

In the
United States Court of Appeals
For the
Ninth Circuit

MICHAEL A. NEWDOW,

Plaintiff-Appellant,

v.

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

Defendants-Appellees,

PACIFIC JUSTICE INSTITUTE,

Defendant-Intervenor-Appellee.

*Appeal from a decision of the United States District Court for the
Eastern District of California, No. CV-05-02339, Honorable Frank C. Damrell, Jr.*

BRIEF OF INTERVENOR/APPELLEE

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CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation that owns 10% of PJI stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT

TABLE OF AUTHORITIES iii

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 2

INTRODUCTION 2

ARGUMENT..... 3

 I. The national motto does not violate the Establishment Clause 3

 (a) Lemon is not applicable to all Establishment Clause Cases3

 (b) The national motto is not sectarian6

 (A) Historically based conduct is not sectarian10

 (B) Ceremonial or solemnizing conduct are not sectarian14

 II. Use of “In God We Trust” poses no Establishment Clause violation because it serves the secular purpose of solemnizing American ideals16

 III. Dr. Newdow has not suffered injury sufficient to confer Article III standing20

 IV. Other items on coins and currency demonstrate the absence of an endorsement of religion23

 V. The other tests that Dr. Newdow raises are also unavailing24

 a. Outsider and Imprimatur Tests24

 b. Coercion Test 25

CONCLUSION27

CERTIFICATE OF COMPLIANCE.....28

STATEMENT OF RELATED CASES.....29

DECLARATION OF SERVICE

TABLE OF AUTHORITIES

CASES

<i>Abington School District v. Schempp</i> , 374 U.S. 203 (1963).....	5,13,21
<i>ACLU of KY v. McCreary Co.</i> , 354 F.3d 438 (6 th Cir. 2003).....	18,19
<i>ACLU of KY v. Mercer Co.</i> , 432 F.3d 624 (6 th Cir. 2005).....	22
<i>Allegheny County v. Greater Pittsburgh ACLU</i> , 492 U.S. 573 (1989).....	5,15,25
<i>Aronow v. United States</i> , 432 F.2d 242 (9 th Cir. 1970).....	29
<i>Baker v. Carr</i> , 369 U.S. 186 (1962).....	21
<i>Bender v. Williamsport Area School Dist.</i> , 475 U.S. 534 (1986).....	21
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004).....	4
<i>Good News Club v. Milford Central Sch.</i> , 533 U.S. 98 (2006).....	3
<i>Larson v. Valente</i> , 456 U.S. 228 (1982).....	7
<i>Lee v. Weisman</i> , 505 U.S. 577 (1992).....	26
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	<i>passim</i>
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984).....	<i>passim</i>
<i>Marsh v. Chambers</i> , 436 U.S. 783 (1983).....	3, 12
<i>McCreary County v. ACLU</i> , 545 U.S. 844 (2005).....	2, 6
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983).....	25
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005).....	3,11,14

<i>Viceroy Gold v. Aubry</i> , 75 F.3d 482 (9 th Cir. 1996).....	20
<i>Washegesic ex rel. Pensinger v. Bloomington Public School</i> , 33 F.3d 679 (6 th Cir. 1994).....	23
<i>Watson v. Jones</i> , 80 U.S. 679 (1871).....	7
<i>West Virginia Board of Education v. Barnette</i> , 319 U.S. 624 (1943).....	7
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	5,22,26
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 639 (2006).....	3
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952).....	6,11

STATUTES AND RULES

Federal Rules of Appellate Procedure, Rule 28(b)(4).....	1
31 U.S.C. 5112	1, 2
31 U.S.C. 5114	1, 2
36 U.S.C. 302	1, 2, 17

OTHER AUTHORITIES

Carl Becker, <i>The Declaration of Independence: A Study in the History of Ideas</i> 79 (1922)	19
David McCullough, <i>John Adams</i> 121 (2001)).....	19
United States Constitution, Amendment I	<i>passim</i>

STATEMENT OF FACTS¹

Appellant, Michael A. Newdow (“Newdow” or Appellant”), “filed a complaint...seeking declaratory and injunctive relief regarding the use of the phrase ‘In God We trust’ as the national motto and its inscription on United States coins and currency.” (ER at 508, lines 2-5). Dr. Newdow “is an ordained minister and the founder of the Atheistic church, the First Amendmist Church of True Science (‘FACTS’). (ER at 508, lines 16-18, inner quotes and citation omitted). He “is an Atheist whose religious beliefs are specifically and explicitly based on the idea that there is no god...His church, FACTS, ‘holds as a fundamental truth that there is no god or supernatural being.” (ER Vol. 2, 508:20-22). Dr. Newdow “finds it deeply offensive to have his government and its agents advocating for a religious view he specifically decries.” (ER at 508, lines 22-24). Notably, he “takes issues with the legislation set forth in 36 U.S.C. § 302 which provides that ‘In God We Trust’ is the national motto, and in 31 U.S.C. §§ 5112 and 5114, which provide that United States coins and currency shall have the inscription ‘In God We Trust.’” (ER at 508, lines 25-26; 509, lines 1-3). Because of this, Dr. Newdow brought suit alleging a violation of his rights under the Establishment

¹ Pursuant to Rule 28(b)(4) of the Federal Rules of Appellate Procedure, Intervenor/Appellee, Pacific Justice Institute (“PJI”) respectfully submits its own Statement of Facts. These are taken nearly verbatim from the District Court’s order dismissing the complaint. (Excerpts of Record (“ER”) at 509-510).

Clause, the Free Exercise Clause, the Religious Restoration Act, the Equal Protection Clause, and the Free Speech Clause. (ER at 509).

SUMMARY OF THE ARGUMENT

First, PJI argues that the three pronged test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971), is not applicable to the law and facts in this controversy. Second, whether the Lemon test is used or not, “In God We Trust” is not, on its face, sectarian and thus does not pose a constitutional violation or otherwise burden Dr. Newdow’s free exercise of religion. Third, because of (1) its historical ubiquity, and (2) its primarily ceremonial and/or solemnizing purpose, the motto does not violate the Establishment Clause.

INTRODUCTION

Dr. Newdow filed a complaint in federal court against numerous federal officials, agencies, Congress and the United States challenging the legality of the national motto, “In God We Trust” (36 U.S.C. §302), which is inscribed on U.S. coins and currency pursuant to 31 U.S.C. §§5112(d)(1); 5114(b). The goal of Dr. Newdow is to use the judicial branch to purge all traces of religion from government and thus impose a secular interpretation of the Constitution which is more French than American. *McCreary County, Ky v. American Civil Liberties Union of Ky*, 545 U.S. 844, 125 S.Ct. 2722 (2005) (Scalia, J. dissenting). It is

PJI's position that the national motto, though religious, is not sectarian and hence its appearance on money does not violate the Establishment Clause.

ARGUMENT

I. The national motto does not violate the Establishment Clause

a. Lemon is not applicable to all Establishment Clause Cases.

In Establishment Clause cases, the Supreme Court frequently uses the three-prong test from *Lemon*, i.e., (1) secular legislative purpose; (2) principal or primary effect of law or conduct must be one that neither advances nor inhibits religion; and, (3) said law or conduct must not foster excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-613. It is important to recognize that in analyzing Establishment Clause cases, the High Court has stopped short of making the *Lemon* prongs universal.

Chief Justice Rehnquist wrote in *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005), that “the factors identified in *Lemon* are no more than helpful signposts.” *Id.* at 2861. For example, in addition to *Van Orden*, *Lemon* was not used in *Zelman v. Simmons-Harris*, 536 U.S. 639, 718, 122 S.Ct. 2460 (2002) (upholding school voucher program); *Good News Club v. Milford Central School*, 533 U.S. 98, 121 S.Ct. 2093 (2001) (allowing religious groups to use school facilities does not violate the Establishment Clause); or *Marsh v. Chambers*, 463

U.S. 783, 103 S.Ct. 3330 (1983) (confirming the constitutionality of legislative prayer).

Further, although the Supreme Court has not directly ruled on the constitutionality of the national motto, in its dicta it has **never** scrutinized “In God We Trust” using Lemon’s three prongs. It is PJI’s position that this Court should follow the Supreme Court’s lead and also resist that temptation. A brief review of the high court’s dicta relative to the national motto is sufficient.

“[O]ur national culture allows public recognition of our Nation's religious history and character.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 29-30, 124 S.Ct. 2301 (2004) (Rehnquist, C.J., concurring); “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.” *Lynch v. Donnelly*, 465 U.S. 668, 692-693, 104 S.Ct. 1355 (1984) (O’Conner, J., concurring); “Intuition tells us that some official ‘acknowledgment’ is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people.” *Id.* at 714 (Brennan, J., dissenting); “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.” *County of Allegheny v. ACLU*, 492 U.S. 573, 602-603, 109 S.Ct. 3086 (1989); “Because... [the national motto and legislative prayers] 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.” *Id.* at 673 (Kennedy, J., concurring in the judgment in part and dissenting in part); “Currency is generally carried in a purse or pocket and need not be displayed to the public.” *Wooley v. Maynard*, 430 U.S. 705, 771, 97 S.Ct. 1428 (1977); “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.’” *Id.* at 722 (1977) (Rehnquist, J., dissenting); “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.” *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 303, 88 S.Ct. 1560 (1963) (Brennan, J., concurring); “how can the Court *possibly* assert that ‘the First Amendment mandates governmental neutrality between... religion and nonreligion,’ and that ‘[m]anifesting a purpose to favor... adherence to religion generally,’ 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.” *McCreary County, Ky v. American Civil Liberties*

Union of Ky, 545 U.S. 848, 125 S.Ct. 2722, 2750 (2005) (Scalia, J., dissenting, emphasis in original (inner citations and some quotation marks omitted for ease of reading)).

There is good reason that strict adherence to the pall of orthodoxy found in *Lemon* is unworkable. Absent consideration of rulings that do not rely on *Lemon*, Dr. Newdow's radical interpretation of *Lemon* would have breathtaking implications. By way of illustration, the names of California's historical Roman Catholic cities would be in jeopardy because they are overtly religious, e.g., Sacramento (sacrament) or Santa Cruz (Holy Cross). An unquestioning loyalty to *Lemon* will end in draconian restrictions which will rob a predominantly "religious people's" government of its historical traditions. *Zorach v. Clauson*, 343 U.S. 306, 313, 72 S.Ct. 679, (1952) Instead, a more nuanced approach to the Establishment Clause is appropriate. Although it has not articulated a precise test, fortunately the U.S. Supreme Court has provided guidance.

b. The national motto is not sectarian.

At the outset it is important to note that Dr. Newdow and PJI are in agreement that a constitutional prohibition on government support of sectarian laws or practices is a legal maxim. (Appellate's Opening Brief ("AOB") at 32-34). A brief review of this proposition will suffice.

The high court has made the following observations: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in... religion...” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178 (1943); “The clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673 (1982); “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.” *Watson v. Jones*, 80 U.S. 679, 728 (1871).

The disagreement between Dr. Newdow and PJI is whether the phrase, “In God We Trust,” is *sectarian*. Not surprisingly, Dr. Newdow’s position is that the presence of “In God We Trust” on coins and currency (and as our national motto) lends that ‘power, prestige and financial support’ to the sectarian view that there exists a God.” (AOB at 32; ER at 44, 62, 113, 322 and 339). Dr. Newdow paints with too broad a stroke. To the contrary, a belief in God encompasses such a wide expanse of religious beliefs and philosophies that it would rob language of its meaning to assert that such a generalized concept is sectarian. In like manner, monotheism is not much narrower. It is a theological view held by numerous religions and embraced by billions of people. Yet, it is far too broad to fit within the confines of a sectarian belief.

Not surprisingly, in its dicta on the national motto, the Supreme Court has never characterized “In God We Trust” as “sectarian.” Under the ordinary usage of the term (sectarian), this is understandable. “Sectarian” means “adhering or confined to the dogmatic limits of a sect or denomination; partisan; of, relating to, or characteristic of a sect.”²

In contrast to the plain meaning of “sectarian,” Dr. Newdow discusses in his Complaint how he seeks to have this word defined in the most expansive of ways possible. In a section entitled, “IN GOD WE TRUST,” CONSTITUTIONALLY, IS SECTARIAN (ER at 63) Dr. Newdow asserts that “[S]ectarianism... -- in constitutional terms – refers not only to beliefs held by any one religious sect, but to all religious beliefs that are not universal. In other words, any belief that is not adhered to by all is – from the point of view of the Constitution as well as the nonadherent – a sectarian belief.” *Id.*

The consequence of a court adopting such a position is sobering. It would require that any governmental conduct, statement, or practice that relates to “religion” must be **unanimous** to avoid unlawful sectarianism. Thus, government would be unable to take a position on any values or attitudes unless the public is in

² Dictionary.com © (<http://dictionary.reference.com/search?q=sectarian>). Accessed November 8, 2006.

total unanimity on the issue. Otherwise, public officials would entangle themselves in an unconstitutional sectarian dispute.

But Dr. Newdow does not stop there. His concept of the word “religion” or “religious” is the broadest imaginable. “Religion” for Dr. Newdow is used in a manner that does not necessarily include spirituality, i.e., “personal beliefs or values: a set of strongly-held beliefs, values, and attitudes that somebody lives by.”³

For example, as an atheist, Dr. Newdow and those in his church insist that they are “religious.” (ER at 11, 39-40). Further, Dr. Newdow is an ordained minister (ER at 11) in the First Amendmist Church of True Science (FACTS) (ER at 39). In understanding the enormous scope of Dr. Newdow’s use of the term “religion,” it is important to recognize that FACTS does not have ten commandments but rather three “suggestions” for its members.⁴ *Id.*

Dr. Newdow’s view is so expansive that anyone who lives by a mere hand full of **suggestions** is “religious.” This is problematic because Dr. Newdow asserts that constitutionally, “sectarian refers to all *religious* beliefs that are not universal.” (ER at 63, emphasis added). Clearly this view is fundamentally flawed because of its breadth.

³ Encarta Dictionary © <http://dictionary.reference.com/search?q=religion>. Accessed November 13, 2006.

Even though “In God We Trust” is concededly a religious sentiment on its face, it is not sectarian merely because it is not a belief unanimously held by the populace. Simply put, there is no legal authority to support Dr. Newdow’s breathtaking proposition as to what is “sectarian.” Taken to its logical conclusion, any value-based law or conduct by a state actor, whether ceremonial or even codified in penal codes (e.g., prohibitions on larceny), would violate the Establishment Clause because such judgments are “sectarian.” In view of this, the Court should reject Dr. Newdow’s position because it is so broad that it robs the term of its meaning and is thus, as a practical matter, an unworkable construct. In sum, the phrase “In God We Trust” is simply not sectarian.

A. Historically based conduct is not sectarian.

A law or conduct should not be deemed sectarian if it has an historical basis. The reason is self-evident. A nation’s history, both good and bad, is something that its citizens share in common. Because of its commonality, said *history* is not sectarian, even if religious.

The pleadings by the parties, as well as submissions by *amici*, discuss at length the religious history of this country, particularly as it relates to the national motto. To avoid repetition of this agreed upon history, it is sufficient to note that the Supreme Court opined over half a century ago that this country was founded

⁴(1) Question, (2) Be honest, and (3) Do what’s right. (ER at 39).

on religious principles and its people are now, and have always been, religious. *Zorach*, 343 U.S. at 313.

Though not setting down a precise rule, the Supreme Court relied on the concept of historical background in one of its most recent Establishment Clause cases. In *Van Orden* three justices and the Chief Justice penned separate opinions in a case involving a monument displaying the Ten Commandments. Chief Justice Rehnquist wrote the lead opinion in which he found the monument constitutional. The essence of the argument was that the display did not violate the Establishment Clause because of its nature and “by our Nation’s history” (*Van Orden*, 125 S.Ct. at 2861), recognizing “the role the Decalogue plays in America’s heritage.” *Id.*, 125 S.Ct. at 2863.

Similarly, Justice Scalia argued that Establishment Clause jurisprudence should be in “accord with our Nation’s past and present practices.” *Id.* 125 S.Ct. at 2864 (Scalia, J. concurring). In like manner, Justice Thomas opined that it is permissible for the government to engage in conduct which is consistent with acknowledging the religious history of our country. *Id.*, 125 S.Ct. at 2865 (Thomas, J. concurring). Though using a different construct, Justice Breyer also asserted that history, in the context of a given case, should be factored into Establishment Clause analysis. *Id.* 125 S.Ct. at 2870-71 (Breyer, J. concurring).

The forerunner of this line of reasoning probably comes from Justice O'Connor who determined that governmental conduct which is ingrained in "historical ubiquity" is not sectarian. *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring). Examples of historical ubiquity would include reciting the pledge of allegiance (i.e., "one nation under God"), singing the national anthem (verse 4), displaying historically based artwork with religious themes in government buildings, opening legislative sessions in prayer⁵ and opening court sessions with "God save the United States and this Honorable Court." Justice O'Connor explains that these types of practices "cannot fairly be understood to convey a message of government endorsement of religion." Moreover, "because of their *history and ubiquity*, those practices are not understood as conveying government approval of *particular religious beliefs*." *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring) (emphasis added). Justice O'Connor finds that, by its nature, an historical practice will not be perceived as government endorsement of something that is sectarian, i.e., "particular religious beliefs," *Id.*

Dr. Newdow raises two issues of protest. First, he writes: "'In God We Trust' places the government on one side in the quintessential theological debate: Does God exist?" (AOB at 13; ER at 65). In view of this country's origins, it is

⁵ Consistent with this theme, the prayer was found constitutional due to its "unique history." *Marsh*, 463 U.S. at 790-792.

not surprising that the government would reflect the Nation's religious history in its motto in which said history presupposes the existence of God. Indeed, the initiating document (Declaration of Independence) makes numerous references to God. Because belief in the existence of God is the historical reality of the founding of this country, it is not *per se* sectarian for the government to officially recognize something so entwined in the Nation's heritage. "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." Schempp, 374 U.S. at 304 (1963) (Brennan, J., concurring).

Second, Dr. Newdow takes issue with the fact that the national motto is self-evidently monotheistic. (AOB *passim*; ER at 26-27). Again, this is not astonishing in that this Nation's initiating document's references to the divine are always monotheistic, e.g., "We, therefore, the Representatives of the United States of America...*appealing to the Supreme Judge of the world* for the rectitude of our intentions, do,...solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States...." (Declaration of Independence) (emphasis added). Though there is certainly no unanimity relative to polytheism versus monotheism, the monotheistic national motto is consistent with this country's history as reflected in the Declaration of Independence.

Because history is something that all citizens of a country have in common, official laws and practices which reflect a religious history pass constitutional muster under the majority view expressed in *Van Orden* and Justice O'Connor's reasoning in her concurring opinion in *Lynch*. For this same reason, statutes mandating the use of the monotheistic motto do not transgress the provisions of the First Amendment.

B. Ceremonial or solemnizing acts are not sectarian.

Official law or conduct should not be deemed sectarian if they involving mere ceremonial or solemnizing acts. Certain "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." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Justice O'Connor further explained in a case familiar to Dr. Newdow, as follows:

There are no *de minimis* violations of the Constitution--no constitutional harms so slight that the courts are obliged 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 (opinion of O'Connor, J.). 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. (*Elk Grove*, 542 U.S. at 36-37).

It is self-evident that ceremony and tradition go hand in hand. The question must be asked, how can the government engage in meaningful ceremony or other solemnizing acts without reference to a common heritage? Should it sacrifice an animal or engrave “Hail Caesar” on the penny? These may be perfectly fine ceremonial or solemnizing acts in other nations. But in this country, such acts lack the traditions based in our common historical roots to have meaning. As such, it is appropriate that “In God We Trust” is engraved on coins and a variety of government buildings given the religious history of this country. In sum, because it is ceremonial in nature, as well as based upon this country’s religious historical

tradition, use of the national motto is not sectarian. Lynch, 465 U.S. at 693 (O'Connor, J. concurring).

II. Use of “In God We Trust” poses no Establishment Clause violation because it serves the secular purpose of solemnizing American ideals.

Even if the Court were to use the Lemon test, the religious motto serves the secular purpose of solemnizing American ideals. Dr. Newdow has provided this Court with numerous citations in support of this.

[T]he American dollar travels all over the world, into every country of the world, and frequently gets behind the Iron Curtain, and if it carries this message in that way I think it would be very good. I think that is one of the most compelling reasons why we should put it on our currency.

(AOB at 19, citing a key figure on the House Banking and Currency Committee in 1955 opining on the national motto). Consistent with this, Dr. Newdow references the dictionary definition of “motto,” i.e., “a phrase...inscribed on something...indicative of its character” or “a short expression of a guiding principle.” (AOB at 37; ER at 324). He also quotes the Annual Report for the year 2003 from the Director of the U.S. Mint, Henrietta Holsman Fore, as follows:

“‘Wherever United States coins travel, they serve as reminders of the **values that all Americans share.**’ This was followed by her proclamation that ‘In God We Trust’ is among ‘[t]he words and symbols that **define us as Americans,**’ and among the ‘declarations of **our beliefs,**’ which ‘showcase **how we see ourselves and our sense of sovereign identity.**’ Finally, she noted that our coins – with the ‘In God We Trust’ phrase – ‘serve as ambassadors of **American values and ideals.**’” (AOB at 50-51, emphasis in original).

There is a secular purpose for spreading American ideals and values abroad. As cited above, when the national motto was codified (36 U.S.C. § 302) in 1955, it was noted that U.S. money goes behind the iron curtain. (AOB at 19). As such, American values, ideals and principles would be carried by the inscriptions on the money. Of course, even today most people of the world do not live in democratic societies. Thus, the conclusion of the “Cold War” did not end the need for spreading American values and ideals.

As to those values and ideals, even a glancing view of this nation’s history reflects that the fundamental presupposition for our liberties is that they are present as an immutable circumstance of birth. In sum, the founders of this country believed in the existence of God and that He endowed humanity with unalienable

rights, i.e., they are natural. The preamble to the U.S. Constitution calls this the “Blessings of Liberty.” (U.S. Const., Preamble).

The secular purpose for a religious motto serves as a reminder, though in an unobtrusive way, that America believes that basic rights are not given at the discretion of government, but rather, are something present at birth. In like manner, the Declaration of Independence explains the nation’s core precepts when it states: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

The natural state of equality is illustrative of an American value and principle. It should be noted that the Declaration of Independence sees people as “*created* equal” (emphasis added). The nation was established upon a founding notion that equality is not something given by human discretion (i.e., the government) but by Divine choice. Likewise, the other rights listed (“Life, Liberty and the pursuit of Happiness”) are also based upon a God-given gift, i.e., they have been “endowed.”

That was the political philosophy of the colonial period. Indeed, it was an idea which was not original with the Founding Fathers, having come from writings of political philosophers such as John Locke’s *Second Treatise on Government*, e.g., “Jefferson copied Locke” (*ACLU of Kentucky v. McCreary County*, 354 F.3d.

438, footnote 7 (6th Cir. 2003) (citing Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922), David McCullough, *John Adams* 121 (2001)). Moreover, other philosophers had an influence on the Founding Fathers, such as, Henry St. John Bolingbroke, David Hume, and Francis Hutcheson. *Id.* In other words, the Founding Fathers had philosophical foundations themselves for which to build a nation.

For purposes of this litigation, the truth of whether the liberties that we enjoy are ultimately given by God is not important. What is crucial to this case on appeal is that this was a presupposition of those who started this country. As such, it is entirely appropriate that Congress recognized this when it chose “In God We Trust” as the national motto. The solemnizing or ceremonial use of the inscription (“In God We Trust”) on coins and currency reflects the historical reality that there was a theological basis for having certain unalienable rights. Hence, even the use of a religious motto promotes the secular purpose of propagating core American values and ideals.

At this point it should be noted that the darker side of American history has been repeatedly discussed in filings by Dr. Newdow in the lower court and in his opening brief, e.g., race and gender (AOB at 30), slavery (ER at 58, 107), relations with American Indians, (ER at 324), and Jim Crow laws (ER at 496). In sum, Dr.

Newdow asserts that an historical basis for the national motto is illegitimate because of the presence of shameful acts found in this country's history.

Dr. Newdow suggests that the national motto is just as egregious as “In White Superiority We Trust.” (ER at 61). However, it is PJI's position that conditions such as slavery and segregation are not American values or principles. Rather, they demonstrate a failure of not living in accordance to founding ideals. Although there is value in examining how this nation has not always lived in a manner consistent with its principles, Congress can and should legitimately promote American historical values and ideals which are noble. As such, the language of the national motto reflects ideals that are positive. In view of this, should the Court scrutinize the motto using Lemon's three prongs, surely recognition of the secular purpose of promoting what is good about America should be acknowledged.

III. Dr. Newdow has not suffered injury sufficient to confer Article III standing.

PJI concedes that the lower court found that Dr. Newdow suffered injury sufficient to meet Article III standing. However, this Court is not bound by that determination. *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 487-88 (9th Cir.1996). Standing is, of course, a threshold issue. Ironically, Dr. Newdow articulates this quite well when he writes:

In a challenge to “In God we trust,” where it is clear that “there would be intense opposition to the abandonment of that motto,” *School Dist. v. Schempp*, 374 U.S. 203, 303 (Brennan, J., concurring), it is imperative to have a plaintiff who will “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions,” *Baker v. Carr*, 369 U.S. 186, 204 (1962), and will “ensure that our deliberations will have the benefit of adversary presentation and a full development of the relevant facts.” *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 (1986).

(AOB at 57).

The core of Dr. Newdow’s argument for actual injury is as follows: An individual adopts as his own those statements and symbols carried on his person. In dicta, the late Chief Justice Rehnquist disagreed. “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.’” Wooley, *Id.* at 722 (Rehnquist, J., dissenting). In the same case,⁶ the majority stated,

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.

Id. at 771.

In view of the nature of currency as described by the high court, this Court should reverse the lower court’s ruling that Dr. Newdow has suffered sufficient injury to confer Article III standing. (ER at 511-518). PJI asks that the Court follow the Sixth Circuit which opined that the “eggshell plaintiff” is unknown in the context of the Establishment Clause. *American Civil Liberties Union of Kentucky v. Mercer County*, 432 F.3d 624, 639 (6th Cir. 2005).

⁶ The majority struck down a law making it a criminal act to obstruct the words “Live free or die” on a license plate.

What is established is a class of “eggshell” plaintiffs of a delicacy never before known to the law. I can well understand that someone (perhaps this plaintiff) in some sense could be offended by this portrait, but “injured” is another matter. In this multicultural world that young persons are entering today, I would hope our schools are turning out people with a little more resiliency than is evidenced here.

Washegesic ex rel. Pensinger v. Bloomington Public School, 33 F.3d 679, 684-685 (6th Cir. 1994) (Guy, J. concurring).

PJI asks that this Court reexamine the issue of Article III standing and thereby not adopt an “eggshell plaintiff” doctrine for Establishment Clause purposes.

IV. Other items on U.S. coins and currency demonstrate the absence of an endorsement of religion.

Dr. Newdow has brought to the Court’s attention that, in addition to “In God We Trust,” coins are engraved with “Liberty” and “*E Pluribus Unum*” (AOB at 51). “Liberty” and “*E Pluribus Unum*” are, of course, secular terms. The inclusion of these secular phrases on coins can be analogized to Christmas displays by a local government. When there is a mixture of religious and secular items in a holiday display, there is generally no Establishment Clause violation. *Lynch, Id.*

In sum, the Supreme Court has determined that the secular items allowed the nativity scenes to survive Establishment Clause scrutiny because of the overall context. *Id.* 465 U.S. at 690-694. In the same manner, the national motto engraved on coins does not violate the Establishment Clause because “In God We Trust” must not be viewed in isolation but in its context with other terms which reflect foundational tenets, i.e., “Liberty” and “*E Pluribus Unum*” (out of one many).

Although Dr. Newdow may protest that this violates the neutrality test (*McCreary County, Ky v. American Civil Liberties Union of Ky*), his is a minority position which was held by the dissent in *Lynch*. *Lynch*, 465 U.S. at 698 (Brennan, J., dissenting). This position, having not mustered a majority of the high court for any opinion, should not be followed in this Circuit until such time as the Supreme Court embraces it. In sum, because of other secular messages on coins and currency, the “neutrality test” is not violated.

V. The other tests that Dr. Newdow raises are also unavailing.

a. Outsider and Imprimatur Tests

In addition to *Lemon* and the “endorsement test” found in the *Lynch* concurrence, Dr. Newdow raises other tests, i.e., outsider, imprimatur, and coercion tests. Two of these tests (outsider and imprimatur) are usually analyzed

within the framework of either Lemon or the endorsement test. For example, Dr. Newdow briefly discusses an “outsiders test” (AOB at 42) in which he relies on the concurring and dissenting opinion of Justice Kennedy in *Allegheny*. A review of *Allegheny* shows that the “outsiders test” is simply a factor *within* the “endorsement test.” *See, Allegheny*, 492 U.S. at 595 and Justice O’Connor’s concurrence in *Lynch*, 465 U.S. at 688. In like manner, Justice Kennedy noted that the “imprimatur test” has in some of the cases been used synonymously with the “endorsement test.” *Allegheny*, 492 U.S. at 668 (Kennedy, J., concurring and dissenting). However, the high court in determining whether an activity “confer[ed] any imprimatur of State approval,” was done so when within the context of analyzing Lemon’s second prong. *Mueller v. Allen*, 463 U.S. 388, 397, 103 S.Ct. 3062 (1983).

Because both Lemon and the endorsement test have been discussed elsewhere in this brief, PJI will not burden the Court with repetitive analysis of said tests.

b. Coercion Test

However, Dr. Newdow also raises the “coercion test” (AOB at 44-45) in which he argues that the use of money is obligatory. As such, he asserts that carrying money on his person inscribed with the national motto is coercive in

nature. Dr. Newdow relies on *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649 (1992), in which a prayer was a part of middle and high school graduation ceremonies at a public school district.

The essence of his position is that he is somehow forced to adopt as his own the inscriptions on money. This position is simply too tenuous. Carrying coins and currency does not “convey any affirmation of belief” by the carrier in the inscriptions or other words or symbols appearing on said money. Wooley, *Id.* at 722 (Rehnquist, J., dissenting). It is interesting to note that Dr. Newdow has traveled broadly. (ER at 50). In addition, he is a numismatist. (ER at 12). Surely, when Dr. Newdow exchanges foreign currency or collects coins from around the world he would be finding that money typically has political and religious symbols and statements inscribed or printed on it. When he uses foreign currency or is collecting coins he surely cannot suggest that he is adopting the messages found in the symbols, mottos, or other statements appearing on the money. In like manner, it cannot be fairly stated that his use of U.S. money is an act by the government to force him into affirming a religious position anymore than this would occur when he uses foreign money or adds to his coin collection.

In sum, Dr. Newdow is “coerced” into using U.S. money to engage in daily life in the same manner as all other persons. However, he is not being “coerced,”

in a constitutional sense, into adopting every symbol or statement appearing on coins and currency. Thus, the coercion test does not advance his argument.

CONCLUSION

This Court need not and should not rely on Lemon’s three prongs because the U.S. Supreme Court has never used that analysis in its national motto dicta. Instead, this Court should look to both the historical traditions as well as the solemnizing nature of the motto to find that its use is not sectarian. Further, on its face, “In God We Trust” is not “sectarian” as that term is ordinarily understood. Therefore, there is no violation of the Establishment Clause.

As such, PJI requests that the lower court’s decision be affirmed save for that portion which finds that Dr. Newdow suffered injury sufficient to confer standing under Article III.

Date: November 13, 2006

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief uses a proportional typeface and 14-point font, and contains 5,897 words.

Date: November 13, 2006

PACIFIC JUSTICE INSTITUTE

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STATEMENT OF RELATED CASES

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