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## OPINION OF THE SEVENTH CIRCUIT
## (MAY 31, 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KENNETH MAYLE,

*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, ET AL.,

*Defendants-Appellees*.

No. 17-3221

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17 C 3417–Amy J. St. Eve, Judge.

Before: WOOD, Chief Judge,
MANION, and ROVNER, Circuit Judges.

WOOD, Chief Judge.

Kenneth Mayle, an adherent of what he calls non-theistic Satanism, sued the United States and officials from the United States Mint, Department of the Treasury, and Bureau of Engraving and Printing, to enjoin the printing of the national motto, "In God We Trust," on United States currency. The district court dismissed his complaint, and we affirm.

Mayle asserts that the motto amounts to a government endorsement of a "monotheistic concept of God." Because Satanists practice a religion that rejects monotheism, they regard the motto as "an attack on their very right to exist." Possessing and using currency, Mayle complains, forces him (and his fellow Satanists) to affirm and spread a religious message "committed to the very opposite ideals that he espouses." In addition, Mayle characterizes the printing of the motto as a form of discrimination against adherents to minority religions because it favors practitioners of monotheistic religions. All this, Mayle asserts, demonstrates that the defendants are violating the Religious Freedom Restoration Act (RFRA), the Fifth Amendment's Equal Protection clause, and the First Amendment's Free Speech, Free Exercise, and Establishment clauses.

In granting the defendants' motion to dismiss, the district court, citing *Newdow v. Lefevre*, 598 F.3d 638, 645-46 (9th Cir. 2010), held that it is well-settled that the motto on currency does not violate RFRA or the Free Exercise or Free Speech Clauses, because the motto has no theological import. It dismissed Mayle's equal-protection claim because the currency's appearance affects all citizens equally. The court did not resolve Mayle's properly preserved Establishment Clause claim, however, and so we begin our *de novo* review there.

Mayle claims that the motto establishes religion (in the constitutional sense) because it is inherently Christian, or at least monotheistic, and it sends a message to nonadherents that they are "outsiders." In order to move forward, he must indicate in which way the government has transgressed the Constitution:

through impermissible endorsement of a religious view, through coercion, or through a forbidden religious purpose. *Freedom From Religion Found., Inc. v. Concord Cmty. Sch.*, 885 F.3d 1038, 1045 (7th Cir. 2018).

The reason all of these "tests" or approaches have developed is that the Establishment Clause does not mandate the eradication of all religious symbols in the public sphere. *Salazar v. Buono*, 559 U.S. 700, 718 (2010). Because it does not sweep that far, we know that before we can find that something runs afoul of the Establishment Clause, we must do more than spot a single religious component of a challenged activity, no matter how inconsequential. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). To avoid that error of over-inclusion, we instead scrutinize challenged conduct "to determine whether, in reality, it establishes a religion or religious faith, or tends to do so." *Id.* at 678. We "look at the totality of the circumstances surrounding the challenged conduct from the perspective of a reasonable observer" who is aware of the practice's history and context. *Freedom From Religion Found., Inc.*, 885 F.3d at 1045.

Under the "endorsement" approach, that inquiry is designed to show whether the government is pushing for the adoption of a particular religion (or for religion over atheism, humanism, animism, or other alternative world views). The Supreme Court has observed that the motto "In God We Trust" does no such thing. The motto merely acknowledges a part of our nation's heritage (albeit a religious part). *Lynch*, 465 U.S. at 676. The Court has dismissed the notion that this symbol "pose[s] a real danger of establishment of a state church [as] far-fetched indeed." *Id.* at 676, 686.

Following this guidance, we have twice suggested that the motto, and specifically the motto on money, does not violate the Establishment Clause. In *Sherman v. Community Consolidated School District 21 of Wheeling Township*, we said that the original religious significance of "In God We Trust" has dissipated and the motto is now secular. 980 F.2d 437, 446-48 (7th Cir. 1992). And in *American Civil Liberties Union of Illinois v. City of St. Charles*, we said that "the establishment clause is not so strictly interpreted as to forbid conventional nonsectarian public invocations of the deity, a standard example being the slogan on U.S. currency and coins: 'In God We Trust.'" 794 F.2d 265, 271 (7th Cir. 1986).

The inclusion of the motto on currency is similar to other ways in which secular symbols give a nod to the nation's religious heritage. Examples include the phrase "one nation under God," which has been in the Pledge of Allegiance since 1954, *see* Pub. L. No. 83-396, ch. 297, 68 Stat. 249 (1954), as well as the National Day of Prayer, which has existed in various forms since the dawn of the country and is now codified at 36 U.S.C. § 119. *Lynch*, 465 U.S. at 676-77. Moreover, when the religious aspects of an activity account for "only a fraction," the possibility that anyone could see it as an endorsement of religion is diluted. *Freedom From Religion Found., Inc.*, 885 F.3d at 1047. In the case of currency, the motto is one of many historical reminders; others include portraits of presidents, state symbols, monuments, notable events such as the Louisiana Purchase, and the national bird. In this context, a reasonable observer would not perceive the motto on currency as a religious endorsement.

Mayle's Establishment Clause claim fares no better under either of the other two approaches—coercion and purpose—the Supreme Court takes in this area. Under the former, we look to see whether the government has coerced the plaintiff to support or participate in religion. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1825 (2014); *Lee v. Weisman*, 505 U.S. 577, 587 (1992); *Freedom From Religion Found., Inc.*, 885 F.3d at 1048. Mayle maintains that he has been coerced into participating in Christianity because credit and debit cards are too risky and he is thus compelled by default to conduct all of his economic transactions using money with a religious message. We grant that using currency is essentially obligatory for someone such as Mayle, who eschews electronic forms of payment. *See Lee*, 505 U.S. at 589. But no one walking down the street who saw Mayle would have the faintest idea what Mayle had in his pocket—currency or plastic payment cards or perhaps just a smart phone. The government has thus not coerced Mayle into advertising, supporting, or participating in religion; it has merely included on its currency the religious heritage of the country along with other traditions. *See Lynch*, 465 U.S. at 676, 686. And if, as the Supreme Court has held, public or legislative prayer does not force religious practice on an audience, *see, e.g.*, *Town of Greece*, 134 S. Ct. at 1824-28, it is difficult to see how the unobtrusive appearance of the national motto on the coinage and paper money could amount to coerced participation in a religious practice.

Last, we have the "purpose" test, under which we ask whether the motto was placed on the currency for a religious purpose, or, put differently, whether its inclusion "lacks a secular objective." *Freedom From*

*Religion Found., Inc.*, 885 F.3d at 1049; *see Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Mayle contends that because the Department of the Treasury admits that religious sentiment was the driving force behind the decision permanently to affix the motto to currency in 1955, its attempt now to separate secular "religious heritage" from "religious practice" is illusory. But his premise is too simplistic. The Cold War was at its height during the mid-1950s, and so it is just as accurate to say that the motto was placed on U.S. currency to celebrate our tradition of religious freedom, as compared with the communist hostility to religion. Moreover, even if the motto was added to currency in part because of religious sentiment, it was also done to commemorate that part of our nation's heritage. *See Lynch*, 465 U.S. at 676, 686. And having just one secular purpose is sufficient to pass the *Lemon* test. *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 800 (7th Cir. 1999).

Inscribing the motto on currency, Mayle argues next, violates the Free Speech Clause because the national motto conveys a religious message, which he is being forced to convey: that he "trusts" in a deity. But Mayle is not in any meaningful way affirming the motto by using currency. *See Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). He is not wearing a sign or driving a car displaying a slogan. *See id.* at 717. As the district court noted, most people do not brandish currency in public—they keep it in a wallet or otherwise out of sight until the moment of exchange. And the recipient of cash in a commercial transaction could not reasonably think that the payer is proselytizing. If the recipient thought about it at all, she would understand that the government designed the currency and

is responsible for all of its content, including the motto. She would not regard the motto as Mayle's own speech.

Mayle also argues that, in holding and using currency, he is compelled to affirm a religious message that contradicts his Satanist beliefs, and so the motto on currency violates his rights under the Free Exercise Clause and places an undue burden on his exercise of religion for purposes of RFRA, 42 U.S.C. §§ 2000bb-1(a), (b). Under the Free Exercise Clause, the law authorizing the placement of the motto on currency is constitutional if it is neutral and generally applicable. *See Lis-tecki v. Official Comm. of Unsecured Creditors*, 780 F.3d 731, 742 (7th Cir. 2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) ("[N]eutral, generally applicable laws may be applied to religious practices even when not supported by a compelling government interest.")). But Mayle's claim fails because the motto's placement on currency has the secular purpose of recognizing the religious component of our nation's history, *see Sherman*, 980 F.2d at 446-47, and it does not affect current religious practices. The motto appears on all currency, in addition, which means that law in question is generally applicable.

Under RFRA, Mayle must allege plausibly that the exercise of his religion is substantially burdened by the motto's placement on currency. *See Korte v. Sebelius*, 735 F.3d 654, 673 (7th Cir. 2013). Mayle argues that having the motto printed on currency forces him to choose between using cash, a necessary part of life, and violating his sincerely held religious beliefs. Using the currency makes him feel "guilt, shame and above all else fear," and those feelings, he contends, qualify as a substantial burden. He likens himself to

a fundamentalist Christian baker who would be forced to endorse gay marriage—a practice that violates his religious beliefs—by selling a couple a wedding cake. This term the Supreme Court is considering that baker's case. *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, *cert. granted*, 138 S. Ct. 419 (U.S. Oct. 30, 2017) (No. 16-111). No matter how that case is decided, however, no reasonable person would believe that using currency has religious significance. *See Wooley*, 430 U.S. at 717 n.15. And because using money is not a religious exercise, and the motto has secular as well as religious significance, Mayle has not plausibly alleged that the motto's placement on currency increases the burden on practicing Satanism. Moreover, *Hobby Lobby*, a case upon which Mayle relies, does not stand for the proposition that the government must accommodate every person who believes that a particular law is incompatible with the person's sincerely held religious beliefs. 134 S. Ct. at 2760, 2783. Unlike the plaintiffs in *Hobby Lobby* and *Thomas v. Review Board of Indiana Employment Security Division*, Mayle has not suffered a financial burden because of his religious beliefs, nor has he altered his behavior to avoid violating his religious beliefs. *See id.* at 2766, 2755; 450 U.S. 707, 709-12, 716-18 (1981). Mayle's feelings are not insignificant, but the burden he experiences is not substantial.

Mayle last attempts to state a claim under the Equal Protection component of the Fifth Amendment. He argues that the government's inclusion of what he describes as a Christian message on currency, but not any Satanist or other religious dogma, amounts to irrational government discrimination. (Christianity, of course, is not unique in its monotheism; the same

can be said of Judaism and Islam, but this fact does not matter to our analysis.) We approach this as we would an equal-protection claim under the Fourteenth Amendment, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 217-18 (1995), while applying rational-basis scrutiny. *See St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 638 (7th Cir. 2007) (when Free Exercise claim has failed, rational-basis scrutiny applied to religious equal-protection claim based on same facts). To proceed on this claim, Mayle must plausibly allege government action "wholly unrelated to any legitimate state objective." *Vision Church v. Vill. of Long Grove*, 468 F.3d 975, 1001 (7th Cir. 2006) (citation omitted). But as multiple courts have said, the motto's placement on currency is related to at least one legitimate governmental objective—acknowledging an aspect of our nation's heritage. *See, e.g.*, *Lynch*, 465 U.S. at 676, 686; *Sherman*, 980 F.2d at 446-47.

For all of these reasons, we join every court that has directly addressed these issues in holding that it is neither unconstitutional nor a violation of RFRA to print the national motto on currency. *See, e.g.*, *Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014); *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1978); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970). We do so not because we think that the phrase "In God We Trust" is absolutely devoid of religious significance, but instead because the religious content that it carries does not go beyond statutory or constitutional boundaries.

We thus AFFIRM the judgment of the district court.

## ORDER OF THE DISTRICT COURT ILLINOIS (SEPTEMBER 29, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KENNETH MAYLE,

*Plaintiff,*

v.

UNITED STATES OF AMERICA, ET AL.,

*Defendants.*

Case No. 17 C 3417

Before: Amy J. St. EVE,
United States District Court Judge.

The Court grants Defendants' motion to dismiss with prejudice and dismisses this lawsuit in its entirety. [15]. All pending dates and deadlines are stricken. Civil case terminated.

### STATEMENT

On May 5, 2017, pro se Plaintiff Kenneth Mayle filed a Complaint against Defendants United States of America, the United States Secretary of the Treasury, and other federal government officials for violating the United States Constitution and the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C.

§ 2000bb-1.[1] Also, pro se Plaintiff paid the $400 filing fee on May 5, 2017. Before the Court is Defendants' motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court grants Defendants' motion with prejudice and dismisses this lawsuit in its entirety.

## LEGAL STANDARD

"A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the viability of a complaint by arguing that it fails to state a claim upon which relief may be granted." *Camasta v. Jos. A. Bank Clothiers, Inc.*, 761 F.3d 732, 736 (7th Cir. 2014). Under Rule 8(a)(2), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under the federal pleading standards, a plaintiff's "factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007). Put differently, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). When determining the sufficiency of a complaint under the plausibility standard, courts must "accept all well-pleaded facts as true and draw reasonable inferences in the plaintiffs' favor." *Roberts v. City of Chicago*, 817 F.3d 561, 564 (7th Cir. 2016).

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[1] On July 7, 2017, the parties stipulated to the dismissal of Defendant Congress of the United States of America pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii).

## BACKGROUND

Construing his pro se allegations liberally, *see Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 811 (7th Cir. 2017), Plaintiff challenges the use of the phrase "In God We Trust" on the nation's currency.[2] Plaintiff alleges that he is a non-theistic Satanist and that Satanism rejects the existence of supernatural deities and celebrates, rather than rejects, the material and carnal universe. In his Complaint, Plaintiff alleges that "In God We Trust" is a direct endorsement of a supernatural deity that advocates for the destruction of people who reject the existence of deities. He further states that the nation's money forces him to carry forth a government message proclaiming the existence of "God" and professing "trust' in that God. In particular, he alleges that by using American currency, he is compelled to proselytize for an official government ideology that professes faith in one "God."

In Count I of his Complaint, Plaintiff alleges that "In God We Trust" on the nation's coins and currency violates RFRA. In Count II, he asserts that "In God We Trust" on the nation's coins and currency violates Congress' "enumerated power" limitation. Plaintiff further alleges an Equal Protection Clause claim in Count III and a First Amendment Free Speech Clause claim in Count IV. In Count V, Plaintiff contends that the use of the nation's motto "In God We Trust" on currency violates the First Amendment's Free Exercise Clause.

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[2] "In God We Trust" is the national motto. *See* 36 U.S.C. § 302.

## ANALYSIS

### I. RFRA and First Amendment Free Exercise Clause Claims–Counts I and V

Under RFRA, the government cannot "substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government can show the rule is in furtherance of a "compelling governmental interest" and is the "least restrictive means" of furthering that governmental interest. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2761 (2014); 42 U.S.C. § 2000bb-1. The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. 1, cl. 1. "The First Amendment, via its Free Exercise Clause, guarantees that government will not impinge on the freedom of individuals to celebrate their faiths, in the day-to-day, or in life's grand moments." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 856 (7th Cir. 2012).

Pro se Plaintiff is not the first individual who has challenged "In God We Trust" on the nation's coins and currency. In fact, it is well-settled that the nation's motto "In God We Trust" on currency does not violate the Free Exercise Clause or RFRA. *See Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014) ("the carrying of currency, which is fungible and not publicly displayed, does not implicate concerns that its bearer will be forced to proclaim a viewpoint contrary to his own"); *Newdow v. Lefevre*, 598 F.3d 638, 645-46 (9th Cir. 2010) ("national motto is of a 'patriotic or ceremonial character,' has no 'theological or ritualistic impact,' and does not constitute 'governmental

sponsorship of a religious exercise"') (citation omitted); *see also New Doe Child # 1 v. Cong. of the United States of Am.*, No. 5:16CV59, 2016 WL 6995358, at *2 (N.D. Ohio Nov. 30, 2016) ("Plaintiffs cannot demonstrate that the use of the motto on currency substantially burdens their religious exercise."); *Newdow v. United States*, No. 13 CV 741 HB, 2013 WL 4804165, at *4 (S.D.N.Y. 2013) ("[T]here is no showing of government coercion, penalty, or denial of benefits linked to the use of currency or the endorsement of the motto."); *Newdow v. Cong. of U.S. of Am.*, 435 F. Supp. 2d 1066, 1077 (E.D. Cal. 2006) ("Because the national motto has been held to be secular in nature, there is no proper allegation that the government compelled plaintiff to affirm a repugnant belief in monotheism").

Accordingly, because pro se Plaintiff cannot state a plausible claim under RFRA and the Free Exercise Clause, the Court grants Defendants' motion to dismiss Counts I and V. *See Iqbal*, 556 U.S. at 678 (complaint is plausible on its face when plaintiff alleges "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.").

## II. Enumerated Power Claim–Count II

Next, in Count II, Plaintiff alleges that Congress lacks the constitutional power to make religious claims such as printing "In God We Trust" on the nation's currency. *See* 31 U.S.C. §§ 5112(d)(1), 5114(b). Contrary to Plaintiff's assertion, in Article I, Section 8, the United States Constitution specifies that Congress, within its enumerated powers, has the power to "coin money," "regulate [its] value," and to "provide for

the punishment of counterfeiting." U.S. Const. Article I, Section 8. Congress also has the power to pass any laws "necessary and proper" to achieve those ends that are specifically enumerated. *See* U.S. Const. Article I, Section 8, cl. 18.

Moreover, the Court cannot grant the relief Plaintiff seeks against Congress because the parties have voluntarily dismissed Congress from this lawsuit. In addition, in his response and sur-reply briefs, Plaintiff makes no mention of his enumerated power claim, and thus has abandoned it. *See Steen v. Myers*, 486 F.3d 1017, 1020-21 (7th Cir. 2007) (absence of discussion in briefs amounts to abandonment of claim). The Court therefore grants Defendants' motion to dismiss Count II.

### III. Equal Protection Claim–Count III

In Count III of his Complaint, pro se Plaintiff alleges an Equal Protection Clause claim stating that by "placing 'In God We Trust' on the money, Defendants are clearly disrespecting Plaintiff's religious views, while supporting the majority's monotheistic religious beliefs." The Equal Protection Clause prohibits a state from denying to "any person within its jurisdiction the equal protection of the laws." U.S. Const. Am. XIV, § 1. The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1050 (7th Cir. 2017) (citation omitted).

Pro se Plaintiff's Equal Protection Clause Claim necessarily fails because the statutes allowing for the engraving and printing of currency affect all citizens equally–regardless of their religious beliefs. *See Smith*

*v. Severn*, 129 F.3d 419, 429 (7th Cir. 1997) ("An equal protection violation occurs only when different legal standards are arbitrarily applied to similarly situated individuals"); *see, e.g.*, *New Doe Child # 1*, 2016 WL 6995358, at *4. The Court thus grants Defendants' motion to dismiss Count III.

## IV. First Amendment Free Speech Claim–Count IV

Last, pro se Plaintiff alleges a First Amendment Free Speech Clause Claim, namely, that by inscribing the terms "In God We Trust" on the nation's coins and currency bills—with the specific intention of having individuals proselytize that religious message—Defendants have violated his free speech rights. In general, "leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

In the context of compelled speech, the Supreme Court, in dicta, rejected Plaintiff's argument approximately forty years ago. *See Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977). To clarify, in *Wooley*, the Supreme Court "held that New Hampshire's compulsory 'Live Free or Die' license plates violated the First Amendment rights of plaintiffs, who were Jehovah's Witnesses, but noted that it did not view the ruling as one that would apply to the country's currency: 'currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.'"

*Newdow*, 753 F.3d at 109 (quoting *Wooley*, 430 U.S. at 717 n.15). Based on *Wooley*, federal courts have rejected free speech challenges to "In God We Trust" on the nation's currency. *See New Doe Child # 1*, 2016 WL 6995358, at *3 ("Printing the motto on currency is distinguishable from forcing an individual to salute the flag or display a license plate. . . . No reasonable viewer would think a person handling money does so to spread its religious message."). As such, the Court grants Defendants' motion to dismiss Count IV.

/s/ Amy J. St. Eve
United States District Court Judge

Dated: September 29, 2017

## ORDER OF THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (AUGUST 6, 2018)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

KENNETH MAYLE,

*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA, ET AL.,

*Defendants-Appellees.*

No. 17-3221

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17 C 3417–Amy J. St. Eve, Judge.

Before: WOOD, Chief Judge,
MANION, and ROVNER, Circuit Judges.

Plaintiff-appellant filed a petition for rehearing and rehearing *en banc* on July 12, 2018. No judge[1] in regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing.

[1] Judge Amy J. St. Eve did not participate in the consideration of this matter.

The petition for rehearing and rehearing *en banc* is therefore DENIED.

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