.**

The Federal Defendants contend that "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." *Br. FGA* at 12. This is an extreme stretch, and especially bizarre in view of their own admission that no Supreme Court case is "'closely on point.'" *Id*., at 27 (citation omitted).

Actually, in terms of clear guiding principle, five cases are "closely on point." In each, the government singled out and supported one religious view, giving it preferential access within a limited environment. *Stone v. Graham*, 449 U.S. 39 (1980) (posting, by itself, the Ten Commandments); *Allegheny County*,

*supra* (placing, by itself, a creche scene); *Lee v. Weisman*, 505 U.S. 577 (1992) (providing, by itself, a prayer); *Grumet*, *supra* (creating, by itself, a Jewish school district); *McCreary County*, *supra* (displaying, (originally) by itself, a Ten Commandments display).[9]

With the Supreme Court ruling that each of the above post-*Aronow* activities was a "law respecting an establishment of religion," it is ludicrous to contend that a 36 year-old decision which says, in essence, "declaring 'In God We Trust' to be the nation's sole motto is not such a law" has continued validity. When "government ... sends an unmistakable message that it supports and promotes the ... religious message," *Allegheny County*, 492 U.S. at 600, the Establishment Clause is violated. In this nation comprised of Monotheists and Atheists,[10] government's advocacy of "In God We Trust" sends an unmistakable message that it supports and promotes only the beliefs of the former.

This leads to the other on-point principle repeatedly upheld by the Supreme Court: that "irreligion" (*i.e.*, Atheism) must be accorded the same respect as "religion" (*i.e.*, Monotheism). "[T]he government may not favor ... religion over irreligion." *McCreary County*, 125 S. Ct. at 2742. *See also*, *AOB* 33-34 (providing

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[9] *Cf. Van Orden v. Perry*, 125 S. Ct. 2854 (2005), where a Ten Commandments monument was one of 38 monuments and markers.

[10] And others.

similar quotations from six other Supreme Court cases). Placing the claim that "none of the post-*Aronow* Supreme Court cases plaintiff cites ... announced any principle that remotely conflicts with *Aronow*," *Br. FGA* at 27, in juxtaposition with these many post-*Aronow* proclamations shows the constitutional bankruptcy of Defendants' arguments.

Despite the foregoing, Defendants persist in arguing that the Supreme Court "specifically approved the motto." They begin with *Lynch v. Donnelly,* 465 U.S. 668 (1984), in which Chief Justice Burger, writing for a 5-4 majority, listed "In God We Trust" among a number of "official references to the value and invocation of Divine guidance." *Id*., at 675. Justice Douglas used this same "listing" technique in *Engel v. Vitale*, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring), only to have the public school Bible readings on his list ruled unconstitutional the very next year. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Additionally, the *Lynch* court received no briefing on the origin or effects of "In God We Trust." If standing is important to provide 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), then a dictum made as an aside on a matter for which there was no presentation at all surely cannot hold any significant sway. *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20

(1979) (rejecting claim similar to that made by Defendants here because issue "never received full plenary attention").

The allusion to Justice Brennan's *Lynch* dissent is even more tenuous. Decrying "governmental favoritism toward one set of religious beliefs," 465 U.S. at 714 (Brennan, J., dissenting), Justice Brennan prefaced his discussion of the motto by writing that he "remain[ed] uncertain about these questions." *Id*., at 716. Additionally, a year earlier he wrote, "I frankly do not know what should be the proper disposition of ... 'In God We Trust.'" *Marsh v. Chambers*, 463 U.S. 783, 818 (1983) (Brennan, J., dissenting). That is hardly a "specific approval."

The alleged "specific approval" in the other case referenced by Defendants is equally exaggerated. When Justice Blackmun wrote that the Court had "previous[ly] ... considered ... the motto ..., characterizing [it] as consistent with the proposition that government may not communicate an endorsement of religious belief" in *Allegheny County*, 492 U.S. at 602-03, he specifically added the caveat that this statement was made "in dicta." He further highlighted that when a "practice is not before us, we express no judgment about its constitutionality." *Id*., at 603 (n.52). Combining the foregoing with Justice Blackmun's other *Allegheny* remarks – e.g., "[G]overnment may not promote or affiliate itself with any religious doctrine." *Id*., at 590; "[G]overnment affiliation with particular religious messages is precisely what the Establishment Clause precludes." *Id*., at 601 (n.51);

"'[G]overnment may not favor religious belief over disbelief.'" *Id*., at 593 (citation omitted); "[W]e have held [the Establishment Clause] to mean no official preference even for religion over nonreligion." *Id*., at 605; and many others – one cannot seriously contend that "In God We Trust" on the money or as the national motto is constitutional under Justice Blackmun's jurisprudence.

Defendants add scattered dicta from other justices – some of whom also issued opinions totally at odds with the conclusion that the motto is constitutional, most of whom are no longer on the Court, and all of whom issued their dicta without the benefit of any pertinent briefing whatsoever. In the face of prescribed tests – each of which, when applied, results in invalidation of the "In God We Trust" phrase – Defendants' mining of very occasional statements is of little, if any, probative value.

**(E) Defendants' own materials belie their claims**

The *Aronow* notions that "[i]t is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust,'" *Aronow*, 432 F.2d at 243, and "the motto has no theological ... impact," *id*., are also contradicted by Defendants' own

information, which was apparently unseen by the *Aronow* court.[11] In H.R. Rep. No. 1106, 60th Cong., 1st Sess. 1 (1908), for instance, a bill to restore the motto to the coins was being considered:

> [T]he Committee unanimously recommended passage of the bill, "in confidence that **the measure simply reflects the reverent and religious conviction** which underlies American citizenship."

Emphasis added. Similarly, it was under the heading, "**RELIGIOUS INSCRIPTIONS** ON COINS IN THE UNITED STATES" (emphasis added) that Defendants' excerpt regarding pre-founding inscriptions on the coins was listed in H.R. Rep. No. 662, 84th Cong., 1st Sess. 4 (1955).[12]

Addendum 2 of the Federal Defendants' Brief is comprised of the Treasury Department's *Fact Sheet* on the "History of 'In God We Trust.'" It begins:

> The motto IN GOD WE TRUST was placed on United States coins largely because of **the increased religious sentiment** existing during the Civil War.

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[11] *Aronow*, 432 F.2d at 244 (n.3), mentions neither of the congressional reports which – although cited by Defendants – point to the unquestionably religious nature of the "In God We Trust" verbiage (*i.e.*, H.R. Rep. No. 1106, 60th Cong., 1st Sess. 1 (1908) and H.R. Rep. No. 662, 84th Cong., 1st Sess. 4 (1955)). Of course, reference to the Treasury Department's *Fact Sheet*, *Br. FGA*, Addendum 2, was also absent in the 1970 *Aronow* decision.

[12] *Br. FGA* at 6-7. It is difficult to understand why Defendants (or Congress) would use pre-Fourteenth Amendment state coins to justify the federal government's claiming that "In God We Trust." This case involves only the federal government, which has never been permitted to enact laws that even **respect** religious establishments.

*id*. (emphasis added), and it reminds the reader that the motto originated when a "**Minister of the Gospel**" requested "the **recognition of the Almighty God** in some form on our coins." *Id*. The same "Fact Sheet" – again, provided by Defendants themselves – noted that Treasury Secretary Chase intended for "**[t]he trust of our people in God** [to be] declared on our national coins." *Id*. (emphasis added).

Plaintiff won't reiterate here the myriad other similar facts demonstrating that "In God We Trust" was meant to be what the words reveal: a purely religious phrase with purely religious effects. *See EOR* 131-47. He will, however, address Defendants' citation to *United States v. Sanchez-Lopez*, 879 F.2d 541, 548 (9th Cir. 1989), claiming that "Plaintiff ... cannot employ the 2006 Senate resolution and the presidential proclamation" (further showing the religious nature of "In God We Trust") because "[t]he record for purposes of an appeal consists only of the facts that were before the district court." *Br. FGA* at 29 (n.11). Like intervening judicial opinions, these governmental expressions by the other two coequal branches are supplemental authorities, which Plaintiff may cite. FRAP 28(j).

**(F) "In God We Trust" fails every Establishment Clause test**

Defendants write that "the motto is consistent with every test the Supreme Court has applied in Establishment Clause cases." *Br. FGA* at 25. As their own "analyses" reveal, this is patently incorrect.

### (1) Defendants' "Neutrality" analysis is essentially nonexistent

Although the Supreme Court has deemed neutrality to be the "touchstone" of Establishment Clause jurisprudence, *McCreary County v. ACLU*, 125 S. Ct. at 2733, the federal Defendants spend a grand total of three sentences discussing it. *Br. FGA* at 44. Furthermore, in not one of those sentences is there even the most remote support for the heading they place before their prose: "The Motto is Consistent with the Neutrality Principle."[13]

Apparently recognizing the futility in attempting to suggest that "In God We Trust" is religiously neutral, Intervenor-Defendant Pacific Justice Institute chooses an alternative route. It makes the incredible assertion that the neutrality analysis "should not be followed in this Circuit." *Br. PJI* at 24.

These approaches are understandable inasmuch as the argument that "In God We Trust" is neutral between the two religious views – *i.e.*, (1) there exists a benevolent God who warrants the trust of our nation, and (2) God is a myth – is ludicrous. In no way does the motto accord with the neutrality "touchstone" of the Supreme Court's Establishment Clause analysis.

[13] Defendants' assertion that "In God We Trust" is "facially neutral," *Br. FGA* at 56, perhaps explains their remarkable thesis.

### (2) To conclude that "In God We Trust" does not endorse Monotheistic religion, is to render the Endorsement Test meaningless

Defendants claim that referring to the motto as "an endorsement of religion" is an "erroneous premise." *Br. FGA* at 13. Plaintiff has already detailed how the motto (and its use on the money) fails the endorsement test upon any honest review of its "text, legislative history, and implementation." *AOB* at 40-42. Moreover, if "In God We Trust" is not an endorsement of a religious idea, what could possibly be one? Certainly there is no constitutional difference between that phrase and "In Jesus We Trust," "In Protestantism We Trust, "In Mohammed We Trust," "In Sung Myung Moon We Trust" or any other similar claim. Would anyone seriously contend that any of these latter phrases – as the nation's sole official motto, no less – was not an endorsement of the corresponding religious claim? The argument is too fatuous to fathom.

Defendants' litany of examples of governmental espousals of Monotheism, *Br. FGA* at 38-42 and *Br. PJI* at 12, does not help their case. To begin with, this is the nation's sole official motto, proclaiming "In God We Trust" to be the nation's "guiding principle." *EOR* 171. That sets it distinctly apart from those other examples.

Furthermore, the establishment effect of the motto is increased, not mitigated, by the Monotheistic milieu that has been created. Plaintiff respectfully

requests the Court to read Defendants' prose with "Jesus" replacing "God" in each espousal. Surely the corresponding version of 36 U.S.C. § 302 – *i.e.*, "'In Jesus We Trust' is the national motto" – would be a law "respecting an establishment" of Christianity. Why that argument fails when "God" (rather than "Jesus") is employed has no constitutional explanation.

By a three to one margin, Americans believe that "In God We Trust" endorses a belief in God. *EOR* 276-77. Thus, the motto "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community," *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). This demonstrates the endorsement effects – and the forbidden nature – of its use.

**(3) Defendants' Lemon analysis is deeply flawed**

With the *Lemon* test recently upheld, *McCreary County v. ACLU*, 125 S. Ct. 2722, 2734-37 (2005), Defendants assert that "the motto serves the permissible secular purpose of acknowledging the religious heritage and character of our Nation." *Br. FGA* at 45. They do this by noting that the *Aronow* Court found that the motto "has 'spiritual and psychological value,'" and by referring to the Tenth Circuit's contention in *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996), *cert. denied*, 517 U.S. 1211 (1996), 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." *Br. FGA* at 45.

The purpose prong, however, does not look to reasons that can be "invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). On the contrary, "in determining the legislative purpose of the statute, the Court has ... considered ... the specific sequence of events leading to [its] passage." *Edwards v. Aguillard*, 482 U.S. 578, 594 (1987). As with the statute in *Wallace v. Jaffree*, 472 U.S. 38, 78 (1985) (O'Connor, J., concurring), "candor requires us to admit that this ... [motto] statute was intended to convey a message of state encouragement and endorsement of religion."

Defendants also write that the "secular effect" of the motto is "promoting unity, patriotism, and an appreciation for the values that define the Nation." *Br. FGA* at 47. Yet – as the Framers recognized – having the government taking a religious position fractures unity, as cases such as this corroborate.

To argue that trusting in God is a key to "patriotism" is to say, in essence, that no Atheist can be patriotic. That hardly seems in keeping with the ideals of the First Amendment. What is truly "patriotic" is not violating those ideals.

Lastly, for government to say that Monotheism is one of "the values that define the Nation" is, in essence, to establish Monotheism as the national religion.

This is the heart of an Establishment Clause violation (which, it should be recalled, does not require an establishment, but only a law **respecting** an establishment).

The purpose of placing "In God We Trust" on our coins and turning that phrase into our nation's motto was exactly as is manifest in its four words: to make the purely religious claim that "we" – as a nation – adhere to one purely religious view: there exists a God in whom we trust. That violates *Lemon*.

**(4) The motto fails the Coercion test**

The Coercion test is also violated in this case. Coercion – actually a measure of Free Exercise infringements – "is not necessary to prove an Establishment Clause violation, [but] it is sufficient." *Lee v. Weisman*, 505 U.S. 577, 604 (1992) (Blackmun, J., concurring). Defendants properly define the test: "coercing people to engage in unwanted religious activity," *Br. FGA* at 49, but then revert to their "We, the government actors, will tell you what is or isn't religious" mode to argue that coercion doesn't exist.

If pledging allegiance (**without God**) to a flag is religious activity, *West Virginia v. Barnette*, *supra*, then bearing "In God We Trust" on one's person must be such as well. Plaintiff has little choice but to carry money bearing this phrase. *Br. FGA* at 19 ("[E]ncounters with the national motto [by] us[ing] ... coins and currency [are] ... common to all Americans."). Thus, the Coercion test is violated.

### (G) It is religion – not "history," "tradition," or "heritage" – that the motto exists to promote

Referencing the words literally one hundred (100!) times within their two briefs, Defendants claim their Herculean efforts to keep "In God We Trust" as the motto stem from concerns about "history," "tradition," and "heritage." Yet, in other instances, Congress often disregards those concerns. The 104th Congress, for instance, abolished the position of doorkeeper,[14] which had been in continual existence since the Continental Congress.[15] Additionally, as already noted, the *de facto* motto, "E Pluribus Unum" – with as rich a history, etc., as is imaginable, *EOR* 170 (FAC ¶ 285) – was replaced without protest. Claims of "history," "tradition," and "heritage," therefore, are mere ploys to divert the Court's attention from the desire to espouse Monotheism that everyone knows is really behind these efforts.

### (H) Solemnization does not require God, and God does not solemnize for non-believers

Perhaps the best demonstration that the motto is a "law respecting an establishment of religion," is given by Intervenor-Appellee PJI. There, where "In God We Trust" is analogized to animal sacrifice and worship of Caesar, *Br. PJI* at

[14] Pub. L. No. 104-186, 110 Stat. 1718 (Aug. 20, 1996).
[15] *See*, *e.g.*, Journals of the Continental Congress, vol. 10, p. 113 (Tuesday, February 3, 1778).

15, it is asserted that "American ideals" include belief in God, *Id*., at 16-17, and that this purely religious notion is what "America believes." *Id*., at 18. To PJI, the motto reflects and "promotes" this dogma. *Id.*, at 19.

PJI further demonstrates that the motto violates the Establishment Clause by maintaining that "solemnizing" can only be accomplished by references to God. *Id*., at 14 *et seq*. As noted, this claim has been specifically disputed in the Supreme Court. *Allegheny County*, 492 U.S. at 673-74 (Kennedy, J., dissenting). Moreover, the very assertion affirms the Framers' view that religion fuels myopia. God no more solemnizes occasions than does Jesus, Mohammed, the Pope or David Koresh. For some people, God provides solemnization; for others, God does no such thing. In fact, to some, God can even be offensive, and denigrates public occasions. "In the realm of religious faith ... the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

PJI asserts that "the national motto reflects ideals that are positive," *Br. PJI*, at 20, and that's why "In God We Trust" is different from "In White Superiority We Trust." But that's the whole point: America in the past thought White Superiority was a "positive" ideal, just as PJI today believes is the case for God. That God is positive ... or negative or anything else (except a religious entity about which people hold differing opinions) ... is precisely what the Establishment Clause precludes from government advocacy.

## III. PLAINTIFF HAS STANDING

### (A) By statute, Plaintiff has standing for his RFRA claim

Standing for Plaintiff's RFRA claim is provided by statute. 42 U.S.C. § 2000bb-1(c). Defendants have not argued otherwise.

### (B) Plaintiff has standing for his Establishment Clause claims

#### (1) Plaintiff has suffered injuries-in-fact

Defendants correctly cite Supreme Court cases for the proposition that "plaintiff's mere allegation that he is offended by the motto does not give him standing to challenge it." Br. FGA at 15. Thus, those cases "remin[d] the federal courts that only concrete, personalized injury – not an abstract, generalized grievance – suffices to confer standing." *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004).[16]

Unlike in the cited cases, Plaintiff here has alleged the necessary "concrete, personalized injur[ies]." Regarding the motto statute, 36 U.S.C. § 302, Plaintiff has personally suffered the stigmatic injury[17] which the Supreme Court has clearly

[16] Expressed alternatively, "The problem was not the nature of 'the psychological consequence' plaintiffs experienced in observing 'conduct with which [they] disagreed,' but the absence of any personal injury at all." *Id*.

[17] Plaintiff has shown that he, personally, has been affected by the stigma that has resulted from the Defendant's acts. *EOR* 233, 236 and 238 (FAC Appendix I, ¶¶ 9-14, 33-36, 54).

stated suffices for standing. "[S]tigmatizing members of the disfavored group ... can cause serious noneconomic injuries." *Heckler v. Mathews*, 465 U.S. 728, 739 (1984). "There can be no doubt that this sort of noneconomic injury ... is sufficient in some circumstances to support standing. *Allen v. Wright*, 468 U.S. 737, 755 (1984).

In regard to the motto on the nation's money, Plaintiff personally handles coins and currency and confronts the offensive verbiage all year round. Surely this occurs far more often than the episodic confrontations suffered by the plaintiffs in *Lynch v. Donnelly* and *Allegheny County* (where the Supreme Court obviously found that standing existed), and during the two weeks per year that the menorah was erected in *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (*en banc*).

**(2) Plaintiff's injury is personalized**

Defendants claim that "plaintiff's encounters with the national motto ... are not particularized, but common to all Americans." *Br. FGA* at 19. Yet, "standing is not to be denied simply because many people suffer the same injury." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). If the money were radioactive, for instance, and each person who handled it became ill, then everyone – suffering a "concrete, personalized injury" – would have standing.

Moreover, the injury in this case is not one "common to all Americans." Plaintiff's injury is being forced to confront, carry and espouse a religious message contrary to his personal religious beliefs. Because the vast majority of Americans believe in God, *EOR* 240-47, this injury is actually suffered by relatively few.

**(3) Plaintiff's injury is redressable**

Defendants' contention that Plaintiff's injury is not redressable is countered by the recent District Court decision in *Am. Council of the Blind v. Paulson*, 2006 U.S. Dist. LEXIS 86610 (D.D.C. 2006). *Paulson* involved a Rehabilitation Act claim brought by visually impaired individuals seeking to have the various denominations of the nation's currency bills produced in ways that can be distinguished by feel. The Court ruled that instituting the requisite changes will redress the injury.

**(C) Collateral Estoppel does not apply in this case**

Defendants maintain that Plaintiff is collaterally estopped from raising his claims here because he previously challenged[18] having Christian chaplains (who ask the nation to pray, for example, "in the name that's above all other names,

[18] *Br. FGA* at 22-24 (citing *Newdow v. Bush*, 2004 WL 334438 (9th Cir. 2004) and *Newdow v. Bush*, 391 F. Supp. 2d 95, 100 (D.D.C. 2005)).

Jesus the Christ"[19]) at presidential inaugurations. Aside from the fact that those cases also involve the Establishment Clause, there are no facts sufficiently similar to invoke collateral estoppel. *See*, *e.g.*, *Blackfoot Livestock v. Dept. of Agriculture*, 810 F.2d 916, 922 (9th Cir. 1987) (party "may not rely on collateral estoppel because the factual issues litigated were different from those in the present case"); *Black Constr. Corp. v. Immigration & Naturalization Service*, 746 F.2d 503, 504-05 (9th Cir. 1984) (collateral estoppel unavailable where there are "different factual findings in the two cases.").

Additionally, this claim was never raised in the lower court, and "a party generally forfeits an affirmative defense by failing to raise it." *Arizona v. California*, 530 U.S. 392, 409 (2000) (specifically discussing collateral estoppel).

[19] Prayer given at the 2001 inauguration of President Bush. 147 Cong. Rec. S422-23 (January 22, 2001).

## CONCLUSION

"An important aspect of a person's full participation in today's society is being able to conveniently and confidentially exchange currency in everyday transactions." *American Council of the Blind v. Paulson*, Memorandum Order, November 28, 2006 (D.C.D.C.) at 9 (citing study by National Academy of Sciences). The government of the United States has interfered with Plaintiff's ability to fully participate – especially in regard to his religious activities – by placing completely unnecessary and purely religious words on that currency (as well as on the nation's coins). This violates RFRA and the Establishment Clause. Plaintiff respectfully requests this Court to do as the lower court did in *Paulson*, and (1) declare that the current manufacture of the nation's money does not comport with the law of the land, and (2) require that a remedy be instituted.

**SIGNATURE PAGE**

**Case No. 06-16344**

December 21, 2006 _____

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## CERTIFICATE OF TYPE SIZE AND STYLE

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

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December 21, 2006 _____

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**CERTIFICATE OF SERVICE**

**CASE NO. 06-16344**

I HEREBY CERTIFY that on this 21st day of December, 2006, true and correct copies of the PLAINTIFF-APPELLANT'S REPLY BRIEF were delivered by e-mail to the following individuals:

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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.

December 21, 2006 _____

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(New, 12-01-02)

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