13-4049

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROSALYN NEWDOW; KENNETH BRONSTEIN; BENJAMIN DREIDEL; NEIL GRAHAM; JULIE WOODWARD; JAN AND PAT DOE; DOE-CHILD1 AND DOE-CHILD2; ALEX AND DREW ROE; ROE-CHILD1, ROE-CHILD2, AND ROE-CHILD3; VAL AND JADE COE; COE-CHILD1 AND COE-CHILD2; NEW YORK CITY ATHEISTS; FREEDOM FROM RELIGION FOUNDATION;

Plaintiffs-Appellants,

v.

THE UNITED STATES OF AMERICA; JACOB J. LEW, SECRETARY OF THE TREASURY; RICHARD A. PETERSON, ACTING DIRECTOR, UNITED STATES MINT; LARRY R. FELIX, DIRECTOR, BUREAU OF ENGRAVING AND PRINTING;

Defendants-Appellees,

On Appeal from the United States District Court
for the Southern District of New York
(District Court Case #13-cv-741)

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Because Defendants' responses to Plaintiffs' key legal arguments (that "In God We Trust" inscriptions are facially unconstitutional, fail to meet the neutrality "touchstone," arose for purely religious reasons, have predominantly religious effects, and substantially burden Plaintiffs' Free Exercise rights) were vacuous, Plaintiffs will reply to their arguments (in this Introduction) by addressing the reality that underlies Defendants' approach – i.e., that "not only [are] atheists … less accepted than other marginalized groups but … attitudes toward them have not exhibited the marked increase in acceptance that has characterized views of other racial and religious minorities over the past forty years."[1] This empirically ascertained truth, reflecting the fact that Atheists have not only been despised and severely disenfranchised in the past, but that they remain so today, is why the nation's money **is required** to bear the "In God We Trust" phrase. Surely "In Protestantism We Trust," "In the Caucasian Race We Trust," "In Heterosexuality We Trust," and so forth would be recognized – today, at least (if not in the past) – as egregiously offensive to the constitutional principle of equality. "In God We Trust" is no less offensive.

[1] Penny Edgell et al., *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 212 (2006). *See also* Document 31 at 87-88 (Amended Complaint ("AC") ¶¶ 321-29). [Document 31 is the Joint Appendix ("JA"). "JA084-85" format will be used from here on.]

Plaintiffs have already spoken of James Pollock, the Director of the Mint who was largely responsible for the origin of the "In God We Trust" inscriptions.[2] As mentioned, Director Pollock (while simultaneously serving in his official federal capacity), was a vice president of an organization seeking to amend the United States Constitution so that its Preamble would read:

> We, the people of the United States, [recognizing the being and attributes of Almighty God, the Divine Authority of the Holy Scriptures, the law of God as the paramount rule, and Jesus, the Messiah, the Saviour and Lord of all], in order to form a more perfect union ....[3]

Additionally (as also previously noted), Director Pollock was the presiding officer of the association when the following resolution was passed:

> That a national recognition of God, the Lord Jesus Christ, and the Holy Scriptures, as proposed in the memorial of this Association to Congress, is clearly a scriptural duty, which it is national peril to disregard.

What Plaintiffs did not previously note, since they have not yet had an opportunity to present any evidence at trial, was the explicit anti-Atheism that accompanied this fervid Christian advocacy. For instance, when those from Director Pollock's circle met later (in a convention held in New York in 1873), the renowned Jonathan Edwards, D. D., uttered the following:

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[2] *See*, *e.g.*, JA045-49 (AC ¶¶ 80-104).
[3] JA046 (AC ¶ 88).

> *Tolerate atheism, sir? There is nothing out of hell that I would not tolerate as soon!* The atheist may live, as I have said; but, God helping us, the taint of his destructive creed shall not defile any of the civil institutions of all this fair land! Let us repeat, atheism and Christianity are contradictory terms. They are incompatible systems. *They cannot dwell together on the same continent!*[4]

Government agents play a huge role in perpetuating (or ending) discrimination of this sort. Perhaps this is best appreciated in the realm of race, where, in the wake of such odious decisions as *Dred Scott v. Sandford*[5] and *Plessy v. Ferguson*,[6] the executive and legislative branches of government were able to maintain the second-class citizenship of black Americans – not only legally, but also in the minds of large numbers of whites – for centuries. Thus, in 1958, fifty-three percent of the population stated they would refuse to vote for a black candidate for president solely on the basis of his race.[7] Yet, once the effects of *Brown v. Board of Education*[8] diffused throughout American society, that figure decreased to 4% within only two generations.[9]

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[4] Alonzo T. Jones, *Civil Government and Religion, or Christianity and the American Constitution* (1889) 55-56. (Emphases in original.)
[5] 60 U.S. 393 (1856).
[6] 163 U.S. 537 (1896).
[7] Frank Newport, *Americans Today Much More Accepting of a Woman, Black, Catholic, or Jew as President*. Gallup polls conducted between 1937 and 1999. (Hereafter "Newport.") Reported March 29, 1999, at www.gallup.com/poll/3979/Americans-Today-Much-More-Accepting-Woman-Black-Catholic.aspx.
[8] 347 U.S. 483 (1954).
[9] Newport, *supra* note 7.

Few are aware that the same polls have consistently demonstrated far worse sentiment towards Atheists. In 1958, for example, 75% of the population would have refused to vote for a qualified Atheist.[10] More important is the relative change as the government has worked to end discrimination against Blacks, while perpetuating (with the "In God We Trust" inscriptions) discrimination against Atheists. In 1999, when the 4% "no to blacks" figure was obtained, a whopping 48% of the population was still unwilling to vote for an Atheist.[11] As was concluded, "[b]eing an atheist, unlike most of these other characteristics, is still not widely acceptable to the American public …, making this the most discriminated-against characteristic of the eight tested in the research."[12]

The last Gallup Poll on this subject, performed only a year and a half ago, continues to show pervasive anti-Atheism. In fact, more than ten times as many Americans would now refuse to vote for a qualified Atheist American than would refuse to vote for a qualified Black.[13]

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[10] *Id*.
[11] *Id*.
[12] *Id*. The eight characteristics were Jewish, Atheist, Black, Catholic, homosexual, woman, Baptist, and Mormon.
[13] Jeffrey M. Jones, *Atheists, Muslims See Most Bias as Presidential Candidates*. Gallup poll conducted June 7-10, 2012 (revealing that at as of that month, 43% of Americans would refuse to vote for an Atheist candidate). Reported June 21, 2012, at www.gallup.com/poll/155285/Atheists-Muslims-Bias-Presidential-Candidates.aspx.

One can readily imagine how this plays out in the lives of non-believers, not only in the barriers to elected office, but to social circles, employment, education, the military and more. When large segments of American society consistently (over many decades) hold such notions as Atheists should not be allowed to broadcast their religious views over the radio,[14] Atheists should not be allowed to vote,[15] or Atheists are less trustworthy than rapists,[16] and when eight states – **in their constitutions** – still harbor explicitly anti-Atheist provisions,[17] the federal government should be working to end such discriminatory views, not foster them.

Atheists are as trustworthy, generous, and caring as any other religious minority. They simply have little voice in our society, similar to the equally despised and disenfranchised founding-era Catholics.[18] With Atheists lacking the strength to garner six Supreme Court justiceships, however, Defendants have chosen to view "In God We Trust" as distinct from "In Protestantism We Trust."

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[14] 57% of the population held this view in 1946. Gallup Poll – A.I.P.O. (December 18, 1946).

[15] Gallup Poll – A.I.P.O. (July 21, 1965). More than four times as many people (27%) would have kept Atheists from voting than would have withheld that franchise from high school dropouts (6%).

[16] Will M. Gervais et al., *Do You Believe in Atheists? Distrust Is Central to Anti-Atheist Prejudice,* 101 J. of Personality & Soc. Psychol. 1189, 1195-96 (2011).

[17] *See* Addendum A.

[18] *See generally* Michael Newdow, *Question to Justice Scalia: Does the Establishment Clause Permit the Disregard of Devout Catholics?* 38 Cap. U. L. Rev. 409 (2009).

That is a distinction without a constitutional difference. (Christian) Monotheism can be no more governmentally preferred than Protestantism. In fact, in terms of equal protection, race versus religion is a distinction without a difference, as the Department of Justice recognized in *Brown v. Bd. of Education*:

> "We shall not … finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result *of his race, or religion* … . The Federal Government has a clear duty to see that constitutional guarantees of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."[19]

This "affirmative government obligation"[20] extends to "discriminations imposed by law, or having the sanction or support of government, [which] inevitably tend to undermine the foundations of a society dedicated to freedom, justice and equality."[21] At least it did sixty years ago. Today, apparently, the Department believes that obligation has vanished.

Of special note is that nowhere in its *Brown* amicus curiae brief did the Department of Justice worry that ending racial segregation "would depart starkly from the historical understanding of the [Fourteenth] Amendment and the nation's

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[19] Brief for the United States as Amicus Curiae supporting Appellants, *Brown v. Board of Education*, 347 U.S. 483 (1954), at 2 (citing "[President Truman's] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2") (emphasis added). A copy of this brief is provided in Addendum B.
[20] *Id*. at 2-3.
[21] *Id*. at 3.

established traditions."[22] Nowhere did they write that "the Constitution has always been understood to permit such practices as [segregation in railroad cars, or segregation in marriage, or] ceremonial calls for [racial separation]."[23] And, despite *Plessy* (and myriad lower court decisions that adhered to its precedent), the Department of Justice in *Brown* did not argue that:

> As the Supreme Court and other courts have recognized, [segregation in our public schools] falls in this category, as a permissible reference to [racial integrity] that does not convey approval of [Caucasians] but rather serves substantial [societal] purposes, including acknowledging the historical role of [race] in our society, formalizing our [education system], fostering patriotism, and expressing confidence in the future.[24]

Perhaps the most striking difference between the Department of Justice's approach in *Brown* and the approach taken in this case is how the government dealt with its hypocrisy. In the 1950s, when the official disrespect for blacks conflicted with constitutional principles, the Department wrote:

> The United States is trying to prove to the people of the world … that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.[25]

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[22] *See* Document 45 (Brief for Defendants-Appellees – hereafter "BFD") at 14.
[23] *Id*.
[24] *Id*.
[25] Brief for the United States as Amicus Curiae, *supra*, note 19, at 6 (Addendum B at B-006).

Here, as the government "is trying to prove to the people of the world" that "freedom of religion … [is] a pillar of our Nation"[26] and that there is an "unwavering commitment of the United States to religious freedom,"[27] it inscribes on every coin and currency bill a phrase that favors an exclusionary religious view and turns nonadherents into political outsiders.

This approach is particularly disheartening in view of the recent decision to "no longer defend the constitutionality of DOMA's §3."[28] If the Department of Justice finds it proper to refuse to defend a law that simply denies discretionary benefits under "'a heightened standard of scrutiny,'"[29] why would it tenaciously defend flagrant governmental religious favoritism that falls under "strict scrutiny"? The answer undoubtedly can be found in what was stated at the beginning of this introduction: that Atheists are a disenfranchised minority despised by a segment of the population powerful enough to influence our government's political branches. Hopefully, as the apolitical branch of government, this Court will show that the power to protect minorities, enshrined in the Constitution, is greater.

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[26] International Religious Freedom Act of 1998, Pub. L. 105-292, § 2(a)(1), codified at 22 U.S.C. § 6401.
[27] *Id*. at § 2(b)(3).
[28] *United States v. Windsor*, No. 12-307, slip op. at 3 (570 U.S. ___ (June 26, 2013))). As with same-sex couples in *Windsor*, Plaintiffs here only seek "the same status and dignity," *id.* at 13, as others.
[29] *Id*. (citation omitted).

THE MONETARY ITEMS PRODUCED ARE QUITE TELLING

Addendum C contains a few examples of the coins at issue in this case. If these do not immediately demonstrate the unconstitutional religious favoritism involved, the Panel is requested to again imagine a few constitutionally-identical phrases being inscribed on these and every other coin and currency bill that the Treasury Department manufactures. Would Defendants (or anyone else) ever seriously argue that the First Amendment's religion clauses permit "In Jesus We Trust," "In Mohammed We Trust," or "In Joseph Smith We Trust"? If Atheists were somehow to overcome the unremitting disparagement of the government's current scheme such that they eventually acquired the power to place "God is a Fiction" on the money, would Defendants believe that, too, should be allowed?

This year marks the Mint Department's production of the 2014 Civil Rights Act of 1964 Silver Dollar.[30] Celebrating the 50th anniversary of that landmark legislation (which served to work for, rather than strike a blow against, equality), the United States Mint's brochure on the coin speaks in lofty terms of how the Act "served as a model for subsequent anti-discrimination laws."[31] The description of the coin includes:

[30] *See* Addendum D.
[31] *Id*. at D-003.

> The obverse (heads) design features three people holding hands at a civil rights march. The man holds up a sign that reads WE SHALL OVERCOME. The design is symbolic of all marches that helped galvanize the civil rights movement.[32]

Surely it would be outrageous to have the figures standing over an "In the Caucasian Race We Trust" motto. Just as surely, it is no less outrageous to have them standing, as they are, over the constitutionally indistinguishable "In God We Trust."

Interestingly, the brochure references Rosa Parks and her "single brave act of defiance, refusing to give up her seat to a white person on a segregated bus in 1955."[33] Ms. Parks, it may be recalled, was deemed by the government to be the "first lady of civil rights" and the "mother of the freedom movement" as a result of her act,[34] and she was bestowed with extraordinary governmental honors, including the Presidential Medal of Freedom and the Congressional Gold Medal.[35]

Plaintiffs have no desire to discuss relative heroism, nor in any manner to impugn Ms. Parks, whom they admire greatly. They will, however, highlight the difference in the treatment they have been accorded. Like Ms. Parks (on the basis of her race), Rosalyn Newdow (on the basis of her religious views) also refuses to

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[32] *Id*.
[33] *Id*.
[34] Pub. L. No. 106-26, 113 Stat. 50 (1999).
[35] Addendum E at E-002.

be forced to sit in the back of society's bus. She asks for no accolades or medals, but she demands the equality in treatment for which Ms. Parks was honored. Flagrant disrespect and specious legal arguments do not meet that demand.

Incidentally, the United States Postal Service sheet of stamps recently produced in honor of Ms. Parks has the word "COURAGE" printed in its margin.[36] Hopefully the Court will bear in mind that courage – like equal treatment under the law – is also a trait greatly admired by the people of this country.

RESPONSES TO DEFENDANTS' ARGUMENTS

In seeking to defend governmental favoritism for (Christian) Monotheism, Defendants continue to offer only weak and strained arguments. Plaintiffs will highlight and clarify the latest sophisms.

I. Altering Definitions Still Does Not Excuse Constitutional Violations

Defendants persist in skirting the key issues in this case by contorting the English language. For instance, they again attempt to characterize the "In God We Trust" inscription as a "reference to religion," Document 45 (BFD) at 14, and the use of that motto as "acknowledging the historical role of religion in our society," *id*. Perhaps the following will put an end to this linguistic abuse.

[36] Addendum E at E-001.

That the Framers were all white is a "reference" to race. That four of the first five presidents bought, sold and owned human beings of color is an "acknowledgement" of "the historical role of [race] in our society." "In the Caucasian Race We Trust," however, is neither a "reference" nor an "acknowledgement." It is an affirmative statement, in the present tense, which would immediately be recognized as an illicit discriminatory endorsement were it advocated by white, rather than (Christian) Monotheistic, supremacists. This is especially true had it been formulated by a governmental official who asserted, "We claim to be a white nation. … Our national coinage … should declare our trust in Caucasians." *Cf.* (Admitted) Material Fact #15 (JA136) (noting that Mint Director Pollock – in his official annual report – argued that "We claim to be a Christian nation. … Our national coinage … should declare our trust in God; in him who is 'King of kings and Lord of lords.'").

Defendants' attempt to characterize Plaintiffs' goal in this case as seeking to have "all religious matters … purged from the public square," Document 45 (BFD) at 14, is similarly a false characterization. Plaintiffs thrill to see robust **private** speech in the public square. But "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Westside Community Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).

It is only a public square filled with "government speech endorsing religion, which the Establishment Clause forbids," that Plaintiffs seek to end.

II. Justice Breyer's *Van Orden* Concurrence Does Not Strongly Support Defendants' Position

Because Justice Breyer was the "swing vote" in *Van Orden v. Perry*, 545 U.S. 677 (2005), and *McCreary County v. ACLU*, 545 U.S. 844 (2005), this Circuit appropriately deemed his *Van Orden* concurrence as "controlling." *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 650 F.3d 30, 49 (2d Cir. 2011). Seizing upon this adjective, Defendants attempt to place enormous weight on that concurrence, since Justice Breyer listed "public references to God on coins" as being within "the Establishment Clause's tolerance." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). This attempt is understandable, since that dictum provides the strongest verbiage supporting their argument. However, the reliance they wish this Court to place on that isolated phrase would be misplaced.

To begin with, no other justice joined Justice Breyer in his concurrence. Thus, this is not an instance of "Supreme Court dicta." It is merely the statement of one lone justice, and "the views of individual Justices are not binding on [the lower courts]." *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1339 (11th Cir. 1999). In fact, as Justice Breyer's individual view, it has no more precedential value than any other statement of any other individual justice. Certainly its precedential value is

no greater than Justice Stevens's *Van Orden* pronouncement that "the Establishment Clause requires the same respect for the atheist as it does for the adherent of a Christian faith." 545 U.S. at 711 (Stevens, J., dissenting). In fact, with Justice Stevens having been joined by Justice Ginsburg in *Van Orden*, twice as many justices supported his statement than supported Justice Breyer's.

Even if a Supreme Court majority had issued Justice Breyer's dictum, it is well established that "'[j]udges risk being insufficiently thoughtful and cautious in uttering pronouncements that play no role in their adjudication.'" *Pearson v. Callahan*, 555 U.S. 223, 239-40 (2009) (citation omitted). Accordingly, "*obiter dicta* … 'may be respected but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" *Williams v. United States*, 289 U.S. 553, 568 (1933) (citation omitted). This is especially true when, as in *Van Orden*, there was no briefing related to the "In God We Trust" inscriptions. It is highly doubtful that Justice Breyer (or any other justice) knows of the abundant evidence demonstrating their overwhelmingly religious purposes and effects.

For Defendants to suggest that Justice Breyer's dictum is dispositive, therefore, is unsupportable. In fact, it may well be that, when presented with the question of the constitutionality of "In God We Trust" on the money, Justice Breyer will do precisely as Justice Douglas did with a different Establishment Clause matter a half century ago.

In his concurrence in *Engel v. Vitale*, 370 U.S. 421 (1962), Justice Douglas included (among apparently tolerable "'aids' to religion") "Bible-reading in the schools of the District of Columbia." *Id.* at 437 n.1 (Douglas, J., concurring). Yet merely one year later, when that practice was actually before the court, eight justices (including Justice Douglas) found it to be unconstitutional. *Abington School District v. Schempp*, 374 U.S. 203 (1963).

Judging from the principled statements made by Justice Breyer – in conjunction with the fact that he joined the *McCreary County* majority (holding that public Ten Commandments displays in county courthouses violate the Establishment Clause) – it seems likely that following Justice Douglas's lead is exactly what would occur. Justice Breyer began his concurrence by noting that the Religion Clauses "seek to 'assure the fullest possible scope of religious liberty and tolerance for all' … [and] to avoid that divisiveness based upon religion that promotes social conflict." 545 U.S. at 698 (Breyer, J., concurring). Both of those goals are hindered, not furthered, by the government's advocacy of the exclusionary religious claim that is now present on each coin and currency bill. Furthermore, Justice Breyer highlighted that government "must 'effect no favoritism … between religion and nonreligion.'" *Id.* That ideal is obviously incompatible with government advocacy for "In God We Trust."

Also important to Justice Breyer was that these are "fact-intensive cases." *Id.* at 700. The facts regarding the motto inscriptions are highly different from those regarding the *Van Orden* monument, and are surely sufficient to result in an outcome quite unlike the one in that latter "borderline case." *Id*. For instance:

(1) In *Van Orden*, the monument was "donated … [by] a private civic (and primarily secular) organization." *Id*. at 701.

Here, no "private … organization" was involved at all. Rather, the "In God We Trust" inscriptions were chosen by high-ranking federal officials who had nothing "civic (and primarily secular)" in mind. On the contrary, both unabashedly proclaimed that their purposes were purely religious, as the multiple references to the "King of kings and Lord of lords" (i.e., Jesus Christ) makes incontrovertible. *See* (Admitted) Material Facts 15-17 (JA213-14).

(2) In *Van Orden*, the purpose of the Ten Commandments monument donation was "to highlight the Commandments' role in shaping civic morality as part of [the sponsoring] organization's efforts to combat juvenile delinquency." 545 U.S. at 701 (Breyer, J., concurring).

The purpose of placing "In God We Trust" on the money was purely religious – i.e., "[to declare] [t]he trust of our people in God … on our national coins." (Admitted) Material Fact 6 (JA210).

(3) In *Van Orden*, the monument "prominently acknowledge[d] that [a private organization] donated the display, a factor which … further distances the State itself from the religious aspect of the Commandments' message." 545 U.S. at 701-02 (Breyer, J., concurring).

With the inscriptions, there is no distance at all between "the State" and the religious prose. "In God We Trust" serves as **the national motto**, and **Congress** has mandated that it be inscribed on each and every coin and currency bill produced by **the nation's Treasury Department**.

(4) In *Van Orden*, "[t]he monument sits in a large park containing 17 monuments and 21 historical markers, all designed to illustrate the 'ideals' of those who settled in Texas and of those who have lived there since that time." *Id*. at 702;

The "In God We Trust" phrase is not merely one of 38 displays designed to illustrate acceptable ideals and scattered about a large park. In terms of prose unrelated (and contrary) to our nation's Constitution, the motto is, for the most part, all there is on the money. *See*, *e.g.*, Addendum C.

(5) In *Van Orden*, "[t]he setting … provide[s] a context of history and moral ideals. It (together with the display's inscription about its origin) communicates to visitors that the State sought to reflect moral principles, illustrating a relation between ethics and law that the State's citizens, historically speaking, have endorsed. That is to say, the context suggests that the State intended the display's moral message--an illustrative message reflecting the historical 'ideals' of Texans--to predominate." 545 U.S. at 701-02 (Breyer, J., concurring).

There is no similar "context of [secular] history and moral ideals" for the "In God We Trust" inscriptions. On the contrary, there is a stark claim that this nation officially adheres to and promotes the exclusionary and purely religious claims that (i) there exists a (Christian) God, and (ii) this nation trusts in that (Christian) God.

(6) In *Van Orden*, "40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation." *Id*.

The first attempt to rid the money of this religious phrase was in 1968, *see* JA185, only two years after the Treasury Department put an end to the production of any secular currency, *see* www.treasury.gov/about/education/Pages/in-god-we-trust.aspx. Since then there have been, by Defendants' own admission, multiple additional attempts. *See* JA091 (Amended Complaint ¶ 376). Moreover, Congress's mandate that all coins and currency bear the motto occurred in the midst of McCarthyism, when Atheism was often associated with communism,[37] which itself was reviled. Thus, there was certainly the "climate of intimidation" about which Justice Breyer was concerned.

(7) *Van Orden* "differs from *McCreary County*, where the … history of the courthouse Commandments' displays demonstrates the substantially

[37] *See, e.g.*, (Admitted) Statements of Fact #110 (JA242), #118 (JA245), #134 (JA250), #149 (JA255), and #161 (JA258).

religious objectives of those who mounted them … .” 545 U.S. at 703 (Breyer, J., concurring).

The instant case is very similar to *McCreary County*, with the history clearly demonstrating “the substantially religious objectives” of those who pressed to have “In God We Trust” placed on the money.

(8) *Van Orden* “differs from *McCreary County* … [because] that history there indicates a governmental effort substantially to promote religion, not simply an effort primarily to reflect, historically, the secular impact of a religiously inspired document.” *Id*.

This case is very similar to *McCreary County*, in that the history here indicates a governmental effort substantially to promote religion, and (except, perhaps, in post hoc congressional “reaffirmations”) no effort to reflect, historically, the secular impact of a purely religious phrase.

Thus, not only is the instant case lacking the facts that led Justice Breyer to approve of the *Van Orden* display (in that “borderline” case), but it largely replicates the facts that led him to disapprove of the display in *McCreary County*. Accordingly, Justice Breyer may well support a Plaintiffs’ verdict here.

III. "In God We Trust" Violates the Neutrality "Touchstone"

After speciously arguing that Plaintiffs are "asserting a strict 'neutrality principle' that would preclude the government from even mentioning religion," Document 45 (BFD) at 25, Defendants place five pages of prose under the heading, "The Motto's Inscription on U.S. Money Does Not Violate the Neutrality Principle." *Id*. at 47-51. Their entire exegesis, however, is a Potemkin village.

This, of course, is unsurprising. After all, the essential element of "religion" is that God exists, and the essential element of "nonreligion" is that God is a fiction. Because "In God We Trust" is 100% supportive of the former view and completely incompatible with the latter, any claim that the phrase is "neutral" as between these polar opposite religious views is illusory.

The first page of Defendants foray into this imaginary realm is spent introducing their "'In God We Trust' is neutral" contention and notifying the reader that they plan to rely again on Justice Breyer's *Van Orden* concurrence. Ignoring that Justice Breyer had already joined the *McCreary County* majority's declaration that neutrality – including that "between religion and nonreligion" – is "the touchstone" for analyzing Establishment Clause cases, 545 U.S. at 860), Defendants point to the two circumstances Justice Breyer highlighted as possibly mitigating the neutrality principle. The problem with their argument is that neither of these circumstances is applicable to the gravamen of Plaintiffs' Complaint.

The first circumstance is when "it is … difficult to determine when a legal rule is 'neutral.'" 545 U.S. at 699 (Breyer, J., concurring). With no such difficulty in regard to the "In God We Trust" inscriptions, Defendants spend the second of their five pages presenting a collection of dicta that all say essentially the same thing: i.e., sometimes there are difficult cases. True, but this is not one of them.

Still skipping over the facial lack of neutrality inherent in "In God We Trust," Defendants fill their third page with their old standby – i.e., contorting the ancillary dicta about the motto that has, upon occasion, been included in Supreme Court cases. Plaintiffs, of course, have already laid out every Supreme Court "In God We Trust" mention for all to review. *See* Document 43 (AOB) at 89-107 (Addendum C). None leads to the conclusion Defendants desire.

The obvious non-neutrality of the challenged inscriptions is also ignored in the discussion on Defendants' page four. Here, the argument is that *McCreary County*'s "touchstone" language should be trivialized because (i) it was used "in the limited context of assessing the purpose of the challenged display," Document 45 (BFD) at 50, and (ii) most of the **forty-one Supreme Court majority opinions upholding the neutrality principle** are not sufficiently on point. As to the "limited context" in *McCreary County*, the fact is that the same context is involved in this case. If there is any difference, it is that the historical record showing that the religious purpose is clearer for "In God We Trust."

As to the extraordinary number of Supreme Court **majority opinions** upholding the neutrality principle, Defendants first seem to bolster Plaintiffs' argument by quoting *Skoros v. City of New York*, 437 F.3d 1, 18 (2d Cir. 2006): "[The] first prong of the *Lemon* test 'is … intended … to prevent government from "abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters."'" Document 45 (BFD) at 38 (internal citation omitted). Defendants then make the incomprehensible claim that "*Skoros* directly contradicts [Plaintiffs'] neutrality argument." *Id*. at 50.

The fifth and final page of Defendants' "'In God We Trust' is neutral" section reveals a truly bizarre approach to legal analysis: disregarding the clear, on-point decisions in seven of this Circuit's prior Establishment Clause cases by doing nothing more than finding features that make those cases "distinguishable," Document 45 (BFD) at 51, from the instant action.

Cases are always in some way "distinguishable." Thus, ending all analysis once a "distinguishable" feature can be found would end jurisprudence as it is known in this nation. That this technique was applied to *Cooper v. United States Postal Service*, 577 F.3d 479 (2d Cir. 2009) – a case that is virtually identical (although far weaker – *see* Document 43 (AOB) at 24-27) to this case in terms of the basic issues – can only be interpreted as Defendants' admission that this Circuit's precedent mandates a decision in Plaintiffs' favor.

In any event, although this case is now ready for oral argument in the Court of Appeals, Defendants have still not provided a single sentence explaining how "In God We Trust" is neutral as between (Christian) Monotheism and Atheism. Plaintiffs suspect that everyone knows why that is.

IV. Ending an Establishment Clause Violation is Not "Hostility" to Religion

The second circumstance where Justice Breyer felt the "neutrality" principle can be tempered is where there is "'hostility to the religious.'" *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring) (citation omitted). Plaintiffs agree. However, ensuring that the government adheres to its constitutional obligation to "not … lend its power to one or the other side in controversies over religious authority or dogma," *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990), is not "hostility to the religious." Were it otherwise, such cases as *Engel*, *Abington*, *Epperson v. Arkansas*, 393 U.S. 97 (1968), *Stone v. Graham*, 449 U.S. 39 (1980), *Wallace v. Jaffree*, 472 U.S. 38 (1985), *Edwards v. Aguillard*, 482 U.S. 578 (1987), *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), *Lee v. Weisman*, 505 U.S. 577 (1992), *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290 (2000), and *McCreary County* (not to mention myriad Second Circuit cases – such as the eight noted in the AOB (Document 43 at 24-31)) would all have been decided otherwise.

V. Defendants' Free Exercise and RFRA Arguments Are Unavailing

In claiming that there is no Free Exercise or RFRA violation in this case, Defendants cite *Smith* for the proposition just provided – i.e., that "'government may not … lend its power to one or the other side in controversies over religious … dogma.'" Document 45 (BFD) at 53 (citation omitted). Yet in the religious debate over the existence of God, government surely is lending its power to the side that claims God exists when it inscribes "In God We Trust" on all currency.

Defendants then jump to *Skoros*'s recognition that freedom to act on one's beliefs is not absolute, as if that recognition is in some way dispositive. Plaintiffs agree that freedom to act on one's beliefs is not absolute. This is because religiously neutral laws always have the potential of infringing upon some desired activity that individuals or groups may believe is religious. Thus, for instance, in *Smith*, the religiously neutral laws against the use of controlled substances infringed upon the desire of Native Americans to ingest peyote. Although the Supreme Court ruled that the Constitution does not require the government to apply strict scrutiny in such circumstances, RFRA re-imposes that level of scrutiny for matters (such as the one here) that involve federal laws.

It is essential to note that this analysis – which, in itself, should lead to Plaintiffs prevailing – only applies to religiously neutral laws. When a law is clearly religiously inspired or has clearly religious effects, the government has an

even greater (and, Plaintiffs would say, impossible under the Establishment Clause) burden to demonstrate a compelling interest and narrowly tailored laws designed to serve that interest. Defendants have never come close to meeting that burden. *See* Document 43 (AOB) at 40.

Defendants' next citation – to *Universal Church v. Geltzer*, 463 F.3d 218 (2d Cir. 2006) – shows again that they are missing the basic point of *Smith* and its progeny (not to mention *Smith*'s being overruled by RFRA in terms of federal statutes). Again, those cases apply only when the statute in question is (as Defendants wrote) "'a generally applicable law.'" Document 45 (BFD) at 54 (citing *Geltzer*, 463 F.3d at 227). A law that makes a purely religious statement such as "In God We Trust" does not fit in the "generally applicable" category.

In Document 45 (BFD) at 55, Defendants reference the dictum in *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977), stating that "[c]urrency is generally carried in a purse or pocket and need not be displayed by the public. The bearer of currency is thus not required to publicly advertise the national motto." This is a straw man. *Wooley* was decided as a free speech case (holding, incidentally, 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), and the majority never discussed the religious ramifications of the **non-religious** governmental speech at issue there.

In any event, having "to publicly advertise" a religious message has never been a criterion for a Free Exercise or RFRA violation. Certainly the plaintiff in *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), did not have to "publicly advertise" his (or the state's) policy on tuberculosis testing. Nor has any other complainant been required to "publicly advertise" his or her sincerely held religious beliefs in order to prevail in a Free Exercise or RFRA litigation.

Also without foundation is Defendants' claim that "the religious content of the message is minimal," Document 45 (BFD) at 55, especially in view of the history provided in the Amended Complaint, *see* JA043-91. The reason that the only two amicus curiae in this legal action are (i) an organization with a mission statement that seeks "the spread of the Gospel by transforming the legal system," www.alliancedefendingfreedom.org/about/, and (ii) another that claims to work "for Religious Liberty," is the same reason there will be "intense opposition to the abandonment of that motto." *Abington*, 374 U.S. at 303 (Brennan, J., concurring). That is because the religious content of the message is huge.

Defendants' further RFRA arguments are similarly unavailing. They claim that RFRA is inapt in this case because the statute was meant only to apply "clearly, rather than obliquely." Document 45 (BFD) at 56. If this limitation were valid, then 42 U.S.C. § 2000bb et seq. would essentially become a nullity, since there is no "clear" application to any particular existing statute in RFRA.

The further argument that there is no "'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" Document 45 (BFD) at 57 (citation omitted) – when Plaintiffs have specifically asserted that there is precisely that pressure – is arrogant and offensive. "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989).

Also invented is Defendants' transformation of a few (allegedly) "'legitimate secular purposes,'" Document 45 (BFD) at 57 (citation omitted), into compelling interests. How can those interests be "compelling" when the nation did fine without them for 75 years? Likewise, it is fantastical to claim that the least restrictive means of serving these allegedly compelling interests is to use an exclusionary and purely religious phrase. *See County of Allegheny*, 492 U.S. at 673-74 (Kennedy, J., concurring and dissenting).

VI. Plaintiffs Have Not Waived Their Equal Protection Claims

Defendants contend that Plaintiffs have waived their equal protection claims because "they have not developed the argument in their brief." Document 45 (BFD) at 52. Yet Plaintiffs raised equal protection concerns repeatedly in the AOB. *See, e.g.*, Document 43 at 16-18, 49-51, 65, 67-69 and 72. Furthermore, the equal

protection arguments are largely coextensive with the "neutrality" argument (as Defendants acknowledged, Document 45 (BFD) at 53). Surely, when an equal protection violation is as manifest as it is in this case – especially when Plaintiffs specifically cited *Bradwell v. Illinois*, 83 U.S. 130 (1873), *Plessy v. Ferguson*, and *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940), Document 43 (AOB) at 49-50 – no further argument is necessary to preclude equal protection waiver.

It is worth noting again the difference between the approach the Department of Justice is taking here as opposed to the approach it took in its *Brown v. Board of Education* amicus curiae brief: "The constitutional requirement is that of equality, not merely in one sense of the word but in every sense."[38] At least "separate but equal" had ostensible equality. Here there is nothing but blatant inequality, declared in our national motto and inscribed on every article of currency.

RESPONSE TO AMICI

Amicus curiae Alliance Defending Freedom (ADF) contends that Plaintiffs lack standing in this case. Amicus curiae the Becket Fund for Religious Liberty contends that there are four forms of an establishment, and, since none of those are included among the challenges in this litigation, Defendants should prevail. Space

[38] Brief for the United States as Amicus Curiae, *supra* note 19, at 17-18 (Addendum B at B-017-18).

limitations preclude Plaintiffs from fully addressing these contentions. As an initial matter, however, it should be recognized that were those arguments valid, the plaintiffs in *Stone v. Graham*, *County of Allegheny*, *McCreary County*, *Van Orden*, and a multitude of Second Circuit cases (including *Cooper v. United States Postal Serv.*) would all have lacked standing and would also have all lost their cases on the merits.

The argument of Amicus Becket Fund for Religious Liberty[39] is noteworthy in that it relies upon a single law review article. Moreover, the first line under the heading "Elements of the Establishment" in that article specifically states, "An establishment is the promotion and inculcation of a common set of beliefs through governmental authority." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). That is close to a perfect description of what this case involves.

[39] One wonders what "religious liberty" the Becket Fund **for Religious Liberty** seeks to uphold in this case. There is no liberty interest in having the government doing one's religious bidding. That, in fact, is what the Religion Clauses prohibit. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 592 (1992) ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, … may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."); *Abington*, 374 U.S. at 226 ("While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs.").

More importantly, however, is that the First Amendment does not limit proscribed governmental activity to religious establishments. As the text of the Establishment Clause makes clear, the Framers opted to use a far broader brush, prohibiting the government from making laws even "respecting" – i.e., having anything to do with – an establishment of religion. Accordingly, even if the Court disagrees that choosing "In God We Trust" as the nation's sole official motto and mandating the inscription of that motto on every coin and currency bill is an establishment of (Christian) Monotheism, it is certainly a law **respecting** such an establishment.

CONCLUSION

Defendants still have not demonstrated how "In God We Trust" on the money is facially constitutional, meets the neutrality "touchstone," survives the *Lemon* test, meets the demands of strict scrutiny, or in any other manner accords with the requirements of the Constitution or of RFRA. There is good reason for this: "In God We Trust" on the money does none of these things.

A decision should issue in Plaintiffs' favor.

Respectfully submitted,

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/s/ Michael Newdow Dated: January 31, 2014

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ADDENDUM A

CURRENT (2014) STATE CONSTITUTIONS PROVISIONS FACIALLY DISCRIMINATORY TOWARDS ATHEISTS

Arkansas State Constitution: Article 19, Section 1 ("No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.")

Maryland State Constitution: Article 37 ("That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God.")

Mississippi State Constitution: Article 14, Section 265 ("No person who denies the existence of a Supreme Being shall hold any office in this state.")

North Carolina State Constitution: Article 6, Section 8 ("The following persons shall be disqualified for office: First, any person who shall deny the being of Almighty God.")

Pennsylvania State Constitution: Article 1, Section 4 ("No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth.")

South Carolina State Constitution: Article 17, Section 4 ("No person who denies the existence of a Supreme Being shall hold any office under this Constitution.")

Tennessee State Constitution: Article 9, Section 2 ("No person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this state.")

Texas State Constitution: Article 1, Section 4 ("No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.")

ADDENDUM B

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS, *BROWN V. BD. OF EDUC.*, 347 U.S. 483 (1954)

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 8*

OLIVER BROWN, ET AL., APPELLANTS

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Because of the national importance of the constitutional questions presented in these cases, the United States considers it appropriate to submit this brief as *amicus curiae*. We shall not undertake, however, to deal with every aspect of the issues involved. Comprehensive briefs have been submitted by the parties and other *amici curiae;* and, so far as possible, this brief will avoid repetition of arguments and materials contained in those briefs. We shall try to confine ourselves to those aspects of the cases which are of particular concern to the Government or within its special competence to discuss.

*Together with No. 101, *Briggs, et al.* v. *Elliott;* No. 191, *Davis, et al.* v. *County School Board, et al.;* No. 413, *Bolling, et al.* v. *Sharpe, et al.;* and No. 448, *Gebhart, et al.* v. *Belton, et al.*

I

The interest of the United States

In recent years the Federal Government has increasingly recognized its special responsibility for assuring vindication of the fundamental civil rights guaranteed by the Constitution. The President has stated: "We shall not * * * finally achieve the ideals for which this Nation was founded so long as any American suffers discrimination as a result of his race, or religion, or color, or the land of origin of his forefathers. * * * The Federal Government has a clear duty to see that constitutional guaranties of individual liberties and of equal protection under the laws are not denied or abridged anywhere in our Union."[1]

Recognition of the responsibility of the Federal Government with regard to civil rights is not a matter of partisan controversy, even though differences of opinion may exist as to the need for particular legislative or executive action. Few Americans believe that government should pursue a *laissez-faire* policy in the field of civil rights, or that it adequately discharges its duty to the people so long as it does not itself intrude on their civil liberties. Instead, there is general acceptance of an affirmative government obligation to insure respect for fundamental human rights.

[1] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2.

The constitutional right invoked in these cases *is the basic right, secured to all Americans, to* equal treatment before the law. The cases at bar do not involve isolated acts of racial discrimination by private *individuals or groups. On the* contrary, it is contended in these cases that public school systems established in the states of Kansas, South Carolina, Virginia, and Delaware, and in the District of Columbia, unconstitutionally discriminate against Negroes solely because of their color.

This contention raises questions of the first importance in our society. For racial discriminations imposed by law, or having the sanction or support of government, inevitably tend to undermine the foundations of a society dedicated to freedom, justice, and equality. The proposition that all men are created equal is not mere rhetoric. It implies a rule of law—an indispensable condition to a civilized society—under which all men stand equal and alike in the rights and opportunities secured to them by their government. Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American,* and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy. The color of a man's skin—like his religious beliefs, or his political attachments, or the country from which he or his ancestors came to the United States—does not

diminish or alter his legal status or constitutional rights. "Our Constitution is color-blind, and *neither knows nor tolerates classes among citizens.*"[2]

The problem of racial discrimination is particularly acute in the District of Columbia, the nation's capital. This city is the window through which the world looks into our house. The embassies, legations, and representatives of all nations are here, at the seat of the Federal Government. Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude toward minorities generally. The President has stated that "The District of Columbia should be a true symbol of American freedom and democracy for our own people, and for the people of the world."[3] Instead, as the President's Committee on Civil Rights found, the District of Columbia "is a graphic illustration of a failure of democracy."[4] The Committee summarized its findings as follows:

> For Negro Americans, Washington is not just the nation's capital. It is the

[2] Mr. Justice Harlan in *Plessy* v. *Ferguson*, 163 U. S. 537, 559. Regrettably, he was speaking only for himself, in dissent.

[3] Message to the Congress, note 1, *supra*, p. 5.

[4] *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 89.

point at which all public transportation into the South becomes "Jim Crow." If he stops in Washington, a Negro may dine like other men in the Union Station, but as soon as he steps out into the capital, he leaves such democratic practices behind. With very few exceptions, he is refused service at downtown restaurants, he may not attend a downtown movie or play, and he has to go into the poorer section of the city to find a night's lodging. The Negro who decides to settle in the District must often find a home in an overcrowded, substandard area. He must often take a job below the level of his ability. He must send his children to the inferior public schools set aside for Negroes and entrust his family's health to medical agencies which give inferior service. In addition, he must endure the countless daily humiliations that the system of segregation imposes upon the one-third of Washington that is Negro.

* * * * *

The shamefulness and absurdity of Washington's treatment of Negro Americans is highlighted by the presence of many dark-skinned foreign visitors. Capital custom not only humiliates colored citizens, but is a source of considerable embarrassment to these visitors. * * * Foreign officials are often mistaken for American Negroes and refused food, lodging and entertainment. However, once it

is established that they are not Americans, they are accommodated.[5]

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed. The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing firm determination to remove existing flaws in our democracy.

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith. In response to the request of the Attorney General for an authoritative statement of the effects of racial discrimination in the United States upon the conduct of foreign relations, the Secretary of State has written as follows:

> * * * I wrote the Chairman of the Fair Employment Practices Committee on May 8, 1946, that the existence of discrimination against minority groups was having an adverse effect upon our relations with other countries. At that time I pointed out that

[5] *Id.*, pp. 89, 95.

discrimination against such groups in the United States created suspicion and resentment in other countries, and that we would have better international relations were these reasons for suspicion and resentment to be removed.

During the past six years, the damage to our foreign relations attributable to this source has become progressively greater. The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country. As might be expected, Soviet spokesmen regularly exploit this situation in propaganda against the United States, both within the United Nations and through radio broadcasts and the press, which reaches all corners of the world. Some of these attacks against us are based on falsehood or distortion; but the undeniable existence of racial discrimination gives unfriendly governments the most effective kind of ammunition for their propaganda warfare. The hostile reaction among normally friendly peoples, many of whom are particularly sensitive in regard to the status of non-European races, is growing in alarming proportions. In such countries the view is expressed more and more vocally that the United States is hypocritical in claiming to be the champion of democracy while permitting practices of racial discrimination here in this country.

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The segregation of school children on a racial basis is one of the practices in the United States that has been singled out for hostile foreign comment in the United Nations and elsewhere. Other peoples cannot understand how such a practice can exist in a country which professes to be a staunch supporter of freedom, justice, and democracy. The sincerity of the United States in this respect will be judged by its deeds as well as by its words.

Although progress is being made, the continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.[4]

II

The Court may not find it necessary to reach the question whether the "separate but equal" doctrine should be reaffirmed or overruled

The briefs in these cases are largely concerned with the question, specifically reserved in *Sweatt* v. *Painter*, 339 U. S. 629, 635–636, whether the "separate but equal" doctrine of *Plessy* v. *Ferguson*, 163 U. S. 537, "should be reexamined in the light of contemporary knowledge respecting

[4] Letter to the Attorney General, dated December 2, 1952. The earlier letter of May 8, 1946, referred to by the Secretary, is quoted in *To Secure These Rights*, note 4, *supra*, pp. 146–147.

the purposes of the Fourteenth Amendment and the effects of racial segregation."

In the *Sweatt* case (p. 631) the opinion stated: "We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible." The essential requisites for constitutional adjudication "may be lacking though there be entire disinterestedness on both sides in their desire to secure at the earliest possible moment an adjudication on constitutional power."[1] The Court has emphasized that "it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. These rules are safe guides to sound judgment. It is the dictate of wisdom to follow them closely and carefully." *Liverpool Steamship Company* v. *Emigration Commissioners*, 113 U. S. 33, 39. Additional authorities are collected in the concurring opinion of Brandeis, J., in *Ashwander* v. *T. V. A.*, 297 U. S. 288, 346–348.

Because of its "traditional reluctance to extend constitutional interpretations to situations or facts" not actually presented to it, the Court

[1] *United States* v. *CIO*, 335 U. S. 106, 120 (concurring opinion).

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has declined to pass on the abstract constitutionality of racial segregation *per se* in cases where such an issue was raised but where other or additional grounds for finding inequality were present. *Sweatt* v. *Painter, supra; Sipuel* v. *Board of Regents,* 332 U. S. 631, 633; *Fisher* v. *Hurst,* 333 U. S. 147, 150; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; cf. *Henderson* v. *United States,* 339 U. S. 816, 826. The Court may find, upon examination of the records in the cases at bar, that none of them presents inescapably the question whether separate but otherwise equal public schools for white and colored children are, solely because they are separate, constitutionally unequal.

That question would not arise unless and until it were found as a fact, upon the basis of supporting evidence, that the separate schools are equal in the educational benefits and opportunities afforded children of both races. Such a finding, if made by a district court and sustained by the evidence, would make it necessary to decide whether the establishment of such "separate but equal" schools satisfies the requirements of the Constitution. In none of the cases before the Court, however, is there such a finding.

In the Virginia, South Carolina, and Delaware cases, physical inequality, apart from segregation, was expressly found, and these findings of fact are not here challenged. (No. 101, R. 210, 307; No. 191, R. 622, 624; No. 448, R. 48–66.) The specific findings of inequality in those cases make it unnecessary to go further in order to establish that plaintiffs' constitutional rights have been violated. Failure of a state to provide "equal" educational facilities to some of its citizens, solely because of their race or color, is without more a violation of the Fourteenth Amendment. "The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337, 349. The constitutional right to equality of educational opportunity is "personal and present" (*Sweatt* v. *Painter,* 339 U. S. 629, 635), and it is no answer to the particular plaintiffs' claim to say that, at some time in the future, colored persons as a group will be treated "equally." A state can discharge its obligation to persons discriminated against only by furnishing them equal educational benefits "as soon as it does for applicants of any other group." *Sipuel* v. *Board of Regents,* 332 U. S. 631, 633. We agree with the Supreme Court of Delaware in No. 448 that, in cases where separate schools are found physically unequal, the particular plaintiffs should not be required to attend inferior schools until such time as the state may complete an "equalization" program. Accordingly, the district courts, upon making such findings in the Virginia and South Carolina cases, erred in withholding from the plaintiffs the relief to which they were then imme-

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diately entitled. If and when it should be found as a fact, and not merely prophesied, that "equalization" has been accomplished, there would arise the question which on the present records in the Virginia and South Carolina cases may be deemed hypothetical, namely, whether "equalization" is the same as equality. Cf. *Wilshire Oil Co.* v. *United States*, 295 U. S. 100, 102.

In the Kansas case, the district court found equality of physical facilities, curricula, qualifications of teachers, transportation service, etc., and held that the plaintiffs were "denied no constitutional rights or privileges by reason of any of these matters." (R. 245–246.) But it also made the following finding of fact (*ibid.*):

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain [retard?] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.[8]

[8] A substantially identical finding of fact was made by the Chancellor in the Delaware case. The state Supreme Court, although it held that this finding was "immaterial" to the constitutional issue, did not reject it as unsupported by the evidence.

This is not a finding of "separate but equal." On the contrary, it is a finding of "separate but unequal," or more precisely, "separate and hence unequal." Despite this finding, the district court held that the plaintiffs' constitutional right to equality of treatment had not been violated. This holding was based solely on the court's understanding of the "separate but equal" doctrine of *Plessy* v. *Ferguson*. The district court thought that that case required it to hold as a matter of law that separate schools are legally equal even though it finds that, because of segregation, they are in fact unequal. This, we submit, was plain error even if it be assumed that *Plessy* is still controlling.

Plessy v. *Ferguson* did not purport to lay down an inexorable rule of law, which could not be challenged at any time in the future no matter how different the circumstances, that segregation could *never* create inequality. In the *Plessy* case the Court said only that, as a general matter, laws requiring the separation of white and colored persons "do not *necessarily* imply the inferiority of either race to the other." (P. 544; italics added.) This was asserted as if it were axiomatic and too obvious to admit of dissent. We do not pause here to demonstrate the errors of fact and law contained in the Court's generalization.[9] It suffices to note that the *Plessy* case plainly does not

[9] See Brief for the United States, pp. 27–35, 49–60, in *Henderson* v. *United States*, No. 25, Oct. Term 1949, 339 U. S. 816.

preclude a district court from finding, as the district court found in the Kansas case, that segregation can, and in the particular instance does, produce unequal and inferior treatment. In *Plessy* the Court indulged in an abstract speculation as to the effects of racial segregation in general; in No. 8 there is a contrary finding of fact, based on evidence and not on unproved assumptions, as to the particular effects of racial segregation in public schools on the education of colored children. Hence, we believe, the Kansas district court erred in construing *Plessy* v. *Ferguson* as compelling a holding of constitutional equality where there is a specific finding of fact that the particular type of enforced racial segregation creates inequality.

The District of Columbia case arises on the pleadings, the precise issue being whether the district court erred in granting the motion to dismiss the complaint. No evidence was taken, and no findings of fact were made. To the extent that determination of the constitutional questions raised may depend on facts, the case may not be in an appropriate posture for deciding such questions. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 568–575, and cases cited.

In any event, it is contended that the action of respondents in establishing segregated schools in the District of Columbia infringes petitioners' rights under the Fifth Amendment. Respondents assert that such segregation is compelled by cer-

tain Acts of Congress, and their interpretation of these Acts was upheld by the district court in dismissing the complaint, apparently on the authority of *Carr* v. *Corning*, 182 F. 2d 14 (C. A. D. C.). There is, therefore, an initial question of statutory construction.

The Court may find this an appropriate case for application of the well-settled rule of construction that doubts as to the meaning of a statute should be resolved so as to avoid serious constitutional questions. The Court has in countless cases affirmed its duty "in construing congressional enactments to take care to interpret them so as to avoid a danger of unconstitutionality." *United States* v. *CIO*, 335 U. S 106, 120–121, and cases cited. There is room for reasonable argument that in the pertinent statutes Congress *assumed* the existence of a system of segregated schools in the District of Columbia, but did not make it mandatory upon the responsible District authorities to maintain and continue such segregation.

The langunge of these Acts of Congress may be regarded as significantly different from the constitutional and statutory provisions involved in the state cases. Typical of the latter in their explicitness are those of Virginia.[10] Its Constitution (1902, Article IX, section 140) provides:

[10] The texts of the constitutional and statutory provisions in states having school segregation are quoted in appellees' brief in No. 101, pp. 38–46.

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rights.

[1] Message to the Congress, February 2, 1948, H. Doc. No. 516, 80th Cong., 2d sess., p. 2.

attachments, or the country from which he or his ancestors came to the United States—does not

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"White and colored children shall not be taught in the same school." Its statutes (Code 1950, section 22–221) provide: "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

No similarly explicit and mandatory language, manifesting an unmistakable intention to make racial segregation compulsory in the public schools of the District of Columbia, is to be found in the pertinent Acts of Congress.[11] If Congress had expressly required such segregation, a grave and difficult question under the Fifth Amendment would arise. This question could be avoided if these Acts were construed as meaning only that in them Congress assumed, but neither approved nor disapproved, the fact of a segregated school system in the District. Such a construction, we suggest, is not precluded by the terms of the legislation. *Cf. Ex parte Endo*, 323 U. S. 283, 303, note 24, and cases cited. If the Court should adopt this construction, it would be appropriate to remand the case to the district court with instructions to enter a declaratory judgment to that effect. The respondent Board of Education would then be free to abandon the present segregated school system in the District of Columbia. If it should thereafter continue to maintain such a segregated school system, its action

[11] These provisions are set out in petitioners' brief in No. 413, pp. 23–26.

could not be based upon any asserted mandate from Congress but would arise solely from its own independent action. In such event the legal questions which might arise would not be the same as those now sought to be raised.

III

If the Court should reach the question, the "separate but equal" doctrine should be reexamined and overruled

In the briefs submitted by the United States in *Henderson* v. *United States*, 339 U. S. 816, and in *Sweatt* v. *Painter*, 339 U. S. 629, and *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, the Government argued that racial segregation imposed or supported by law is *per se* unconstitutional. We renew that argument here. Without repeating in detail the grounds, stated at length in those briefs, for the conclusion that the doctrine of "separate but equal" is wrong as a matter of constitutional law, history, and policy, the United States again urges the Court, if it should reach the question, to reexamine and overrule that doctrine.

The Government submits that compulsory racial segregation is itself, without more, an unconstitutional discrimination. "Separate but equal" is a contradiction in terms. Schools or other public facilities where persons are segregated by law, solely on the basis of race or color, cannot in any circumstances be regarded as equal. The con-

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[3] Message to the Congress, note 1, *supra*, p. 5.
[4] *To Secure These Rights*, Report of the President's Committee on Civil Rights (1947), p. 89.

American Negroes and refused food, lodging and entertainment. However, once it

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stitutional requirement is that of equality, not merely in one sense of the word but in every sense. Nothing in the language or history of the Fourteenth Amendment supports the notion that facilities need be equal only in a physical sense.

People who are compelled by law to live in a ghetto do not enjoy equality, even though their houses are as good as, or better than, those on the outside. Cf. *Buchanan* v. *Warley*, 245 U. S. 60. The same is true of children who know that because of their color the law sets them apart from others, and requires them to attend separate schools specially established for members of their race. The facts of every-day life confirm the finding of the district court in the Kansas case that segregation has a "detrimental effect" on colored children; that it affects their motivation to learn: and that it has a tendency to retard their educational and mental development and to deprive them of benefits they would receive in an integrated school system. (*Supra*, p. 12.) Similar considerations are reflected in the opinions of this Court in the *Sweatt* and *McLaurin* cases, 339 U. S. at 633–635 and 641–642.

The broad principle underlying the decisions of this Court from *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, to the *Sweatt* and *McLaurin* cases is that the Fourteenth Amendment forbids the classification of students on the basis of race or color so as to deny one group educational advantages and opportunities afforded to another. To

be sure, those cases involved university graduate and professional schools, but nothing in the language or history of the Fourteenth Amendment could support a constitutional distinction between universities on the one hand, and public elementary or high schools on the other. Strict insistence upon the constitutional requirement of equality is no less necessary as applied to public schools which, as has been said, are "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people * * *. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny." [12]

Similarly, nothing in the language or history of the Fourteenth Amendment could support an interpretation which permits segregation of Negroes but not of other groups in the community. Indeed, as the Court has pointed out in many cases, that Amendment was primarily designed to assure to colored persons the right to be treated under the law exactly like white persons, and to protect them against being singled out for special or discriminatory treatment.

Strauder v. *West Virginia*, 100 U. S. 303, decided in 1880, was the first case in which the Court was called upon to deal with the application of the Fourteenth Amendment to a state law making

[12] *McCollum* v. *Board of Education*, 333 U. S. 203, at 216, 231 (concurring opinion).

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countries. At that time I pointed out that

[1] *Id.*, pp. 89, 95.

of democracy while permitting practices of racial discrimination here in this country.

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a classification based on race or color. The interpretation placed on the Amendment in that case (pp. 306–308) is especially significant, not merely because of its comprehensive nature, but because it was made by a Court whose members had lived during the period when the Amendment was adopted:

> This [the Fourteenth Amendment] is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. The true spirit and meaning of the amendments, as we said in the *Slaughter-House Cases* (16 Wall. 36), cannot be understood without keeping in view the history of the times when they were adopted, and the general objects they plainly sought to accomplish. At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate * * * that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It is well known that in some States laws making such discriminations then existed, and others might well be expected. * * * It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the

> enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * *
>
> * * * What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? * * * The very fact that colored people are singled out * * * is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Referring to the civil rights statutes (now 8 U. S. C. 41 and 42) enacted by Congress pursuant to the Fourteenth Amendment, the Court in *Virginia* v. *Rives*, 100 U. S. 313, 318, stated: "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites. They made the rights and responsibilities, civil and criminal, of the two races exactly the same." See also the *Slaughter-*

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is quoted in *To Secure These Rights*, note 4, *supra*, pp. 146–147.

[7] *United States* v. *CIO*, 335 U. S. 106, 120 (concurring opinion).

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House Cases, 16 Wall. 36, 70–72, 81, and *Buchanan* v. *Warley*, 245 U. S. 60, 76.

In *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 420, the Court said: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." Cf. *Hurd* v. *Hodge*, 334 U. S. 24, 30–34. And in *Shelley* v. *Kraemer*, 334 U. S. 1, 23, the Chief Justice stated for the Court:

> The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color.

"Separate but equal" is sometimes described as an "ancient" doctrine of constitutional law. But its antiquity dates not from the adoption of the Fourteenth Amendment in 1868 but from a judicial expression which did not make its appearance in the reports of this Court until 1896. Almost three decades after ratification of the post-bellum Amendments, when "the history of the times when they were adopted, and the general objects they plainly sought to accomplish" may have become blurred by the passage of time, the opinion in *Plessy* v. *Ferguson*, 163 U. S. 537, read into the Fourteenth Amendment a qualification that enforced separation of white and colored persons in the use of public facilities does not violate the Amendment so long as the separate accommodations are "equal." This judicial contraction of the constitutional rights secured by the Amendment is irreconcilable with the body of decisions which preceded and followed *Plessy* v. *Ferguson*, and is not justified by the considerations adduced to support it.

In the *Plessy* case the view was expressed (p. 551) that the alternative to racial segregation compelled by law is "an enforced commingling" of white and colored persons. This observation, apart from its irrelevance to the constitutional issue, is a plain *non sequitur*. Segregation imposed by law is an interference with the right of an individual to exercise a voluntary choice as to those with whom he will associate. To remove such an interference is to enlarge individual freedom, not to limit it. "Commingling" between white and colored persons can then result as the product of voluntary choice, not of legal coercion. Cf. *McLaurin* v. *Oklahoma State Regents*, 339 U. S. 637, 641–642.

In the *Plessy* case the Court also said (p. 551) that "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon

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the Constitution. In none of the cases before the Court, however, is there such a finding.

In the Virginia, South Carolina, and Delaware cases, physical inequality, apart from segregation, was expressly found, and these findings of fact are not here challenged. (No. 101, R. 210, 307; No. 191, R. 622, 624; No. 448, R. 48–66.) The spe-

physically unequal, the particular plaintiffs should not be required to attend inferior schools until such time as the state may complete an "equalization" program. Accordingly, the district courts, upon making such findings in the Virginia and South Carolina cases, erred in withholding from the plaintiffs the relief to which they were then imme-

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physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." This observation also was irrelevant to the constitutional issue before the Court. It might properly have been made before a legislative body considering a bill to penalize acts manifesting racial prejudice. But the Court was not called upon to make a judgment of policy as to the wisdom of legislation designed to eradicate racial prejudice; the only question before it was whether a particular statute violated a constitutionally-protected right.

In any event, this observation in the *Plessy* opinion is, at best, a half-truth. Although legislation may not be able to "eradicate" racial prejudice, experience has shown that it can create conditions favorable to the gradual elimination of racial prejudice; or it can, on the other hand, strengthen and enhance it. As the Supreme Court of California has said, the way to eradicate racial tension is not "through the perpetuation by law of the prejudices that give rise to the tension."[10] Even if statutes cannot in themselves remove racial antagonisms, they cannot constitutionally exacerbate such antagonisms by giving the sanction of law to what would otherwise be private acts of discrimination.

The above-quoted statements in the *Plessy* opinion illustrate the extent to which the "sepa-

[10] *Perez* v. *Sharp*, 32 Calif. 2d 711, 725.

rate but equal" doctrine represented the views of the members of the Court as the best solution for "the difficulties of the present situation" then existing. But the Justices were being called upon to make, not a judgment as to desirable legislative policy, but a judicial judgment as to the interpretation of the Fourteenth Amendment which would be most faithful to its terms, history, and purposes.

Whatever the merits in 1896 of a judgment as to the wisdom or reasonableness of the rule of "separate but equal", it should now be discarded as a negation of rights secured by the Constitution. The Court has said that "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or essentials of fundamental rights." *Wolf* v. *Colorado*, 338 U. S. 25, 27. "* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States*, 233 U. S. 604, 610.

In sum, the doctrine of "separate but equal" is an unwarranted departure, based upon dubious

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inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain [retard?] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system.[8]

[8] A substantially identical finding of fact was made by the Chancellor in the Delaware case. The state Supreme Court, although it held that this finding was "immaterial" to the constitutional issue, did not reject it as unsupported by the evidence.

the Court said only that, as a general matter, laws requiring the separation of white and colored persons "do not *necessarily* imply the inferiority of either race to the other." (P. 544; italics added.) This was asserted as if it were axiomatic and too obvious to admit of dissent. We do not pause here to demonstrate the errors of fact and law contained in the Court's generalization.[9] It suffices to note that the *Plessy* case plainly does not

[9] See Brief for the United States, pp. 27–35, 49–60, in *Henderson v. United States*, No. 25, Oct. Term 1949, 339 U. S. 816.

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assumptions of fact combined with a disregard of the basic purposes of the Fourteenth Amendment, from the fundamental principle that all Americans, whatever their race or color, stand equal and alike before the law. The rule of *stare decisis* does not give it immunity from reexamination and rejection. In *Smith* v. *Allwright*, 321 U. S. 649, 665–666, the Court said:

> * * * we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle rather than an interpretation of the Constitution to extract the principle itself."

"* * * the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 491–492 (concurring opinion). In *Passenger Cases*, 7 How. 283, 470, Mr. Chief Justice Taney agreed that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

IV

If in any of these cases the Court should hold that a system of "separate but equal" public schools is unconstitutional, it should remand the case to the district court with directions to devise and execute such program for relief as appears most likely to achieve orderly and expeditious transition to a non-segregated system

It is fundamental that a court of equity has full power to fashion a remedy to meet the needs of the particular situation before it. *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 622; *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 132; *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431; *Alexander* v. *Hillman*, 296 U. S. 222, 239; *Union Pacific Railway Co.* v. *Chicago, M. & St. P. Railway Co.*, 163 U. S. 564, 600–601. The fact that a system or practice is determined to be unlawful does not of itself require the court to order that it be abandoned forthwith. Thus, where a violation of the antitrust laws has persisted over a long period of time, resulting in a tangled complex of economic arrangements tainted with illegality, it is recognized that a decree calling for complete elimination of the illegal arrangements overnight would be impracticable. For example, dissolution of the illegal combinations involved in the *Standard Oil* and *Motion Picture*[10] cases was deliberately

[10] *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *Paramount Pictures*, 70 F. Supp. 53 (S. D. N. Y.), 334 U. S. 131, 68 F. Supp. 861, 339 U. S. 974. See also *United States* v. *National Lead Co.*, 332 U. S. 319, 329–335; *United States* v. *Aluminum Co.*, 322 U. S. 716, 148 F. 2d 416 (S. D. N. Y.), 171 F. 2d 285, 91 F. Supp. 333, 419.

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required to take place over a period of years.[28]

If, in any of the present cases, the Court should hold that to compel colored children to attend "separate but equal" public schools is unconstitutional, the Government would suggest that in shaping the relief the Court should take into account the need, not only for prompt vindication of the constitutional rights violated, but also for orderly and reasonable solution of the vexing problems which may arise in eliminating such segregation. The public interest plainly would be served by avoidance of needless dislocation and confusion in the administration of the school systems affected. It must be recognized that racial segregation in public schools has been in effect in many states for a long time. Its roots go deep in the history and traditions of these states. The practical difficulties which may be met in making progressive adjustment to a non-segregated system cannot be ignored or minimized.[29]

[28] As another example, when Congress determined that certain holding company arrangements were illegal, it delayed elimination of such arrangements in particular cases until a satisfactory plan for their dissolution should be proposed by the parties and approved by the Securities and Exchange Commission. Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U. S. C. § 79k.

[29] These anticipated difficulties relate, of course, only to the question of relief; they cannot affect the merits of the constitutionality of compulsory racial segregation. Moreover, the discussion in this section of the brief assumes that the separate schools for colored children are in other respects "equal." It would be manifestly unfair and unjust,

A decision that the Constitution forbids the maintenance of "separate but equal" public schools will necessarily result in invalidation of provisions of constitutions, statutes, and administrative regulations in many states—provisions which were adopted in good faith upon the assumption, supported by previous declarations of this Court, that they were consistent with the requirements of the Fourteenth Amendment. A reasonable period of time will obviously be required to permit formulation of new provisions of law governing the administration of schools in areas affected by the Court's decision. School authorities may wish to give pupils a choice of attending one of several schools, a choice now prohibited. Teachers may have to be transferred, and teaching schedules rearranged. It is possible, of course, that abolition of segregation would in many areas produce no serious dislocations, and no wholesale transfers of teachers or pupils would be required. This could result from purely geographical factors, for it would still be likely that the pupils of a school would be representative of the area in which it is situated.

These are indicative of the kinds of problems which may arise in giving effect to a holding that "separate but equal" school systems are unconstitutional. We suggest that any relief which

and contrary to the Court's decisions, to withhold immediate relief where the separate schools are also physically unequal and inferior. See pp. 10–12, *supra*.

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this Court may direct should contemplate the possibility of such problems and afford opportunity for their expeditious settlement within a specified period. Moreover, to the extent that there may exist popular opposition in some sections to abolition of racially-segregated school systems, we believe that a program for orderly and progressive transition would tend to lessen such antagonism. An appropriate tribunal to devise and supervise execution of such a program is a district court, which could fashion particular orders to meet particular needs. On remand, that court could direct the parties to submit proposals for such a program. And if the district court so desires, it could appoint an advisory committee of lawyers and other citizens to assist it in this task. After the district court adopts a program, either side could seek review, by appeal or otherwise, if it believes the program does not conform to this Court's decision. At reasonable intervals after the program is put into effect, the parties should submit progress reports to the district court, which should have the power, if circumstances so require, to enter any further orders found to be necessary.

Such a procedure should afford opportunity to responsible school authorities to develop a program most suited to their own conditions and needs. Thus, subject to the court's approval, a school board might propose integration on a grade basis, *i. e.*, to integrate the first grades immediately, and to continue such integration until completed as to all grades in the elementary schools. Cf. *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358. Another board might deem it more feasible to integrate on a school-by-school basis. In some states where there is segregation only in some grades of the elementary schools, as a result of the discretionary action of the authorities, it may be feasible to put a non-segregated system into effect immediately.[18]

CONCLUSION

The subordinate position occupied by Negroes in this country as a result of governmental discriminations ("second-class citizenship," as it is sometimes called) presents an unsolved problem for American democracy, an inescapable challenge to the sincerity of our espousal of the democratic faith.

In these days, when the free world must conserve and fortify the moral as well as the material sources of its strength, it is especially important to affirm that the Constitution of the United States places no limitation, express or implied,

[18] It is assumed that the district courts are, because of their familiarity with local conditions, the appropriate tribunals to deal with issues of relief. It may be, however, that the Court will wish to formulate more precise standards and provisions for the guidance of the district courts. In that event we suggest that several procedures are available. One would be for the Court to issue no decree at this time, but to set the matter down for argument at a later date on the question of relief. Another would be to appoint a special master to hold hearings and make recommendations to the Court on that question.

on the principle of the equality of all men before the law. Mr. Justice Harlan said in his dissent in the *Plessy* case (163 U. S. at 562):

> We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.

The Government and people of the United States must prove by their actions that the ideals expressed in the Bill of Rights are living realities, not literary abstractions. As the President has stated:

> If we wish to inspire the people of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy.
>
> We know the way. We need only the will.[38]

Respectfully submitted.

JAMES P. MCGRANERY,
Attorney General.

PHILIP ELMAN,
Special Assistant to the Attorney General.

DECEMBER 1952.

[38] Message to the Congress, note 1, *supra*, p. 7.

U. S. GOVERNMENT PRINTING OFFICE: 1952

ADDENDUM C

SAMPLES OF COINS PRODUCED BY DEFENDANT PETERSON'S UNITED STATES MINT

C-001

C-002

C-003

ADDENDUM D

2014 CIVIL RIGHTS ACT OF 1964 SILVER DOLLAR
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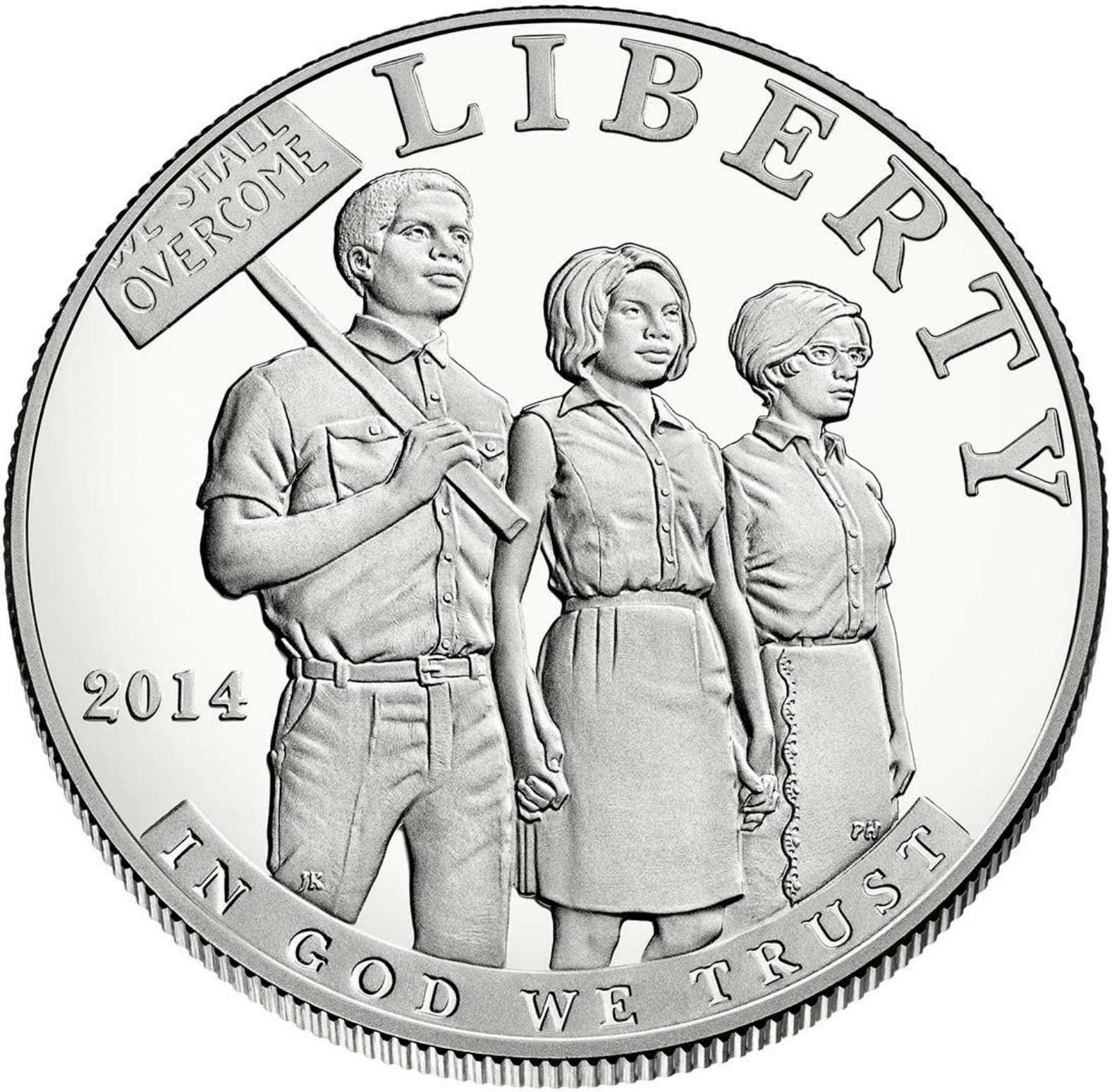

D-001

Equality in education was one of the cornerstones of the civil rights movement.

The mass movement sparked by Rosa Parks and led by Dr. Martin Luther King, Jr., among others, called upon the Congress and Presidents John F. Kennedy and Lyndon B. Johnson to pass civil rights legislation culminating in the enactment of the Civil Rights Act of 1964.

CR2
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D-002

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The Civil Rights Act of 1964 greatly expanded civil rights protections, outlawed racial discrimination and segregation and served as a model for subsequent anti-discrimination laws. Rosa Parks' single brave act of defiance, refusing to give up her seat to a white person on a segregated bus in 1955 in Alabama, galvanized the modern civil rights movement.

Her bravery was followed in 1960 by four college students — Joseph McNeil, Franklin McCain, David Richmond and Ezell Blair, Jr. – when they asked to be served at a lunch counter in North Carolina, beginning lunch counter sit-ins across the South to challenge segregation.

In 1961, the Freedom Rides into the South began to test new court orders barring segregation in interstate transportation.

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In 1963, Dr. Martin Luther King, Jr., the leading civil rights advocate of the time, led more than 250,000 supporters in the March on Washington for Jobs and Freedom and delivered his famous "I Have A Dream" speech to raise awareness and support for civil rights legislation. Coretta Scott King worked side by side with her husband on their shared goal of nonviolent social change and was a leading participant in the American civil rights movement in her own right.

CR1
Proof Silver Dollar

Use your smart phone to see an animated rendering of the coin.

The obverse (heads) design features three people holding hands at a civil rights march. The man holds up a sign that reads WE SHALL OVERCOME. The design is symbolic of all marches that helped galvanize the civil rights movement. Additional inscriptions are LIBERTY, 2014 and IN GOD WE TRUST. The reverse (tails) design features three flames intertwined to symbolize freedom of education, freedom to vote, and the freedom to control one's own destiny. The design was inspired by Martin Luther King, Jr., who said: "They get the fire hose. They fail to realize that water can only put out physical fire. But water can never drown the fire of freedom." Inscriptions read CIVIL RIGHTS ACT OF 1964, SIGNED INTO LAW JULY 2, 1964, E PLURIBUS UNUM, ONE DOLLAR and UNITED STATES OF AMERICA.

PRODUCT		INTRO PRICE	REGULAR PRICE
CR1	Proof Silver Dollar	$49.95*	$54.95*
CR2	Uncirculated Silver Dollar	$44.95*	$49.95*

SPECIFICATIONS	
COMPOSITION	90% silver, 10% copper
DIAMETER	1.500 inches (±0.003) or 38.10 mm (±0.08)
WEIGHT	26.730 grams, nominal
EDGE	Reeded
MINTAGE LIMIT	350,000 (across all options)
MINT	Philadelphia
MINT MARK	P

**Due to the variability of pricing on the precious metal markets, prices for products containing silver are subject to change.*

Coming Soon!

Civil Rights Act of 1964 Tell Your Story Set. Watch our Web site for this exciting new product, which allows the giver, recipient, your family member or friend to document their personal stories. It allows them to reflect on their participation in the events leading up to or how they've been impacted by the passage of the Civil Rights Act of 1964.

D-003

ADDENDUM E

UNITED STATES POSTAL SERVICE'S SHEET OF ROSA PARKS STAMPS


COURAGE
V1 111
V 111
Rosa Parks
V1 111
V1 111

Rosa Parks (1913-2005) became an inspiring, iconic figure of the civil rights movement with one quiet act of courage. On the evening of Thursday, December 1, 1955, after working all day, she was arrested in Montgomery, Alabama, for refusing to give up her seat on a municipal bus to a white man. Discriminatory laws in effect at that time required black passengers to sit in the rear section of the bus and to surrender their seats to white passengers on demand.

The response to her arrest was a successful boycott of Montgomery's bus system that lasted for 381 days and became an international cause célèbre. On November 13, 1956, the U.S. Supreme Court affirmed in a related case that segregating Montgomery buses was unconstitutional.

After the boycott, Parks moved north to Detroit, Michigan, where she continued her activism; she joined the 1963 march on Washington and returned to Alabama for the march from Selma to Montgomery in 1965. She received many honors in her lifetime, including the Presidential Medal of Freedom, awarded by President Clinton in 1996, and the Congressional Gold Medal in 1999. In 1987 she founded, with her friend Elaine Steele, the Rosa and Raymond Parks Institute for Self Development to carry on her life's work in civil rights, education, and advocacy. Upon her death, Parks became the first woman and second African American to lie in honor in the U.S. Capitol Rotunda in Washington.

V2
PLATE POSITION

Rosa Parks's name and image used under license with the Rosa and Raymond Parks Institute for Self Development.

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