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14 UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

15 MICHAEL A. NEWDOW,
16 Plaintiff,

17 v.

No. 2:05-cv-02339-FCD-PAN

18 CONGRESS OF THE UNITED
STATES OF AMERICA, et al.,
19 Defendants.

20 **Brief Amici Curiae of the American Center for Law and Justice and United States Senator Jim DeMint and**
21 **United States Representatives Robert B. Aderholt, W. Todd Akin, Roscoe G. Bartlett, Kevin Brady, John**
Campbell, Steve Chabot, Chris Chocola, K. Michael Conaway, Geoff Davis, Jo Ann Davis, Phil English, Tom
22 **Feeney, Virginia Foxx, Trent Franks, Scott Garrett, Phil Gingrey, Virgil H. Goode, Jr., Gil Gutknecht, J.D.**
Hayworth, Jeb Hensarling, Wally Herger, Bob Inglis, Ernest J. Istook, Jr., Bobby Jindal, Sam Johnson,
23 **Michael T. McCaul, Patrick T. McHenry, Sue Wilkins Myrick, Randy Neugebauer, Charlie Norwood, Mike**
Pence, Charles W. “Chip” Pickering, Todd Russell Platts, Dana Rohrabacher, Paul Ryan, Jim Ryun, John B.
24 **Shadegg, Michael E. Sodrel, Mark E. Souder, Thomas G. Tancredo, Lee Terry, Todd Tiahrt, Zach Wamp,**
Dave Weldon, Lynn A. Westmoreland, and Roger F. Wicker in Support of Defendants’ Motion to Dismiss

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24

1 **INTEREST OF AMICI***

2 Amici United States Senator Jim DeMint and United States Representatives Robert B.
3 Aderholt, W. Todd Akin, Roscoe G. Bartlett, Kevin Brady, John Campbell, Steve Chabot, Chris
4 Chocola, K. Michael Conaway, Geoff Davis, Jo Ann Davis, Phil English, Tom Feeney, Virginia
5 Foxx, Trent Franks, Scott Garrett, Phil Gingrey, Virgil H. Goode, Jr., Gil Gutknecht, J.D.
6 Hayworth, Jeb Hensarling, Wally Herger, Bob Inglis, Ernest J. Istook, Jr., Bobby Jindal, Sam
7 Johnson, Michael T. McCaul, Patrick T. McHenry, Sue Wilkins Myrick, Randy Neugebauer,
8 Charlie Norwood, Mike Pence, Charles W. “Chip” Pickering, Todd Russell Platts, Dana
9 Rohrabacher, Paul Ryan, Jim Ryun, John B. Shadegg, Michael E. Sodrel, Mark E. Souder,
10 Thomas G. Tancredo, Lee Terry, Todd Tiahrt, Zach Wamp, Dave Weldon, Lynn A.
11 Westmoreland, and Roger F. Wicker are currently serving in the One Hundred Ninth Congress.

12 These members of Congress and Amicus American Center for Law and Justice have
13 dedicated time and effort to defending and protecting Americans’ First Amendment freedoms. It
14 is this commitment to the integrity of the United States Constitution and Bill of Rights that
15 compels them to support the dismissal of the Complaint in this case. Plaintiff’s strategy to purge
16 all religious observances and references from American public life must not be permitted to
17 move forward. If Plaintiff is successful, it will undoubtedly embolden further challenges to other
18 religious expressions in government venues, including the several religious works of art¹ and
19 various religious inscriptions in the Capitol Complex,² as well as the prayer rooms in House and

20 _____
21 * This brief is filed upon Motion to the Court and with the consent of the parties. Amicus ACLJ discloses that no
22 counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the
23 preparation of this brief was received from any person or entity other than *amici curiae*.

24 ¹ For example, in the Rotunda of the Capitol Building are paintings with religious themes, such as *The Apotheosis
of Washington*, depicting the ascent of George Washington into Heaven, and the *Baptism of Pocahontas*, portraying
Pocahontas being baptized by an Anglican minister.

1 Senate Office buildings.³

2 Amici urge this Court to uphold the use of “In God We Trust” as our national motto.
3 While the First Amendment affords atheists complete freedom to disbelieve, it does not compel
4 the federal judiciary to redact religious references in every area of public life in order to suit
5 atheistic sensibilities.

6 SUMMARY OF ARGUMENT

7 The use of “In God We Trust” as this country’s national motto is fully consistent with the
8 Establishment Clause of the First Amendment to the United States Constitution. The words of
9 the motto echo the conviction held by the Founders of this Nation that our freedoms come from
10 God. Congress codified “In God We Trust” as our national motto for the express purpose of
11 reaffirming America’s unique history and understanding of this truth, and to distinguish America
12 from atheistic nations who recognize no higher authority than the State.

13 Every court that has decided the issue has held that the national motto presents no
14 Establishment Clause concerns. In fact, the decision of the U.S. Court of Appeals for the Ninth
15 Circuit in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970), is dispositive of Plaintiff’s
16 claims in this case. The court in *Aronow* dismissed an identical challenge to federal statutes
17 requiring the national motto to be inscribed on U.S. currency:

19 ² For example, a wall in the Cox Corridor of the Capitol is inscribed with a line from Katherine Lee Bates’ Hymn,
20 *America the Beautiful*, “America! God shed his grace on Thee, and crown thy good with brotherhood from sea to
21 shining sea.” In the prayer room of the House Chamber, two distinctly religious statements are inscribed: 1) “Annuit
22 coeptus,” which means God has favored our undertakings; and 2) “Preserve me, O God, for in thee do I put my
23 trust,” Psalm 16:1.

22 ³ Plaintiff’s overall strategy seeks to proscribe religious expression well beyond the national motto including
23 presidential addresses invoking the name of God, the use of legislative chaplains, the invocation “God save the
24 United States and this Honorable Court” prior to judicial proceedings, oaths of public officers, court witnesses, and
jurors and the use of the Bible to administer such oaths, the use of “in the year of our Lord” to date public
documents, the Thanksgiving and Christmas holidays, the National Day of Prayer, and the phrase “under God” in
the Pledge of Allegiance.

1 It is quite obvious that the national motto and the slogan on coinage and currency
2 “In God We Trust” has nothing whatsoever to do with the establishment of
3 religion. Its use is of a patriotic or ceremonial character and bears no true
4 resemblance to a governmental sponsorship of a religious exercise. . . . While
5 “ceremonial” and “patriotic” may not be particularly apt words to describe the
6 category of the national motto, it is excluded from First Amendment significance
7 because the motto has no theological or ritualistic impact.

8 *Id.* at 243.

9 Although the Supreme Court has never decided a case involving the constitutionality of
10 the national motto, its Establishment Clause jurisprudence strongly indicates that the display of
11 the national motto raises no Establishment Clause issues. The Supreme Court has repeatedly
12 explained that government use of religious references is consistent with the Establishment
13 Clause. Moreover, numerous pronouncements by past and present members of the Supreme
14 Court expressly state that the motto “In God We Trust” poses no Establishment Clause problems.

15 A decision holding the national motto unconstitutional would have far-reaching
16 ramifications affecting countless other historical religious references that exist in the public
17 arena. In addition, it would render constitutionally suspect a number of public school practices
18 that traditionally have been considered an important part of American public education. For
19 example, there is no principled means of distinguishing between the use of “In God We Trust” as
20 the national motto and recitation of the Pledge of Allegiance or any other passages from
21 historical documents reflecting the same truth. The Declaration of Independence and the
22 Gettysburg Address contain the same recognition that the nation was founded upon a belief in
23 God. Striking down the national motto would cast substantial doubt upon whether a public
24 school teacher could require students to memorize portions of either one. Such a decision would
also likely foreclose the nation’s school districts from teaching students to sing and appreciate
the nation’s patriotic music as well as a vast universe of classical music with religious themes.

1 **ARGUMENT**

2 It is commonly understood that our government, its Constitution, and its laws are founded
3 on a belief in God. Mere acknowledgment of God by the government or government officials
4 cannot be said to be an “establishment of religion” in violation of the Establishment Clause of
5 the United States Constitution.

6 **I. THE MOTTO “IN GOD WE TRUST” ACCURATELY REFLECTS THE**
7 **HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF**
8 **IN GOD.**

9 The Founders of this Nation based a national philosophy on a belief in Deity. The
10 Declaration of Independence⁴ and the Bill of Rights locate the source of inalienable rights in a
11 Creator rather than in government precisely so that such rights cannot be stripped away by
12 government. In 1782, Thomas Jefferson wrote, “[C]an the liberties of a nation be thought secure
13 when we have removed their only firm basis, a conviction in the minds of the people that these
14 liberties are the gift of God? That they are not to be violated but with His wrath?” Thomas
15 Jefferson, *Notes on Virginia* Q.XVIII (1782). The Founders may have differed over the contours
16 of the relationship between religion and government, but they never deviated from the conviction
17 that “there was a necessary and valuable moral connection between the two.” Philip Hamburger,
18 *Separation of Church and State* 480 (2002).

19 The nation’s history is replete with examples of acknowledgment of religious belief in
20

21 ⁴ The Declaration of Independence recognizes that human liberties are a gift from God: “all men are created equal,
22 that they are endowed by *their Creator* with certain unalienable Rights.” *The Declaration of Independence* para. 2
23 (U.S. 1776) (emphasis added). Jefferson wrote further that the right to “dissolve the political bands” connecting the
24 Colonies to England derives from Natural Law and “Nature’s God.” *Id.* para. 1. The founders also believed that God
holds man accountable for his actions as the signers of the Declaration “appeal[ed] to the Supreme Judge of the
world to rectify their intentions.” *Id.* para. 32. In 1774, Jefferson wrote that “The God who gave us life gave us
liberty at the same time; the hand of force may destroy, but cannot disjoin them.” Thomas Jefferson, *Rights of*
British America, 1774. ME 1:211, Papers 1:135.

1 the public sector. Since the Founding of the Republic,⁵ American Presidents have issued
2 Thanksgiving Proclamations establishing a national day of celebration and prayer. President
3 Washington issued the first such proclamation at the request of the First Congress, in which he
4 wrote that it is the “duty of all nations to acknowledge the providence of Almighty God, to obey
5 His will, to be grateful for His benefits, and humbly to implore His protection and favor.” Jared
6 Sparks, *The Writings of George Washington*, Vol. XII, p. T19 (1833-1837). He further
7 “recommend[ed] and assign[ed]” a day “to be devoted by the people of these States to the service
8 of that great and glorious Being who is the beneficent author of all the good that was, that is, or
9 that will be,” so that “we may then unite in most humbly offering our prayers and supplications
10 to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and
11 practice of true religion and virtue . . .” 1 J. Richardson, *A Compilation of Messages and Papers*
12 *of the Presidents, 1789-1897*, p. 64 (1899).

13 Most of President Washington’s successors followed suit, and the forthrightly religious
14 nature of these proclamations has not waned with the years. President Franklin D. Roosevelt
15 went so far as to “suggest a nationwide reading of the Holy Scriptures during the period from
16 Thanksgiving Day to Christmas” so that “we may bear more earnest witness to our gratitude to
17 Almighty God.” Presidential Proclamation No. 2629, 58 Stat. 1160. Similarly, our Presidential
18 inaugurations have traditionally opened with a request for divine blessing.

19 The Executive has not been the only Branch of our Government to recognize the central
20 role of religion in our society. Federal courts, including the Supreme Court of the United States,
21 open sessions with the request that “God save the United States and this honorable Court.” The
22 Legislature has gone much further, not only employing legislative chaplains, see 2 U.S.C. § 61d,

23 ⁵ The following historical summary was distilled from Justice Kennedy’s dissenting opinion in *County of Allegheny*
24 *v. ACLU*, 492 U.S. 573, 671-72 (1989).

1 but also setting aside a special prayer room in the Capitol for use by Members of the House and
2 Senate. The room is decorated with a large stained glass panel that depicts President Washington
3 kneeling in prayer; around him is etched the first verse of the 16th Psalm: “Preserve me, O God,
4 for in Thee do I put my trust.” Beneath the panel is a rostrum on which a Bible is placed; next to
5 the rostrum is an American Flag. See L. Aikman, *We the People: The Story of the United States*
6 *Capitol* 122 (1978).

7 The United States Code itself contains religious references. Congress has directed the
8 President to “issue each year a proclamation designating the first Thursday in May as a National
9 Day of Prayer on which the people of the United States may turn to God in prayer and meditation
10 at churches, in groups, and as individuals.” 36 U.S.C. § 119. This statute does not require anyone
11 to pray, of course, but it is a straightforward acknowledgement of the concept of “turn[ing] to
12 God in prayer.” Also by statute, the Pledge of Allegiance to the Flag describes the United States
13 as “one Nation under God.” Likewise, our national motto, “In God we trust,” 36 U.S.C. § 302, is
14 prominently engraved in the wall above the Speaker’s dais in the Chamber of the House of
15 Representatives and, by mandate of Congress and the President, see 31 U.S.C. § 5112(d)(1)
16 (1982 ed.), is reproduced on every coin minted and every dollar printed by the Federal
17 Government.

18 Use of the slogan “In God We Trust” dates back to the War of 1812. In September 1814,
19 fearing for the fate of America while watching the British bombardment of Fort McHenry in
20 Baltimore, Francis Scott Key composed the poem the “Star Spangled Banner,” of which one line
21 in the final stanza is “And this be our motto—‘In God is our trust.’”⁶ When Congress codified
22 the longstanding motto in 1956, it articulated a secular purpose of patriotic inspiration: “It will be
23

24 ⁶ Steven Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122 (1996)
(citing George J. Svejda, *History of the Star Spangled Banner From 1814 to the Present* ii (1969)).

1 of great spiritual and psychological value to our country to have a clearly designated national
2 motto of inspirational quality in plain, popularly accepted English.” House Report No. 84-1959,
3 1956 Cong. & Admin. News, p. 3720.

4
5 **II. THE FIRST AMENDMENT DOES NOT COMPEL THE REDACTION OF ALL REFERENCES TO GOD JUST TO SUIT ATHEISTIC PREFERENCES.**

6 It is quite clear from the Supreme Court’s Establishment Clause jurisprudence that the
7 Constitution is not to be interpreted in a manner that would purge religion or religious reference
8 from society. In 1892 the Supreme Court stated that “this is a religious nation.” *Church of the*
9 *Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical
10 role of religion in our society and concluded that “[t]here is an unbroken history of official
11 acknowledgment by all three branches of government of the role of religion in American life
12 from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). In *Abington v. Schempp*, 374
13 U.S. 203, 212 (1963), the Court recognized that “religion has been closely identified with our
14 history and government.” Such recognition of the primacy of religion in the Nation’s heritage is
15 nowhere more affirmatively expressed than in *Zorach v. Clauson*, 343 U.S. 306 (1952):

16 We are a religious people whose institutions presuppose a Supreme Being. We
17 guarantee the freedom to worship as one chooses. We make room for as wide a
18 variety of beliefs and creeds as the spiritual needs of man deem necessary. We
19 sponsor an attitude on the part of government that shows no partiality to any one
20 group and that lets each flourish according to the zeal of its adherents and the
21 appeal of its dogma. When the state encourages religious instruction or cooperates
22 with religious authorities by adjusting the schedule of public events to sectarian
23 needs, it follows the best of our traditions. For it then respects the religious nature
24 of our people and accommodates the public service to their spiritual needs. To
hold that it may not would be to find in the Constitution a requirement that the
government show a callous indifference to religious groups. *That would be*
preferring those who believe in no religion over those who do believe.

23 *Id.* at 313-14 (emphasis added). Plaintiff asks this court to do exactly what the Supreme Court

1 warned against in *Zorach*—prefer atheism over religion even to the extent of censoring the
2 historical fact that the United States was founded upon a belief in God.

3 One fundamental flaw in Plaintiff’s understanding of the Establishment Clause is that he
4 appears to conflate religious exercises and patriotic exercises. For example, the Supreme Court
5 consistently has distinguished between religious exercises in public schools, which raise
6 Establishment Clause concerns, and patriotic exercises with religious references, which do not.

7 In *Engel v. Vitale*, 370 U.S. 421 (1962), where the Court struck down New York State’s
8 law requiring school officials to open the school day with prayer, the Court explained:

9 There is of course nothing in the decision reached here that is inconsistent with
10 the fact that school children and others are officially encouraged to express love
11 for our country by reciting historical documents such as the Declaration of
12 Independence which contain references to the Deity or by singing officially
13 espoused anthems which include the composer’s professions of faith in a Supreme
Being, or with the fact that there are many manifestations in our public life of
belief in God. Such patriotic or ceremonial occasions bear no true resemblance to
the unquestioned *religious exercise* that the State of New York has sponsored in
this instance.

14 *Id.* at 435, n.21 (emphasis added).

15 Just one year later, in *Schempp*, Justice Goldberg distinguished mandatory Bible reading
16 in public schools from patriotic exercises with religious references:

17 The First Amendment does not prohibit practices which by any realistic measure
18 create none of the dangers which it is designed to prevent and which do not so
19 directly or substantially involve the state in religious exercises or in the favoring
of religion as to have meaningful and practical impact. It is of course true that
great consequences can grow from small beginnings, but the measure of
constitutional adjudication is the ability and willingness to distinguish between
20 real threat and mere shadow.

21 374 U.S. at 308 (Goldberg, J., concurring).

22 In *Lee v. Weisman*, 505 U.S. 577 (1992), a decision built in large part on *Engel*, see 505
23 U.S. at 590-92, the Court reaffirmed the distinction it drew in *Engel* between religious exercises
24

1 such as state-composed prayers and patriotic exercises with religious references:

2 We do not hold that every state action implicating religion is invalid if one or a
3 few citizens find it offensive. People may take offense at all manner of religious
4 as well as nonreligious messages, but offense alone does not in every case show a
5 violation. We know too that sometimes to endure social isolation or even anger
6 may be the price of conscience or nonconformity. But, by any reading of our
7 cases, the conformity required of the student in this case was too high an exaction
8 to withstand the test of the Establishment Clause. The *prayer exercises* in this
9 case are especially improper because the State has in every practical sense
10 compelled attendance and participation in an explicit *religious exercise* at an
11 event of singular importance to every student, one the objecting student had no
12 real alternative to avoid.

13 *Id.* at 597-98 (emphasis added). Quoting with approval the above-cited language from Justice
14 Goldberg's concurrence in *Schempp*, the Court continued:

15 Our society would be less than true to its heritage if it lacked abiding concern for
16 the values of its young people, and we acknowledge the profound belief of
17 adherents to many faiths that there must be a place in the student's life for
18 precepts of a morality higher even than the law we today enforce. We express no
19 hostility to those aspirations, nor would our oath permit us to do so. *A relentless
20 and all-pervasive attempt to exclude religion from every aspect of public life
21 could itself become inconsistent with the Constitution.* We recognize that, at
22 graduation time and throughout the course of the educational process, there will
23 be instances when religious values, religious practices, and religious persons will
24 have some interaction with the public schools and their students.

15 *Id.* (citations omitted) (emphasis added).

16 The misused concept of a wall of "separation of church and state" does not assist
17 Plaintiff's cause. The United States Court of Appeals for the Sixth Circuit recently issued a
18 stinging rebuke of the ACLU's repeated reference to that phrase, stating: "[t]his extra-
19 constitutional construct has grown tiresome. The First Amendment does not demand a wall of
20 separation between church and state. Our Nation's history is replete with governmental
21 acknowledgment and in some cases, accommodation of religion." *ACLU of Kentucky v. Mercer
22 County*, 432 F.3d 624, 638-39 (6th Cir. 2005) (citations omitted). The reasonable observer would
23

1 *not* conclude that the government has endorsed religion solely by authorizing the word “God” to
2 appear on money because “[s]imply having religious content or promoting a message consistent
3 with a religious doctrine does not run afoul of the Establishment Clause.” *See id.* at 639 (quoting
4 *Van Orden v. Perry*, 125 S. Ct. 2854, 2863 (2005) (plurality opinion)). This is because “the
5 reasonable person is not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has
6 played in our governmental institutions, and finds it historically appropriate and traditionally
7 acceptable for a state to include religious influences, even in the form of sacred texts, in honoring
8 American legal traditions.” *Id.* at 639-40 (citation omitted). In other words, the mere *recognition*
9 of America’s religious heritage does not constitute an impermissible *endorsement* of religion
10 because “[t]o endorse is necessarily to recognize, but the converse does not follow.” *Id.* at 639;
11 *see also id.* (“We will not presume endorsement from the mere display of the Ten
12 Commandments.”).

13 Although the primary issue in this case is whether the Establishment Clause prohibits use
14 of “In God We Trust” as the national motto, far more is at stake. As the Sixth Circuit Court has
15 explained, “[i]f the reasonable observer perceived all government references to the Deity as
16 endorsements, then many of our Nation’s cherished traditions would be unconstitutional,
17 including the Declaration of Independence and the national motto.” *Id.* A decision in this case
18 invalidating the motto would render constitutionally suspect a number of practices that
19 traditionally have been considered an important part of American society. Nothing in the
20 Supreme Court’s Establishment Clause jurisprudence requires the relentless extirpation of public
21 references to God that Plaintiff demands. Whether it be in the national motto, the Pledge of
22 Allegiance, patriotic music, or the nation’s founding documents, such references are wholly
23 consistent with the First Amendment.

1 One of the more obvious casualties of such a holding would be the practice of requiring
 2 students to learn and recite passages from many historical documents reflecting the Nation's
 3 religious heritage and character. If the government violates the Establishment Clause by
 4 inscribing "In God We Trust" on coins and currency, it is difficult to conceive of a rationale by
 5 which compelled study or recitation from the Nation's founding documents would not also
 6 violate the Constitution. The Mayflower Compact⁷ and the Declaration of Independence contain
 7 religious references substantiating the fact that America's "institutions presuppose a Supreme
 8 Being." *See Zorach*, 343 U.S. at 313; *see also Newdow v. United States Congress*, 328 F.3d 466,
 9 473 (9th Cir. 2003) (O'Scannlain, Kleinfeld, Gould, Tallman, Rawlinson, and Clifton, J.J.,
 10 dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a
 11 founding document, contains religious language and, historically, has been the subject of
 12 required recitations in public schools. President Lincoln declared "that this Nation, *under God*,
 13 shall have a new birth of freedom, and that Government of the people, by the people, for the
 14 people, shall not perish from the earth." President Abraham Lincoln, *The Gettysburg Address*
 15 (Nov. 19, 1863) (emphasis added).

16 Indeed, the references to deity in these historical documents are presumably even more
 17 problematic according to the Plaintiff's reasoning because they proclaim not only God's
 18 existence but specific dogma about God—He is involved in the affairs of men; He holds men

19 _____
 20 ⁷ The Mayflower Compact, written by William Bradford in 1620, provides:

21 We whose names are underwritten, the loyal subjects of our dread sovereign Lord, King James,
 22 by *the grace of God*, of Great Britain, France and Ireland king, defender of the faith, etc., having
 23 undertaken, *for the glory of God, and advancement of the Christian faith*, and honor of our king
 24 and country, a voyage to plant the first colony in the Northern parts of Virginia, do by these
 presents solemnly and mutually *in the presence of God*, and one of another, covenant and
 combine ourselves together into a civil body politic, for our better ordering and preservation and
 furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and frame such just
 and equal laws, ordinances, acts, constitutions, and offices, from time to time, as shall be thought
 most meet and convenient for the general good of the colony, unto which we promise all due
 submission and obedience.

Mayflower Compact, *available at* <http://www.project21.org/MayflowerCompact.html> (emphasis added).

1 accountable for their actions; and He is the Author of human liberty. Subscribing to Plaintiff's
2 position will threaten a sort of Orwellian reformation of civic life by censoring American history.

3
4 **III. THE CONSTITUTIONALITY OF THE NATIONAL MOTTO "IN GOD WE TRUST" IS WELL ESTABLISHED IN CASE LAW.**

5 Although the Supreme Court has never decided a case involving the constitutionality of
6 the national motto, numerous pronouncements by past and present members of the Court
7 conclude that the motto "In God We Trust" poses no Establishment Clause problems. In
8 addition, every lower court that has addressed the issue has held that the display of the national
9 motto is constitutional.

10
11 **A. The Supreme Court in Dicta Has Specifically Noted the Constitutionality of the National Motto.**

12 In its Establishment Clause jurisprudence, the Supreme Court has suggested on numerous
13 occasions that the national motto does not violate the Establishment Clause. For example, when
14 the Court recently evaluated Plaintiff's challenge to the Pledge of Allegiance, Justice O'Connor
15 used the national motto as a constitutional example of "ceremonial deism":

16 Given the values that the Establishment Clause was meant to serve, however, I
17 believe that government can, in a discrete category of cases, acknowledge or refer
18 to the divine without offending the Constitution. This category of "ceremonial
19 deism" most clearly encompasses such things as the national motto ("In God We
20 Trust"), religious references in traditional patriotic songs such as the Star-
21 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"). 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.

22 *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring)
23 (internal citations omitted). Justice O'Connor identified four factors that define an instance of

1 ceremonial deism: 1) its history and ubiquity; 2) the absence of worship or prayer; 3) the absence
2 of reference to a particular religion; and 4) minimal religious content or a “highly circumscribed
3 reference to God.” *Id.* at 37-43.

4 Justice O’Connor continued, acknowledging the historical underpinnings of such
5 religious references as “In God We Trust”:

6 Just as the Court has refused to ignore changes in the religious composition of our
7 Nation in explaining the modern scope of the Religion Clauses . . . it should not
8 deny that our history has left its mark on our national traditions. It is unsurprising
9 that a Nation founded by religious refugees and dedicated to religious freedom
10 should find references to divinity in its symbols, songs, mottoes, and oaths.*
11 Eradicating such references would sever ties to a history that sustains this Nation
12 even today.

13 * Note, for example, the following state mottoes: Arizona (“God Enriches”);
14 Colorado (“Nothing without Providence”); Connecticut (“He Who Transplanted
15 Still Sustains”); Florida (“In God We Trust”); Ohio (“With God, All Things Are
16 Possible”); and South Dakota (“Under God the People Rule”). Arizona, Colorado,
17 and Florida have placed their mottoes on their state seals, and the mottoes of
18 Connecticut and South Dakota appear on the flags of those States as well.
19 Georgia’s newly-redesigned flag includes the motto “In God We Trust.” The
20 oaths of judicial office, citizenship, and military and civil service all end with the
21 (optional) phrase “[S]o help me God.” Many of our patriotic songs contain overt
22 or implicit references to the divine, among them: “America” (“Protect us by thy
23 might, great God our King”); “America the Beautiful” (“God shed his grace on
24 thee”); and “God Bless America.”

17 *Id.* at 35-36.

18 Finally, Justice O’Connor specifically rejected any claim of coercion by virtue of such
19 acts of “ceremonial deism”:

20 Any coercion that persuades an onlooker to participate in an act of ceremonial
21 deism is inconsequential, as an Establishment Clause matter, because such acts
22 are simply not religious in character. As a result, symbolic references to religion
23 that qualify as instances of ceremonial deism will pass the coercion test as well as
24 the endorsement test. This is not to say, however, that government could *overtly*
coerce a person to participate in an act of ceremonial deism.

1 *Id.* at 44. Justice O’Connor’s conclusion regarding the religious import of the phrase “one Nation
2 under God” in the Pledge of Allegiance applies equally to the national motto:

3 Whatever the sectarian ends its authors may have had in mind, our continued
4 repetition of the reference to “one Nation under God” in an exclusively patriotic
5 context has shaped the cultural significance of that phrase to conform to that
6 context. Any religious freight the words may have been meant to carry
7 originally has long since been lost.

8 *Id.* at 41.

9 Justice O’Connor’s recent opinion in *Elk Grove* is consistent with past references, both
10 by her and other members of the Court, concerning the national motto. In *Lynch*, Justice
11 O’Connor observed that government acknowledgments of religion, such as the declaration of
12 Thanksgiving as a public holiday, printing “In God We Trust” on coins, and opening court
13 sessions with “God Save the United States an this honorable court” could not be reasonably
14 perceived as a government endorsement of religion.

15 Those government acknowledgments of religion serve, in the only ways
16 reasonably possible in our culture, the legitimate secular purposes of solemnizing
17 public occasions, expressing confidence in the future, and encouraging the
18 recognition of what is worthy of appreciation in society. For that reason, and
19 because of their history and ubiquity, those practices are not understood as
20 conveying government approval of particular religious beliefs.

21 465 U.S. at 693 (O’Connor, J., concurring); *see also County of Allegheny*, 492 U.S. at 603-04
22 (again expressing the belief that the national motto poses no Establishment Clause problems).

23 Justice Brennan, perhaps one of the Court’s strictest separationists, also thought that the
24 national motto was constitutional:

25 [S]uch practices as the designation of “In God We Trust” as our national motto . .
26 . . can best be understood . . . as a form of “ceremonial deism” protected from
27 Establishment Clause scrutiny chiefly because they have lost through rote
28 repetition any significant religious content. Moreover, these references are
29 uniquely suited to serve such wholly secular purposes as solemnizing public
30 occasions, or inspiring commitment to meet some national challenge in a manner

1 that simply could not be fully served in our culture if government were limited to
2 purely nonreligious phrases. The practices by which the government has long
3 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.

4 *Lynch*, 465 U.S. at 716-17 (Brennan, J., dissenting) (citations omitted); *see Schempp*, 374 U.S. at
5 303 (stating the motto is interwoven “so deeply into the fabric of our civil polity that its present
6 use may well not present that type of involvement which the First Amendment prohibits”).

7 In every instance in which the Court or individual Justices have addressed patriotic
8 exercises with religious references, including the national motto, they have concluded
9 unequivocally that those references are constitutional. No Member of the Court, past or current,
10 has suggested otherwise. To the contrary, recognizing that certain of its precedents may create
11 the impression that patriotic exercises with religious references would be constitutionally
12 suspect, the Court has taken pains to assure that such is not the case.

13 In *Allegheny County*, Justice Blackmun, writing for the Court and joined by Justices
14 Marshall, Brennan, Stevens, and O’Connor, referred directly to the constitutionality of the motto:

15 Our previous opinions have considered in dicta *the motto* and the pledge,
16 characterizing them as consistent with the proposition that government may not
communicate an endorsement of religious belief. We need not return to the
17 subject of “ceremonial deism,” . . . because there is an obvious distinction
between creche displays and references to God in *the motto* and the pledge.

18 492 U.S. at 602-03 (emphasis added). The four other Justices in *Allegheny*, Chief Justice
19 Rehnquist and Justices Kennedy, White, and Scalia, explained that striking down traditions like
20 the national motto would be a disturbing departure from the Court’s cases upholding the
21 constitutionality of government practices recognizing the nation’s religious heritage:

22 Taken to its logical extreme, some [statements in the Court’s past opinions] would
23 require a relentless extirpation of all contact between government and religion.
Government policies of accommodation, acknowledgment, and support for
24

1 religion are an accepted part of our political and cultural heritage. . . . “[W]e must
2 be careful to avoid the hazards of placing too much weight on a few words or
3 phrases of the Court,” and so we have “declined to construe the Religion Clauses
with a literalness that would undermine the ultimate constitutional objective as
illuminated by history.”

4 *Id.* at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Walz v. Tax Comm’n*
5 *of New York City*, 397 U.S. 664, 670-71 (1970)).

6 Criticizing the endorsement test as being both flawed and unworkable, the dissent in
7 *Allegheny* set forth a detailed description of every government acknowledgment of religion in
8 public life, including the national motto, and concluded that these acknowledgments could not
9 survive under a consistent and logical application of the endorsement test.

10 Either the Endorsement test must invalidate scores of traditional practices
11 recognizing the place religion holds in our culture, or it must be twisted and
12 stretched to avoid inconsistency with practices we know to have been permitted
in the past, while condemning similar practices with no greater endorsement
effect simply by reason of their lack of historical antecedent.

13 *Id.* at 674.

14 Both the majority and the dissent in *Wooley v. Maynard*, 430 U.S. 705 (1977),
15 acknowledged the innocuous nature of the motto’s presence on the nation’s currency. In *Wooley*,
16 the Court held that a New Hampshire statute requiring vehicles to bear license plates embossed
17 with the state’s motto, “Live Free or Die” violated the First Amendment. *Id.* at 707. In doing so,
18 the Court specifically distinguished the use of the national motto on the nation’s currency:

19 It has been suggested that today’s holding will be read as sanctioning obliteration
20 of the national motto, “In God We Trust” from United States coins and currency.
21 That question is not before us today but we note that currency, which is passed
22 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.

23 *Id.* at 717, n.15. Justice Rehnquist, in his dissent, explained that bearing the state motto on one’s
24

1 license plate involved no affirmation of belief and therefore did not implicate any free speech
 2 rights of motorists. *Id.* at 720 (noting that motorists had not been forced to affirm or reject that
 3 motto). To illustrate his point, he noted that “[t]he fact that an atheist carries and uses United
 4 States currency does not, in any meaningful sense, convey any affirmation of belief on his part in
 5 the motto ‘In God We Trust.’” *Id.* at 722 (Rehnquist, J., dissenting).

6
 7 **B. Lower Courts, Including the Ninth Circuit Court of Appeals, Uniformly
 Have Upheld the Constitutionality of the National Motto.**

8 Every court that has decided the issue has held that the national motto presents no
 9 Establishment Clause concerns. The Ninth Circuit Court has already sustained the
 10 constitutionality of the national motto in *Aronow*. Like *Newdow*, *Aronow* challenged the
 11 constitutionality of federal statutes requiring the national motto to be inscribed on U.S. currency.

12 In a two-page opinion, the court dismissed the plaintiff’s claim, concluding brusquely that

13 [i]t is quite obvious that the national motto and the slogan on coinage and
 14 currency “In God We Trust” has nothing whatsoever to do with the establishment
 15 of religion. Its use is of a patriotic or ceremonial character and bears no true
 16 resemblance to a governmental sponsorship of a religious exercise. . . . While
 “ceremonial” and “patriotic” may not be particularly apt words to describe the
 category of the national motto, it is excluded from First Amendment significance
 because the motto has no theological or ritualistic impact.

17 432 F.2d at 243. Relying on Supreme Court precedent, the court explained that legislation would
 18 only violate the Establishment Clause where its purpose—evidenced facially, through legislative
 19 history, or in effect—is to use the state’s coercive power to aid religion. *Id.* at 244 (citing
 20 *McGowan v. Maryland*, 366 U.S. 420 (1961)). After considering congressional intent⁸ and
 21 societal impact, the court concluded that the motto had no such purpose. *Id.* As to the First
 22 Amendment claims set forth in Plaintiff’s complaint, *Aronow* is dispositive.

23 ⁸ *Id.* (“It will be of great spiritual and psychological value to our country to have a clearly designated national motto
 24 of inspirational quality in plain, popularly accepted English.” House Report No. 84-1959, 1956 Cong. & Admin.
 News, p. 3720).

1 Relying on *Aranow*, the Tenth Circuit Court also rejected an Establishment Clause
2 challenge to the use of the national motto, “In God we Trust,” and its reproduction on United
3 States currency. *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996). The court in *Gaylor*
4 considered itself bound by the Supreme Court’s various dicta on the constitutionality of the
5 national motto “almost as firmly as by the Court’s outright holdings, particularly when the dicta
6 is recent and not enfeebled by later statements.” *Id.* at 217. Applying the *Lemon* test first, the
7 court found that all three parts were easily met:

8 The statutes establishing the national motto and directing its reproduction on U.S.
9 currency clearly have a secular purpose. The motto symbolizes the historical role
10 of religion in our society, formalizes our medium of exchange, fosters patriotism,
11 and expresses confidence in the future. The motto’s primary effect is not to
12 advance religion; instead, it is a form of “ceremonial deism” which through
historical usage and ubiquity cannot be reasonably understood to convey
government approval of religious belief. Finally, the motto does not create an
intimate relationship of the type that suggests unconstitutional entanglement of
church and state.

13 *Id.* at 216 (internal citations omitted). The court then applied the endorsement test, considering
14 the motto and its use on currency from the perspective of the reasonable observer. Noting that a
15 reasonable observer must be deemed to be aware of the purpose, context, and history of the
16 phrase “In God we Trust,” the court held that the reasonable observer would not consider its use
17 or its reproduction on U.S. currency to be an endorsement of religion. *Id.* at 217.

18 A number of district courts have also relied on *Aronow* to hold that the federal statutes
19 requiring the national motto to be printed on the nation’s currency are constitutional.⁹ In *O’Hair*
20 *v. Murray*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff’d per curiam*, 588 F.2d 1144 (5th Cir. 1978),
21 the court, in a one-page opinion, quoted from Justice Brennan’s concurring opinion in *Schempp*,
22 374 U.S. at 303, and concluded that the national motto “does not infringe on First Amendment

23 ⁹ In addition, many federal courts have referred in dicta to the probable constitutionality of the national motto. *See*,
24 *e.g.*, *ACLU v. McCreary County*, 96 F. Supp. 2d 679, 688 (E.D. Ky. 2000).

rights.”¹⁰ *Id.* at 20; *see also Lambeth v. Bd. of Comm’rs*, 321 F. Supp. 2d 688 (M.D.N.C. 2004) (applying *Lemon* and upholding the motto); *Myers v. Loudoun County Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003) (relying on *Aronow* and *Gaylor* to hold that the motto’s reference to God does not make the statement religious and recognizing Supreme Court dicta stating that the motto does not violate the Constitution); *Schmidt v. Cline*, 127 F. Supp. 2d 1169 (D. Kan. 2000) (relying on *Aronow* and *Gaylor* to hold that plaintiff’s Establishment Clause argument was meritless because the motto is not an encouragement of any particular religion). Similarly, in *Opinion of the Justices, Supreme Court of New Hampshire*, 228 A.2d 161, 164 (N.H. 1967), the Supreme Court of New Hampshire advised the New Hampshire Senate that a proposed resolution requiring all public schools to display in every classroom a plaque with the national motto inscribed on it would “not offend the Establishment Clause of the First Amendment.”

CONCLUSION

Under existing case law, there is very little upon which to stake an argument that the national motto violates the Establishment Clause. All authority on point is against such a contention. The Establishment Clause was never intended as a guarantee that a person will not be exposed to religion or religious symbols on public property, and the Supreme Court has rejected previous attempts to eradicate all symbols of this country’s religious heritage from the public’s view. Although enterprising plaintiffs can find support for just about any proposition in the Court’s multifarious Establishment Clause pronouncements, a claim that the national motto violates the First Amendment borders on frivolous.

For the foregoing reasons, Amici Curiae respectfully urge this Court to dismiss the Plaintiff’s Complaint.

¹⁰ In both *Aronow* and *Murray*, the courts affirmed the grant of the defendants’ Motions to Dismiss.

1 Dated March 27, 2006

2 Respectfully submitted,

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1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that two copies of THE BRIEF AMICI CURIAE OF THE
3 AMERICAN CENTER FOR LAW & JUSTICE AND VARIOUS MEMBERS OF THE
4 UNITED STATES CONGRESS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
were served on the parties in the case by depositing them, postage prepaid, in the U.S. Mail, First
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