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' OPENING BRIEF (WITH FINAL CORRECTIONS)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 28, there is no Plaintiff-Appellant corporate party that has any parent corporation or publicly held corporation that owns any of its stock.

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I. District Court's Jurisdiction

This is a civil action claiming violations of the First and Fifth Amendments to the Constitution of the United States of America. Thus, the District Court had subject matter jurisdiction under 28 U.S.C. § 1331. This action also involves a 42 U.S.C. § 2000bb through § 2000bb-4 (Religious Freedom Restoration Act (RFRA)) claim. Under RFRA, a District Court has subject matter jurisdiction pursuant to 42 U.S.C. § 2000bb-1(c).

II. Court of Appeals Jurisdiction and Timeliness of the Appeal

This appeal stems from a final order that disposed of all parties' claims, rendered by the District Court for the Southern District of New York. Specifically, on September 9, 2013, the District Court entered an Opinion & Order granting the defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b)(6). This Court of Appeals has jurisdiction under 28 U.S.C. § 1291. A timely Notice of Appeal was filed by Plaintiffs-Appellants (henceforth "Plaintiffs") on October 21, 2013.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the District Court erred in not granting Plaintiffs' Motion for Summary Judgment.

(2) Whether the District Court erred in granting Defendants' Motion to Dismiss.

STATEMENT OF THE CASE

This case involves constitutional and statutory challenges to the federal statutes that mandate the inscription of "In God We Trust" on the nation's coins and currency bills.[1] Defendants filed a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss on May 8, 2013. Plaintiffs filed a Motion for Summary Judgment on May 29, 2013. A hearing on both motions was held on August 6, 2013.

On September 9, 2013, Hon. Harold Baer, Jr., District Judge (SDNY), filed an Opinion & Order granting Defendants' Rule 12(b)(6) Motion to Dismiss. That Opinion & Order (available at 2013 U.S. Dist. LEXIS 128367 and 2013 WL 4804165) is provided in the Joint Appendix at JA280-86 and in Addendum A here.

[1] 31 U.S.C. § 5112(d)(1) ("United States coins shall have the inscription 'In God We Trust'."); 31 U.S.C. § 5114(b) ("United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate.").

STATEMENT OF THE FACTS[2]

For the first seven decades of the nation's existence, the coins produced by the Department of the Treasury were free of religious advocacy. First Amended Complaint ("FAC") ¶¶ 69-96 (JA043-48). Thus, prior to the Civil War era, our money comported with Congress's early understanding of the Constitution – i.e., "that the line cannot be too strongly drawn between Church and State." FAC ¶ 62 (JA042). It was not until 1864 that the government first inscribed "In God We Trust" on a United States coin. FAC ¶ 96 (JA048).

The history leading to this event unequivocally demonstrates that the purpose of the "In God We Trust" phrase was to convey the purely religious meaning that is evident in its text. FAC ¶¶ 77-104 (JA045-49). As the Director of the Mint wrote in his official annual report of 1863:

> We claim to be a Christian nation. Why should we not vindicate our character by honoring the God of Nations, in the exercise of our political Sovereignty as a nation? Our national coinage should do this. Its legends and devices should declare our trust in God; in him who is the "King of kings and Lord of lords." ... Let us reverently acknowledge his sovereignty, and let our coinage declare our trust in God.

[2] Because the facts of this case are laid out in the Amended Complaint (JA011-128) and in the Plaintiffs' Statements of Material Facts (JA133-83), a significantly abridged version is provided here. It should be noted that almost all of the facts cited in this brief have been accepted by Defendants (JA207-68) and, therefore, are not in dispute. In fact, many of these facts come from Defendants' own websites and other publications.

Statements of Material Facts ("Material Fact(s)") #15 (JA136).

This purely religious purpose has persisted since that initial transgression. In the early 1900s, for instance, a "furor" arose when President Theodore Roosevelt, for artistic reasons, had the motto removed from just one coin. (Admitted) Material Fact #21 (JA215). The motto was replaced after a congressional committee determined that:

> [A]s a Christian nation we should restore this motto … as an evidence to all the nations of the world that the best and only reliance for the perpetuation of the republican institution is upon a Christian patriotism, which, recognize[es] the universal fatherhood of God.

(Admitted) Material Fact #23 (JA215).

Nearly fifty years later – as our legislators interlarded the Congressional Record with an almost unending stream of manifestly Christian Monotheistic articles, FAC ¶¶ 220-21 (JA068)), declared a National Day of Prayer, placed a Prayer Room in the Capitol Building, and spatchcocked "under God" into the previously secular Pledge of Allegiance – Congress mandated that "In God We Trust" be inscribed on all coins and currency bills. FAC ¶¶ 214-17 (JA067). Congress also turned that exclusionary phrase into the national motto, replacing the prior, all-inclusive "E Pluribus Unum." FAC ¶ 218 (JA067). As Defendants themselves declared, the purpose and effect of this inscription was to "witness our faith in Divine Providence." (Admitted) Material Fact #184 (JA264).

That was the situation in the 1950s. In the little more than half a century since, the (Christian) Monotheistic religious favoritism intended and exhibited by the motto has remained unchanged. Seeking political capital, Presidents continue to reference the motto to extol Monotheism. *See*, *e.g.*, FAC ¶¶ 249-61 (JA073-75); (Admitted) Material Facts #127, 130, 164, 165, 169 (JA248-61). Our two major political parties still try to outdo each other's Monotheistic religiosity by highlighting "In God We Trust" on the money. FAC ¶¶ 262-66 (JA075). Congress's chaplains (at times "in Jesus' name") repeatedly include "In God We Trust" in their prayers. FAC ¶¶ 294-301 (JA080-81). And (except when involved in litigation such as this) congressmen still do not hesitate to "reaffirm" the motto by making such declarations as "the rights of man come … from the hand of God," "we must continue to affirm that God has a place in blessing our government," and "our faith in God must remain steadfast." FAC ¶¶ 267-93 (JA076-79).

These facts demonstrate obvious Equal Protection and Establishment Clause violations. For those who must carry on their persons a religious message they fervidly deny as the price to pay for simply using the nation's currency, Free Exercise Clause and RFRA violations exist as well. When it is recognized that such individuals are also expected to proselytize that message, (Admitted) Material Facts #190-92, 194-95 (JA266-67), the unconstitutionality of the "In God We Trust" inscriptions cannot be denied.

SUMMARY OF THE ARGUMENT

The argument in this case is not whether the federal government may lawfully inscribe "In God We Trust" on each of the billions of coins and currency bills it produces each year. The unchallenged facts of this case, in conjunction with the plain language of the phrase and the principles enunciated by the Supreme Court, make it clear that the equal protection goals of the Constitution's Due Process, Establishment, and Free Exercise Clauses (as well as RFRA) are all violated when the government chooses sides in regard to religious questions as fundamental as the trust in (and the existence of) God.

The real argument is quite different, and it is comprised of two parts. The first is whether the Panel here should do as the panels in four other circuits have done: i.e., come up with feeble excuses to justify a facial constitutional violation in which the federal government has, for 150 years, marginalized a religious minority. If the answer is yes (or, phrased alternatively, if it is felt appropriate to cast aside the judicial duty to protect the disenfranchised and uphold the law), then the case is over.

If, however, the Panel opts to end, rather than perpetuate, the abrogations of liberty that underlie the "In God We Trust" inscriptions, then the argument also includes whether an opinion can be drafted that will mitigate the ridicule, derision and condemnation that will surely follow this tribunal's doing its job.

STANDARD OF REVIEW

"We review a district court's grant of a motion to dismiss *de novo*, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Scholz Design, Inc. v. Sard Custom Homes, LLC*, 691 F.3d 182, 185 (2d Cir. 2012). "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Additionally, because this case involves equal protection violations, "strict scrutiny is the proper standard of review." *Johnson v. California*, 543 U.S. 499, 515 (2005). Strict scrutiny is also the proper standard where fundamental rights are infringed. *Clark v. Jeter* 486 U.S. 456 (1988). This has been specifically noted for claims involving the Establishment Clause (*see, e.g.*, *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("[W]hen we are presented with a … law granting a denominational preference … we apply strict scrutiny")) and the Free Exercise Clause (*see, e.g.*, *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) ("[I]ndirect coercion … on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment.")). Finally, strict scrutiny is applied for RFRA violations. 42 U.S.C. § 2000bb(a)(3), § 2000bb(b)(1) and (b)(2), and § 2000bb-1(b)(1) and (b)(2).

THE ARGUMENT

I. Writing an Opinion in Plaintiffs' Favor Is Very Easy to Do

In virtually every Supreme Court religion clause case, the majority opinion contains a multiplicity of clear, principled statements directly on point with the issues in this litigation. For instance, in a unanimous opinion, the justices wrote:

> We repeat and again reaffirm that neither a State nor the Federal Government can … constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (footnotes omitted). Similarly, in a 6-1 decision, the Court wrote:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. … [U]nion of government and religion tends to destroy government and degrade religion.

Engel v. Vitale, 370 U.S. 421, 431 (1962). Even in the plurality opinion upon which Defendants primarily rely, it was written that "this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine," *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 590 (1989), and that "'government may not favor religious belief over disbelief,'" *id*. at 593 (citation omitted).

Application of these (and the mountain of other) principled statements leads to the same result: Governmental inscriptions of religious ideology on the nation's money violate the constitutional and statutory provisions at hand.

(A) "In God We Trust" is an Establishment of Religion

The Establishment Clause reads "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Thus, it is extraordinarily broad, speaking of religion generally (as opposed to "a religion"), and forbidding not only laws establishing religion, but also laws "respecting" (i.e., having anything to do with) such an establishment. The federal government's religious claim that "In God We Trust" plainly falls within the Establishment Clause's domain.

In fact – as can be readily recognized by substituting other religious entities for the word "God" – that phrase, in itself, constitutes an actual establishment. A statute declaring "In Protestantism We Trust"[3] would be an establishment of

[3] Interestingly, although this motto would exclude every member of the current Supreme Court, it reflects a common understanding of the founding era. *See*, *e.g.*, the Articles of Association, signed by both George Washington and John Adams, which referred to the "free Protestant Colonies." 1 *Journals of the Continental Congress, 1774-1789* 75-88 (Worthington Chauncey Ford ed., 1904). *See also* South Carolina's Constitution of 1778, which stated, "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." S.C. Const. art. XXXVIII (as provided in 6 *The Federal and State Constitutions* 3255 (Francis Newton Thorpe ed., 1909)).

Protestant Christianity. An establishment of Buddhism would follow "In Buddha We Trust," just as "In The Pope We Trust" would be an establishment of Roman Catholicism. "In Sun Myung Moon We Trust" would establish the Unification Church. "We Deny God's Existence" would be an establishment of Atheism. In no less a manner, "In God We Trust" is an establishment, at a minimum,[4] of Monotheism.

(B) "In God We Trust" Violates the Principles of the Lemon Test

"In this Circuit, as the parties appear to agree, the Supreme Court's *Lemon* test continues to govern our analysis of Establishment Clause claims." *Peck v. Baldwinsville Cent. School Dist.*, 426 F.3d 617, 634 (2d Cir. 2005). Arising from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this test states that to avoid invalidation under the Establishment Clause, "the statute must have a secular legislative purpose … [and] its principal or primary effect must be one that neither advances nor inhibits religion." *Id.* at 612. That "In God We Trust" was placed on the money for religious, rather than secular, purposes is unequivocal. That the principal and primary effect of those words is religious is no less certain.

[4] There are those who definitely thought the phrase served to establish Christian Monotheism. *See, e.g.*, the annual reports of the Director of the Mint from 1862-65, (Admitted) Material Facts #14-17 (JA212-14).

On their own website, Defendants admit that "The motto IN GOD WE TRUST was placed on United States coins largely because of … increased *religious* sentiment." (Admitted) Material Fact #1 (JA133) (emphasis added). Key to its initiation was that the Secretary of the Treasury "received many appeals from devout persons throughout the country, urging that the United States recognize the Deity on United States coins." (Admitted) Material Fact #2 (JA209). As a result of these "many appeals," the Secretary wrote to the Director of the Mint stating that "[t]he trust of our people in God should be declared on our national coins." (Admitted) Material Fact #6 (JA210).

Year after year, the Director of the Mint's official annual reports explicitly discussed "In God We Trust" in terms of Christianity and Jesus Christ ("King of kings and Lord of lords"). (Admitted) Material Facts #14-17 (JA212-14). In conjunction with the details provided at FAC ¶¶ 77-104 (JA045-49) and (Admitted) Material Facts #3-13 (JA209-12), these facts make it incontrovertible that the challenged phrase was placed on the coinage for religious purposes. Thus, since "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose," *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), this case should end right here with a decision in Plaintiffs' favor.

In fact, "[i]f a statute violates any of … [*Lemon*'s] principles, it must be struck down under the Establishment Clause." *Stone v. Graham*, 449 U.S. 39, 40-

41 (1980) (*per curiam*). *Lemon*'s "effects prong," therefore, should also end this case on its own, especially since Defendants have admitted that the effect of inscribing "In God We Trust" on the coins has been to "witness our faith in Divine Providence." FAC ¶ 219 (JA067).

An additional effect is fostering increased discrimination against Atheists. This was exemplified in *Petition of Plywacki*, 107 F. Supp. 593, 593 (1952), where a federal judge – pointing to "the inscription of 'In God We Trust' upon … United States coins" to support his decision, FAC ¶ 224-27 (JA069) – denied a veteran's application for citizenship solely on the basis of his disbelief in God.

Further evidence of the motto's religious effects can be seen in the words of the nation's chief executives. That "we were placed here on Earth to do His work," according to President George H.W. Bush, is a notion "best embodied in four simple words: In God we trust." FAC ¶ 258 (JA074). To President Reagan, the motto "reflects a basic recognition that there is a divine authority in the universe to which this Nation owes homage," and this religious sentiment is authenticated by the fact that "[i]t says so on our coins." FAC ¶ 256-57 (JA074). Commemorating the motto's 50th anniversary, President George W. Bush stated that its effect is to "recognize the blessings of the Creator." FAC ¶ 260 (JA075). Presidents Kennedy, Ford, Carter, and Clinton all found similar religious effects in "In God We Trust." FAC ¶¶ 250-59 (JA073-74).

So, too, have our legislators, FAC ¶ 267-93 (JA076-79), as well as their chaplains, FAC ¶ 294-301 (JA080-81). Moreover, the only scientific evidence thus far presented reveals that Americans believe "In God We Trust" is religious by a 2:1 margin, JA0123-28, and, by a 3:1 margin, believe that the phrase endorses a belief in God, *id*. Thus, unless the appropriate standard of review for a Rule 12(b)(6) motion is to be disregarded, a decision in Defendants' favor may not issue.

(C) Second Circuit Precedent Overwhelmingly Supports Plaintiffs

Because the Second Circuit has followed the principles laid down by the Supreme Court, the case law that exists to guide the Panel here overwhelmingly supports Plaintiffs. For example, in *Cooper v. United States Postal Serv.*, 577 F.3d 479 (2d Cir. 2009), *cert. denied, Sincerely Yours, Inc. v. Cooper*, 559 U.S. 971 (2010), a plaintiff prevailed when he objected to being required to confront undesired religious messages at a contract post office. Precisely on point with the instant action, "[t]he gravamen of the complaint [wa]s that Mr. Cooper was made to feel that he was an unwilling participant in a faith not his own." *Id*. at 496.

The facts in *Cooper* were that:

(a) The religious messages were sponsored by a private corporation and displayed in one privately-owned building,

(b) There was a disclaimer specifically noting that "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit," *id*. at 495,

(c) The messages attributed no religious belief to the nation or to any individual,

(d) "[T]he power, prestige and financial support … placed behind [the] particular religious belief," *Engel v. Vitale*, 370 U.S. 421, 431 (1962), was of an isolated contract postal station,

(e) The plaintiff's contacts with the religious messages were avoidable. (Mr. Cooper went to the contract station only "because it was closer to his home than the next available post office," *Cooper*, 577 F.3d at 488),

(f) The contacts with the religious messages occurred only sporadically and only in one location, and

(g) The plaintiff never had to physically bear the offensive (to him) religious messages on his person.

Those facts might be contrasted with the facts here:

(a) The religious messages are sponsored by the federal government and displayed ubiquitously (on the government's monetary instruments),

(b) The religious viewpoint expressed is obviously endorsed by the federal government itself,

(c) The religious messages are attributed to the nation and to all its citizens,

(d) "[T]he power, prestige and financial support … placed behind [the] particular religious belief," *Engel*, 370 U.S. at 431, is of the United States of America,

(e) The plaintiffs' contacts with the religious message are unavoidable,

(f) The contacts occur essentially every day, multiple times a day, and essentially everywhere, and

(g) The plaintiffs are required to physically bear the offensive (to them) religious messages on their persons.

If this Panel is to follow the *Cooper* court's holding that "an Establishment Clause violation occurred," 577 F.3d at 493, then, *a fortiori*, the far more comprehensive violations in this case must be impermissible.

The unanimous *Cooper* panel spoke of "the three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity." *Id*. at 493 (citations and internal quotation marks omitted). The "evil" of sponsorship is readily seen in this case: The Treasury Secretary called for "[t]he trust of our people in God," (Admitted) Material Fact #6 (JA210), and the Mint Director officially published his desire to both "indicate the Christian character of our nation," (Admitted) Material Fact #14 (JA212), and "declare our trust in God; in him who is the 'King of kings and Lord of lords,'" (Admitted) Material Fact #15 (JA213).

The "evil" of "financial support" is also evident. Not only does the federal government lend its financial support to the production of the currency, but, by inscribing the motto, it also advertises a religious viewpoint. The financial support thus lent to the religious proclamation might be measured by imagining how much private entities would pay for the right to place, for example, "In Pepsi We Trust" or "In Toyota We Trust," on each of the billions of coins and currency bills sent into the general circulation each year.

Finally, by repeatedly and pervasively proclaiming "In God We Trust," the government manifests "active involvement of the sovereign in religious activity." Thus, all three of *Cooper*'s "main evils against which the Establishment Clause was intended to afford protection" result from the activity challenged in this case.

The history provided by Plaintiffs demonstrates that the "In God We Trust" inscriptions (like the religious postal displays in *Cooper*) "fail spectacularly," *id*. at 495, under the "purpose prong" of the *Lemon* test. Similarly, with it being "no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion," *id*., the principal effect of the motto on the money – far more pervasive, lacking any disclaimer, and purely governmental – is surely no different.

Like *Cooper*, virtually all other Second Circuit Establishment Clause cases support the invalidation of the government's "In God We Trust" inscriptions.

In *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 44-45 (2d Cir. 2011), avoiding "a perception of endorsement" and "viewpoint discrimination" were key reasons for prohibiting worship services in public schools. Obviously, both of these markers of unconstitutionality are present when the government places only the religious view, "In God We Trust," on its money. Indeed, the strong history of explicit anti-Atheism seen in American society, *see* FAC ¶¶ 184-247 (JA063-72), FAC ¶¶ 321-29 (JA084-85), (Admitted) Material Fact #95 (JA237), and (Admitted) Material Facts #106-24, 126-28, 130-69 (JA241-61), call for particular sensitivity to these "perception of endorsement" and "viewpoint discrimination" concerns.

Bronx Household also repeatedly demonstrated concern for those who are "young and impressionable." 650 F.3d at 42, 44. Therefore, the Doe, Roe and Coe children in this case are especially likely to suffer the harms the Religion Clauses exist to preclude.

In *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006), this Circuit highlighted the need "to prevent government from 'abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.'" *Id*. at 18 (citation omitted). Obviously, the government may not promote (through its own activities) the particular point of view that Americans trust in God in a manner consistent with these ideals.

Nor is such promotion consistent with "'the strong public interest in promoting diversity'" or "'maintaining respect for the religious observances of others.'" *Id*. at 19. Furthermore, if an "'objective observer' who can take account of the text, history, and implementation" of the matter, *id*. at 23, is to be employed, the promotion of trust in God is even more problematic. The text, history, and implementation of the "In God We Trust" motto are replete with evidence of a purely religious intent, and thus constitute a blatant violation of the Establishment Clause. *See* FAC ¶¶ 77-247 (JA045-72).

Skoros also cautions that government should be "conscientious in signaling" to "nonbelievers" that "the state [has not] generally favored religion." *Id*. at 34. Yet what is predominantly signaled to nonbelievers when they see "In God We Trust" inscribed on the money they handle is that the state has generally favored "religion" over Atheism.

Finally, *Skoros* spoke of the need for government to avoid "tak[ing] sides or stat[ing] an official position" where "there is [a] doctrinal religious dispute." *Id*. at 38. Perhaps the greatest doctrinal religious dispute in all of history is whether God exists. By mandating that "In God We Trust" be inscribed on every coin and currency bill it produces (after declaring that religious phrase to be the nation's sole official motto), the government of the United States has unquestionably "taken sides" **and** "stated an official position."

In *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415 (2d Cir. 2002), this Circuit invoked the principle that "'[government] may not aid, foster, or promote one … religious theory against another.'" *Id*. at 427 (citation omitted). *Commack* also noted that "the core rationale underlying the Establishment Clause … is preventing a fusion of governmental and religious functions." 294 F. 3d at 428 (citations and internal quotation marks omitted).

In *Knight v. State Dep't of Public Health*, 275 F.3d 156 (2d Cir. 2001), the issue was the government's right to reprimand its employees for engaging in religious speech while working with clients. Because "[a]t a minimum, 'the Establishment Clause … prohibits government from appearing to take a position on questions of religious belief … ,'" *id*. at 165 (citing *Allegheny*, 492 U.S. at 593-94), the Court upheld the reprimands. Surely the government cannot permissibly do on its own what it may reprimand its employees for doing in the government's name.

Altman v. Bedford Cent. School Dist., 245 F.3d 49, 76 (2d Cir. 2001) noted that "the Establishment Clause forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma." (String citation and internal quotation marks omitted). Evidence for the motto's preference for (Christian) Monotheism and its antagonism towards Atheism is strewn throughout the Amended Complaint.

According to *Russman v. Sobol*, 85 F.3d 1050, 1053 (2d Cir. 1996), government involvement with religion will be permitted only when the religion arises "not as a result of legislative choice but rather as a result of … private choice." Thus, government may not act to "create a particular religious message or to advance a particular religious viewpoint." *Id*. at 1054. These directives are necessarily inconsistent with the "In God We Trust" inscriptions.

Important in *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989), which concerned a **privately** erected menorah in a public park, was that "'no viewer could reasonably think that it occupies this location without the support and approval of the government.'" *Id*. at 1030 (citing *Allegheny*, 492 U.S. at 599-600). Such support and approval is part and parcel of inscriptions on the money printed by the nation's Department of Treasury. Only governmental activity that "'does not confer any imprimatur of state approval on religious sects or practices,'" 891 F.2d at 1030 (citing *Widmar v. Vincent*, 454 U.S. 263, 274 (1981)), is permissible.

(D) "In God We Trust" on the Money Violates the Neutrality Principle

In more than forty (!) separate **majority** opinions, Addendum B, the Supreme Court has referenced the government's obligation to remain neutral in matters of religious belief. In fact, that neutrality requirement has been deemed "[t]he touchstone" for analyzing cases within the religion clause realm:

> The touchstone for our analysis is the principle that the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

McCreary County v. ACLU of Kentucky, 545 U.S. 844, 860 (2005) (citation omitted). With some people adhering to the religious belief that there exists a God and others (such as Plaintiffs here) believing that any god is a fiction, it simply cannot be maintained that there is governmental neutrality between those two religious belief systems when the Treasury inscribes only "In God We Trust" on every coin and currency bill it produces.

(E) The Challenged Statutes Are Facially Unconstitutional

"The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional circumstances.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (citation omitted). In this case, the plain language is "United States coins shall have the inscription 'In God We Trust'," 31 U.S.C. § 5112(d)(1), and "United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate," 31 U.S.C. § 5114(b). "In God We Trust," therefore, was meant to convey the idea that "we" (i.e., Americans) "trust" (i.e., place our faith) "in God" (i.e., in a Supreme Being).

The only possible ambiguity relates to which "God" is being alluded to. The many references to Christianity, *see, e.g.*, JA045-48, JA052-54, JA056-57, JA059, JA062, JA065, JA067-70, JA077-78, JA080, JA088, JA091, JA094, JA108-10, JA115, JA120-21, JA133-36, JA139-40, JA143, JA148, JA153, JA155, JA156, JA159-60, JA164-65, JA178-79, JA182, suggest that the answer is the Christian "God." Whatever deity it is, however, it is not "no God." Thus, as Atheists, Plaintiffs are excluded.

Combining the "plain language" principle with the religious neutrality "touchstone" just discussed, the Supreme Court has stated:

> [T]he minimum requirement of neutrality is that a law not discriminate on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context.

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 533 (1993). Trusting in God, as proclaimed by the motto inscriptions, is "a religious practice without a secular meaning discernable from the language or context." Accordingly, 31 U.S.C. §§ 5112(d)(1) and 5114(b) are facially unconstitutional.

(F) No Enumerated Power Authorized the Challenged Statutes

"The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison*, 5 U.S. 137, 176 (1803). In other words, "[t]his government is

acknowledged by all to be one of enumerated powers." *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819). Thus, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill or Rights or elsewhere in the Constitution." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012).

In a document that (i) has no reference to a deity in its Preamble (U.S. Const. pmbl.); (ii) has no "so help me God" conclusion in its only prescribed oath of office **(**U.S. Const. art. II, §1); (iii) forbids any religious test oath (U.S. Const. art. VI, cl. 3); and (iv) includes "Congress shall make no law respecting an establishment of religion" (U.S. Const. amend. I), finding any such "enumerated" power is highly doubtful. Plaintiffs have not been able to locate that power, and Defendants have not informed anyone as to where it can be found. Unless that enumerated power can be identified, 31 U.S.C. §§ 5112(d)(1) and 5114(b) are unconstitutional.

(G) The Supreme Court's Allusions to the Motto Show that the "In God We Trust" Phrase is Religious

Of the eleven Supreme Court cases where the "In God We Trust" language has been raised by one or more justices, nine are Establishment Clause cases. Addendum C. In a tenth, the motto's religiosity was the reason it was discussed. *See Wooley v. Maynard*, 430 U.S. 705 (1977), 430 U.S. at 722 (Rehnquist, J.,

dissenting) (unwittingly demonstrating the motto's Monotheistic consequences by raising on his own its purported non-effects upon "an atheist'). That one sees "In God We Trust" essentially only when the court is debating potential religious endorsements is strong evidence that the motto has the religious meaning Defendants so fervidly attempt to deny. That an Establishment Clause violation was found in many of these cases is proof of the motto's religious effects.

(H) Children Are Among the Plaintiffs in This Case

Since the founding of our republic, there has been concern regarding influencing "children, at an age when their judgments are not sufficiently matured for religious enquiries." Thomas Jefferson, *Notes on the State of Virginia* 270 (rev. 1782). The Supreme Court has apparently agreed. *See, e.g., Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (indicating that young children are "impressionable and … susceptible to religious indoctrination."). As a result, "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), and it has highlighted that "[t]he inquiry into [religious endorsement and disapproval] effect[s] must be conducted with particular care when many of the citizens perceiving the governmental message are children in their formative years." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

Children handle money and also use the various monetary instruments as part of the public school mathematics curriculum. *See* FAC ¶ 11 (JA032). Accordingly, with seven of the plaintiffs "perceiving the governmental message" being "children in their formative years," the Panel has even greater reason to reverse the lower court's decision.

(I) Compelling Plaintiffs to Bear a Religious Message with Which They Disagree Violates the Free Exercise Clause and RFRA

As fervidly as the most devout (Christian) Monotheists believe that God is real, Plaintiffs in this case adhere to the religious view that God is a fiction. In fact, the advice found in passages such as Proverbs 3:5 ("Trust in the Lord with all your heart, and lean not on your own understanding.") could not, to Plaintiffs, be more misguided. Yet, as a result of the statutes at issue in this case, Plaintiffs are required to bear on their persons the religious claim "In God We Trust."

That phrase is the national motto. 36 U.S.C. § 302. Accordingly, its "We" "unambiguously refers to all members of the political community, not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). Plaintiffs, therefore, are required to bear on their persons not only a statement they believe to be false, but also a statement that attributes to them personally a perceived falsehood that is the antithesis of the central tenet of their religious system.

Moreover, they are conscripted into assisting in the proselytization of a religious notion that they explicitly reject. (*See* FAC ¶¶ 346-60 (JA088-89), demonstrating the long history of a legislative intent to engender such proselytization. This intent was reinforced yet again in the 2003 United States Mint Annual Report. FAC ¶¶ 356-59 (JA089).) These compelled activities, without doubt, comprise a substantial burden upon Plaintiffs' religious exercise.

In terms of case law, this substantial burden can be recognized in two ways. The first is to look at two renowned cases that involved another disenfranchised religious minority: Jehovah's Witnesses. In *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 629 (1943), Witnesses challenged the coercion of their children, in the public schools, to engage in the flag salute (which is contrary to their religious principles). In *Wooley*, 430 U.S. at 707-08, a Witness challenged being coerced to exhibit "Live Free or Die" on his license plate, which, again, was contrary to Jehovah's Witness principles. Although both cases were ultimately decided on free speech grounds, "[t]he Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment." *Lee v. Weisman*, 505 U.S. 577, 591 (1992). Under both clauses, "the State's interest ... to disseminate an ideology ... cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717.

The other way to recognize the substantial free exercise burden is to review the Free Exercise and RFRA case law. In doing so, it should first be noted that those cases always involve "neutral, generally applicable law." *Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). It is essentially unheard of to have facially religiously discriminatory law, as is the situation in this litigation.

Even ignoring that distinction (which should, on its own, terminate this action with a ruling in Plaintiffs' favor), the case law reveals that Defendants' actions are legally unsound. To begin with, "[a]n individual claiming violation of free exercise rights need only demonstrate that the beliefs professed are 'sincerely held' and in the individual's 'own scheme of things, religious.'" *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570, 574 (2d Cir. 2002). Phrased alternatively, the sole issue is whether Plaintiffs find the given activity "central or important" to the practice of their faith. *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003). There is no question that these requirements are met.

Moreover, the determination of religious beliefs "is not to turn upon a judicial perception." *Thomas v. Review Bd., Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). Thus, even if there were some question as to the religious nature of the "In God We Trust" phrase (which there is not), "[i]t 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. Comm'r*, 490

U.S. 680, 699 (1989). In fact, any "inquiry into [an individual's] religious views … is not only unnecessary but also offensive. It is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

With that background, the burdens in this case (i.e., being constantly forced to carry a message that contradicts the essential nature of one's religious belief system) can be compared to the burdens that were placed on the plaintiffs in past successful Free Exercise and RFRA litigation. In *Jolly v. Coughlin*, 76 F.3d 468 (2d Cir. 1996), for instance, a Rastafarian prisoner's free exercise was deemed to be substantially burdened by being required to have a screening test for tuberculosis. In *Jackson v. Mann*, 196 F.3d 316 (2d Cir. 1999), the substantial burden to a Jewish prisoner was his inability to have kosher meals. The substantial burden in *Ford* was a Muslim prisoner's missing of a feast (requested well beyond the timeframe recognized as relevant by Muslim authorities). In the Supreme Court, substantial burdens have been found in working on Saturday, *Sherbert v. Verner*, 374 U.S. 398 (1963); in having children attend public secondary school, *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and in not being permitted to import an ingredient used to make a hallucinogenic sacramental tea, *Gonzales v. O Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418 (2006).

Serious as they are, none of these other cases involve a burden as substantial to the exercise of religion as exists in the case at bar. To be sure, those other cases involved governmental interference with a religious activity that the affected individuals desired, whereas this case involves governmental compulsion to engage in undesired activity. Nonetheless, this is truly a distinction without a difference, and (as is illustrated by the rulings in *Barnette* and *Wooley*) this latter injury also merits judicial protection. Being coerced to engage in an act that is contrary to one's religious beliefs, no less than being prevented from engaging in an act that is in accord with those beliefs, involves action that prevents individuals from exercising religion in the manner they "sincerely" believe is necessary in order to remain true to their ideals. *See Jolly*, 76 F.3d at 477 ("[A] substantial burden exists where the state 'puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.'") (citations omitted).

With the substantial burden recognized, Defendants are obligated to demonstrate "a compelling governmental interest," and that they have furthered that interest using "the least restrictive means." 42 U.S.C. § 2000bb-1(b)(1) and (b)(2). It is obvious that they have not (and cannot) come close to meeting those obligations. Thus, this "strict scrutiny" requirement needs no further attention; Plaintiffs' RFRA claim should be upheld.

(J) The Congressional Reaffirmations Are Shams

In *Stone v. Graham*, the Commonwealth of Kentucky sought to place copies of the Ten Commandments on the walls of its public schools. The Commonwealth claimed there was a secular purpose to this activity, and pointed to a mandatory notation stating, "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" 449 U.S. at 41 (citation omitted). The Supreme Court saw through this ploy, writing:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.

449 U.S. at 41 (footnote omitted). The pre-eminent purpose for placing "In God We Trust" on the money is "plainly religious" as well.

In recent years, Congress has passed an assortment of "reaffirmations" of the Motto. FAC ¶ 28 (JA037). Although the Panel will properly review these resolutions with "appropriate respect for a coequal branch of the Government," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 230 (1995), it should also have respect for the congressmen who have recognized the unconstitutionality of the reaffirmations. FAC ¶¶ 267-93 (JA076-79).

In fact, the reaffirmations have been constructed in a manner that has been explicitly condemned by the Supreme Court. In *McCreary*, the Court wrote that "juxtaposing ... other documents with highlighted references to God as their sole common element [reveals an] unstinting focus ... on religious passages, showing ... an impermissible purpose." 545 U.S. at 870. The reaffirmations have had as many as thirteen (Christian) Monotheistic references juxtaposed to the "In God We Trust" language. FAC ¶¶ 286-90 (JA079).

"[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham." *Id*. at 864. Asserting that the purpose of commemorating the motto is to "encourage[] the citizens of the United States to reflect on … the integral part that [it] has played in the life of the Nation," 152 Cong. Rec. S7444, rather than to bolster the claim made by its text (i.e., that there is a God and that the people of this nation trust in Him) is a sham.

(K) This Appeal Is from the Grant of a Motion to Dismiss

The final point to make in showing how easy it is to decide this case is that this appeal is before the Panel on a Rule 12(b) Motion to Dismiss. If the Court is not yet convinced of the purely religious purposes that led to the "In God We Trust" inscriptions, of their overwhelming religious effects, of the complete lack of religious neutrality that the motto evinces, of the unjustifiable burdens the motto

places upon Plaintiffs in their attempts to freely and fully exercise their Atheistic beliefs, etc., then "the accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Plaintiffs believe they have proven the necessary facts. Should there, nonetheless, be doubt in that regard, then Plaintiffs, under Rule 12(b) are to be afforded an opportunity to bring forth evidence and testimony in the District Court.

II. Writing an Opinion in Defendants' Favor is Very Easy to Do

Although following the Constitution's principles (and the Supreme Court's case law) leads to a Plaintiffs' verdict, that is not the Panel's only option. In fact, a wide range of devices are at the Panel's disposal for maintaining governmental activities that favor Monotheists and perpetuate the second-class status of Atheists.

(A) Neutrality Can Be Forgotten

As noted, more than forty Supreme Court Religion Clause majority opinions have referenced neutrality, Addendum B, and the Court has called the neutrality principle – including neutrality between "religion" (i.e., belief in God) and "nonreligion" (i.e., Atheism) – "the touchstone" for the analysis of Establishment Clause claims. With such a pedigree, one would expect defendants and courts to address this principle whenever these clauses are at issue. Yet such attention is surprisingly scarce.

Although Plaintiffs specifically alleged a neutrality principle violation, FAC ¶¶ 423-28 (JA096), Defendants have never even attempted to explain how "In God We Trust" comports with that principle. All they did is:

(1) State that, in two cases where the motto was not at issue, no justice discussed the motto's lack of neutrality, *see* District Court Document 12 at 37 (Defendants' MTD memo), and

(2) Write four pages about nonexistent Atheist vetoes, mischaracterized religious "references," and inapposite Supreme Court decisions, *see* District Court Document 19 at 11-14 (Reply Brief).

The courts in the four circuits that have previously been presented with "In God We Trust" challenges have done no better. Although "'a benevolent neutrality'" unrelated to the motto's clear religious favoritism is found in *Aronow v. United States*, 432 F.2d 242, 244 (9th Cir. 1970) (quoting *Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669-70 (1970)), the Ninth Circuit's judges never used the word "neutrality" themselves. Nor did the judges in *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (in either the Fifth Circuit or the District Court). "Neutrality" was similarly completely absent from the opinions in *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996) and *Kidd v. Obama*, 387 Fed. Appx. 2 (D.C. Cir. 2010).

Thus, in four and a half appellate level cases, not one word has ever been uttered to explain how the motto comports with the "touchstone" for Establishment Clause analysis, mentioned in more than forty Supreme Court religion clause majority opinions. The reason is obvious: the motto flagrantly violates the principle, and it is impossible to even feign otherwise.

Of course, once a case ends, it ends, and the defeated, politically disenfranchised litigants can do nothing except continue enduring the judicially-approved constitutional violations. By also neglecting the command for religious neutrality, the Panel can again approve of those violations.

(B) The Constitutional Injuries Can Be Readily Trivialized

The facts that Atheists are "viewed unfavorably by more than half of their fellow Americans merely on the basis of their deeply felt religious views," that "57% of the population hold[s] the view that nonbelievers are incapable of being moral," and that "Atheists – solely on the basis of their disbelief in God – are felt to be less trustworthy than rapists!," FAC ¶¶ 321-23 (JA084), make it virtually certain that they suffer significant adverse consequences in today's society. Yet, even though the Supreme Court has specifically noted that stigmatizing injuries are among "the most serious consequences of discriminatory government action," *Allen v. Wright*, 468 U.S. 737, 755 (1984), the fact remains that no Plaintiff is at risk of a fine or jail sentence due to the "In God We Trust" inscriptions. Thus, the Panel can readily refer to the occasional Supreme Court comment where an authoring justice (always an "insider" himself or herself) describes the injuries to "outsider" minorities as "mere shadow," *Abington School Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring), or uses such pejorative descriptors as "fastidious Atheist," *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), to deflect valid constitutional and statutory claims.

Another useful descriptor is "de minimis," used to inform religious minorities that their sense of injury is misplaced. *See*, *e.g.*, *Doe v. Elmbrook School Dist.*, 687 F.3d 840 (7th Cir. 2012) (en banc), where a dissenting judge

characterized as "de minimis," *id*. at 877 (Posner, J., dissenting), what the majority recognized as an Establishment Clause violation: "Literally and figuratively towering over the [public school] graduation proceedings in the church's sanctuary space was a 15- to 20-foot tall Latin cross, the preeminent symbol of Christianity." *Id*. at 852 (majority opinion).

The idea that a judge will tell a religious minority that an injury is "de minimis" is remarkable. After all, the Supreme Court has advised that "In the realm of religious faith ... the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). Additionally, "what is one man's comfort and inspiration is another's jest and scorn," *Barnette*, 319 U.S. at 633. *See also supra* p. 27.

In any event, it is undoubtedly true that "there would be intense opposition to the abandonment of that motto," *Abington*, 374 U.S. at 303 (Brennan, J., concurring), and that "In God We Trust," for most Americans, is anything but "de minimis." If "de minimis" is not an accurate descriptor for taking those words **off** the money (which no one has ever suggested would violate the Constitution), it cannot possibly be an accurate descriptor for keeping them **on** the money (where religion clause concerns loom large).

Nonetheless, judges always have this option when Establishment Clause injuries are to be ruled upon.

As demonstrated by the lower court, judges also have that option in the Free Exercise sphere. Judge Baer included an accurate characterization of the substantial burdens on Plaintiffs' free exercise:

> [T]hey are forced to "[b]ear a religious message they believe to be untrue and completely contrary to their sincerely held religious belief" or "utilize a relatively burdensome alternative method." (Am. Compl. ¶ 485.) Plaintiffs also allege a violation of RFRA because the motto's placement on currency has forced them to "bear a religious message," "proselytize," and "further anti-Atheist religious prejudices." (*Id*. ¶ 491-93.)

Opinion & Order (JA285). Those burdens certainly seem substantial, especially when it is realized that they are lifelong, occur virtually daily, and are present no matter where Plaintiffs roam. They also seem substantial when compared, for example, to an Amish person's being required to put a reflector on his buggy, a parent being required to have his child take a standardized test, or a landlord being required to rent to an unmarried cohabiting couple – all of which were burdens specifically mentioned as Congress considered RFRA. *See, e.g.*, David M. Ackerman, *Cong. Research Serv.*, 92-366A, *The Religious Freedom Restoration Act and the Religious Freedom Act: A Legal Analysis* 19-20 (1992).[5]

[5] *Available at* www.justice.gov/jmd/ls/legislative_histories/pl103-141/crsrept-1992.pdf.

Despite the foregoing, the District Court contended that "[t]here is no showing of government coercion, penalty, or denial of benefits linked to the use of currency." Opinion & Order (JA285).

The Panel, of course, can do this as well.

(C) There Is Ample Supreme Court Precedent for Not Upholding the Constitution's Equal Protection Principle

In *Bradwell v. Illinois*, 83 U.S. 130 (1873) – during a time when women were so marginalized in society that the cherished amendment to the Constitution which declares "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws" in its first section could limit the right to vote to "male inhabitants" in its second, U.S. Const. amend. XIV – the Supreme Court upheld a state statute prohibiting women from practicing law.

In *Plessy v. Ferguson*, 163 U.S. 537 (1896) – during a time when people of color were so marginalized in society that there were "[s]eparate hotels, separate conveyances, separate theaters, separate schools, ... separate churches," Cong. Globe, 42d Cong., 2nd Sess. 382-83 (1872) (remarks of Sen. Charles Sumner), each of which was recognized by the non-prejudiced members of society as "an indignity to the colored race," *id*. – the Supreme Court upheld a statute that physically segregated people in public railroad cars based on their skin color.

In *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940) – during a time when Jehovah's Witnesses were so marginalized that they would later be described as the nation's "principal victims of religious persecution," Archibald Cox, *The Court and the Constitution* 189 (1987) – the Supreme Court upheld the public school expulsion of a ten-year-old child for quietly following the religious precepts taught to him by his Jehovah's Witness parents.

Although the *Bradwell*, *Plessy*, and *Gobitis* decisions were all eventually overturned, they still serve as ample precedent for demonstrating that politically disenfranchised minorities can be treated as second-class citizens on the basis of constitutionally unacceptable criteria when the social climate finds such rulings socially acceptable. Should the Panel choose to affirm the lower court opinion, the requisite public support can undoubtedly be counted on in this case as well.

Of note is that the justices in *Bradwell* were all men, in *Plessy* were all white, and in *Gobitis* were all "traditional" Monotheists. This calls to mind the claim by Justice Blackmun in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 614 n.60 (1989), that it would be "intolerable" for a judicial panel to have "bias … according to the religious and cultural backgrounds of its Members." Of course, Justice Blackmun was wrong: such bias is precisely what existed (and was tolerated) in the cases just mentioned.

Had the justices in *Bradwell* been women, those in *Plessy* been black, and those in *Gobitis* been Jehovah's Witnesses, each of those cases would undoubtedly have been decided in accordance with the principle of equality. So, too, would be this case were Plaintiffs before a panel of Atheists.

(D) The Truth Can Be Denied

In his well-known dissent in *Plessy*, Justice Harlan wrote:

> It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons.

163 U.S. at 556-57 (Harlan, J., dissenting). This case is no different. The Panel here, like the *Plessy* majority, can certainly deny what everyone knows to be true. It can pretend that the "In God We Trust" phrase "serves substantial secular purposes, including acknowledging the historical role of religion in our society, formalizing our medium of exchange, fostering patriotism and expressing confidence in the future." District Court Document 12 at 10 (Defendants' MTD memo). But just as the reality in *Plessy* was that the law served to perpetuate invidious government-sponsored favoritism for whites, the reality here is that 31 U.S.C. §§ 5112(d)(1) and 5114(b) do the same for (Christian) Monotheists.

(E) Rare, Equivocal Dicta Can Supersede an Ocean of Established Principle

There is a virtually endless stream of principled Supreme Court statements directing a ruling in Plaintiffs' favor. Pithy pronouncements such as "government should not prefer one religion to another or religion to irreligion," *Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994), and "[the First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers," *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) – all directly on point – abound.

Weighed against this immense quantity of noble commentary are a handful of statements, tangentially related to the case at hand, discussing a matter that was never briefed, and written by jurists who undoubtedly were largely unaware of the relevant history. Moreover, these statements usually arose when a dissenting justice looked at the "test" being applied by the majority and said, "Hey! If that is the rule, then 'In God We Trust' is unconstitutional." With a tenuous majority (or plurality), the author of the prevailing opinion chose not to add to the discord already brewing under the surface. Instead, a wan and noncommittal reply was provided, and the weak coalition was maintained.

Justice Blackmun's dictum in *Allegheny* – the most "potent" of those presented by Defendants – is a perfect example of this dynamic. With five different justices writing opinions, forming a wide assortment of agreements, only a plurality was reached. Looking at the "endorsement" and "outsider" arguments that

were made, Justice Kennedy realized that, under those arguments, the "In God We Trust" inscriptions on the money should be prohibited. Not wanting to alienate any of those in his frail cabal, Justice Blackmun stated, "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *Allegheny*, 492 U.S. at 602-03.

Of note is that he used the modifier "in dicta." If "it is a good deal of a mystery … how judges, of all persons in the world, should put their faith in dicta," Benjamin Nathan Cardozo, *The Nature of the Judicial Process* 29 (1921), faith in dicta about dicta must be completely cryptic. This is especially so if the original dicta – as in this case – are themselves weak and equivocal.

If Justice Blackmun had wanted to support the idea that the motto and the pledge are permissible, he would have simply stated, "Our previous opinions have considered the motto and the pledge … ." A review of Supreme Court opinions reveals that more often than not, when "in dicta" is used as a modifier, the given opinion's author comes to a conclusion contrary to what the dicta support. In fact, Justice Blackmun did this himself in *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 752-53 (1985), when he noted that the Court "in dicta" had come to a given conclusion regarding bargaining in contract matters. Justice Blackmun then came to the contrary opinion in his majority opinion.

In view of the fact that, in *Allegheny*, Justice Blackmun also made such statements as "this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine," 492 U.S. at 590, and "we have held [the Establishment Clause] to mean no official preference even for religion over nonreligion," *id*. at 605, it is virtually certain that he would have ruled that the motto on the money is unconstitutional. However, as he specifically noted in relation to the National Day of Prayer (the constitutionality of which he questioned), "as this practice is not before us, we express no judgment about its constitutionality." *Id*. at 603 n.52.

Given the aforementioned circumstances, it is troubling to see Defendants contend that the *Allegheny* dictum (plus a few others that are even weaker) has somehow morphed into "Supreme Court teachings affirming the constitutionality of In God We Trust." District Court Document 12 at 37 (Defendants' MTD memo). But the Panel here can certainly do such morphing as well.

(F) *Lemon* Can Readily Be Eviscerated

Lemon v. Kurtzman stated, "The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice." 403 U.S. at 625. Nonetheless, techniques are available to eviscerate this ideal, as well as the two prongs of the *Lemon* test, and maintain a constitutional violation.

The first technique is to simply ignore the "purpose prong," which, as they did with the neutrality principle, the four circuits did as well in each of their "In God We Trust" challenges. Perhaps this can be excused in *Aronow*, 432 F.2d at 243, since that case was decided prior to the Supreme Court's 1971 *Lemon* ruling. That excuse, however, is not available for the Fifth Circuit, which was the next to consider the "In God We Trust" inscriptions. In *O'Hair v. Murray*, the Court wrote simply that "we affirm on the opinion of the district court, *O'Hair et al v. Blumenthal et al.*, 462 F. Supp. 19 (W.D. Tex. 1978)." *Blumenthal*, however, consisted of little more than a statement that the issue "has in fact already been decided by the Ninth Circuit." 462 F. Supp. at 19.

In *Gaylor v. United States*, the Tenth Circuit appeared ready to discuss the "purpose prong" when it wrote: "The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose." *Id.* at 216. However, the issue of purpose was quickly skipped, and an "effects" discussion ensued. Thus, in the entire opinion, not a word was heard about what the purpose was for placing "In God We Trust" on the money.

Kidd v. Obama, the last challenge to the motto inscriptions, was a one-paragraph, unpublished opinion consisting of nothing but citations to two Supreme Court concurring opinions (neither of which was joined by any other justice), along with references to *Gaylor* and *Aronow*.

Thus, it appears that this Circuit can emulate the four others that decided this matter without ever writing a word about the statutes' purpose. That may be a wise approach. After all, the nation's money served all its purposes perfectly well for generations before that religious verbiage was added. To manufacture a believable secular purpose in such circumstances is difficult, if not impossible, to do.

There is another option as well. The Panel here can follow the lead of the court below, which wrote "[t]he Supreme Court has repeatedly assumed the motto's secular purpose … ." Opinion & Order (JA282). This is a completely unsupportable assertion, as can be determined by simply looking at the high court's "In God We Trust" references. *See* Addendum C (listing all Supreme Court cases where "In God We Trust" has been mentioned). A careful review of those references shows that the purpose for placing "In God We Trust" on the money has **never** been discussed by **any** Supreme Court justice.

In fact, there is only one passage where that purpose has even appeared to have been discussed.[6] That was when Justice O'Connor included "printing of 'In God We Trust' on coins," among "governmental 'acknowledgments' of religion," *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). She wrote:

[6] Two passages do subsequently allude to this one passage. *See Lynch*, 465 U.S. at 717 (Brennan, J., dissenting), and *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring).

> Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

Id. at 693. But this paragraph does not speak of purposes for placing "In God We Trust" on the coins. On the contrary, it speaks of the purposes government might have for using "In God We Trust" on the coins once those coins have been minted. In other words, what it discusses – in terms of the issues in the instant lawsuit – is *Lemon*'s "effects prong." The statement that "[t]he Supreme Court has repeatedly assumed the motto's secular purpose … ," therefore, is totally in error.

As for those "effects" (as they were propounded in the *Lynch* concurrence), Plaintiffs submit that the entire passage demonstrates remarkable insensitivity. Meaning no disrespect to Justice O'Connor, this sort of statement reveals how individuals can be blinded by their own religious myopia.

A necessary corollary of the "only ways" statement is that Atheists are incapable of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). Justice Kennedy sharply rebuked Justice O'Connor for this claim, as well as its gross failure to comport with the "outsider" test:

> [I]t seems incredible to suggest that the average observer of legislative prayer who either believes in no religion or whose faith rejects the concept of God would not receive the clear message that his faith is out of step with the political norm.

Allegheny, 492 U.S. at 673-74 (Kennedy, J., concurring and dissenting). To be sure, Justice Kennedy indicated that he would uphold "In God We Trust," too. Nonetheless, his language demonstrates that the motto – under the "endorsement test" approved by the plurality – is patently unconstitutional:

> [I]t borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," 36 U.S.C. § 186, which is … reproduced on every coin minted and every dollar printed by the Federal Government, 31 U.S.C. §§ 5112(d)(1), 5114(b), must have the same effect.

Id. at 672-73.

Justice O'Connor, of course, is no longer on the high court, and Justice Kennedy's views seem to have taken a significant departure when he authored *Lee v. Weisman*, 505 at 590:

> [T]he central meaning of the Religion Clauses of the First Amendment … is that all creeds must be tolerated, and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

Still, as Judge Baer proved, statements such as "[t]he Supreme Court has repeatedly assumed the motto's secular purpose … ," Opinion & Order (JA282), can be proffered at will without any adverse consequences.

This Court might also find for defendants by recalling Chief Justice Burger's admonition that "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch*, 465 U.S. at 680. By simply taking its inverse, the Panel can focus exclusively on the secular component of any activity, thus leading to its Establishment Clause validation. Although the Supreme Court has repeatedly rejected this approach – *see*, *e.g.*, *Stone*, 449 U.S. at 41; *Wallace*, 472 U.S. at 56-61; *Edwards v. Aguillard*, 482 U.S. 578, 586-93 (1987); *Santa Fe Indep. School Dist. v. Doe*, 530 U.S. 290, 308-09 (2000); *McCreary*, 545 U.S. at 859-61 – a lower court can still use it to dismiss any Establishment Clause claim.

In fact, *Gaylor* (where, as already noted, the purpose for placing "In God We Trust" on the coins was simply glossed over) focused exclusively on the secular by fabricating justifications that were "hypothesized or invented *post hoc* in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Thus, as with Justice O'Connor with her "only ways" secular effects in *Lynch* (which also were mistakenly referenced as "purposes"), Judge Tacha in *Gaylor* missed the entire point of the First Amendment's Religion Clauses.

"[F]oster[ing] patriotism," *Gaylor*, 74 F.3d at 216, "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), may well be the effects that the motto has on the authors of those opinions. For Plaintiffs, however, who agree that "'[t]he word god is … nothing more than the expression and product of human weaknesses,"[7] and that every Monotheistic religion is "an incarnation of the most childish superstitions,"[8] the effects could not be more dissimilar.

"In God We Trust" causes Plaintiffs severe embarrassment as they are reminded that nearly half of the United States population denies evolution and believes the earth was formed within the past 10,000 years.[9] It ridicules public occasions, reminds them of a past filled with inquisitions, crusades and 9/11, and causes them to fear that our nation has lost track of what is worthy of appreciation.

Nevertheless, each of the above techniques – alone or in combination – gives the Panel the ability to use the *Lemon* test to easily rule in Defendants' favor.

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[7] Quoted from Albert Einstein's letter of January 3, 1954, to Eric Gutkind, in James Randerson, *Childish Superstition: Einstein's Letter Makes View of Religion Relatively Clear*, Guardian, May 12, 2008, *www.theguardian.com/science/2008/may/12/peopleinscience.religion*.

[8] *Id*.

[9] Gallup poll conducted May 10-13, 2012. Reported on June 12, 2012, at www.gallup.com/poll/155003/hold-creationist-view-human-origins.aspx.

(G) The "Reasonable Observer" Is Always Available

Probably the most dependable means of ruling in whatever manner is desired is to rely upon the "reasonable observer" (who somehow always happens to agree with the views of the judge authoring the given opinion). That the Supreme Court – which has specifically warned of "judges" resolving matters "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application," *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) – would use this device (especially in the religious realm) is surprising. Is it "reasonable," for example, to believe there is (or is not) a God? Nonetheless, the test has been approved by the Supreme Court, so the Panel is authorized to use it as it sees fit.

(H) The Wall Between Church and State Can Be Made Porous

Because, at times, there is **"**internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause," *Tilton*, 403 U.S. at 677, some "play in the joints," *Walz*, 397 U.S. at 669, may be necessary. Also, "total separation between church and state … is not possible in an absolute sense [since s]ome relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614.

Those concerns, however, have nothing to do with the instant action, since "the Free Exercise Clause … has never meant that a majority could use the machinery of the State to practice its beliefs," *Abington*, 374 U.S. at 226, and any "relationship between government and religious organizations" in this case is inconsequential. Nonetheless, the prior paragraph's quotations are quite handy, and can be used to convert Jefferson's wall of separation between church and state – which should be impenetrable in pure Establishment Clause cases such as this one – into "a blurred, indistinct, and variable barrier." *Lemon*, 403 U.S. at 614.

Those quotations (and many others) are obviously available for the Panel's use.

(I) The English Language Can Be Contorted

When the government, in *Commack*, 294 F.3d at 426, claimed that "'no one disputes the meaning of the term "kosher,"'" this Circuit politely noted that "[t]here is ample evidence in the record to support the opposite conclusion." *Id*. In this case, there is "ample evidence in the record" to show that the government's chief contention – i.e., that the motto, grammatically in the present tense (and referring to nothing except trusting in the Deity) is a "'government acknowledgment of our Nation's religious heritage,'" District Court Document 12 at 14 (Defendants' MTD memo) (citation omitted), or "a 'reference to our religious

heritage,'" District Court Document 19 at 10 (Defendants' Opposition memo) (citation omitted) – is similarly without support.

The motto is obviously an endorsement of the doctrine of (Christian) Monotheistic Supremacy, just as, in the analogous case of *Loving v. Virginia*, 388 U.S. 1 (1967), the nation's anti-miscegenation laws were "obviously *an endorsement* of the doctrine of White Supremacy." *Id*. at 7 (emphasis added). And just as a "governmental acknowledgment of" or a "reference to" our racial heritage" was not accepted as a valid claim in *Loving*,[10] "a 'reference to our religious heritage'" should not be accepted here.

In fact, the Supreme Court already rejected this sort of argument in the Establishment Clause arena. In *Engel*, the high court struck down a "brief nondenominational prayer," 370 U.S. at 445 (Stewart, J., dissenting), although it was argued that the prayer was, in essence, an acknowledgment of (or reference to) "'our spiritual heritage.'" *Id*. This precedent, however, cannot stop the Panel from doing what Defendants have done – i.e., mischaracterizing as a religious "reference" or "acknowledgment" what is obviously something quite different: a statement of dynamic religious activity that unquestionably **endorses** (Christian) Monotheism.

[10] The Supreme Court rejected the state court's relatively equivalent contention that the law served to "prevent … 'the obliteration of racial pride.'" *Id*. at 7.

For verbal misrepresentation, nothing beats the first court to hear this matter: *Aronow*. There the Ninth Circuit contended that inscribing "In God We Trust" on the nation's money "has nothing whatsoever to do with the establishment of religion …. [and] has no theological … impact." 432 F.2d at 243. To paraphrase the Sixth Circuit in another religious motto case: "With *Aronow*, All Things Are Possible." *See ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291-92 (6th Cir. 2001) ("In 1959, three years after Congress passed and President Eisenhower signed legislation making 'In God We Trust' our national motto, the State of Ohio adopted a similar motto: 'With God, All Things Are Possible.' … Pamphlets published by the state to describe Ohio's history, government, and official symbols also identified the source of the motto as Matthew 19:26.").

(J) A Lofty Adjective Can Obscure the Constitutional Violation

A wonderful method for concealing constitutional infractions is to simply call the given action "ceremonial." Although the word arose from the portion of a dissenting opinion that was prefaced with "While I remain uncertain," *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting), and its third-hand reference is inapplicable to the facts of this case (i.e., it was only to apply when the given verbiage "ha[d] lost through rote repetition any significant religious content," *id*.), it has managed to gain quite a following. *See, e.g.*, Opinion & Order (JA283).

It seems unlikely that this technique would work in other contexts. Favoritism for the Caucasian race, for example, would still likely be recognized as such despite a "ceremonial White Power" appellation. Advantages for men would likely continue to be deemed invidious even if "ceremonial male superiority" were used. Yet placing "ceremonial" before favoritism for the majority's preferred religious belief somehow makes the equal protection violation vanish.

This unique ability, however, seems limited only to belief in God. If an image of the Pope or a Star of David were mandated for all coins and currency bills, the "ceremonial" nature of the practice would almost certainly be taken (by the Protestant majority) as evidence of an actual establishment of religion. Furthermore, whether something is religiously "ceremonial" is dependent upon the experiences of the individual. A Latin cross may seem "ceremonial" to a "casual" Christian, but that description may be deeply offensive to a devout adherent. Similarly, a discriminated-against Jew might very well find nothing "ceremonial" about a cross. As has already been noted, the judicial imposition of a "correct" interpretation of a religious phrase – especially when that interpretation is contrary to the phrase's facial meaning – is odious and contrary to Supreme Court case law. *See supra* p. 27. "However 'ceremonial' their messages may be, they are flatly unconstitutional." *Lee v. Weisman*, 505 U.S. at 631 (Souter, J., concurring).

The Panel, of course, can still employ this well-worn practice.

(K) The Facts Can Be Dispensed With

Prior to this Court, only the Ninth Circuit in *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010), had been presented with the panoply of facts – all demonstrating the clear religious purposes and effects of the motto – that are present in the Complaint here. *Lefevre* ruled that its ability to re-examine this Establishment Clause claim was "foreclosed by our decision in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970)." 598 U.S. at 644. Thus, this Panel is the first that has both the facts and the authority to rule correctly.

Of course, the facts have always been available, and the other circuits could have discovered them had they made the attempt. In any event, those courts wrote their opinions without even mentioning those extraordinarily probative details already noted in this brief. (*See supra* p. 11, highlighting **admitted** facts).

Similar facts keep presenting themselves. For instance, commemorating the 50th anniversary of "In God We Trust" becoming the national motto, the Senate unanimously stated that "the concept embodied in that motto [is] that -- (1) the proper role of civil government is derived from the consent of the governed, who are endowed by their Creator with certain unalienable Rights; and (2) the success of civil government relies firmly on the protection of divine Providence." S. Con. Res. 96, 109th Cong. (2006). This prose expresses a purely religious view that is disputed by millions of American citizens.

Of note is the difference between this commemoration and the one the following year, honoring the 40th anniversary of *Loving v. Virginia*. *See* H.R. Res. 321, 110th Cong. (2007). Even though the nation's anti-miscegenation laws were "traditionally rooted from the time of our Founders up until 1967," *id*. at H6188 (remarks of Rep. King), there was pride that our Supreme Court had finally overturned laws "so directly subversive of the principle of equality." *Id*. (quoting the resolution itself).

In fact, American anti-miscegenation laws date back to 1661. *Id*. at H6187. The laws at issue in this case – which are even more "directly subversive of the principle of equality"[11] – date back only to the 1860s. Nonetheless, this Panel can ignore this and the other facts, just as did the other circuit panels.

(L) The Standard of Review Can Be Dispensed With

Presumably because it is important, the Federal Rules require a "statement of the applicable standard of review" for every appellant's and appellee's brief. *See* Fed. R. App. P. 28(a)(8)(B) and 28(b). The appropriate standard states that "a complaint should not be dismissed for failure to state a claim unless it appears

[11] Detestable as they were, the anti-miscegenation laws treated blacks and whites equally, since both were guilty of the offense. In the instant case, there is not even ostensible equality. (Christian) Monotheists are always favored. Atheists are always disfavored.

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. If they have not already done so, Plaintiffs can certainly prove that the *Lemon* test has been violated, that the requirements of the neutrality "touchstone" have not be met, that their RFRA claim can prevail, etc. Thus, if a decision in their favor is not yet forthcoming, then a remand for trial is warranted.

Nonetheless, that standard of review can also be easily ignored.

(M) Our Religious History Can Be Easily Transformed from One of Equality into One of Religious Favoritism

In *Engel v. Vitale*, 370 U.S. 421, 431 (1962), the Supreme Court wrote:

> The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.

With this in mind, our true religious history – of striving for governmental neutrality and equal respect for all lawful religious views – can be appreciated. Yet that history is often transformed into a history of religious favoritism, as past events inconsistent with those principles are emphasized. After all, the majority always likes to "use the machinery of the State to practice its beliefs." *Abington*, 374 U.S. at 226. Thus, the Panel can safely join engage in this approach.

III. Choosing Between the Two Easy Decisional Pathways Should Be Easy

As the foregoing makes clear, it is easy to rule in favor of either side in this litigation. Hopefully, the Panel will find it easy to decide which ruling is appropriate.

(A) There Are Good Reasons for Ruling in Plaintiffs' Favor

Plaintiffs suggest that there are basically two reasons for ruling in their favor. The first is that such a decision is consistent with the Constitution's magnificent ideals. To be sure, the practice being challenged here has a long tenure, and a huge outcry will result should this Court do what the law commands. Yet, "the strength of those universal principles of equality and liberty provides the means for resolving contradictions between principle and practice." Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 How. L.J. 983, 994 (1987).

The other reason is more practical. As virtually everyone acknowledges, the Supreme Court's Establishment Clause jurisprudence is "in hopeless disarray," *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring), and is "formless, unanchored, subjective and provide[s] no guidance." *Doe v. Elmbrook School Dist.*, 687 F.3d at 872 (7th Cir. 2012) (en banc) (Posner, J., dissenting). In other words, the Supreme Court has not done its job.

This case is an ideal vehicle to have the high court provide the necessary guidance. Are the Constitution's principles to be upheld or not? Are majorities to be permitted to infuse government with their preferred religious ideology? If so, what "logic" is to be employed? For the sake of the thousands of judges in this nation – and the three hundred million citizens they serve – the Panel should send this case to the Supreme Court. Ruling in Plaintiffs' favor is the only way to accomplish that.

(B) There Are Poor Reasons for Ruling in Defendants' Favor

In *Abington*, Justice Brennan referenced "In God We Trust," writing, "I suspect there would be intense opposition to the abandonment of that motto." *Id*. at 303 (Brennan, J., concurring). His suspicion was undoubtedly correct. As a result, the Panel will be subjected to ridicule, derision and condemnation should it rule as the law commands. Avoiding those consequences is a reason – albeit a poor one – for upholding the motto on the money. *Cf. Freytag v. Commissioner*, 501 U.S. 868, 907 (1991) (Scalia, J., concurring) (noting the expectation of "the fearless adjudication of cases and controversies").

The Supreme Court will undoubtedly deny certiorari if the Panel rules in Defendants' favor. Thus, the judges here will have no possibility of being reversed. Avoiding the negative feelings and emotions a reversal engenders is a reason – albeit a poor one – for upholding the motto on the money.

It is suspected that most appellate judges bear at least a faint hope of one day sitting on the Supreme Court. A ruling in favor of the Atheists in this case will undoubtedly extinguish that hope forever. *See*, *e.g.*, 148 Cong. Rec. S6103 (daily ed. June 26, 2002) (where Robert C. Byrd, prior to calling the author of a Ninth Circuit decision striking the "under God" language from the Pledge of Allegiance "this stupid judge," declared, "Let that judge's name ever come before this Senate while I am a Member, and he will be blackballed—if Senators know what 'blackballed' means—fast."). Preserving one's chance for professional advancement is a reason – albeit a poor one – for upholding the motto on the money.

IV. Can an Opinion Be Drafted that Will Mitigate the Ridicule, Derision and Condemnation that Will Follow This Tribunal's Doing Its Job?

No.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Summary Judgment should be granted and the grant of Defendants' Motion to Dismiss should be reversed. The statutes at issue in this case, 31 U.S.C. §§ 5112(d)(1) and 5114(b) should be declared unconstitutional pursuant to the equal protection component of the Fifth Amendment's Due Process Clause, the Establishment Clause and the Free Exercise Clause. They also should be declared invalid under RFRA.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because (according to Microsoft Word's "Statistics") this brief contains 13,716 words, excluding the addenda and the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word (part of Microsoft Office Home and Student 2010, version 14.0.7106.5003 (32-bit)) in 14-point Times New Roman font.

/s/ Michael Newdow Dated: January 16, 2014

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ADDENDUM A

ORDER (AND JUDGMENT) APPEALED FROM

Opinion & Order

Filed on September 9, 2013

By Hon. Harold Baer, Jr., District Judge

United States District Court – Southern District of New York

Judgment

Filed on September 9, 2013

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROSALYN NEWDOW, KENNETH BRONSTEIN, BENJAMIN DREIDEL, NEIL GRAHAM, JULIE WOODWARD, JAN AND PAT DOE, DOE-CHILD-1 AND DOE-CHILD2, ALEX AND DREW ROE, ROE-CHILD-1, ROE-CHILD2 AND ROE-CHILD3 VAL AND JADE COE, COE-CHILD-1 AND COE-CHILD-2, NEW YORK CITY ATHEISTS, and FREEDOM FROM RELIGION FOUNDATION	:	
Plaintiffs,	:	
	:	**13 CV 741 (HB)**
- against -	:	
	:	**OPINION & ORDER**
UNITED STATES OF AMERICA, JACOB J. LEW, SECRETARY OF THE TREASURY, RICHARD A. PETERSON, ACTING DIRECTOR, UNITED STATES MINT, and LARRY R. FELIX, DIRECTOR, BUREAU OF ENGRAVING AND PRINTING,	:	
Defendants,	:	

Hon. HAROLD BAER, JR., District Judge:

Plaintiffs are eleven individuals who are Atheists and Secular Humanists, and two associations, New York City Atheists and the Freedom from Religion Foundation. Plaintiffs claim that Defendants' issuance of United States currency bearing the words "In God We Trust" violates the Establishment Clause, the Free Exercise Clause and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The above-captioned Defendants bring this motion to dismiss the complaint.

For the reasons set forth below, Defendants' Motion to Dismiss is GRANTED, and the case is DISMISSED.[1]

[1] The Court need not reach Plaintiffs' Motion for Summary Judgment or Defendants' arguments that mandamus would not be proper in this action.

I. BACKGROUND

Atheist and Secular Humanist individual Plaintiffs are numismatics, a teacher, parents and their minor children, and others who allege that they suffer harm because of the appearance of the words "In God We Trust" on U.S. currency. (Am. Compl. ¶¶ 7-17.) Plaintiffs New York City Atheists ("NYC Atheists") and Freedom from Religion Foundation ("FFRF") are associations committed to the values of Atheism and the separation of church and state. They allege that their members suffer the same harm as the individual Plaintiffs. (*Id.* ¶¶ 18, 19.) Plaintiffs challenge statutory provisions that require the inscription of "In God We Trust" on all coins and printed currency, 31 U.S.C. §§ 5112(d)(1), 5114(b), which were enacted in 1955. In 1956, Congress established "In God We Trust" (hereinafter "motto") as the national motto of the United States. 36 U.S.C. § 302. Congress reaffirmed this language in 2002, with detailed findings. *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002). Plaintiffs allege that the inclusion of the motto on currency violates the Establishment Clause and substantially burdens their practice of Atheism and Secular Humanism, in violation of the Free Exercise Clause and RFRA. (Am. Compl. ¶¶ 379-511.)

Plaintiffs ask the Court to declare that the statutes requiring that the motto appear on United States currency violate the Establishment Clause and the Free Exercise Clause of the First Amendment, as well as RFRA. (Am. Compl. at 78.) In addition, Plaintiffs seek an injunction preventing defendants from issuing currency containing the motto. (*Id.*)

II. LEGAL STANDARD

A complaint will be dismissed under Rule 12(b)(6) if there is a "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss on this ground, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A facially plausible claim is one where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Further, "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," dismissal is appropriate. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Iqbal*, 556 U.S. at 679).

III. DISCUSSION[2]

A. Establishment Clause

The Establishment Clause provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. In *Lemon v. Kurtzman*, the Supreme Court set out three tests to determine whether the Establishment Clause has been violated: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U.S. 602, 612-13 (1971) (citations omitted). Although the *Lemon* test has faced criticism, the Second Circuit has instructed district courts to apply it until it is reconsidered en banc or explicitly rejected by the Supreme Court. *Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006). The parties do not dispute that only the first two tests—those relating to the purpose and effect of the statute—are applicable here. *See* Defs.' Supp. 25-26; Pls.' Opp. 9-12. The purpose test is expanded upon by the objective observer standard, which asks how the government's purpose would be perceived by an objective observer. *Skoros*, 437 F.3d at 22 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984)).

The Supreme Court has repeatedly assumed the motto's secular purpose and effect, and all circuit courts that have considered this issue—namely the Ninth, Fifth, Tenth, and D.C. Circuit— have found no constitutional violation in the motto's inclusion on currency. While Plaintiffs urge that this court should disregard Supreme Court dicta, the Second Circuit counsels otherwise. *See United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975) (Supreme Court dicta "must be given considerable weight and [cannot] be ignored in the resolution of the close question we have to decide."); *see also United States v. Colasuonno*, 697 F.3d 164, 178-79 (2d Cir. 2012) (acknowledging that it is the "usual obligation to accord great deference to Supreme Court dicta" except in certain circumstances, such as when Congress has "removed or weakened the conceptual underpinnings" of a decision).

[2] The Court does not address the argument that associational plaintiff FFRF is collaterally estopped from bringing this action because Plaintiffs do not dispute this in their opposition brief, Pls.' Opp. 1-2, and Defendants only assert this defense against FFRF as an association, not against its members. Defs.' Reply Mem., 13-14.

In *Lynch v. Donnelly*, the Supreme Court held that a city's Christmas display of a crèche passed the purpose and effect *Lemon* tests by comparing the crèche to the motto on the U.S. currency. 465 U.S. at 676 (in discussing permissible religious references, notes that "[o]ther examples of reference to our religious heritage are found in the statutorily prescribed national motto 'In God We Trust,' which Congress and the President mandated for our currency . . . .") (citations omitted). The concurring and the dissenting justices in *Lynch* shared the majority's view that the motto's place on currency was constitutionally sound. *See* 465 U.S. at 693 (O'Conner, J., concurring) (opining that the crèche, like the motto on coins, "served a secular purpose" because "government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society"); *id.* at 716-17 (Brennan, Marshall, Blackmun & Stevens, JJ., dissenting) ("[S]uch practices as the designation of 'In God We Trust' as our national motto . . . can best be understood, in Dean Rostow's apt phrase, as a form a 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content . . . [and] are uniquely suited to serve such wholly secular purposes as solemnizing public occasions . . . .").

The following year, when the Supreme Court held that a crèche display in a different setting was unconstitutional, the majority declined to revisit the discussions of "ceremonial deism" from *Lynch*, because of "an obvious distinction between crèche displays and references to God in the motto" distinguishing "a specifically Christian symbol, like a crèche" from "more general religious references," which are constitutionally permissible. *County of Allegheny v. ACLU*, 492 U.S. 573, 603 (1989). More recent Supreme Court decisions have affirmed this analysis. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) (discussing "the Establishment Clause's tolerance . . . [of] public references to God on coins"); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) ("'[C]eremonial deism' most clearly encompasses such things as the national motto ('In God We Trust')," whose "history, character, and context prevent them from being constitutional violations at all.").

Each circuit court that has considered the issue found no Establishment Clause violation in the motto's placement on currency, finding ceremonial or secular purposes and no religious effect or endorsement. In *Aronow v. United States*, decided before *Lemon* but affirmed well after, the Ninth Circuit held that the motto on currency did not violate the Establishment Clause because "[i]ts use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise." 432 F.2d 242, 243 (9th Cir. 1970) (citing dicta in *Engel v. Vitale*, 370 U.S. 421 (1962)); *see also Newdow v. Lefevre*, 598 F.3d 638, 644 (9th Cir. 2010) (declining to overrule *Aronow*). The Fifth Circuit similarly affirmed a district court's decision on this issue, which held that the placement of the motto on the currency survived *Lemon* because "it served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange" and "it is equally clear that the use of the motto on the currency or otherwise does not have a Primary effect of advancing religion." *O'Hair v. Blumenthal*, 462 F. Supp. 19, 20 (W.D. Tex. 1978), *aff'd sub nom. O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (per curiam). The Tenth Circuit reached the same result in *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996), and more recently, the D.C. Circuit came out the same way, *Kidd v. Obama*, 387 F. App'x 2 (D.C. Cir. 2010) (per curiam). In both cases, the court relied on language from the Supreme Court and other circuits.

Plaintiffs urge this court to disregard those decisions, but neither those decisions nor the history and context of the motto's placement on currency can be ignored. To do so would be to disregard the dicta from the Supreme Court, which this Circuit has instructed me to follow, and as well the reasoning in *Lemon* and its progeny. Taken together, they support only one conclusion: the inclusion of the motto on U.S. currency satisfies the purpose and effect tests enunciated in *Lemon*, and does not violate the Establishment Clause.[3]

B. Free Exercise Clause and RFRA

The Free Exercise Clause encompasses both "freedom to believe and freedom to act on one's beliefs." *Skoros*, 437 F.3d at 39 (internal quotations and citations omitted). Absent some

[3] Indeed, there appears to be only one exception to the unanimity of federal courts in accepting the motto as constitutional. *See Engel v. Vitale*, 370 U.S. 421, 437 & n.1 (1962) (Douglas, J., concurring) (considering the appearance of the motto on currency in a list of activities that constituted "financ[ing] [of] religious exercise," which was "an unconstitutional undertaking whatever form it takes.")

demonstration that "the purpose of the defendants' challenged actions was to impugn . . . or to restrict their religion practices . . . a Free Exercise claim will be sustained only if the 'government has placed a substantial burden on the observation of a central religious belief,' without 'a compelling governmental interest justif[ying] the burden.'" *Id.* (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 384–85 (1990)).

Similarly, RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless it demonstrates that such practice "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. The Second Circuit instructs that "substantial burden is a term of art in the Supreme Court's free exercise jurisprudence" and it "exists when an individual is required to 'choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.'" *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2007) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

Plaintiffs argue creatively, albeit not for the first time, that the Free Exercise Clause is violated because they are forced to "[b]ear a religious message they believe to be untrue and completely contrary to their sincerely held religious belief" or "utilize a relatively burdensome alternative method." (Am. Compl. ¶ 485.) Plaintiffs also allege a violation of RFRA because the motto's placement on currency has forced them to "bear a religious message," "proselytize," and "further anti-Atheist religious prejudices." (*Id.* ¶ 491-93.)

Here again, as with the arguments presented with respect to the Establishment Clause, Plaintiffs' claims are not violative of constitutional guarantees and they fail to demonstrate the "substantial burden" required by the Free Exercise Clause and RFRA. Put another way, there is no showing of government coercion, penalty, or denial of benefits linked to the use of currency or the endorsement of the motto. *See Newdow v. Cong. of U.S. of Am.*, 435 F. Supp. 2d 1066, 1077 (E.D. Cal. 2006), *aff'd sub nom. Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010). Indeed, the case that Plaintiffs highlighted at oral argument appears to cut against their argument. *See* 08/06/2013 Transcript of Oral Argument on Motion to Dismiss at 40-41. In that case, *Wooley v.*

Maynard, the Supreme Court held that requiring individuals to use license plates bearing the state motto "Live Free or Die" was unconstitutional. 430 U.S. 705 (1977). However, the Court specifically distinguished currency, not surprisingly finding that "currency, which is passed from hand to hand, differs in significant respects from an automobile . . . . Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." *Id.* at 717 n.15.

While Plaintiffs may be inconvenienced or offended by the appearance of the motto on currency, these burdens are a far cry from the coercion, penalty, or denial of benefits required under the "substantial burden" standard. As such, the inclusion of the motto on currency does not present a violation to the Free Exercise Clause or RFRA.

IV. CONCLUSION

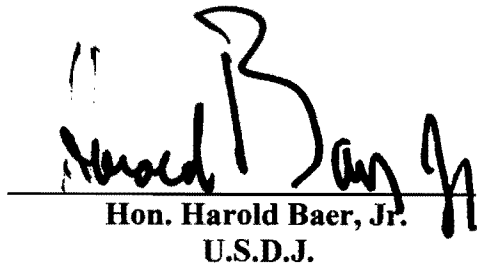
For the foregoing reasons, Plaintiffs have not stated a claim under the Establishment Clause, the Free Exercise Clause, or RFRA, and Defendants' motion to dismiss is GRANTED.

The Clerk of the Court is instructed to close this case and remove it from my docket.

SO ORDERED.

September 9, 2013

New York, New York



Hon. Harold Baer, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROSALYN NEWDOW, KENNETH BRONSTEIN, BENJAMIN DREIDEL, NEIL GRAHAM, JULIE WOODWARD, JAN AND PAT DOE, DOE-CHILD-1 AND DOE-CHILD2, ALEX AND DREW ROE, ROE-CHILD-1, ROE-CHILD2 AND ROE-CHILD3, VAL AND JADE COE, COE-CHILD-1 AND COE-CHILD-2, NEW YORK CITY ATHEISTS, and FREEDOM FROM RELIGION FOUNDATION,

Plaintiffs,

-against-

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

Defendants.

----------X

13 **CIVIL** 0741 (HB)

JUDGMENT

Defendants having moved to dismiss the complaint, and the matter having come before the Honorable Harold Baer Jr., United States District Judge, and the Court, on September 9, 2013, having rendered its Opinion and Order granting Defendants' motion to dismiss, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated September 9, 2013, Defendants' motion to dismiss is granted; accordingly, the case is closed.

Dated: New York, New York
September 10, 2013

RUBY J. KRAJICK

Clerk of Court

BY:

Deputy Clerk

ADDENDUM B

LISTING OF SUPREME COURT MAJORITY OPINIONS CITING THE NEED FOR NEUTRALITY

ADDENDUM B

UNITED STATES SUPREME COURT MAJORITY OPINIONS DEMONSTRATING A MANDATE FOR RELIGIOUS NEUTRALITY[1]

(1) *Van Orden v. Perry*, 125 S. Ct. 2854, 2860 (2005) (discussing "the very neutrality the Establishment Clause requires")

(2) *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005) ("The touchstone for our analysis is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.")

(3) *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (courts "must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths")

(4) *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) ("[W]here a government aid program is neutral with respect to religion ... the program is not readily subject to challenge under the Establishment Clause.")

(5) *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) ("[W]e have held that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.")

(6) *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1254 (2000) (noting that a school board statement needs to be "sufficiently neutral to prevent it from violating the Establishment Clause.")

(7) *Mitchell v. Helms*, 530 U.S. 793, 809 (2000) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality.")

(8) *Agostini v. Felton*, 521 U.S. 203, 234 (1997) ("We therefore hold that a federally funded program providing supplemental, remedial instruction … on a neutral basis is not invalid under the Establishment Clause ...")

[1] All citations and internal quotations are omitted in this listing.

(9) *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995) ("A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.")

(10) *Bd. of Educ. v. Grumet*, 512 U.S. 687, 696 (1994) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.")

(11) *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) ("[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge.")

(12) *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993) ("A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.")

(13) *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) ("[T]he total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral.")

(14) *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 251 (1990) (Government act is constitutional if it "evinces neutrality toward, rather than endorsement of, religious speech.")

(15) *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 384 (1990) (noting "the constitutional requirement for governmental neutrality.")

(16) *Hernandez v. Comm'r, 490 U.S. 680*, 712 (1989) (stating that there is no *Lemon* test violation if a "provision is neutral both in design and purpose.")

(17) *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 13 (1989) (referencing "the policy of neutrality")

(18) *Bowen v. Kendrick*, 487 U.S. 589, 609 (1988) (recognizing the requirement that "the challenged statute appears to be neutral on its face.")

(19) *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987) ("Lemon's 'purpose' requirement aims at preventing the relevant governmental decisionmaker -- in this case, Congress -- from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.")

(20) *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 145 (1987) (citing to "the governmental obligation of neutrality in the face of religious differences.")

(21) *School Dist. v. Ball*, 473 U.S. 373, 382 (1985) ("The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion.")

(22) *Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (recognizing "the established principle that the government must pursue a course of complete neutrality toward religion.")

(23) *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983) ("a program ... that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.")

(24) *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (upholding "policy ... founded on a neutral, secular basis.")

(25) *Larkin v. Grendel's Den*, 459 U.S. 116, 125 (1982) (referencing the need for power delegated by the government to be used "in a religiously neutral way."

(26) *Larson v. Valente*, 456 U.S. 228, 246 (1982) ("This principle of denominational neutrality has been restated on many occasions.")

(27) *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (denying challenge because "the University's policy is one of neutrality toward religion.")

(28) *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 720 (1981) (noting "the governmental obligation of neutrality in the face of religious differences.")

(29) *McDaniel v. Paty*, 435 U.S. 618, 629 (1978) (noting the Establishment Clause's "command of neutrality.")

(30) *Wolman v. Walter*, 433 U.S. 229 (1977) (repeatedly referencing the need for religious neutrality in terms of instructional materials, equipment, services, facilities, counseling, locations and teaching.)

(31) *Buckley v. Valeo*, 424 U.S. 1, 92 (1976) "We have, of course, held that the Religion Clauses – 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' -- require Congress, and the States through the Fourteenth Amendment, to remain neutral in matters of religion.")

(32) *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (requiring "that auxiliary teachers remain religiously neutral, as the Constitution demands.")

(33) *Johnson v. Robison*, 415 U.S. 361, 385 (1974) (discussing legislative power "to advance the neutral, secular governmental interests.")

(34) *Comm. for Public Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) ("A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion.")

(35) *Norwood v. Harrison*, 413 U.S. 455, 472 (1973) (referencing "constitutional neutrality as to sectarian schools.")

(36) *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972) (speaking of "the constitutional requirement for governmental neutrality.")

(37) *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (approving of "facilities that are themselves religiously neutral.")

(38) *Lemon v. Kurtzman*, 403 U.S. 602, 618 (1971) (recognizing the mandate for "remaining religiously neutral.")

(39) *Gillette v. United States*, 401 U.S. 437, 449 (1971) ("the section survives the Establishment Clause because there are neutral, secular reasons to justify the line that Congress has drawn.")

(40) *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.")

(41) *Sherbert v. Verner*, 373 U.S. 398, 409 (1963) (noting "the governmental obligation of neutrality in the face of religious differences.")

ADDENDUM C

LISTING OF ALL SUPREME COURT MENTIONS OF "IN GOD WE TRUST"

ADDENDUM C

U.S. SUPREME COURT MENTIONS OF "IN GOD WE TRUST"

Table of Contents

(1) *Engel v. Vitale*, 370 U.S. 421 (1962)

370 U.S. at 437 n.1 (Douglas, J., concurring)

> It is customary in deciding a constitutional question to treat it in its narrowest form. Yet at times the setting of the question gives it a form and content which no abstract treatment could give. The point for decision is whether the Government can constitutionally finance a religious exercise. Our system at the federal and state levels is presently honeycombed with such financing.[1] Nevertheless, I think it is an unconstitutional undertaking whatever form it takes.
>
> Footnote 1: "There are many 'aids' to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N. Y. A. and W. P. A. funds were available to parochial schools during the depression. Veterans receiving money under the 'G. I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan 'In God We Trust' is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits -- 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations -- contributions to religious organizations are deductible for federal income tax purposes. There are no limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal 'aids' could easily be expanded, and of course there is a long list in each state." Fellman, The Limits of Freedom (1959), pp. 40-41.

370 U.S. at 440 n.5 (Douglas, J., concurring)

> What New York does on the opening of its public schools is what each House of Congress 3 does at the opening [440] of each day's business. 4 Reverend Frederick B. Harris is Chaplain of the Senate; Reverend Bernard Braskamp is Chaplain of the House. Guest chaplains of various denominations also officiate.[5]
>
> Footnote 5: It would, I assume, make no difference in the present case if a different prayer were said every day or if the ministers of the community rotated, each giving his own prayer. For some of the petitioners in the present case profess no religion.
>
> The Pledge of Allegiance, like the prayer, recognizes the existence of a Supreme Being. Since 1954 it has contained the words "one Nation under God, indivisible, with liberty and justice for all." 36 U. S. C. § 172. The House Report recommending the addition of the words "under God" stated that those words in no way run contrary to the First Amendment but recognize "only the guidance of God in our national affairs." H. R. Rep. No. 1693, 83d Cong., 2d Sess., p. 3. And see S. Rep. No. 1287, 83d Cong., 2d Sess. Senator Ferguson, who sponsored the measure in the Senate, pointed out that the words "In God We Trust" are over the entrance to the Senate Chamber. 100 Cong. Rec. 6348. He added:
>
> "I have felt that the Pledge of Allegiance to the Flag which stands for the United States of America should recognize the Creator who we really believe is in control of the destinies of this great Republic.
>
> "It is true that under the Constitution no power is lodged anywhere to establish a religion. This is not an attempt to establish a religion; it has nothing to do with anything of that kind. It relates to belief in God, in whom we sincerely repose our trust. We know that America cannot be defended by guns, planes, and ships alone. Appropriations and expenditures for defense will be of value only if the God under whom we live believes that we are in the right. We should at all times recognize God's province over the lives of our people and over this great Nation." Ibid. And see 100 Cong. Rec. 7757 et seq. for the debates in the House.
>
> The Act of March 3, 1865, 13 Stat. 517, 518, authorized the phrase "In God We Trust" to be placed on coins. And see 17 Stat. 427. The first mandatory requirement for the use of that motto on coins was made by

the Act of May 18, 1908, 35 Stat. 164. See H. R. Rep. No. 1106, 60th Cong., 1st Sess.; 42 Cong. Rec. 3384 et seq. The use of the motto on all currency and coins was directed by the Act of July 11, 1955, 69 Stat. 290. See H. R. Rep. No. 662, 84th Cong., 1st Sess.; S. Rep. No. 637, 84th Cong., 1st Sess. Moreover, by the Joint Resolution of July 30, 1956, our national motto was declared to be "In God We Trust." 70 Stat. 732. In reporting the Joint Resolution, the Senate Judiciary Committee stated:

"Further official recognition of this motto was given by the adoption of the Star-Spangled Banner as our national anthem. One stanza of our national anthem is as follows:

"'O, thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation!
Blest with vict'ry and peace may the heav'n rescued land
Praise the power that hath made and preserved us a nation!
Then conquer we must when our cause it is just,
And this be our motto -- "In God is our trust."
And the Star-Spangled Banner in triumph shall wave
O'er the land of the free and the home of the brave.'

"In view of these words in our national anthem, it is clear that 'In God we trust' has a strong claim as our national motto." S. Rep. No. 2703, 84th Cong., 2d Sess., p. 2.

370 U.S. at 449 (Stewart, J., concurring)

In 1954 Congress added a phrase to the Pledge of Allegiance to the Flag so that it now contains the words "one Nation under God, indivisible, with liberty and justice for all."[6] In 1952 Congress enacted legislation calling upon the President each year to proclaim a National Day of Prayer.[7] Since 1865 the words "IN GOD WE TRUST" have been impressed on our coins.[8]

Footnote 8: 13 Stat. 517, 518; 17 Stat. 427; 35 Stat. 164; 69 Stat. 290. The current provisions are embodied in 31 U. S. C. §§ 324, 324a.

(2) *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963)

374 U.S. at 303 (Brennan, J., concurring)

[From page 296: It may be helpful for purposes of analysis to group these other practices and forms of accommodation into several rough categories.]

F. Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning. -- As we noted in our Sunday Law decisions, nearly every criminal law on the books can be traced to some religious principle or inspiration. But that does not make the present enforcement of the criminal law in any sense an establishment of religion, simply because it accords with widely held religious principles. As we said in *McGowan v. Maryland*, 366 U.S. 420, 442, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as "de minimis" -- for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

(3) *Wooley v. Maynard*, 430 U.S. 705 (1977)

430 U.S. at 717 n.15 (Burger, C.J., majority opinion)

> We conclude that the State of New Hampshire may not require appellees to display the state motto[15] upon their vehicle license plates; and, accordingly, we affirm the judgment of the District Court.
>
> Footnote 15: It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

430 U.S. at 722 (Rehnquist, J., dissenting)

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

(4) Stone v. Graham, 449 U.S. 39 (1980)

449 U.S. at 45 (Rehnquist, J., dissenting)

> The Court rejects the secular purpose articulated by the State because the Decalogue is "undeniably a sacred text," ante, at 41. It is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World. The trial court concluded that evidence submitted substantiated this determination. App. to Pet. for Cert. 38. See also *Anderson v. Salt Lake City Corp.*, 475 F.2d 29, 33 (CA10 1973) (upholding construction on public land of monument inscribed with Ten Commandments because they have "substantial secular attributes"). Certainly the State was permitted to conclude that a document with such secular significance should be placed before its students, with an appropriate statement of the document's secular import. See id., at 34 ("It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era"). 2 See also Opinion of the Justices, 108 N. H. 97, 228 A. 2d 161 (1967) (upholding placement of plaques with the motto "In God We Trust" in public schools).

(5) *Marsh v. Chambers*, 463 U.S. 783 (1983)

463 U.S. at 818 (Brennan, J., dissenting)

> Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." Ante, at 786. It is also exemplified by the Court's apparent conclusion that legislative prayer is, at worst, a "'mere shadow'" on the Establishment Clause rather than a "'real threat'" to it. Ante, at 795, quoting *Schempp*, supra, at 308 (Goldberg, J., concurring). Simply put, the Court seems to regard legislative prayer as at most a de minimis violation, somehow unworthy of our attention. I frankly do not know what should be the proper disposition of features of our public life such as "God save the United States and this Honorable Court," "In God We Trust," "One Nation Under God," and the like. I might well adhere to the view expressed in Schempp that such mottos are consistent with the Establishment Clause, not because their import is de minimis, but because they have lost any true religious significance. 374 U.S., at 303-304 (BRENNAN, J., concurring). Legislative invocations, however, are very different.

(6) ***Lynch v. Donnelly*, 465 U.S. 668 (1984)**

465 U.S. at 676 (Burger, C.J., majority opinion)

> Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U. S. C. § 186, which Congress and the President mandated for our currency, see 31 U. S. C. § 5112(d)(1) (1982 ed.), and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children -- and adults -- every year.

465 U.S. at 693 (O'Connor, J., concurring)

> These features combine to make the government's display of the creche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" [693] of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 463 U.S. 783 (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the creche likewise serves a secular purpose -- celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. It is significant in this regard that the creche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the creche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the creche does not have the effect of communicating endorsement of Christianity.

465 U.S. at 714 and 716 (Brennan, J., dissenting).

> Although the Court's relaxed application of the Lemon test to Pawtucket's creche is regrettable, it is at least understandable and properly limited to the particular facts of this case. The Court's opinion, however, also sounds a broader [714] and more troubling theme. Invoking the celebration of Thanksgiving as a public holiday, the legend "In God We Trust" on our coins, and the proclamation "God save the United States and this Honorable Court" at the opening of judicial sessions, the Court asserts, without explanation, that Pawtucket's inclusion of a creche in its annual Christmas display poses no more of a threat to Establishment Clause values than these other official "acknowledgments" of religion. Ante, at 674-678, 685-686; see also ante, at 692-693 (O'CONNOR, J., concurring).
>
> …
>
> Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. See *Engel v. Vitale*, supra, at 435, n. 21; *Schempp*, supra, at 300-304 (BRENNAN, J., concurring). While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form a "ceremonial deism," 24 protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. See *Marsh v. Chambers*, 463 U.S., at 818 (BRENNAN, J., dissenting). [717] Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. Cf. *Schempp*, supra, at 265 (BRENNAN, J., concurring). The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

(7) *Regan v. Time, Inc.*, 468 U.S. 641 (1984)

468 U.S. at 683 (Brennan, J., concurring and dissenting)

> "[Equally] banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent's birthday gift of a $ 20 bill; a green, six-foot enlargement of the portrait of George Washington on a $ 1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, 'In God We Trust', on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist's rendering of a 'shrinking' dollar bill, borne by a striking worker [684] to epitomize his demand for higher wages in a period of inflation." Brief for Appellee 5-6.

(8) ***County of Allegheny v. ACLU*, 492 U.S. 573 (1989)**

492 U.S. at 602 (Blackmun, J., plurality opinion)

> In *Marsh*, the Court relied specifically on the fact that Congress authorized legislative prayer at the same time that it produced the Bill of Rights. See n. 46, supra. Justice Kennedy, however, argues that Marsh legitimates all "practices with no greater potential for an establishment of religion" than those "accepted traditions dating back to the Founding." Post, at 670, 669. Otherwise, the Justice asserts, such practices as our national motto ("In God We Trust") and our Pledge of Allegiance (with the phrase "under God," added in 1954, Pub. L. 396, 68 Stat. 249) are in danger of invalidity.
>
> Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement [603] of religious belief. *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring); id., at 716-717 (Brennan, J., dissenting). We need not return to the subject of "ceremonial deism," see n. 46, supra, because there is an obvious distinction between creche displays and references to God in the motto and the pledge. HN12 However history may affect the constitutionality of nonsectarian references to religion by the government, 52 history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed.

492 U.S. at 625 (O'Connor, J., concurring)

> I joined the majority opinion in *Lynch* because, as I read that opinion, it was consistent with the analysis set forth in my separate concurrence, which stressed that "[e]very government [625] practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." Id., at 694 (emphasis added). Indeed, by referring repeatedly to "inclusion of the creche" in the larger holiday display, id., at 671, 680-682, 686, the *Lynch* majority recognized that the creche had to be viewed in light of the total display of which it was a part. Moreover, I joined the Court's discussion in Part II of Lynch concerning government acknowledgments of religion in American life because, in my view, acknowledgments such as the legislative prayers upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983), and the printing of "In God We Trust" on

> our coins serve the secular purposes of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S., at 693 (concurring opinion). Because they serve such secular purposes and because of their "history and ubiquity," such government acknowledgments of religion are not understood as conveying an endorsement of particular religious beliefs. Ibid. At the same time, it is clear that "[g]overnment practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny." Id., at 694.

492 U.S. at 673 (Kennedy, J., concurring and dissenting).

> The United States Code itself contains religious references that would be suspect under the endorsement test. Congress has directed the President to "set aside and proclaim a suitable day each year . . . as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U.S.C. § 169h. This statute does not require anyone to pray, of course, but it is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." 36 U.S.C. § 172. [673] To be sure, no one is obligated to recite this phrase, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), but it borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we trust," 36 U.S.C. § 186, which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, 31 U.S.C. §§ 5112(d)(1), 5114(b), must have the same effect.

(9) *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004)

542 U.S. at 29 (Rehnquist, C.J., concurring)

> [From page 26: Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.]
>
> The motto "In God we Trust" first appeared on the country's coins during the Civil War. Secretary of the Treasury Salmon P. Chase, acting under the authority of an Act of Congress passed in 1864, prescribed that the motto should appear on the two cent coin. The motto was placed on more and more denominations, and since 1938 all United States coins bear the motto. Paper currency followed suit at a slower pace; Federal Reserve notes were so inscribed during the decade of the 1960's. Meanwhile, in 1956, Congress declared that the motto of the United States would be "In God We Trust." Act of July 30, 1956, ch. 795, 70 Stat. 732.

542 U.S. at 37 (O'Connor, J., concurring)

> There are no de minimis violations of the Constitution--no constitutional harms so slight that the courts are obliged [37] to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). See *Allegheny*, 492 U.S., at 630, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (O'Connor, J., concurring in part and concurring in judgment). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

(10) *Van Orden v. Perry*, 545 U.S. 677 (2005)

545 U.S. at 716 (Stevens, J., dissenting)

> The reason this message stands apart is that the Decalogue is a venerable religious text.[14] As we held 25 years ago, it is beyond dispute that "[t]he Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths." *Stone v. Graham*, 449 U.S. 39, 41, 66 L. Ed. 2d 199, 101 S. Ct. 192 (1980) (per curiam). For many followers, the Commandments represent the literal word of God as spoken to Moses and repeated to his followers after descending from Mount Sinai. The message conveyed by the Ten Commandments thus cannot be analogized to an appendage to a common article of commerce ("In God we Trust") or an incidental part of a familiar recital ("God save the United States and this honorable Court"). Thankfully, the plurality does not attempt to minimize the religious significance of the Ten Commandments. Ante, at 690, 162 L. Ed. 2d, at 619 ("Of course, the Ten Commandments are religious--they were so viewed at their inception and so remain"); ante, at 692, 162 L. Ed. 2d, at 620 (Thomas, J., concurring); see also *McCreary County v.* [717] *American Civil Liberties Union of Ky.*, post, at 909, 162 L. Ed. 2d 729, 125 S. Ct. 2722 (Scalia, J., dissenting). Attempts to secularize what is unquestionably a sacred text defy credibility and disserve people of faith.

(11) *McCreary County v. ACLU*, 545 U.S. 844 (2005)

545 U.S. at 854 (Souter, J., majority opinion)

> As directed by the resolutions, the Counties expanded the displays of the Ten Commandments in their locations, presumably along with copies of the resolution, which instructed that it, too, be posted, id., at 9. In addition to the first display's large framed copy of the edited King James version of the Commandments,[4] the second included eight other documents in smaller frames, each either having a religious [854] theme or excerpted to highlight a religious element. The documents were the "endowed by their Creator" passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, "In God We Trust"; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible," reading that "[t]he Bible is the best gift God has ever given to man"; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact. 96 F. Supp. 2d, at 684; 96 F. Supp. 2d, at 695-696.

545 U.S. *at* 889 (Scalia, J., dissenting)

> Nor have the views of our people on this matter significantly changed. Presidents continue to conclude the Presidential oath with the words "so help me God." Our legislatures, state and national, continue to open their sessions with prayer led by official chaplains. The sessions of this Court continue to open with the prayer "God save the United States and this Honorable Court." Invocation of the Almighty by our public figures, at all levels of government, [889] remains commonplace. Our coinage bears the motto, "IN GOD WE TRUST." And our Pledge of Allegiance contains the acknowledgment that we are a Nation "under God." As one of our Supreme Court opinions rightly observed, "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952), repeated with approval in *Lynch v. Donnelly*, 465 U.S. 668, 675, 79 L. Ed. 2d 604, 104 S. Ct. 1355

(1984); *Marsh*, 463 U.S., at 792, 77 L. Ed. 2d 1019, 103 S. Ct. 3330; *Abington Township*, supra, at 213, 10 L. Ed. 2d 844, 83 S. Ct. 1560.

With all of this reality (and much more) staring it in the face, how can the Court possibly assert that "'the First Amendment mandates governmental neutrality between . . . religion and nonreligion,'" ante, at ____, 162 L. Ed. 2d, at ____, and that "[m]anifesting a purpose to favor . . . adherence to religion generally," ante, at ____, 162 L. Ed. 2d, at ____, is unconstitutional? Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words. Surely not even the current sense of our society, recently reflected in an Act of Congress adopted unanimously by the Senate and with only five nays in the House of Representatives, see 148 Cong. Rec. 12041/S6226 (June 28, 2002); id., at 19518/H7186 (Oct. 8, 2002), criticizing a Court of Appeals opinion that had held "under God" in the Pledge of Allegiance unconstitutional. See Act of Nov. 13, 2002, §§ 1(9), 2(a), 3(a), 116 Stat. 2057, 2058, 2060-2061 (reaffirming the Pledge of Allegiance and the National Motto ("In God We Trust") and stating that the Pledge of Allegiance is "clearly consistent with the text and intent of the Constitution"). Nothing stands behind the Court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the Court's own say-so, citing as support only the unsubstantiated say-so of earlier Courts going back no further than the mid-20th century. See ante, at ____, 162 L. Ed. 2d, at ____, citing *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335, 97 L. Ed. 2d 273, 107 S. Ct. 2862 (1987), in turn citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 29 L. Ed. 2d 745, 91 S. Ct. 2105 (1971), in [890] turn citing *Board of Ed. of Central School Dist. No. 1 v. Allen*, 392 U.S. 236, 243, 20 L. Ed. 2d 1060, 88 S. Ct. 1923 (1968), in turn quoting *Abington Township*, 374 U.S., at 222, 10 L. Ed. 2d 844, 83 S. Ct. 1560, in turn citing *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 15, 91 L. Ed. 711, 67 S. Ct. 504 (1947). 2 And it is, moreover, a thoroughly discredited say-so. It is discredited, to begin with, because a majority of the Justices on the current Court (including at least one Member of today's majority) have, in separate opinions, repudiated the brain-spun "Lemon test" that embodies the supposed principle of neutrality between religion and irreligion. See *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-399, 124 L. Ed. 2d 352, 113 S. Ct. 2141 (1993) (Scalia, J., concurring in judgment) (collecting criticism of *Lemon*); *Van*

Orden, ante, at ____, ____, 162 L. Ed. 2d ____, 125 S. Ct. ____(Thomas, J., concurring); *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 720, 129 L. Ed. 2d 546, 114 S. Ct. 2481 (1994) (O'Connor, J., concurring in part and concurring in judgment); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 655-656, 672-673, 106 L. Ed. 2d 472, 109 S. Ct. 3086 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part); *Wallace*, 472 U.S., at 112, 86 L. Ed. 2d 29, 105 S. Ct. 2479 (Rehnquist, J., dissenting); see also *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 671, 63 L. Ed. 2d 94, 100 S. Ct. 840 (1980) (Stevens, J., dissenting) (disparaging "the sisyphean task of trying to patch together the 'blurred, indistinct, and variable barrier' described in Lemon"). And it is discredited because the Court has not had the courage (or the foolhardiness) to apply the neutrality principle consistently.

545 U.S. *at* 903 (Scalia, J., dissenting)

Entitled "The Foundations of American Law and Government Display," each display consisted of nine equally sized documents: the original version of the Magna Carta, the Declaration of Independence, the Bill of Rights, the Star Spangled Banner, the Mayflower Compact of 1620, a picture of Lady Justice, the National Motto of the United States ("In God We Trust"), the Preamble to the Kentucky Constitution, and the Ten Commandments. The displays did not emphasize any of the nine documents in any way: The frame holding the Ten Commandments was of the same size and had the [904] same appearance as that which held each of the other documents. See 354 F.3d 438, 443 (CA6 2003).