CASE NO. 06-16344

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REV. DR. MICHAEL A. NEWDOW,

Plaintiff-Appellant, pro se,

v.

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

Defendants-Appellees,

PACIFIC JUSTICE INSTITUTE,

Defendant-Intervenor-Appellee

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

PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC

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STATEMENT REQUIRED BY FRAP 35(b)(1)

(I) This proceeding involves three questions of exceptional importance:

A. May the federal government use as **the national motto (**placed on every coin and currency bill) a statement that violates the first ten words of the Bill of Rights, and which would never be permitted against other religious (or racial) minorities? Phrased alternatively, may the federal government declare to be its "guiding principle," EOR 171, a statement that is facially religiously discriminatory, and perpetuates the "political outsider" status of the nation's most stigmatized suspect class?[1] The Supreme Court has described instances of such discrimination (especially within otherwise patriotic exercises) as "matters of great national significance." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

B. Is a three-judge panel precluded from overturning Circuit precedent when that precedent is recognized to have been established in an unconstitutional manner?

[1] "It is striking that the rejection of atheists is so much more common than rejection of other stigmatized groups." Edgell P, Hartmann D, and Gerteis J. *Atheists as "other": Moral Boundaries and Cultural Membership in American Society*. American Sociological Review, Vol. 71 (April, 2006) at 230.

C. In a Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*, claim, may a court ignore a plaintiff's religious interpretation of a facially (and historically) religious governmental action, even if Circuit precedent says otherwise for Establishment Clause purposes?

(II) The panel decision conflicts with existing case law in two ways.

A. The panel claimed it was required to give precedential effect to *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), a case in which jurisdiction was clearly lacking. Yet, moments earlier, the same panel ruled that it was precluded from giving precedential effect to such a case. *Newdow v. Rio Linda USD*, Nos. 05-17257, 05-17344, 06-15093, ___ F.3d ___ (9th Cir. 2010), slip op. at 3928.

B. *Aronow*'s underlying theory was "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." 432 F.2d at 243 (emphasis added). An analysis of the Supreme Court's post-1970 cases quickly demonstrates that this theory conflicts with the high court's jurisprudence. *Aronow*'s holding is also in conflict with any reasoned application of the Supreme Court's myriad Establishment Clause tests.

In view of the foregoing, it is not surprising that the panel decision (Appendix E) conflicts with Ninth Circuit case law as well. A claim that "In God We Trust" is a permissible national motto (that can be placed on every coin and currency bill) is completely incompatible with, for example, *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009).

Consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions.

INTRODUCTION

This case involves Establishment Clause and RFRA challenges to the national motto of the United States, "In God We Trust,"[2] as well as its inscription on the nation's coins and currency. The panel held that "our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), forecloses both claims," op. at 4200, because "we, as a three-judge panel, are without authority to 'overrule a circuit precedent; that power is reserved to the circuit court sitting en banc.' *Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007)." Op. at 4206.

Because that precedent (i) infringes upon the rights of millions of individuals within a "suspect class," (ii) resulted from a case brought by a sole unskilled *pro se*

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

plaintiff who not only provided skeletal pleadings determined to be "unintelligible" by the District Court, but who was determined to lack standing, (iii) was established prior to the formulation of the present Establishment Clause tests, and (iv) is in conflict with all of those tests (and, accordingly, with the constitutional principles they seek to reflect), Plaintiff respectfully requests the circuit court sitting en banc to exercise "that power."

ARGUMENT

(I) QUESTIONS OF EXCEPTIONAL IMPORTANCE

A. May the Government Officially Discriminate Against Atheists?

Twenty years after *Aronow* was decided, the Supreme Court wrote 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). In what may be the greatest of such controversies – i.e., the debate as to the existence or non-existence of God – it is impossible to seriously argue that the government has not lent its power to the side that says God exists when it declares (as its national motto, no less) that "In God We Trust."

Consideration of analogous claims corroborates this. If the divinity of Jesus were as central and divisive an issue in our nation, would anyone even suggest that "In Jesus We Trust" comports with the Establishment Clause?

Would "In Protestant Christianity We Trust" be permitted? After all, during the founding era, Catholics (as a small religious minority[3] that was generally despised[4]) were treated like Atheists are treated today. Every one of the original thirteen colonies, at one point or another, had a legal provision denigrating the rights of Catholics.[5] The 1765 Resolutions of the Stamp Act Congress described the colonists as "inviolably attached to the present happy establishment of the Protestant succession."[6] Signed by George Washington and John Adams (among others), the 1774 Articles of Association spoke of "the Protestant colonies" and their concerns about the "wicked ministry" (i.e., Catholicism) being established in Canada.[7] A year later, the Declaration of the Causes and Necessity of Taking Up Arms described Catholic government as "a

[3] "Even as late as 1785, when the new United States contained nearly four million people, there were scarcely more than 25,000 Catholics." Ellis, John Tracy. *American Catholicism*. (Chicago: University of Chicago Press; 1969), p. 21.
[4] "Much of the fear and hatred of Catholics in England during [the founding of the American colonies] found its way across the Atlantic." Kaminski, John P. *Religion and the Founding Fathers*. Newsletter of the National Historical Publications and Records Commission (NHPRC), Vol. 30:1 (March 2002). Accessed at the NHPRC website on 02APR10 at http://www.archives.gov/nhprc/annotation/march-2002/religion-founding-fathers.html.
[5] Pyle, Ralph E. and Davidson, James D. *The Origins of Religious Stratification in Colonial America*. 42 Journal for the Scientific Study of Religion 57 (2003), at 66-68 (where "Catholics excluded from office," "Catholics disenfranchised," "Officeholders must take anti-Catholic oaths," "Toleration of all Christians except Catholics," "Toleration of all except Catholics," etc., are among the listings).
[6] Accessed at http://avalon.law.yale.edu/18th_century/resolu65.asp on 02APR10.

despotism dangerous to our very existence."[8] Even the Declaration of Independence includes (among the "repeated injuries and usurpations" perpetrated by King George III) the support of Catholicism in neighboring Canada.[9] In fact, in its 1778 Constitution, South Carolina went so far as to declare that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State."[10] *See also Zelman v. Simmons-Harris*, 536 U.S. 639, 720 (2002) (Breyer, J., dissenting).[11]

Surely, no Catholic judge would ever find "In Protestant Christianity We Trust" to comport with the Establishment Clause. Similarly, no Atheist judge would ever find that for "In God We Trust." Thus, what the Supreme Court

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[7] Accessed at http://avalon.law.yale.edu/18th_century/contcong_10-20-74.asp on 02APR10.
[8] Accessed at http://avalon.law.yale.edu/18th_century/arms.asp on 02APR10.
[9] Referencing the Quebec Act, the Declaration decried the "arbitrary Government" and "absolute Rule" of the papal system "in a neighbouring Province."
[10] South Carolina Constitution of 1778, Article XXXVIII accessed at http://avalon.law.yale.edu/18th_century/sc02.asp on 02APR10.
[11] For a full exegesis on colonial America's anti-Catholicism, see Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?* 38 CAP. U. L. REV. ___ (2010); Available at https://culsnet.law.capital.edu/LawReview/NewdowCULRVol38.pdf and at SSRN: http://ssrn.com/abstract=1594374.

called "intolerable," i.e., "bias … according to the religious and cultural backgrounds of its Members," *County of Allegheny v. ACLU*, 492 U.S. 573, 614 n.60 (1989), is precisely what is seen in this case.

There is also the matter of strict scrutiny. *Smith*, 494 U.S. at 886 n.3 ("Just as we subject to the most exacting scrutiny laws that make classifications based on race ... so too we strictly scrutinize governmental classifications based on religion." (Citations omitted)). "In God We Trust," therefore, must serve some compelling interest. *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("[O]nly a compelling state interest … can justify limiting First Amendment freedoms."). Moreover, "[t]he burden of justification is demanding and it rests entirely on the State." *United States v. Virginia*, 518 U.S. 515, 533 (1996).

No compelling interest has ever even been suggested, much less proven, for choosing "In God We Trust." All that exists are non-compelling excuses "invented post hoc in response to litigation." *Id*. After all, the nation's money functioned perfectly well for nearly a century with only "Liberty" as the inspirational inscription. EOR 131-32. From 1864 (when the first coin was minted with "In God We Trust," EOR 135) through 1955 (when that inscription became mandatory, EOR 143), only the religious suggested that the Monotheistic money served the country better than the money adhering to the design approved by the First Congress.

For those contending the harms are insignificant:

> The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial. The Court has not required proof of "substantial" concrete harm with other forms of discrimination, see, e.g., *Brown v. Board of Education*, 347 U.S. 483, 493-495, 98 L. Ed. 873, 74 S. Ct. 686 (1954).

Locke v. Davey, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). *Aronow* has been subjecting millions of Atheists to "profound" indignity for forty years, and – unless reversed by the en banc panel – will continue this indignity upon millions more yet unborn.

Justice Scalia's citation to *Brown* warrants special attention, for the instant case mirrors the well-known history of that "landmark decisio[n which] arose in response to the continued exclusion of [a minority] from the mainstream of American society," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 (1978). Just as it took judicial intervention in *Brown* to end "discrimination by the 'majority' whites against the Negro minority," *id*., judicial intervention is needed here to end discrimination by the majority Monotheists against Atheists.

To be sure, because religious beliefs are not physically apparent, the exclusion and discrimination of Atheists has been more subtle (though more explicit) than it was for blacks. But the exclusion and discrimination is no less real, and just as "In Our White Heritage We Trust" would violate "the equality

which ought to be the basis of every law,"[12] so does the current motto. More importantly for the purposes of this Petition, no one would ever accept that "'In [Our White Heritage] We Trust' has nothing whatsoever to do with the establishment of [a racial preference,] ... is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a [race-related] exercise." *Aronow*, 432 F.2d at 243.

Although many have extolled the virtues of *Brown*, Plaintiff submits that condemning the odious decision in *Plessy v. Ferguson*, 163 U.S. 537 (1896) is a more apt way to review the nation's equal protection jurisprudence. *Aronow* is this Circuit's *Plessy*, and, like *Plessy*, it "was wrong the day it was decided." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 863 (1992). In fact, *Aronow* is worse; *Plessy* at least involved facial neutrality and equality. There is no "separate but equal" motto for Atheists. There is only "In God We Trust" – a statement contrary and offensive to Plaintiff's religious views.

B. Is Precedent Binding When Established Unconstitutionally?

"The federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the

[12] Madison J. *Memorial and Remonstrance Against Religious Assessments*, as provided in the Appendix to *Everson v. Board of Education*, 330 U.S. 1, 66 (1947).

jurisdictional] doctrines.'" *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (citation omitted). As Appendix A reveals, *Aronow* showcases the theory behind this statement. The plaintiff there obviously lacked the skill set "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). Thus, *Aronow* merits a reevaluation to ensure that the millions of Atheists within this Circuit – now and in the future – will not continue to be wrongfully bound by its result.

The *Aronow* District Court found that "[t]he complaint fails to demonstrate that plaintiff has any standing to maintain this action." Appendix B at 1-2. Thus, its (and the Ninth Circuit's) opinion was rendered using "hypothetical jurisdiction." However, as the instant panel noted, op. at 4208:

> The Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), decided after *Aronow*, invalidated the practice of "hypothetical jurisdiction"—i.e., assuming jurisdiction for the purpose of deciding the merits of a case. *Id.* at 93-94. After *Steel Co.*, a court cannot do what the *Aronow* court did: address the merits of a case without ensuring it has jurisdiction over the case.

Again, Appendix A highlights the rectitude of *Carr* and *Steel Co.* In a complaint the District Court found to be "unintelligible," Appendix B at 1, one sees virtually no legal argument, nor any of the critical history demonstrating the purely religious background of "In God We Trust." *Cf.* EOR 132 (revealing

that a "minister of the gospel" wrote to the Secretary of the Treasury, stating "You are probably a Christian," and seeking "the recognition of Almighty God" on the nation's coins.); EOR 133 (noting the Secretary's response: "The trust of our people in God should be declared on our national coins."); EOR 134 (quoting the Mint Director's official 1863 Annual Report: "We claim to be a Christian nation," and "Our national coinage … should declare our trust … in Him who is the 'King of Kings and Lord of Lords.'").[13]

To be sure, the instant panel was correct when it wrote "the Supreme Court in *Steel Co.* did not overturn the holdings of every case that had been decided using the 'hypothetical jurisdiction' approach." Op. at 4208. However, the leap the panel then took – i.e., that "*Aronow*'s failure to address whether the plaintiff had standing does not undermine the precedential value of its holding," *id*. – completely contradicts the very same panel's holding in *Newdow v. Rio Linda USD*, Nos. 05-17257, 05-17344, 06-15093, ___ F.3d ___ (9th Cir. 2010), slip op. at 3928, decided moments earlier:

> Because the Supreme Court held the *Newdow III* court erred by deciding the Establishment Clause question, *Newdow III*'s holding on that question is not precedential. To hold otherwise would give precedential effect to the

[13] Limitations of space prevent Petitioner from detailing the remainder of the purely religious underpinnings of the motto. The reader is encouraged to review the thunderous cascade of examples supplied to the panel. EOR 132-47. *See also* the many Complaint Appendices at EOR 177-308.

> determination of an issue that should never have been decided.

Just like *Newdow III*, *Aronow* "should never have been decided." Thus, the "general rule [that] we, as a three-judge panel, are without authority to 'overrule a circuit precedent,'" op. at 4206 (citation omitted), is inapplicable. *Aronow* is no more "circuit precedent" than *Newdow III*, because *Aronow* – like *Newdow III* – "erred by reaching the merits of the case." *Rio Linda*, slip op. at 3928.[14]

Additionally, *stare decisis* is inappropriate if the issue "has never received full plenary attention." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 478 n.20 (1979). The "unintelligible" advocacy of the unskilled pro se *Aronow* plaintiff brought anything but "full plenary attention" to the issues. In combination with the above, it is obvious, again, that *Aronow* is not precedential.

[14] The claim that "*Steel Co.* held only that courts may not decide cases using that approach in the future," op. at 4208, is rather disingenuous. The issue is simply whether a decision rendered without standing is precedential. In 1970, the lower courts were fully informed that "the question of standing goes to [a] Court's jurisdiction," *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and that "no justiciable controversy is presented … when there is no standing to maintain the action." *Flast v. Cohen*, 392 U.S. 83, 95 (1968).

C. May a Court Apply an Establishment Clause Finding That a Facially Religious Phrase is Non-Religious to a RFRA Claim?

Aronow was a pure Establishment Clause case: "The complaint fails to state any claim upon which relief can be granted **under the 'establishment clause'** of the First Amendment." Appendix B at 2, ¶ 7 (emphasis added). Thus, even if the panel, in the Establishment Clause context, was correct to ignore the mountain of material demonstrating that the motto reflects its Monotheistic text, there is no basis for extending that approach to Plaintiff's RFRA claim. In 1970, RFRA was still more than two decades in the future, and *Aronow* never addressed the Free Exercise issues upon which RFRA is based.

"Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause." *Tilton v. Richardson*, 403 U.S. 672, 677 (1971). Inasmuch as religiosity "is not to turn upon a judicial perception," *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981), that "internal tension" includes the fact that, in a Free Exercise case, "[t]he … conviction that counts is that of the plaintiff, not that of the court." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1297 (11th Cir. 2007) (referencing *Thomas*). "Repeatedly and in many different contexts, we have warned that courts must not presume to determine ... the plausibility of a religious claim." *Smith*, 494 U.S. at 887. Thus, even if courts are somehow permitted to declare that religious verbiage is nonreligious

in the realm of the Establishment Clause,[15] they are prohibited from doing so for RFRA purposes. If Plaintiff says "In God We Trust" means (to him) what it says, the Court is obligated to take him at his word.

This is especially true when "the term 'religious exercise' includes **any** exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7)(A)) (emphasis added). The panel, therefore, was wrong to contend that the bizarre Establishment Clause holding of *Aronow* "forecloses the central premise of Newdow's RFRA Claim." Op. at 4210. If this circuit claimed "'Jesus is Lord'[16] "has nothing whatsoever to do to do with the establishment of religion," RFRA would still protect objecting rabbis from having to bear that message. Similarly, priests would be protected from bearing "Abhor the Whore of Rome,"[17] even if this circuit found that vile governmental pronouncement constitutional. Atheistic ministers deserve the same protection in regard to "In God We Trust."

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[15] *But see New York v. Cathedral Academy*, 434 U.S. 125, 133 (1977) ("The prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment.").

[16] *See* United States Constitution, Article VII.

[17] *New England Primer, or, An easy and pleasant guide to the art of reading: Adorned with cuts; to which is added, the Catechism*. (Boston: Massachusetts Sabbath School Society; 1843) p. 25.

(II) CONFLICTS WITH EXISTING CASE LAW

A. Conflict Regarding Circuit Precedent

As noted at page 11, *supra*, the instant panel contended that *Aronow* is binding precedent despite acknowledging that the *Aronow* court lacked jurisdiction. This obviously conflicts with the holding in *Rio Linda USD*, slip op. at 3928, that a court may not "give precedential effect to the determination of an issue that should never have been decided."

B. Conflict Regarding the Establishment Clause

(1) Conflict With the Supreme Court's Establishment Clause Case Law

Aronow's assertion "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," 432 F.2d at 243 (emphasis added) (s*ee also* op. at 4206), is patently inconsistent with the Supreme Court's post-1970 case law. Since *Aronow*, the high court has issued over 4,000 decisions, of which 121 (3%) mention the Establishment Clause and nine (less than 0.25%) contain "In God We Trust." Appendix D at D1-D5. Of those nine, the Establishment Clause was key in seven. *Id* at D6.

Only in two cases was "In God We Trust" mentioned without any explicit reference to the Establishment Clause. *Id*. One had the phrase

merely as a reference to a party's submission. *Id.* at D7. In the other, "In God We Trust" was mentioned regarding the proposition that the words "impinge upon the First Amendment rights of an atheist." *Id.* at D8. Thus, in 100% of the eight cases where "In God We Trust" was raised *sua sponte* by one or more justices, Establishment Clause concerns were implicated. One need not be a statistician to recognize that "nothing whatsoever" does not accurately depict the high court's approach to the relationship between the motto and that constitutional provision.

Aronow also conflicts with the Supreme Court's Establishment Clause tests. Government claiming "In God We Trust" obviously violates "[t]he touchstone for our analysis [which] is the principle that the 'First Amendment mandates governmental neutrality … between religion and nonreligion.'" *McCreary County v. ACLU*, 545 U.S. 844, 860 (2005) (citation omitted). **This principle has been repeated in the majority opinions of thirty separate religion clause cases.** AOB Appendix C.

In this Circuit, the test formulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) "remains the benchmark to gauge whether a particular government activity violates the Establishment Clause." *Access Fund v. United States Dep't of Agric.*, 499 F.3d 1036, 1042 (9th Cir. 2007). Under *Lemon*, "[t]he Establishment Clause … prevents [the government] from

enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion." *Zelman v. Simmons-Harris*, 536 U.S. at 648-49. That the purpose of "In God We Trust" was to advance belief in God is not only facially incontrovertible, but was explicitly stated throughout the history of the phrase's creation and implementation. *See* at page 10, *supra*. Congress itself proclaimed that the words "witness our faith in Divine Providence."[18]

That the motto has "no theological … impact," *Aronow*, 432 F.2d at 243, is clearly false, as has been shown (without any rebuttal evidence from Defendants) in a commissioned survey, EOR 272-77; in the outlandish discrimination perpetrated by a Ninth Circuit District Court judge, EOR 278-92; in the books, leaflets, etc., that pervade our culture, EOR 293-305; and in the words of our present congressmen, congressional chaplains, and presidents. EOR 306-08; AOB 39-40. As President Bush proclaimed (commemorating the motto's 50th anniversary), "these words ... recognize the blessings of the Creator … [and lead Americans to] continue to seek His will."[19]

[18] 84th Cong., 1st Sess., House Doc. 234 at 5. *The Prayer Room in the United States Capitol*. (USGPO: Washington, DC; 1956).
[19] Note "**the** Creator" and "**H**is will." Accessed 13APR10 at http://georgewbush-whitehouse.archives.gov/news/releases/2006/07/20060727-12.html.

"In God We Trust" facially endorses the controversial, purely religious notion that there exists a God whom Americans embrace. Thus, the "endorsement test" was violated when Congress replaced the all-inclusive "*E Pluribus Unum*" with the divisive new phrase. As the official national motto, the words turn Atheists into "outsiders, not full members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). Moreover, the "imprimatur of state approval," *Zelman*, 536 U.S. at 650, is obviously placed on belief in a Supreme Being when the government's "power, prestige and financial support," *Engel v. Vitale*, 370 U.S. 421, 431 (1962), is used to further that claim.

(2) Conflict With the Ninth Circuit's Establishment Clause Case Law

In *Nurre v. Whitehead*, 580 F.3d 1087, 1090 (9th Cir. 2009), a private party chose a musical composition ("Ave Maria") to be played at a high school graduation. This Circuit found that the desire of government "to avoid a collision with the Establishment Clause" outweighs such an individual's Free Speech right. In fact, merely because "it could be seen as endorsing religion," *id.*, *Nurre* found that the government's non-establishment interest sufficed.

> Six months later, this panel completely contradicted *Nurre*. Even though there is no conflicting interest in this case; even though the government (not a private party) chose the religious content; even though the government itself (not as a facilitator for an individual) does the speaking; and even though explicitly religious words comprising the entirety of **the nation's official motto** (as opposed to high school music, played with no lyrics at all) were at issue; the panel upheld a forty-year-old precedent permitting the government to claim "In God We Trust." Certainly, this "could be seen as endorsing religion" far more powerfully than the instrumental music (open to any interpretation) in *Nurre*.

CONCLUSION

A legally untenable conclusion rendered in a forty year-old case in which a plaintiff lacking standing provided an "unintelligible" complaint should not persist as binding precedent, especially when the precedent infringes upon fundamental constitutional rights belonging to millions within a "suspect class." This case "of great national significance" cries out for panel rehearing or for rehearing en banc.

Respectfully submitted,

April 22, 2010

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Plaintiff-Appellant, *in pro per*
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CERTIFICATE OF COMPLIANCE

(Form 11 Equivalent)

CASE NO. 06-16344

I certify that pursuant to Circuit Rule 40-1, the attached Petition for Panel Rehearing or for Rehearing En Banc is proportionately spaced, has a typeface of 14 points or more and contains no more than 4,200 words.

According to Microsoft Word's "Statistics," this document – excluding the Cover Page, Table of Contents, Table of Citations, Signature Page, Appendices, (this) Certificate of Compliance, and Certificate of Service – contains 4,198 words.

April 22, 2010

s/ - Michael Newdow

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CERTIFICATE OF SERVICE

CASE NO. 06-16344

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC** was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 22nd day of April, 2010. Assumedly, counsel for all parties (registered CM/ECF users) will be automatically served by the system.

April 22, 2010

s/ - Michael Newdow

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LIST OF APPENDICES

APPENDIX A

Complaint of Stefan Ray Aronow, September 18, 1968

(amended September 19, 1968)

United States District Court
FOR THE

FILED

SEP 18 1968

JAMES P. WELSH, Clerk

STEFAN RAY ARONOW

PLAINTIFF

US

United states, Dean Rusk, Henry Fowler, and The Postmaster General

DEFENDANT

CIVIL ACTION FILE NO 49992

REQUEST FOR A TEMPORARY RESTRAINING ORDER, A PRELIMINARY INJUNCTION, AND A FINAL INJUNCTION; THREE JUDGE COURT

Stefan Ray Aronow
18 Sunnydale Ave
San Carlos, Calif 94070

I

This court gains jurisdiction from U.S code Title 28, section 2282 (June 25, 1948 ch 646, 62 stat 968)

This action arises under the constitution article I, section 8, Parts 5 and 18; and Amendment One, Establishment of Religion Clause; acts of congress ch 303, 69 stat 290 and ch 797, 70 stat 732; U.S code Title 31, section 324(a) and Title 36, section 186

II

The defendants are currently under the color of the law of the United States spending public money for the engraving, printing, and distributing the motto "In God We Trust" on U.S paper currency, coins, stamps, and official documents. They also display "In God

We Trust" the national motto for which public money is being spent on at least the U.S. Code Books printings

Stefan Ray Aronow's religion is founded on the concepts that the universe is the largest entity in existence, that everything is part of the universe, that each thing has a role to play in the universe, and that role is to develope and act within the natural limits of one's being. His system does not include a transcendental deity which is trinitarian in nature

Stefan Ray Aronow feels his religion is being discriminated against and trinitarian Christian religions favored by the Federal government through the laws and practices thereof which establishes this government as trinitarian Christian in nature by adopting as a national motto "In God We Trust" and engraving, printing, and distributing it on U.S paper currency, coin, stamps, or official document. He feels that such laws and practices thereof violate the Establishment of Religion Clause of the First Amendment and are not constitutional powers of Congress. He also wishes to see stopped public money being spent for the propagation of trinitarian Christian religions as opposed to his religion. He believes this act violates

the Establishment of Religion clause of the First Amendment

III

Stefan Ray Aronow asks this court for a temporary restraining order, a preliminary injunction, and a permanent injunction against the U.S. government, Henry Fowler, Dean Rusk, the Postmaster General, their employees, officials, agents, servants, and attorneys enjoining them from engraving, printing, or putting on in any manner in coin, paper currency, stamp, or official document of the United States the motto "In God We Trust" from now on or where necessary as reasonable prudent for the sake of the economy

Stefan Ray Aronow also asks the court for a temporary restraining order, a preliminary injunction, and a permanent injunction against the federal government, their officials, employees, agents, and attorneys enjoining them from using "In God We Trust" as a national motto

Stefan Ray Aronow also asks the court to enter any such orders that fulfills the previous requests or helps to fulfill the previous requests

Stefan R. Aronow

U.S District Court

for the

Northern District of California

Stefan Ray Aronow — Civil Action File No 49992

Plaintiff

vs

U.S., Dean Rusk, Henry Fowler, and the Postmaster General — Amendment to Complaint

Defendent

Stefan Ray Aronow
18 Sunnydale Ave
San Carlos, Calif 94070

The original complaint of Section III, Paragraph One is amended as the following:

... from now on except as being reasonable prudent where necessary for the sake of the economy

Stefan R Aronow

4

APPENDIX B

ORDER of Hon. Lloyd H. Burke

U.S. District Court for the Northern District of California

September 30, 1968

FILED

SEP 30 1968

JAMES P. WELSH, Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

JS 6

STEFON RAY ARONOW,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

CIVIL NO. 49992

ORDER DENYING TEMPORARY RESTRAIN ORDER, PRELIMINARY INJUNCTION, A MOTION FOR THREE-JUDGE DISTRICT COURT AND DISMISSING ACTION

Plaintiff has brought this action apparently seeking injunctive relief against the use of the phrase "In God We Trust as a national motto and to prohibit the use of said phrase on th currency and other documents of the United States. Plaintiff also has moved to convene a three-judge district court;

The Court heard plaintiff concerning his application for interim injunctive relief and considered all documents on file and made the following determinations:

1. The issuance of any temporary restraint or preliminary injunction of the nature prayed for in the complaint would cause severe harm to the defendants and the United States, whereas the denial of such relief would not cause the plaintiff irreparable injury;

2. The complaint fails to state a claim upon which relief can be granted;

3. The complaint is unintelligible;

4. The complaint fails to state any valid basis for this Court to exercise jurisdiction and in fact the Court lacks subject matter jurisdiction;

5. The complaint fails to demonstrate that plaintiff

GPO: 1963—O-713-713

has any standing to maintain this action;

6. The complaint fails to state any claim which would necessitate the convening of a three-judge district court and the Court finds that no substantial constitutiona question concerning any federal statute has been presented;

7. The complaint fails to state any claim upon which relief can be granted under the "establishment clause" of the First Amendment.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's motion to conver a three-judge district court and his application for temporary restraining order and preliminary injunction be and hereby are denied;

IT IS FURTHER ORDERED that the complaint and action be and hereby are dismissed in their entirety.

Dated: Sept. 30, 1968

UNITED STATES DISTRICT COURT

GPO: 1983—O-713-713

2.

APPENDIX C

Aronow v. United States, 432 F.2d 242 (9th Cir. 1970)

October 6, 1970

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEFAN RAY ARONOW,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA, et al.,
Defendants-Appellees.
No. 23,444

[October 6, 1970]

On Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and CARTER, Circuit Judges, and
THOMPSON,* District Judge.

THOMPSON, District Judge:

This is an appeal from the orders of the District Court refusing to invoke a three-judge court and dismissing plaintiff's complaint. The complaint challenged the use of expressions of trust in God by the United States Government on its coinage, currency, official documents and publications. Specifically, the action challenged the constitutionality as repugnant to the Establishment Clause of the First Amendment of two federal statutes:

> "At such time as new dies for the printing of currency are adopted, the dies shall bear, at such place or places thereon as the Secretary of the Treasury may determine to be appropriate, the inscription 'In God we Trust', and thereafter this inscription shall appear on all United States currency and coins." 31 U.S.C. § 324a.
>
> "The national motto of the United States is declared to be 'In God we Trust.' 36 U.S.C. § 186.

*Hon. Bruce R. Thompson, United States District Judge, Reno, Nevada, sitting by designation.

The District Court ruled that plaintiff, as a taxpayer and citizen, lacked standing to challenge the validity of the statutes and that the merits of the claim of unconstitutionality were insubstantial. Inasmuch as we agree on the insignificance of the charge of unconstitutionality, we do not reach the question of standing.

A three-judge court need not be convened under 28 U.S.C. § 2282 unless there are substantial grounds for attacking the constitutionality of the Congressional enactment in question. *Ex Parte Poresky,* 290 U.S. 30 (1933); *Bailey v. Patterson*, 369 U.S. 31 (1962).

It is quite obvious 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. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

In *Engel* v. *Vitale,* 370 U.S. 421 (1962), the Supreme Court held that the Regents' Prayer prescribed by state statute as part of the daily ceremony for opening school was definitely a religious activity falling under the prohibition of the First Amendment. Yet, in alluding to the distinction between this and purely patriotic or ceremonial expressions, the High Court said:

> "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. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

It 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" or the study of a government publication or document bearing that slogan. In fact, such secular uses of the motto was viewed as sacrilegious and irreverent by President

Theodore Roosevelt. Yet, Congress has directed such uses.[1] While "ceremonial" and "patriotic" may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact.[2] As stated by the Congressional report, it has "spiritual and psychological value" and "inspirational quality."[3]

Not only does *Engel* v. *Vitale, supra*, direct the result here, but *McGowan* v. *Maryland*, 366 U.S. 420 (1961), buttresses the position. There the Maryland Sunday laws were held not violative of the Establishment Clause, and the majority opinion concluded: "We do not hold that Sunday legislation may not be a violation of the 'Establishment' Clause if it can be demonstrated that its purpose —evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion." As we have seen, the national motto has no such purpose, either in Congressional intent or practical impact on society. And earlier this year, in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the High Court, holding tax exemption of religious organizations constitutional reiterated the *McGowan* philosophy, at pp. 669-670:

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none

---

[1]Church and State in the United States, Stokes & Pfeffer, p. 569.

[2]"Separation purists like Jefferson might have theoretic objections to these, but even he recognized that as a practical matter such ceremonial verbalizations could frequently not be avoided; both his Declaration of Independence and his Virginia Religious Freedom statute invoked God. The problems raised by such references are not intrinsic but extrinsic; that is, of themselves they are of no practical significance, but their importance lies in their facile and frequent use to justify practices that raise substantial and practical church-state problems." Church State and Freedom, Pfeffer, p. 238.

[3]"Currency has been issued by the United States Government since 1861. Thus, for almost a century, there has been no inscription on our currency reflecting the spiritual basis of our way of life." Senate Report No. 637, 1955 Cong. & Admin. News, 2417.

"It will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality in plain, popularly accepted English." House Report No. 1959, 1956 Cong. & Admin. News, 3720.

inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

"*Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.* Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice." (Emphasis added.)

Accordingly, the judgment of the District Court is affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 10-8-70—360

APPENDIX D

United States Supreme Court Cases since October 6, 1970

*(*when *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) was decided)

Cases Decided by the United States Supreme Court (by year since 10/06/1970)

Start Date		End Date	Lexis Search "Opinion of the court"	Hook Article*
10/6/1970	-	9/30/1971	100	-
10/1/1971	-	9/30/1972	130	151
10/1/1972	-	9/30/1973	138	164
10/1/1973	-	9/30/1974	139	157
10/1/1974	-	9/30/1975	124	137
10/1/1975	-	9/30/1976	138	159
10/1/1976	-	9/30/1977	121	142
10/1/1977	-	9/30/1978	127	135
10/1/1978	-	9/30/1979	130	138
10/1/1979	-	9/30/1980	133	149
10/1/1980	-	9/30/1981	123	138
10/1/1981	-	9/30/1982	145	167
10/1/1982	-	9/30/1983	147	162
10/1/1983	-	9/30/1984	157	163
10/1/1984	-	9/30/1985	143	151
10/1/1985	-	9/30/1986	143	159
10/1/1986	-	9/30/1987	142	152
10/1/1987	-	9/30/1988	136	142
10/1/1988	-	9/30/1989	125	143
10/1/1989	-	9/30/1990	120	139
10/1/1990	-	9/30/1991	106	120
10/1/1991	-	9/30/1992	106	114
10/1/1992	-	9/30/1993	105	114
10/1/1993	-	9/30/1994	80	87
10/1/1994	-	9/30/1995	83	86
10/1/1995	-	9/30/1996	71	75
10/1/1996	-	9/30/1997	80	86
10/1/1997	-	9/30/1998	89	93
10/1/1998	-	9/30/1999	75	81
10/1/1999	-	9/30/2000	73	77
10/1/2000	-	9/30/2001	79	86
10/1/2001	-	9/30/2002	74	81
10/1/2002	-	9/30/2003	68	78
10/1/2003	-	9/30/2004	70	80
10/1/2004	-	9/30/2005	74	79
10/1/2005	-	9/30/2006	67	81
10/1/2006	-	9/30/2007	68	-
10/1/2007	-	9/30/2008	65	-
10/1/2008	-	9/30/2009	74	-
10/1/2009	-	9/30/2010	25	-
		Total number of cases:	4193	4266

* Peter A. Hook, *The aggregate harmony metric and a statistical and visual contextualization of the Rehnquist court: 50 years of data* . 24 Constitutional Commentary 221, 241-42 (March 2007)

Lexis Search #1

Time of Request: Saturday, April 03, 2010 17:40:53 EST
Client ID/Project Name:
Number of Lines: 957
Job Number: 1842:213726657

Research Information

Service: Terms and Connectors Search
Print Request: All Documents 1-121
Source: U.S. Supreme Court Cases, Lawyers' Edition
Search Terms: "Establishment Clause" and date(geq (10/06/1970) and leq (04/03/2010))

Lexis Search #2

Time of Request: Saturday, April 03, 2010 17:50:19 EST
Client ID/Project Name:
Number of Lines: 102
Job Number: 1842:213727028

Research Information

Service: Terms and Connectors Search
Print Request: All Documents 1-9
Source: U.S. Supreme Court Cases, Lawyers' Edition
Search Terms: "In God We Trust" and date(geq (10/06/1970) and leq (04/03/2010))

1. McCreary County v. ACLU, No. 03-1693, SUPREME COURT OF THE UNITED STATES, 545 U.S. 844; 125 S. Ct. 2722; 162 L. Ed. 2d 729; 2005 U.S. LEXIS 5211; 15 A.L.R. Fed. 2d 865; 18 Fla. L. Weekly Fed. S 532, March 2, 2005, Argued , June 27, 2005, Decided , The LEXIS pagination of this document is subject to change pending release of the final published version. , Partial summary judgment denied by, Summary judgment denied by ACLU v. McCreary County, 2007 U.S. Dist. LEXIS 77338 (E.D. Ky., Sept. 28, 2007)
... the national motto, "**In God We Trust**"; a page from ...
... bears the motto, "**IN GOD WE TRUST.**" And our Pledge ...
... the National Motto ("**In God We Trust**") and stating that ...
... the United States ("**In God We Trust**"), the Preamble to ...

2. Van Orden v. Perry, No. 03-1500, SUPREME COURT OF THE UNITED STATES, 545 U.S. 677; 125 S. Ct. 2854; 162 L. Ed. 2d 607; 2005 U.S. LEXIS 5215; 18 Fla. L. Weekly Fed. S 494, March 2, 2005, Argued , June 27, 2005, Decided , The LEXIS pagination of this document is subject to change pending release of the final published version.
... article of commerce ("**In God we Trust**") or an incidental ...

3. Elk Grove Unified Sch. Dist. v. Newdow, No. 02-1624, SUPREME COURT OF THE UNITED STATES, 542 U.S. 1; 124 S. Ct. 2301; 159 L. Ed. 2d 98; 2004 U.S. LEXIS 4178; 72 U.S.L.W. 4457; 17 Fla. L. Weekly Fed. S 359, March 24, 2004, Argued , June 14, 2004, Decided , US Supreme Court rehearing denied by Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 961, 125 S. Ct. 21, 159 L. Ed. 2d 851, 2004 U.S. LEXIS 4886 (U.S., Aug. 23, 2004)
... file). The motto "**In God we Trust**" first appeared on ...
... States would be "**In God We Trust.**" Act of July 30, 1956, ch. 795, 70 Stat. 732 ...
... Still Sustains"); Florida ("**In God We Trust**"); Ohio ("With God ...
... includes the motto "**In God We Trust.**" The oaths of ...
... the national motto ("**In God We Trust**"), religious references in ...

4. County of Allegheny v. ACLU, No. 87-2050 , SUPREME COURT OF THE UNITED STATES, 492 U.S. 573; 109 S. Ct. 3086; 106 L. Ed. 2d 472; 1989 U.S. LEXIS 3468; 57 U.S.L.W. 5045, February 22, 1989, Argued , July 3, 1989, * Decided* Together with No. 88-90, Chabad v. American Civil Liberties Union et al., and No. 88-96, City of Pittsburgh v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al., also on certiorari to the same court.
... our national motto ("**In God We Trust**") and our Pledge ...
... the printing of "**In God We Trust**" on our coins ...
... our national motto, "**In God we trust,**" 36 U.S.C. § 186 ...

5. Regan v. Time, Inc., No. 82-729 , SUPREME COURT OF THE UNITED STATES, 468 U.S. 641; 104 S. Ct. 3262; 82 L. Ed. 2d 487; 1984 U.S. LEXIS 147; 52 U.S.L.W. 5084, November 9, 1983, Argued , July 3, 1984, Decided
... of the legend, '**In God We Trust',** on the leaflets ...

6. Lynch v. Donnelly, No. 82-1256 , SUPREME COURT OF THE UNITED STATES, 465 U.S. 668; 104 S. Ct. 1355; 79 L. Ed. 2d 604; 1984 U.S. LEXIS 37; 52 U.S.L.W. 4317, October 4, 1983, Argued , March 5, 1984, Decided , Petition for Rehearing Denied May 14, 1984.
... prescribed national motto "**In God We Trust,**" 36 U. S. C. § 186 ...
... holiday, printing of "**In God We Trust**" on coins, and ...
... holiday, the legend "**In God We Trust**" on our coins, ...
... the designation of "**In God We Trust**" as our national ...

7. Marsh v. Chambers, No. 82-23 , SUPREME COURT OF THE UNITED STATES, 463 U.S. 783; 103 S. Ct. 3330; 77 L. Ed. 2d 1019; 1983 U.S. LEXIS 107; 51 U.S.L.W. 5162, April 20, 1983, Argued , July 5, 1983, Decided
... this Honorable Court," "**In God We Trust,**" "One Nation Under ...

8. Stone v. Graham, No. 80-321, SUPREME COURT OF THE UNITED STATES, 449 U.S. 39; 101 S. Ct. 192; 66 L. Ed. 2d 199; 1980 U.S. LEXIS 2; 49 U.S.L.W. 3369, November 17, 1980, Decided , Petition for Rehearing Denied January 12, 1981.
... with the motto "**In God We Trust**" in public schools ...

9. Wooley v. Maynard, No. 75-1453, SUPREME COURT OF THE UNITED STATES, 430 U.S. 705; 97 S. Ct. 1428; 51 L. Ed. 2d 752; 1977 U.S. LEXIS 75, Argued November 29, 1976 , April 20, 1977
... the national motto, "**In God We Trust**" from United States ...
... example, the mottoes "**In God We Trust**" and "E Pluribus ...
... in the motto "**In God We Trust.**" Similarly, there is ...

GRAVAMEN OF SUPREME COURT CASES SINCE 1970 IN WHICH "IN GOD WE TRUST" APPEARS

(1) *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Whether Ten Commandments displays violated the Establishment Clause)

(2) *Van Orden v. Perry*, 545 U.S. 677 (2005) (Whether Ten Commandments monument violated Establishment Clause)

(3) *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Whether "under God" in Pledge of Allegiance violated Establishment and Free Exercise Clauses)

(4) *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Whether displays of crèche and menorah violated Establishment Clause)

(5) *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (Whether statute restricting reproductions of currency violated Free Speech clause).

(6) *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Whether display of crèche violated Establishment Clause)

(7) *Marsh v. Chambers*, 463 U.S. 783 (1983) (Whether legislative prayer violated Establishment Clause)

(8) *Stone v. Graham*, 449 U.S. 39 (1980) (Whether posted copy of Ten Commandments violated Establishment Clause)

(9) *Wooley v. Maynard*, 430 U.S. 705 (1977) (Whether forcing individuals to display state motto violated Free Speech Clause)

As can be seen, all these cases except *Regan v. Time, Inc.*, 468 U.S. 641 (1984) and *Wooley v. Maynard*, 430 U.S. 705 (1977) primarily involved challenges under the Establishment Clause.

REGAN V. TIME, INC., 468 U.S. 641 (1984)

In *Regan v. Time, Inc.*, 468 U.S. 641 (1984), there is one reference to "In God We Trust." It is as follows:

> As appellee notes:
>
> "[Equally] banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a $ 20 bill; a green, six-foot enlargement of the portrait of George Washington on a $ 1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, 'In God We Trust', on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a 'shrinking' dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation." Brief for Appellee 5-6.

Regan v. Time, Inc., 468 U.S. 641, 683-84 (1984) (Brennan, J., concurring and dissenting).

WOOLEY V. MAYNARD, 430 U.S. 705 (1977)

In *Wooley v. Maynard*, 430 U.S. 705 (1977), three references to "In God We Trust" can be found. Chief Justice Burger, in his majority opinion, wrote:

> It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Wooley, 430 U.S. at 717 n.15.

In dissent, then-Justice Rehnquist used the phrase twice:

> The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes "In God We Trust" and "E Pluribus Unum" appear on the coin and currency of the United States. I cannot imagine that the statutes, see 18 U.S.C. §§ 331 and 333, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto "In God We Trust." Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

APPENDIX E

Newdow v. Lefevre, ___ F.3d ___, No. 06-16344 (9th Cir. March 11, 2010)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. NEWDOW,
Plaintiff-Appellant,

v.

PETER LEFEVRE, Law Revision Counsel; UNITED STATES OF AMERICA; HENRY M. PAULSON, JR.,* Secretary of the Treasury; HENRIETTA HOLSMAN FORE, Director, United States Mint; THOMAS A. FERGUSON, Director, Bureau of Engraving and Printing; THE CONGRESS OF THE UNITED STATES OF AMERICA,
Defendants-Appellees,

PACIFIC JUSTICE INSTITUTE,
Defendant-Intervenor-Appellee.

No. 06-16344
D.C. No.
CV-05-02339-FCD
OPINION

Appeal from the United States District Court
for the Eastern District of California
Frank C. Damrell, District Judge, Presiding

Argued and Submitted
December 4, 2007—San Francisco, California

Filed March 11, 2010

Before: Dorothy W. Nelson, Stephen Reinhardt, and
Carlos T. Bea, Circuit Judges.

*Henry M. Paulson, Jr. is substituted for his predecessor, John W. Snow, as Secretary of the Treasury, pursuant to Fed. R. App. P. 43(c)(2).

Opinion by Judge Bea;
Concurrence by Judge Reinhardt

COUNSEL

Michael A. Newdow (argued), in pro per, Sacramento, California; for the plaintiff-appellant.

Peter D. Keisler, McGregor W. Scott, Robert M. Loeb, Lowell V. Sturgill Jr. (argued), Department of Justice, Washington, D.C.; for defendants-appellees the United States of America *et al.*

Kevin T. Snider (argued), Pacific Justice Institute, Sacramento, California; for defendant-intervenor-appellee Pacific Justice Institute.

Norman Goldman, Law Office of Norman Goldman, Los Angeles, California; for Atheists and Other Freethinkers as Amicus Curiae in Support of plaintiff-appellant.

Edward L. White III, Thomas More Law Center, Ann Arbor, Michigan; for the Thomas More Law Center as Amicus Curiae in Support of the defendants-appellees.

Erik W. Stanley, Mary E. McAlister, Liberty Counsel, Lynchburg, Virginia; Mathew D. Staver, Anita L. Staver, Liberty Counsel, Maitland, Florida; for Liberty Counsel as Amicus Curiae in Support of the defendants-appellees.

Jay Alan Sekulow, Stuart J. Roth, Colby M. May, Shannon Demos Woodruff, American Center for Law and Justice, Washington, D.C.; Douglass S. Davert, David C. Loe, Davert & Loe, Long Beach, California; John Casoria, Law Office of John Casoria, Coto de Caza, California; for American Center for Law and Justice et al. as Amici Curiae in Support of the defendants-appellees.

Roy S. Moore, Gregory M. Jones, Benjamin D. Dupré, Foundation for Moral Law, Montgomery, Alabama; for the Foundation for Moral Law as Amicus Curiae in Support of the defendants-appellees.

Gary G. Kreep, Vicki A. Rothman, D. Colette Wilson, United States Justice Foundation, Ramona, California; for the United States Justice Foundation *et al.* as Amici Curiae in Support of the defendants-appellees.

Steven W. Fitschen, Barry C. Hodge, The National Legal Foundation, Virginia Beach, Virginia; for Wallbuilders, Inc., as Amicus Curiae in Support of the defendants-appellees.

OPINION

BEA, Circuit Judge:

This case calls upon us to decide whether the national motto of the United States, "In God We Trust," and its inscription on the Nation's coins and currency, violates the Establishment Clause of the First Amendment or the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*, or both. We hold our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), forecloses both claims. Accordingly, we affirm the district court's order dismissing this case under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

I. Factual and Procedural Background

Plaintiff Michael A. Newdow ("Newdow") is an ordained minister and founder of the First Amendmist Church of True Science ("FACTS"). Newdow and the members of FACTS are Atheists "whose religious beliefs are specifically and explicitly based on the idea that there is no god."

This case is part of a group of lawsuits Newdow has started challenging various government-sanctioned references to God.[1] In this action, Newdow alleges the statute that establishes "In God We Trust" as the national motto, 36 U.S.C. § 302,[2] and the statutes that require the motto's inscription on the

[1]Named as Defendants in this case are the United States of America, the Congress of the United States of America, the Law Revision Counsel, the Secretary of the Treasury, the Director of the United States Mint, and the Director of the Bureau of Engraving and Printing ("Defendants"). The district court allowed the Pacific Justice Institute, a "Sacramento-based, nonprofit organization dedicated to defending religious and civil liberties," to intervene as a defendant.

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

Nation's coins and currency, 31 U.S.C. §§ 5112(d)(1),[3] 5114(b),[4] violate the Establishment Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb *et seq*.[5] Newdow asks this court to declare §§ 302, 5112(d)(1), and 5114(b) violate the Establishment Clause and RFRA. Newdow also requests injunctive relief to enjoin the Defendants from inscribing the motto on coins and currency, placing in the United States Code any act or law that references the motto, and "such and other further relief" as this court deems proper.

The Defendants filed a motion to dismiss Newdow's action under Federal Rule of Civil Procedure 12(b)(6). In their motion, the Defendants contended, *inter alia*, Newdow lacks standing to sue; his Establishment Clause claim is foreclosed by Ninth Circuit precedent; and he failed to allege facts sufficient to state a RFRA claim.

The district court granted the Defendants' Rule 12(b)(6) motion to dismiss. As an initial matter, the district court held Newdow had standing to bring his claims. According to the district court, Newdow suffered a cognizable injury-in-fact because the motto forced him repeatedly to confront a religious symbol he found offensive. The district court further held a judicial declaration that the motto is unconstitutional would redress this injury.

The district court dismissed the Legislative Branch Defendants (Congress and the Law Revision Counsel) as immune from suit under the Speech and Debate Clause of Article I of

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

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

[5]Newdow also brought claims under the Free Exercise Clause, the Free Speech Clause, and the Equal Protection Clause, but he has abandoned those claims on appeal.

the United States Constitution. *See* U.S. Const. art. I, § 6, cl. 1 ("[F]or any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other Place."). Newdow did not appeal this ruling.

Turning to the merits of the case, the district court held our decision in *Aronow* forecloses Newdow's Establishment Clause claim. The district court held *Aronow* also bars Newdow's RFRA claim, because the RFRA claim rests on Newdow's "assertion that the motto is blatantly religious" and thus "simply restate[s]" the Establishment Clause claim. Therefore, the district court dismissed Newdow's complaint for failure to state a claim upon which relief can be granted.

Newdow's timely appeal to this court followed.

II. Standard of Review

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6). *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When we review the grant of a motion to dismiss, "we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Id.*

III. Standing

[1] The Defendants contend Newdow lacks standing to challenge the statutes that adopt "In God We Trust" as the national motto and require its inscription on coins and currency.[6] The "irreducible constitutional minimum of standing" contains three elements: (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[6]Standing to bring a RFRA challenge is "governed by the general rules of standing under article III of the Constitution," 42 U.S.C. § 2000bb-1(c), so our standing analysis in this section applies equally to Newdow's Establishment Clause and RFRA claims.

[2] Newdow has standing to challenge the statutes that require the inscription of the motto on coins and currency, 31 U.S.C. §§ 5112(d)(1) and 5114(b). Newdow alleges—given the ubiquity of coins and currency in everyday life—the placement of "In God We Trust" on the Nation's money forces him repeatedly to encounter a religious belief he finds offensive. Under our precedent, "spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." *Vasquez v. L.A. County*, 487 F.3d 1246, 1253 (9th Cir. 2007). That Newdow's encounters with the motto are common to all Americans does not defeat his standing, because Newdow has alleged a concrete, particularized, and personal injury resulting from his frequent, unwelcome contact with the motto. *See FEC v. Akins*, 524 U.S. 11, 24 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.' "). Further, Newdow's unwelcome contact with the national motto is caused by the statutes requiring the placement of the motto on coins and currency, and is redressable by an injunction ordering the removal of the motto from coins and currency.[7] Thus, Newdow satisfies all three requirements for Article III standing as to his challenge to §§ 5112(d)(1) and 5114(b).[8]

[7]The Defendants contend Newdow's injury is not redressable because he requests injunctive relief that would prohibit the Defendants from continuing to place the motto on coins and currency in the future. This injunction, the Defendants assert, would leave untouched the vast quantities of currency already in circulation and thus would not "appreciably reduce" Newdow's exposure to the motto. Nevertheless, Newdow's complaint also asks for "such and other further relief" as we may deem proper, which could include an injunction requiring the replacement of currency already in circulation.

[8]The Defendants assert Newdow is collaterally estopped from alleging the placement of the motto on coins and currency causes him an injury-in-fact. In support, the Defendants cite our decision in *Newdow v. Bush*, 89 F. App'x 624 (9th Cir. 2004) (unpublished memorandum disposition), where we held Newdow lacked Article III standing to bring an Establishment Clause challenge to clergy-led prayer at the 2001 presidential inau-

[3] Nevertheless, Newdow lacks standing to challenge 36 U.S.C. § 302, which merely recognizes "In God We Trust" is the national motto.[9] Unlike §§ 5112(d)(1) and 5114(b), § 302 does not authorize or require the inscription of the motto on any object. Without §§ 5112 and 5114, the motto would not appear on coins and currency, and Newdow would lack the "unwelcome direct contact" with the motto that gives rise to his injury-in-fact. Although Newdow alleges the national motto turns Atheists into political outsiders and inflicts a stigmatic injury upon them, an "abstract stigmatic injury" resulting from such outsider status is insufficient to confer standing. *See Allen v. Wright*, 468 U.S. 737, 755-56 (1984).

Newdow alleges, however, the injury caused by the national motto is personal, because he was "recently refused a job because of the [misperception] of his activism" and has given up hope of obtaining elected office because of government-perpetuated anti-Atheism bias. Nevertheless, these claims are insufficient to establish standing, because Newdow cannot show these claimed injuries are traceable to the Defendants, and not to the actions of third parties who are not before this court—*i.e.*, the employer who denied Newdow a job or the electorate whom Newdow alleges would not elect him to public office.[10] *See Simon v. E. Ky. Welfare Rights*

guration, because Newdow failed to allege a "sufficiently concrete and specific injury." The Defendants' collateral estoppel argument lacks merit because *Newdow v. Bush* involved a different Establishment Clause challenge from the present case. *See Blackfoot Livestock Comm'n Co. v. Dept' of Agriculture, Packers & Stockyards Admin.*, 810 F.2d 916, 922 (9th Cir. 1987) (holding a party cannot invoke collateral estoppel if "the factual issues litigated were different from those in the present case").

[9]During oral argument, Newdow conceded he could not establish standing to challenge § 302, were it not for the statutes requiring the inscription of the motto on coins and currency. Oral Argument (Dec. 4, 2007) at 7:00-8:30.

[10]Further, Newdow does not allege he ever sought public office, so any injury resulting from his failure to attain public office is purely hypothetical and insufficient to show injury-in-fact. *See Lujan*, 504 U.S. at 560 (holding an injury must be "concrete and particularized," and not "conjectural" or "hypothetical," to give rise to Article III standing).

Org., 426 U.S. 26, 28, 41-42 (1976) (holding the indigent plaintiffs lacked standing to challenge an Internal Revenue Service Ruling that provided favorable tax treatment to hospitals who denied certain services to indigents, because it was "purely speculative" whether the denials of service could be traced to the Revenue Ruling or, instead, to decisions made by the hospitals without regard to any tax implications).

[4] In sum, Newdow lacks standing to challenge § 302, but has standing to challenge §§ 5112(d)(1) and 5114(b).

IV. The Establishment Clause

[5] The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause prohibits the enactment of a law or official policy that "establishes a religion or religious faith, or tends to do so." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

Newdow alleges the placement of "In God We Trust" on coins and currency violates the Establishment Clause. According to Newdow, the motto unconstitutionally places the government's imprimatur on a belief in a monotheistic God. Newdow further alleges the national motto turns him and other Atheists into political outsiders by reinforcing the "twin notions that belief in God is 'good,' and disbelief in God is 'bad.' " Thus, Newdow asserts the statutes requiring the inscription of the motto on coins and currency run afoul of the Establishment Clause.

[6] Newdow's Establishment Clause claim is foreclosed by our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). In *Aronow*, we held the national motto, "In God We Trust," and the statutes requiring its placement on coins and currency, do not violate the Establishment Clause. *Id.* at 243. We reasoned:

> It is quite obvious 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. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.
>
> * * *
>
> It 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' or the study of a government publication or document bearing that slogan. . . . While 'ceremonial' and 'patriotic' may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact. As stated by the Congressional report, it has 'spiritual and psychological value' and 'inspirational quality.'

Id. at 243-44 (footnotes omitted).[11]

Newdow concedes his Establishment Clause challenge is "essentially identical" to the one raised in *Aronow*, but contends *Aronow* is not binding precedent. As a general rule, we, as a three-judge panel, are without authority to "overrule a circuit precedent; that power is reserved to the circuit court sitting en banc." *Robbins v. Carey*, 481 F.3d 1143, 1149 n.3 (9th Cir. 2007). Nevertheless, "where the reasoning or theory

[11]Our sister circuits are in accord with *Aronow*. Indeed, every circuit to address the question has held the national motto does not violate the Establishment Clause. *See, e.g.*, *Lambeth v. Bd. of Comm'rs of Davidson County, North Carolina*, 407 F.3d 266, 270-73 (4th Cir.), *cert. denied*, 546 U.S. 1015 (2005); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979).

of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

Newdow asserts the reasoning and theory of *Aronow* is "clearly irreconcilable" with intervening Supreme Court precedent. According to Newdow, the Supreme Court's Establishment Clause jurisprudence went through significant changes since *Aronow* was decided. Specifically, Newdow notes all of the Establishment Clause tests with which he asserts "In God We Trust" is "incompatible" were developed by the Supreme Court after *Aronow* was decided. Therefore, Newdow contends *Aronow* is no longer binding precedent.

[7] We disagree. That the Supreme Court has developed new Establishment Clause tests does not render *Aronow* "clearly irreconcilable" with Supreme Court precedent. Newdow did not and cannot cite a single Supreme Court case that called into question the motto's constitutionality or otherwise invalidated *Aronow*'s reasoning or theory. To the contrary, and consistent with *Aronow*, the Supreme Court has noted in dicta the national motto does not violate the Establishment Clause. *See County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989) (noting the motto is "consistent with the proposition that government may not communicate an endorsement of religious belief"); *Lynch*, 465 U.S. at 676 (noting the "statutorily prescribed national motto 'In God We Trust' " is a constitutional "reference to our religious heritage"); *see also United States v. Montero-Camargo*, 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) ("Supreme Court dicta have a weight that is greater than ordinary judicial dicta as prophecy of what that Court might hold; accordingly, we do not blandly shrug them off because they were not a holding." (citation and internal quotation marks omitted)).

Alternatively, Newdow asserts *Aronow* is not binding precedent because the district court in *Aronow* held the "plaintiff, as a taxpayer and citizen, lacked standing to challenge the validity of the statutes." *Aronow*, 432 F.2d at 243. On appeal, however, the *Aronow* court decided the merits of the Establishment Clause claim after assuming, but without deciding, the plaintiff had standing. *Id.* Newdow contends *Aronow*'s failure to address the standing question renders it without precedential value, because a court lacks subject matter jurisdiction without Article III standing. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc).

[8] This contention is without merit. The Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), decided after *Aronow*, invalidated the practice of "hypothetical jurisdiction"—i.e., assuming jurisdiction for the purpose of deciding the merits of a case. *Id.* at 93-94. After *Steel Co.*, a court cannot do what the *Aronow* court did: address the merits of a case without ensuring it has jurisdiction over the case. Nevertheless, the Supreme Court in *Steel Co.* did not overturn the holdings of every case that had been decided using the "hypothetical jurisdiction" approach; *Steel Co.* held only that courts may not decide cases using that approach in the future. Thus, *Aronow*'s failure to address whether the plaintiff had standing does not undermine the precedential value of its holding that the national motto does not violate the Establishment Clause.

[9] Accordingly, Newdow's Establishment Clause challenge is foreclosed by *Aronow*.

V. Religious Freedom Restoration Act of 1993 ("RFRA")

[10] Under RFRA, the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can show the rule is in furtherance of a "compelling

governmental interest" and is the "least restrictive means" of furthering that governmental interest. 42 U.S.C. § 2000bb-1. Newdow alleges the inscription of "In God We Trust" on coins and currency substantially burdens the free exercise of his religion in two primary ways. First, because Newdow's religion prohibits him from carrying currency that bears the motto "In God We Trust," Newdow is impeded in his ability to engage in religious activities that require cash payments—*e.g.*, purchase of church attire, ingredients for the church libation "The Freethink Drink," and books for the church library; travel for religious purposes to locations that require cash payments; and raise funds through cash donations. Second, because Newdow cannot entirely avoid using money in his daily life, the inscription of the motto on coins and currency forces him to violate a basic tenet of his religion and requires him to evangelize for a religious belief he expressly decries.

[11] The burdens Newdow contends are imposed by the motto rest on a single premise: the motto represents a purely religious dogma and constitutes a government endorsement of religion.[12] During oral argument, Newdow confirmed his RFRA claim is dependent on his contention that the national motto represents a religious dogma and constitutes governmental sponsorship of religion. Newdow further confirmed he does not claim his religious exercise would be burdened even if the motto were not a purely religious dogma.

[12]For instance, the complaint makes the following allegations: "Newdow is forced to confront government-endorsed, purely religious dogma . . . ."; "Defendants have chosen to place purely ((Christian) monotheistic) religious dogma on the coins and currency . . . ."; "Defendants' use of the purely religious, (Christian) monotheistic motto has also substantially burdened Newdow's ability to meet and assemble with others for the purpose of furthering his ministry."; "[Newdow is] forced to evangelize for (Christian) Monotheism precisely as Congress and others envisioned." Newdow's opening brief in this court similarly alleges: "Defendants have essentially compelled [Newdow] to bear on his person items that make a purely religious claim . . . ."; and "Plaintiff is, in essence, forced to advocate for Monotheism, a religious belief system he expressly repudiates.").

[12] As a result, Newdow's RFRA claim is barred by *Aronow*. Although *Aronow* was an Establishment Clause challenge to the motto, and did not involve a RFRA claim, *Aronow* forecloses the central premise of Newdow's RFRA claim: the motto is a purely religious dogma and a government endorsement of religion. *Aronow* held the national motto is of a "patriotic or ceremonial character," has no "theological or ritualistic impact," and does not constitute "governmental sponsorship of a religious exercise." *Aronow*, 432 F.2d at 243-44.

VI. Conclusion

We hold Newdow lacks standing to challenge 36 U.S.C. § 302. Newdow's Establishment Clause challenge against 31 U.S.C. §§ 5112(d)(1) and 5114(b) and his RFRA claim are foreclosed by binding Ninth Circuit precedent. We dismiss Newdow's challenge to § 302 for lack of jurisdiction, and affirm the district court's order dismissing the remaining causes of action for failure to state a claim upon which relief can be granted.

AFFIRMED.

REINHARDT, Circuit Judge, concurring in the result only:

The majority opinion in *Newdow v. Rio Linda Union School District*, No. 05-17257, which has today become the law of the circuit, fails to comprehend the constitutional principles set forth in the relevant Establishment Clause cases that the Supreme Court has decided in the years following our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). *See Rio Linda* dissent *passim* (Reinhardt, Circuit Judge). Because I am now required to follow that precedent, no matter how misguided, I am also now required to conclude that Newdow's claims in this case are foreclosed by *Aronow*,

and therefore to concur in the result. I do not express any view as to what result I might have reached in the absence of the numerous errors of constitutional law that the majority made in *Rio Linda*, and the erroneous result it reached.