IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

NEW DOE CHILD #1, et al.,	)	
	)	Civil Action No. 5:16-cv-00059
Plaintiffs,	)	
v.	)	
THE CONGRESS OF THE UNITED STATES OF AMERICA, et al.,	)	Judge Benita Y. Pearson
Defendants.	)	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United State Supreme Court

United States Court of Appeals

United States District Court

Statutes

Other Authorities

INTEREST OF *AMICI*

Amici, United States Members of Congress, J. Randy Forbes, Senator James Lankford, Senator Roy Blunt, Senator Steve Daines, Senator Jerry Moran, Robert Aderholt, Lou Barletta, Rob Bishop, Diane Black, Doug Collins, K. Michael Conaway, Kevin Cramer, Jeff Duncan, John Fleming, Trent Franks, Louie Gohmert, Bob Goodlatte, Garret Graves, H. Morgan Griffith, Glenn Grothman, Gregg Harper, Vicky Hartzler, Jody Hice, Richard Hudson, Tim Huelskamp, Randy Hultgren, Bill Johnson, Sam Johnson, Walter Jones, Doug LaMalfa, Doug Lamborn, Robert Latta, Barry Loudermilk, Blaine Luetkemeyer, Tom McClintock, Jeff Miller, Randy Neugebauer, Dan Newhouse, Steven Palazzo, Steve Pearce, Robert Pittenger, Joe Pitts, Tom Price, John Ratcliffe, Peter Roskam, Pete Sessions, Michael R. Turner, Tim Walberg, Mark Walker, and Daniel Webster are currently serving in the One Hundred Fourteenth 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) (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 120,000 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. While the First Amendment affords atheists complete freedom to disbelieve, it does not compel the federal

judiciary to redact the national motto from the Nation's currency.

ARGUMENT

Plaintiffs bootstrap Free Speech, Free Exercise and Religious Freedom Restoration Act (RFRA) claims onto the unanimously repudiated proposition that the National Motto is an unconstitutional government sponsorship of religion.[1] Plaintiffs' quarrel is essentially with a foundational principle of America. Just as the National Motto is constitutional under the Establishment Clause, it is also constitutional under the Free Exercise and Free Speech Clauses, as well as RFRA.

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[1] In ¶¶ 118-377 of their Amended Complaint, Plaintiffs set forth factual allegations clearly tailored to an Establishment Clause Claim, which Plaintiffs then do not assert.

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, J., 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); *Sch. Dist. v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

Additionally, the 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); *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).

The Sixth Circuit expressed its view in dicta that the national motto is constitutional in *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (en banc).

I. THE NATIONAL MOTTO DOES IN FACT REFLECT THE HISTORICAL FACT THAT THIS NATION WAS FOUNDED UPON A BELIEF IN GOD.

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 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). 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,

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[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).

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.

A decision invalidating the national motto on Free Speech and Free Exercise grounds 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 Plaintiffs' theory. The Mayflower Compact[3] and the Declaration of Independence, and the Gettysburg Address,[4] all contain religious references substantiating the fact that America's "institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313; *see also Newdow v. U.S. Cong.*, 328 F.3d 466, 473 (9th Cir. 2003) (O'Scannlain, J., dissenting from denial of rehearing en banc) (If reciting the Pledge of Allegiance is truly "'a religious act' . . . then so is recitation of the Constitution itself, the Declaration of Independence, the Gettysburg Address, the National Motto, or the singing of the National Anthem" (footnotes omitted)).

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[3] 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.

[4] 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).

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).

III. PLAINTIFFS' FREE SPEECH CLAIM IS MERITLESS.

The inscription of the national motto on the nation's currency is government speech which cannot be imputed to Plaintiffs, and which compels no one to say anything. *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (No free speech violation where law schools not required to speak in support of military recruiters' access to law students; mere cooperation with military recruiters is not compelled speech); *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 an observer would fail to" understand that the government was speaking, and the government "effectively controlled the message" by exercising "final approval authority" over the message.); *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 "unmistakeably signifies 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 Plaintiffs' use of currency would be interpreted as Plaintiffs' speech. The inscription of the National Motto on currency is not compelled speech any more than speech on driver's licenses or Social Security cards is compelled speech.

In *Wooley v. Maynard*, 430 U.S. 705 (1977), both the majority and dissenting opinions

rejected in dicta 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).

Plaintiffs' free speech rights are intact and their claim should be dismissed.

IV. PLAINTIFFS' LACK STANDING TO ASSERT FREE EXERCISE AND RFRA CLAIMS BECAUSE THEY HAVE 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.[5] Although Plaintiffs' assert injury from having to "bear a religiously offensive message," *see e.g.*, Am. Compl. ¶¶ 32, 400, 440, their "injury" distills down to mere disagreement with the Government's chosen message. Plaintiffs' 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., Washegesic v. Bloomington Pub. Sch.*, 33 F.3d 679, 682–83 (6th Cir. 1994), does not extend to RFRA and Free Exercise Clause claims.

[5] 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).

Just as Plaintiffs' Free Speech Clause claim fails because they are not compelled to say anything, their Free Exercise Clause and RFRA claims fail because Plaintiffs have not alleged any governmental coercion to do, or refrain from doing, anything.[6] Plaintiffs' "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 not otherwise interfere with plaintiffs' religious belief or practice). In fact, Plaintiffs' 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, Plaintiffs do not allege that the government compels them to carry currency,[7] and they do not allege any other direct government interference with their atheistic beliefs or practice.

Plaintiffs' 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

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[6] Plaintiffs do not allege, for example, that they are denied the receipt of government benefits for their 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 Plaintiffs' 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.

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

insufficient to establish Article III standing.[8] *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 Plaintiffs have alleged no direct government interference with their religious beliefs, they can show nothing more than offense, which is not a legally cognizable injury under the Free Exercise Clause and RFRA.

[8] Although the Sixth Circuit has held that mere exposure to religious expression on government property is sufficient to confer standing in an Establishment Clause case, *see, e.g.*, *Washegesic v. Bloomington Pub. Sch.*, 33 F.3d. 679, 682–83 (6th Cir. 1994), Plaintiffs do not assert an Establishment Clause claim. No court has held that mere offense at government speech is sufficient to confer standing to assert a Free Exercise Clause claim.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully urge this Court to grant Defendant's Motion to Dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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Dated: June 13, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 7.1(F)

The undersigned counsel of record for *Amici* certifies that this brief complies with the page limitation of Rule 7.1(f) because this brief contains 10 pages, excluding the parts of the brief exempted by Rule 7.1(f).

Dated: June 13, 2016

/s/ *Patrick M. McLaughlin*
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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2016, 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.

Dated: June 13_, 2016

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