IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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,	)	
v.	)	Civil Action No. 1:13-cv-000741-HB
THE CONGRESS OF THE UNITED STATES OF AMERICA; THE UNITED STATES OF AMERICA; TIMOTHY F. GEITHNER, SECRETARY OF THE TREASURY; RICHARD A. PETERSON, DEPUTY DIRECTOR, UNITED STATES MINT; LARRY R. FELIX, DIRECTOR, BUREAU OF ENGRAVING AND PRINTING,	)	
Defendants.	)	

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS, THE AMERICAN CENTER FOR LAW AND JUSTICE, THE AMERICAN CATHOLIC LAWYERS ASSOCIATION, AND THE COMMITTEE TO PROTECT THE NATIONAL MOTTO IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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INTEREST OF *AMICI*[*]

Amici, Members of Congress, Randy Forbes, Robert Aderholt, Marsha Blackburn, Bill Cassidy, Michael Conaway, Jeff Duncan, John Duncan, John Fleming, Bill Flores, Trent Franks, Scott Garrett, Louie Gohmert, Vicky Hartzler, Tim Huelskamp, Bill Huizenga, Randy Hultgren, Bill Johnson, Walter Jones, John Kline, Doug LaMalfa, Doug Lamborn, James Lankford, Mike McIntyre, Jeff Miller, Randy Neugebauer, Alan Nunnelee, Steven Palazzo, Steve Pearce, Robert Pittenger, Joe Pitts, Bill Posey, David P. Roe, Matt Salmon, Marlin Stutzman, Lee Terry, Glenn Thompson, Tim Walberg, Lynn Westmoreland, Joe Wilson, Robert Wittman, and Frank Wolf are currently serving in the One Hundred Thirteenth Congress.

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued in numerous cases involving First Amendment issues before the Supreme Court of the United States and other federal and state courts. *See, e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540

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

U.S. 93 (2003); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

Amicus, American Catholic Lawyers Association (ACLA) is a Catholic religious organization that engages in public interest litigation and public discourse and debate on issues related to the religious liberty of Catholics and the proper role of religion in civil society. ACLA's attorneys have defended the civil and constitutional rights of Catholics in state and federal courts across the country, particularly in the area of First Amendment freedoms.

This brief is also filed on behalf of the ACLJ's Committee to Protect the National Motto which consists of 87,500 Americans who oppose Plaintiffs' effort to strip the national motto from the Nation's currency.

Amici have dedicated time and effort to defending and protecting Americans' First Amendment freedoms. It is this commitment to the integrity of the United States Constitution and Bill of Rights that compels them to support dismissal of the Plaintiffs' Complaint. Plaintiffs' claims and arguments, if accepted, would eventually lead to the purging of all governmental acknowledgements of America's religious life and produce the kind of hostility toward religious faith that is incompatible with the Religion Clauses. Undoubtedly,

further challenges would ensue to other religious expressions in government venues, including the several religious works of art[1] and various religious inscriptions in the Capitol Complex,[2] as well as the prayer rooms in House and Senate Office buildings all of which may also cause Plaintiffs to feel "degraded from the equal ranks of citizens." Compl. ¶ 441.

Amici take the position that the inscription of the national motto "In God We Trust" on the nation's currency does not violate the Establishment Clause of the First Amendment to the United States Constitution. The national motto simply echoes the principle found in the Declaration of Independence that our freedoms come from God and not the state. The national motto was adopted for the express purpose of reaffirming America's unique understanding of this truth. While the First Amendment affords atheists complete freedom to disbelieve, it does not compel the federal judiciary to redact religious references in every area of public life in order to suit atheistic sensibilities. *Amici* therefore urge this Court to grant

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

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

the Defendant's motion to dismiss Plaintiffs' claims.

ARGUMENT

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

I. THE NATIONAL MOTTO, "IN GOD WE TRUST," REFLECTS THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

This Nation's Founders based a national philosophy on a belief in Deity. The Declaration of Independence[3] and the Bill of Rights locate the source of inalienable rights in a Creator rather than in government precisely so that such rights cannot be stripped away by government. In 1782, Thomas Jefferson wrote, "[C]an the

[3] The Declaration of Independence recognizes that human liberties are a gift from God: "all men are created equal, that they are endowed by *their Creator* with certain unalienable Rights." *The Declaration of Independence* para. 2 (U.S. 1776) (emphasis added). Jefferson wrote further that the right to "dissolve the political bands" connecting the 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 for the rectitude of [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.

liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on Virginia* Q.XVIII (1782). The Founders may have differed over the contours of the relationship between religion and government, but they never deviated from the conviction that "there was a necessary and valuable moral connection between the two." Philip Hamburger, *Separation of Church and State* 480 (2002).

As Plaintiffs' Complaint well documents, the nation's history is replete with examples of acknowledgment of religious belief in the public sector. Since the Founding of the Republic, American Presidents have issued Thanksgiving Proclamations establishing a national day of celebration and prayer. At the request of the First Congress, President Washington issued the first such proclamation, in which he wrote that it is the "duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor." 12 George Washington, *The Writings of George Washington* T19 (Jared Sparks ed. 1837). He further "recommend[ed] and assign[ed]" a day "to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be," so that "we may then unite in most humbly offering our prayers

and supplications to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and practice of true religion and virtue . . . .” 1 J. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897*, at 64 (1899).

Most of President Washington’s successors have followed suit:

- John Adams, 1798:

  “[W]ith the deepest humility, acknowledge before God the manifold sins and transgressions with which we are justly chargeable as individuals and as a nation, beseeching Him at the same time, of His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation which may afford us reason to hope for his inestimable favor and heavenly benediction . . . .”

- James Madison, 1814:

  “[A] day on which all may have an opportunity of voluntarily offering at the same time in their respective religious assemblies their humble adoration to the Great Sovereign of the Universe, of confessing their sins and transgressions, and of strengthening their vows of repentance and amendment.”

- Abraham Lincoln, 1863:

  “[A]nd finally to lead the whole nation through the paths of repentance and submission to the divine will back to the perfect enjoyment of union and fraternal peace.”

- Grover Cleveland, 1887:

  “On that day let all secular work and employment be suspended, and let our people assemble in their accustomed places of worship and with prayer and songs of praise give thanks to our Heavenly Father for all that He has done for us, while we humbly implore the forgiveness of our sins and a continuance of His mercy.”

- Dwight Eisenhower, 1953:

"On that day let all of us, in accordance with our hallowed custom, forgather in our respective places of worship and bow before God in contrition for our sins, in suppliance for wisdom in our striving for a better world, and in gratitude for the manifold blessings He has bestowed upon us and upon our fellow men."

- John F. Kennedy, 1963, quoted from Washington's Proclamation, including the plea to "beseech Him to pardon our national and other transgressions."
- Ronald Reagan, 1988, quoting Washington:

  "[A] recognition of our shortcomings and transgressions and our dependence, in total and in every particular, on the forgiveness and forbearance of the Almighty."
- President George H.W. Bush, 1990, quoting Washington:

  "Let us seek His forgiveness for our shortcomings and transgressions and renew our determination to remain a people worthy of His continued favor and protection."
- President George W. Bush, 2003

  "This Thanksgiving, we again give thanks for all of our blessings and for the freedoms we enjoy every day. Our Founders thanked the Almighty and humbly sought His wisdom and blessing. May we always live by that same trust, and may God continue to watch over and bless the United States of America."
- President Barack Obama, 2012

  "Let us spend this day by lifting up those we love, mindful of the grace bestowed upon us by God and by all who have made our lives richer with their presence."[4]

Every proclamation concludes with the same phrase used in the U.S. Constitution: "In the year of our Lord."[5] Similarly, our Presidential inaugurations

[4] These proclamations can be accessed on the Pilgrim Hall Museum's website. *Thanksgiving Proclamations*, Pilgrim Hall Museum, http://www.pilgrimhall museum.org/thanksgiving_proclamations.htm (last visited May 7, 2013).

traditionally have opened with a request for divine blessing. *See generally Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 10, 101st Cong., 1st Sess. (1989).

The Executive has not been the only Branch of our Government to recognize the central role of theistic belief in our society. Federal courts, including the Supreme Court of the United States, open sessions with the request that "God save the United States and this honorable Court." The Legislative Branch has gone much further, not only employing legislative chaplains, *see* 2 U.S.C. § 61d (2006), but also setting aside a special prayer room in the Capitol for use by Members of the House and Senate. The room is decorated with a large stained glass panel that depicts President Washington kneeling in prayer; around him is etched the first verse of the 16th Psalm: "Preserve me, O God, for in Thee do I put my trust." Beneath the panel is a rostrum on which a Bible is placed; next to the rostrum is an American Flag. *See* L. Aikman, *We the People: The Story of the United States Capitol* 122 (1978).

The United States Code itself contains religious references. Following the historical practice, Congress has directed the President to "issue each year a proclamation designating the first Thursday in May as a National Day of Prayer on

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[5] *See id.*

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. § 119 (2006).[6] This statute does not require anyone to pray, but it is a straightforward acknowledgement of the concept of "turn[ing] to God in prayer." *Id.* Likewise, the national motto is prominently engraved in the wall above the Speaker's dais in the Chamber of the House of Representatives.

The use of the phrase "In God We Trust" dates back to the War of 1812. In September 1814, fearing for the fate of America while watching the British bombardment of Fort McHenry in Baltimore, Francis Scott Key composed the poem the "Star Spangled Banner," of which one line in the final stanza is "And this be our motto—'In God is our trust.'"[7] When Congress codified the longstanding motto in 1956, it articulated a secular purpose of patriotic inspiration: "It will be of great spiritual and psychological value to our country to have a clearly designated

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[6] On April 17, 1952, President Truman signed Congress's Public Law 324 that marked the first Thursday in May as a day of Prayer. However, this law only established a National Day of Prayer; it did not fix the day, and the day varied according to each president's proclamation date. But, in 1988, Congress amended the law and fixed the date to the first Thursday in May. President Reagan signed the amendment into law. *See America's National Day of Prayer*, The Pluralism Project at Harv. U. (2006), http://pluralism.org/research/profiles/display.php?profile=74229.

[7] Steven B. 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*, at ii (1969)).

national motto of inspirational quality in plain, popularly accepted English." H.R. Doc. No. 84-1959 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3720.

> The national motto simply describes the indisputable historical fact that
>
> > the founding generation viewed the separation of powers as the surest security of civil right. Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god. This was well known to Rousseau and Marx who both complained that acknowledging God creates a competition or check upon the secular state.

Douglas W. Kmiec, *Oh God! Can I Say That in Public?*, 17 Notre Dame J.L. Ethics & Pub. Pol'y 307, 312–13 (2003).

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

It is clear from the Supreme Court's Establishment Clause jurisprudence that the Constitution is not to be interpreted in a manner that would purge religion or religious reference from society. In 1892, the Supreme Court stated that "this is a religious nation." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical role of religion in our society and concluded that "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). In *School District v. Schempp*, 374 U.S. 203 (1963), the Court recognized that "religion has been

closely identified with our history and government." *Id.* at 212. Such recognition of the primacy of religion in the Nation's heritage is nowhere more affirmatively expressed than in *Zorach v. Clauson*, 343 U.S. 306 (1952):

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature 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.*

Id. at 313–14 (emphasis added). Plaintiffs ask this Court to do exactly what the Supreme Court warned against in *Zorach*—prefer atheism over religion even to the extent of censoring the historical fact that the United States was founded upon a belief in God.

In *Lee v. Weisman,* 505 U.S. 577 (1992), the Court reaffirmed that its decisions

> do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that

> sometimes to endure social isolation or even anger may be the price of conscience or nonconformity.

Id. at 597–98 (emphasis added). Citing with approval Justice Goldberg's concurrence in *Schempp*, the Court continued, explaining that "[a] *relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution.*" *Id*. at 598 (citing *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) (emphasis added)).

The misused concept of a wall of "separation of church and state" does not assist Plaintiffs' cause. In a case involving a Ten Commandments display, the United States Court of Appeals for the Sixth Circuit rebuked the ACLU's repeated reference to that phrase, stating: "[t]his extra-constitutional construct has grown tiresome. The First Amendment does not demand a wall of separation between church and state. Our Nation's history is replete with governmental acknowledgment and in some cases, accommodation of religion." *ACLU v. Mercer Cnty.*, 432 F.3d 624, 638–39 (6th Cir. 2005) (citations omitted). The reasonable observer would not conclude that the government has endorsed religion solely by authorizing the word "God" to appear on money; "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *Id.* at 639 (quoting *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (plurality opinion)). This is because "the reasonable person is

not a hyper-sensitive plaintiff. Instead, he appreciates the role religion has played in our governmental institutions, and finds it historically appropriate and traditionally acceptable for a state to include religious influences, even in the form of sacred texts, in honoring American legal traditions." *Id.* at 639–40 (citation omitted). In other words, the mere *recognition* of America's religious heritage does not constitute an impermissible *endorsement* of religion because "[t]o endorse is necessarily to recognize, but the converse does not follow." *Id.* at 639 ("We will not presume endorsement from the mere display of the Ten Commandments.").

Although the primary issue in this case is whether the Establishment Clause prohibits the inscription of the national motto on the nation's currency, far more is at stake. As the Sixth Circuit has explained, "[i]f the reasonable observer perceived all government references to the Deity as endorsements, then many of our Nation's cherished traditions would be unconstitutional, including the Declaration of Independence and the national motto." *Id.* A decision invalidating the motto would render constitutionally suspect a number of practices that traditionally have been considered an important part of American society. Nothing in the Supreme Court's Establishment Clause jurisprudence requires the relentless extirpation of public references to God that Plaintiffs demand. In fact, stripping the currency of the national motto would promote religious divisiveness and exhibit hostility, not

neutrality, toward religion. As Justice Breyer noted in his concurring opinion in *Van Orden v. Perry*, to tear down a Ten Commandments monument display

> based primarily on the religious nature of the tablets' text would, I fear, lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions. Such a holding might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. *And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.*

545 U.S. at 704 (Breyer, J., concurring) (emphasis added).

One of the more obvious casualties of such a holding would be the practice of requiring students to learn and recite passages from many historical documents reflecting the Nation's religious heritage and character. If the government violates the Establishment Clause by inscribing "In God We Trust" on coins and currency, it is difficult to conceive of a rationale by which compelled study or recitation from the Nation's founding documents would not also violate the Constitution. The Mayflower Compact[8] and the Declaration of Independence contain religious

[8] The Mayflower Compact, written by William Bradford in 1620, provides:

> We whose names are underwritten, the Loyal Subjects of our dread Sovereign Lord, King James, by *the Grace of God*, of Great Britain, France, and Ireland King, Defender of the Faith, etc. Having undertaken, *for the Glory of God, and Advancement of the Christian Faith*, and the Honour of our King 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 another, covenant and combine ourselves together into a civil Body Politik, for

references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313; *see also Newdow v. U.S. Congress*, 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc). Similarly, the Gettysburg Address, though not a founding document, contains religious language and, historically, has been the subject of required recitations in public schools. President Lincoln declared "that this Nation, *under God*, shall have a new birth of freedom, and that Government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, *The Gettysburg Address* (1863) (emphasis added).

Indeed, the references to deity in these historical documents are presumably even more problematic under Plaintiffs' reasoning because they proclaim not only God's existence but specific dogma about God—He is involved in the affairs of men; He holds men accountable for their actions; and He is the Author of human liberty. Acceptance of Plaintiffs' reasoning will ultimately threaten a sort of Orwellian reformation of civic life by censoring American history.

> 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 Officers, 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 (1620) (emphasis added).

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

Although the Supreme Court has never decided a case involving the constitutionality of the national motto, numerous pronouncements by past and present members of the Court conclude that it poses no Establishment Clause problem. In addition, lower courts that have addressed the issue have held that inscription of the national motto on the nation's currency is constitutional.

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

In its Establishment Clause jurisprudence, the Supreme Court and individual Justices have suggested on numerous occasions that the national motto does not violate the Establishment Clause. For example, when the Court dismissed a challenge to the Pledge of Allegiance,[9] Justice O'Connor, chief architect of the endorsement test, upon which Plaintiffs primarily rely, used the national motto as a constitutionally valid example of "ceremonial deism":

> 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

[9] The case was ultimately dismissed for lack of standing.

> 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.

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring) (citations omitted). Justice O'Connor identified four factors that define an instance of ceremonial deism: 1) its history and ubiquity; 2) the absence of worship or prayer; 3) the absence of reference to a particular religion; and 4) minimal religious content or a "highly circumscribed reference to God." *Id.* at 37–43.

Justice O'Connor continued, acknowledging the historical underpinnings of such religious references as "In God We Trust":

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

Id. at 35–36 (citations and footnote omitted). Further, Justice O'Connor listed some of the important references to divinity found in our Nation:

> Note, for example, the following state mottoes: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God, All Things Are Possible"); and South Dakota

> ("Under God the People Rule"). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly-redesigned flag includes the motto "In God We Trust." The oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase "[S]o help me God." Many of our patriotic songs contain overt or implicit references to the divine, among them: "America" ("Protect us by thy might, great God our King"); "America the Beautiful" ("God shed his grace on thee"); and "God Bless America."

Id. at n.*.

Finally, Justice O'Connor specifically rejected any claim of coercion by virtue of such acts of "ceremonial deism":

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

Id. at 44.

Furthermore, the Establishment Clause is not so broad as to allow mere offense to religious references in the nation's currency to convert the handling of money into religious coercion. In fact, Justice O'Connor dismissed such a broad construction of the Establishment Clause in *Elk Grove*, stating that

> distaste for the reference to "one Nation under God," however sincere, cannot be the yardstick of our Establishment Clause inquiry. . . . It would be ironic indeed if this Court were to wield our constitutional

> commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

Id. at 44–45. Justice O'Connor also made it clear that "the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory." *Id.* at 44.

Justice O'Connor's opinion in *Elk Grove* is consistent with other references, both by her and other members of the Court, concerning the national motto. For example, in his concurring opinion in *Elk Grove*, Chief Justice Rehnquist stated that

> [t]he Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they [choose] to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Id. at 33 (Rehnquist, C.J., concurring).

In *Lynch*, Justice O'Connor observed that government acknowledgments of religion, such as the declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God Save the United States and this honorable court" could not be reasonably perceived as a

government endorsement of religion. 465 U.S. at 693 (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. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id.; *see also Cnty. of Allegheny*, 492 U.S. at 603–04 (again expressing the belief that the national motto poses no Establishment Clause problems).

Justice Brennan, perhaps one of the Court's stricter separationists, also thought that the national motto was constitutional:

> [S]uch practices as the designation of "In God We Trust" as our national motto . . . can best be understood . . . as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. 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 non-religious phrases. 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.

Lynch, 465 U.S. at 716–17 (Brennan, J., dissenting) (citations omitted); *see also Schempp*, 374 U.S. at 303 (Brennan, J., concurring) (stating the motto is interwoven "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").

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

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

> 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. We need not return to the subject of "ceremonial deism," because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.

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

> Taken to its logical extreme, some [statements in the Court's past opinions] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage. . . . [W]e must be careful to avoid "[t]he hazards of placing too much weight on a few words or 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."

Id. at 657 (Kennedy, J., concurring in part and dissenting in part) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 670, 671 (1970)).

B. Lower Courts Uniformly Have Upheld the Constitutionality of the National Motto.

Every lower court that has decided the issue has held that the national motto presents no Establishment Clause concerns. This is not surprising, given overwhelming approval of the national motto by the Supreme Court and individual Justices. As the Seventh Circuit stated in *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), "If the [Supreme] Court proclaims that a practice is consistent with the establishment clause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." *Id.* at 448. Thus, the Seventh Circuit explained that a mechanistic application of all Establishment Clause tests is unnecessary when the Supreme Court has already spoken so clearly on the issue. *Id.*

The Ninth Circuit sustained the constitutionality of the national motto in *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). Like the Plaintiffs here, the plaintiff in *Aronow* challenged the constitutionality of federal statutes requiring the national motto to be inscribed on U.S. currency. In a two-page opinion, the Ninth Circuit brusquely dismissed the plaintiff's claim:

> It is quite obvious that the national motto and the slogan on coinage and currency "In God We Trust" has nothing whatsoever to do with the establishment of religion. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.
>
> . . . .
>
> . . . 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.

Id. at 243. Relying on Supreme Court precedent, the court in *Aronow* explained that legislation would only violate the Establishment Clause where its purpose—evidenced facially, through legislative history, or in effect—is to use the state's coercive power to aid religion. *Id.* at 244 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)). After considering congressional intent[10] and societal impact, the court

[10] *Id.* n.3 ("It will be of great spiritual and psychological value to our country to have a clearly designated national motto of inspirational quality in plain, popularly accepted English." (quoting H.R. Doc. No. 84-1959 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3720)).

concluded that the motto had no such purpose. *Id.*

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

> The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose. The motto symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future. The motto's primary effect is not to 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.

Id. at 216 (citations omitted). The court then applied the endorsement test, considering the motto and its use on currency from the perspective of the reasonable observer. Noting that a reasonable observer must be deemed to be aware of the purpose, context, and history of the phrase "In God We Trust," the court held that the reasonable observer would not consider its use or its

reproduction on U.S. currency to be an endorsement of religion. *Id.* at 217. *Cf. ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 291–310 (6th Cir. 2001) (upholding Ohio's state motto, "In God, All Things Are Possible," against an Establishment Clause attack); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006) ("References to God in a motto or pledge, for example, have withstood constitutional scrutiny; they constitute permissible 'ceremonial deism' and do not give an impression of government approval."), *vacated on other grounds by* 494 F.3d 494 (5th Cir. 2007) (en banc).

A number of district courts have also relied on *Aronow* to hold that the federal statutes requiring the national motto to be printed on the nation's currency are constitutional.[11] In *O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978), *aff'd per curiam*, 588 F.2d 1144 (5th Cir. 1979), the court, in a one-page opinion, quoted from Justice Brennan's concurring opinion in *Schempp* and concluded that the national motto "does not infringe on First Amendment rights." *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); *Meyers v. Loudoun Cnty. Sch. Bd.*, 251 F. Supp. 2d 1262 (E.D. Va. 2003) (relying on *Aronow* and *Gaylor* to hold that the motto's

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

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*, 228 A.2d 161 (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." *Id.* at 164.

CONCLUSION

Under existing case law, there is very little upon which to stake an argument that inscribing the national motto on the nation's currency 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. For the foregoing reasons, *Amici Curiae* respectfully urge this Court to grant Defendant's motion to dismiss Plaintiffs' Complaint with prejudice.

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CERTIFICATE OF COMPLIANCE WITH RULE 7.1(d)

The undersigned counsel of record for *Amici* certifies that this brief complies with the type-volume limitation of Rule 7.1(d) because this brief contains 5,945 words, excluding the parts of the brief exempted by Rule 7.1(d).

Dated: May 10, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2013, I electronically filed a copy of the foregoing *Amici Curiae* Brief using the ECF System which will send notification of that filing to all counsel of record in this litigation.

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