Case No. 17-3221

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

KEN MAYLE

Plaintiff-Appellant

v.

UNITED STATES, ET AL.,

Defendants-Appellees,

On Appeal from the United States District Court
for the Northern District of Illinois

AMICI CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE, AND THE COMMITTEE TO PROTECT THE NATIONAL MOTTO SUPPORTING APPELLEES AND AFFIRMANCE

LAURA B. HERNANDEZ*
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

* Not admitted in this jurisdiction

Attorneys for Amici Curiae

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The ACLJ is a non-profit legal corporation dedicated to the defense of constitutional liberties secured by law. The ACLJ has no parent corporation and issues no stock.

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INTEREST OF *AMICI*[1]

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) (counsel for Petitioner); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) (counsel for Amicus Curiae).

This brief is also filed on behalf of the ACLJ's Committee to Protect the National Motto which consists of over 315,000 Americans who oppose Appellant's 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 affirmance of the district court's decision. While the First Amendment affords

[1] Counsel for Appellees consented to the filing of this amicus brief but Appellant declined consent. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Appellant complete freedom to embrace any religious belief, it does not compel the federal judiciary to redact the national motto from the Nation's currency.

ARGUMENT

I. The National Motto Does in Fact Reflect the Historical Fact that this Nation Was Founded upon a Belief in God.

Appellant's quarrel is essentially with a foundational principle of America: the nation's Founders based a national philosophy on a belief in Deity. The Declaration of Independence[2] 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 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

[2] 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, *A Summary View of the Rights of British America* (1774), *reprinted in Thomas Jefferson: Writings* 103, 122 (Merrill D. Peterson ed., 1984).

they are not to be violated but with His wrath?" Thomas Jefferson, *Notes on the State of Virginia* Q.XVIII (1782), *reprinted in Thomas Jefferson: Writings* 123, 289 (Merrill D. Peterson ed., 1984).

While Jefferson certainly opposed state compulsion of religious observance, he had "no objection to official acknowledgment of God." *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (en banc). Jefferson's *Bill for Establishing Religious Freedom* states that "Almighty God hath created the mind free, and manifested his Supreme will that free it shall remain . . . ." 243 F.3d at 301 (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 12, 1779), *reprinted in* 5 Founders' Constitution 77). 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).

The national motto simply echoes the principle found in the Declaration of Independence that our freedoms come from God and not the state. "Anchoring basic rights upon a metaphysical source is very much part of that structural separation [of powers], 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 Minority Religious Preferences.

Appellant asserts that the nation's currency must be purged of the national motto inscription to avoid a violation of his First Amendment rights. It is clear, however, from the Supreme Court's Establishment Clause jurisprudence[3] that the First Amendment 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

[3] Despite not having asserted an Establishment Clause claim in his Complaint, Appellant raises the argument for the first time in his opening brief.

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).

As this Court recognized in *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437, 446-47 (7th Cir. 1992), a decision invalidating the National Motto would render constitutionally suspect a number of practices that traditionally have been considered an important part of American society. For example, the practice of requiring public school students to learn and recite passages from foundational historical documents reflecting the Nation's religious heritage would be unconstitutional as "compelled speech" under Appellant's theory. The Mayflower

Compact,[4] the Declaration of Independence, and the Gettysburg Address[5] all contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313; *see also Sherman*, 980 F.2d at 446–47; *Newdow v. U.S. Cong.*, 328 F.3d 466, 473 (9th Cir. 2003)

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

> *In the Name of God, Amen.* We whose Names are under-written, 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 Countrey, 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 our selves together into a Civil Body Politick, 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 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), *reprinted in* George Ernest Bowman, *The Mayflower Compact and Its Signers* 15, 15 (1920) (emphasis added), https://babel.hathitrust.org/cgi/pt?id=loc.ark:/13960/t5h99gm63;view=1up;seq=19.

[5] 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 (Nov. 19, 1863) (emphasis added).

(O'Scannlain, J., dissenting from denial of rehearing en banc) ("If reciting the Pledge [of Allegiance] is truly 'a religious act' . . . , then so is the recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem." (footnotes omitted)). As Justice O'Connor wrote, "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." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44–45 (2004) (O'Connor, J., concurring).

Dicta in several United States Supreme Court decisions establish that the National Motto is a constitutional acknowledgment of the Nation's religious heritage. *See, e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 716 (2005) (Stevens & Ginsburg, JJ., dissenting); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37 (2004) (O'Connor, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 602–04, 673 (1989) (Opinions joined by all the Justices); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) majority opinion); *id* at. 687 (O'Connor, J., concurring); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

In *Sherman v. Cmty. Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), this Court understood the various Supreme Court opinions addressing the national

motto as dispositive on the question of the national motto's constitutionality. "If the 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.

Additionally, other lower courts are unanimous in holding that the inscription of the national motto on the nation's currency is constitutional. *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (per curiam); *Newdow v. Lefevre*, 598 F.3d 638, 640 (9th Cir. 2010); *Kidd v. Obama*, 387 Fed. App'x. 2, 2 (D.C. Cir. 2010) (per curiam); *Gaylor v. United States*, 74 F.3d 214, 217–18 (10th Cir. 1996); *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970); *New Doe Child v. Cong. of the United States*, 2016 U.S. Dist. LEXIS 165156 (N.D. Ohio Nov. 30, 2016); *O'Hair v. Blumenthal*, 462 F. Supp. 19, 19–20 (W.D. Tex. 1978), *aff'd sub nom. O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam); *cf. Lambeth v. Bd. of Comm'rs*, 321 F. Supp. 2d 688, 707 (M.D.N.C. 2004) (relying on currency cases to hold that displaying "In God We Trust" on a government building did not violate the Establishment Clause); *Meyers v. Loudoun Cty. Sch. Bd.*, 251 F. Supp. 2d 1262, 1274–75 (E.D. Va. 2003) (relying, in part, on currency cases to hold that displaying "In God We Trust" in a school building did not violate the Establishment Clause); *Schmidt v. Cline*, 127 F. Supp. 2d 1169,

1178 (D. Kan. 2000) (relying on currency cases to hold that displaying "In God We Trust" in a County Treasurers office did not violate the Establishment Clause).

In short, the national motto cannot be understood to violate the Establishment Clause unless the Founders are viewed as "unable to understand their handiwork (or, worse, hypocrites about it)." *Sherman*, 980 F.2d at 445.

III. Appellant's Free Speech Claim Is Meritless.

The inscription of the national motto on the nation's currency is government speech which cannot be imputed to Appellant, and which compels no one to say anything. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (law requiring military recruiters' access to law school facilities did not compel law schools' speech in support of military recruiters); *Pleasant Grove City v. Summum*, 555 U.S. 460, 471, 473 (2009) (donated monument in public park is government speech where "there is little chance that observers will fail to" understand that the government is speaking, and the government "'effectively control[s]' the message[] . . . by exercising 'final approval authority'" over the message (citation omitted)); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.").

The United States government exercises complete editorial control over

contents of the nation's currency. *See, e.g.*, 18 U.S.C. §§ 331, 333 (2012) (proscribing defacement of United States currency). That control "unmistakably signif[ies] to all [citizens] that the [government] intends the [currency] to speak on its behalf." *Summum*, 555 U.S. at 474. There is virtually no chance Appellant's use of currency would be interpreted as his speech. In *Wooley v. Maynard*, 430 U.S. 705 (1977), both the majority and dissenting opinions rejected the notion that the National Motto on the Nation's currency implicates free speech rights.

> It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Id. at 717 n.15; *see also id*. at 722 (Rehnquist, J., dissenting) ("The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'")*; cf. Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014) (per curiam).

Passing currency is not compelled speech because any reasonable observer understands that the message on national currency was government selected. There is therefore no likelihood that passing currency would be understood as

Appellant's speech by those who receive the money.

IV. Appellant Lacks Standing to Assert Free Exercise and RFRA Claims Because He Has Alleged No Legally Cognizable Injury.

Government expression on government-issued currency does not, in the absence of other governmental compulsion, inflict a legally cognizable injury under RFRA and the Free Exercise Clause.[6] Although Appellant asserts injury from having to "repeatedly carry money bearing religious symbolism which is not only contrary to his religious beliefs, but which also directly attacks his religious faith, Brief of Appellant at 14, his "injury" distills down to mere disagreement with the Government's chosen message. Appellant's RFRA and Free Exercise Clause claims are premised on nothing more than **"**offended observer standing," which though recognized in the Establishment Clause context, *see, e.g.*, *Books v. Elkhart County*, 401 F.3d 857 (7th Cir. 2005), does not extend to RFRA and Free Exercise Clause claims.

To have standing to pursue a claimed violation of the Free Exercise Clause, the plaintiff must allege that his own "particular religious freedoms are infringed."

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[6] The "irreducible constitutional minimum of standing contains three elements": (1) injury-in-fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992).

School District of Abington v. Schempp, 374 U.S. at 224 n.9; see also *Harris v. McRae*, 448 U.S. 297, 321(1980) ("It is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." (quoting *Schempp*, 374 U.S. at 223)).

Just as Appellant's Free Speech Clause claim fails because he is not compelled to say anything, his Free Exercise Clause and RFRA claims fail because he has not alleged any governmental coercion to do, or refrain from doing, anything.[7] Appellant's "injury" is qualitatively indistinguishable from the injury suffered by taxpayers who object on religious grounds to certain government expenditures. Where there is no direct interference with religious conduct or belief, there is no taxpayer standing to assert Free Exercise claims. *See, e.g., Tarsney v. O'Keefe*, 225 F.3d 929, 938 (8th Cir. 2000) (No direct Article III injury where government funding of abortion violates plaintiffs' religious convictions but does

[7] Appellant does not allege, for example, that he is denied the receipt of government benefits for his refusal to use U.S. currency. *See, e.g. Bowen v. Roy*, 476 U.S. 693 (1986) (parents of a Native American child challenged the constitutionality of using social security numbers in the federal food stamp and AFDC programs). If Appellant's injury is cognizable under Article III, there would be standing to bring Free Exercise claims any time someone objects on religious grounds to speech in other government-issued documents which are routinely carried on one's person, such as driver's licenses, passports, and social security cards.

not otherwise interfere with plaintiffs' religious belief or practice). In fact, Appellant's injury in this case is even less than the injury alleged in *Tarsney*. There was no question that the Plaintiffs in *Tarsney* were compelled to pay taxes and that some of their money was used to subsidize activity to which they objected on religious grounds. Here, Appellant does not allege that the government compels him to carry currency,[8] and he does not allege any other direct government interference with his religious beliefs or practice.

Appellant's injury is no more than "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 485 (1982). Such an injury is insufficient to establish Article III standing. *Steele Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("psychic satisfaction . . . does not redress a cognizable Article III injury"). Because Appellant has alleged no direct government interference with his religious beliefs, he can show nothing more than offense, which is not a legally cognizable injury under the Free Exercise Clause and RFRA.

[8] It is, of course, now possible to conduct the overwhelming majority of financial transactions without using currency.

CONCLUSION

For the foregoing reasons, Amici respectfully ask this Court to affirm the District Court's judgment.

Respectfully Submitted,

/s/ Jay Alan Sekulow

LAURA B. HERNANDEZ*
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

JAY ALAN SEKULOW
Counsel of Record
STUART J. ROTH
AMERICAN CENTER FOR LAW & JUSTICE
[redacted]

* Not admitted in this jurisdiction

Attorneys for Amici Curiae