No. 19-

IN THE
Supreme Court of the United States

NEW DOE CHILD #1, ET AL.;

Petitioners,

v.

THE UNITED STATES OF AMERICA, ET AL.;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Item A

Court of Appeals' Opinion
(filed August 28, 2018)

United States Court of Appeals
For the Eighth Circuit

No. 16-4440

New Doe Child #1; New Doe Child #2; New Doe Child #3; New Doe Parent; New Roe Child; New Roe Parent; New Boe Child; New Boe Parent; New Poe Child; New Poe Parent; New Coe Child #1; New Coe Child #2; New Coe Child #3; New Coe Parent; Gary Lee Berger; Marie Alena Castle; Charles Daniel Christopher; Patrick Ethen; Betty Gogan; Thomas Gogan; Roger W. Kaye; Charlotte Leverette; Dr. James B. Lyttle; Kyle Pettersen-Scott; Odin Smith; Andrea Dawn Sampson; Eric Wells; Atheists for Human Rights (AFHR); Saline Atheist & Skeptic Society

Plaintiffs – Appellants

v.

The United States of America; Steven T. Mnuchin,[1] Secretary of the Treasury; David J. Ryder,[2] Director, United States Mint; Leonard R. Olijar, Director, Bureau of Engraving and Printing

Defendants – Appellees

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[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Steven T. Mnuchin has been automatically substituted as a party.

[2] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), David J. Ryder has been automatically substituted as a party.

The Becket Fund for Religious Liberty

Amicus on Behalf of Appellee(s)

Appeal from United States District Court for the District of Minnesota - Minneapolis

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Submitted: March 13, 2018
Filed: August 28, 2018

Before GRUENDER, BEAM, and KELLY, Circuit Judges.

GRUENDER, Circuit Judge.

This case presents a challenge to the inscription of the national motto, "In God We Trust," on United States coins and currency. The Plaintiffs are twenty-seven individuals who are atheists or children of atheists and two atheist organizations who "definitely do not trust in God." They brought this action against the United States and officials from the United States Mint, Treasury, and Bureau of Engraving and Printing (collectively "the Government"), raising various constitutional and statutory challenges. In the complaint, the Plaintiffs allege that the statutes requiring the inscription of the national motto on U.S. coins and currency, 31 U.S.C. §§ 5112(d)(1) & 5114(b), violate the Establishment Clause, the Free Speech Clause, and

the Free Exercise Clause of the First Amendment; the Religious Freedom Restoration Act ("RFRA"); and the Equal Protection component of the Fifth Amendment. They seek declaratory relief and a permanent injunction barring the Government from minting coins or printing currency with the phrase "In God We Trust." The Government filed a motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss the action for failure to state a claim, which the district court granted.[3] Plaintiffs timely appealed.

Having satisfied ourselves that we have jurisdiction to hear each challenge, *see Nolles v. State Comm. for Reorganization of Sch. Dists.*, 524 F.3d 892, 897 (8th Cir. 2008), we now review *de novo* the district court's grant of the motion to dismiss, *see Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 927 (8th Cir. 2016). We address each challenge in turn, and we affirm.

I.

A.

The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion." U.S. Const. amend. I. Plaintiffs argue that placing the motto "In God We Trust" on coins and currency violates the Establishment Clause because "the text is purely religious." In their view, the motto

[3] The Honorable Wilhelmina M. Wright, United States District Judge for the District of Minnesota.

is an explicit endorsement of Christianity and monotheism, with the purpose and effect of spreading that faith and coercing non-believers to participate in religious acts. Thus, the Plaintiffs claim, the motto's continued use on U.S. money constitutes "an actual establishment of religion" under "every test enunciated by the Supreme Court."

We note at the outset that each of our sister circuits to have considered the question has found that placing "In God We Trust" on U.S. coins and currency does not violate the Establishment Clause. *See Mayle v. United States*, 891 F.3d 680, 684-86 (7th Cir. 2018); *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014) (per curiam); *Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979) (per curiam); *Kidd v. Obama*, 387 F. App'x 2 (D.C. Cir. 2010) (per curiam). In *dicta*, the Supreme Court has repeatedly suggested the same.[4] *See, e.g.*, *Lynch v.*

[4] While undoubtedly important to our analysis, Supreme Court *dicta* does not dictate the outcome of this case. This court, sitting *en banc*, recently clarified the role of Supreme Court *dicta* in our decisionmaking: "Although panels have held that federal courts are 'bound' by Supreme Court dicta, this goes too far. Appellate courts should afford deference and respect to Supreme Court dicta, particularly where, as here, it is consistent with longstanding Supreme Court precedent." *In re Pre-Filled Propane Tank Antitrust Litig.*, 860 F.3d 1059, 1064 (8th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct.

Donnelly, 465 U.S. 668, 676 (1984); *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 602-03 (1989). Thus, we are not writing on a blank slate.

We do, however, address this issue for the first time today under the guidance of new Supreme Court precedent, not yet considered in this circuit. *See Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). Over the last half century, the Supreme Court has adopted numerous tests to interpret the Establishment Clause, without committing to any one. *See Lynch*, 465 U.S. at 678-79; *see also Van Orden v. Perry*, 545 U.S. 677, 692 (2005) (Scalia, J., concurring). Its most recent direction[5] came in *Town of Greece v. Galloway*. As we have noted, in particularly complex and changing areas of the law, the "prudent course for an inferior court . . . is to hew closely to the Court's specific, contemporary guidance." *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013). Thus, we analyze *Galloway* with particular care.

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647 (2018). Thus, like our sister circuits, we respectfully consider the Supreme Court's statements on this issue, but we do not stop our analysis there. *See, e.g.*, *Mayle*, 891 F.3d at 684-86.

[5] The Court addressed an Establishment Clause challenge in *Trump v. Hawaii*, but expressly noted that the case was atypical. 138 S. Ct. 2392, 2418, 2420 & n.5 (2018).

In *Galloway*, the Supreme Court offered an unequivocal directive: "[T]he Establishment Clause *must* be interpreted by reference to historical practices and understandings." 134 S. Ct. at 1819 (internal quotation marks omitted) (emphasis added). The Court adopted the principle that the "line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[6] *Id.* (quoting *Sch. Dist. Of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)). *Galloway* involved a challenge to a town's practice of opening its board meetings with a prayer that often contained sectarian language. *See id.* at 1815-17. In upholding the practice, the Court

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[6] The Court explained that it was applying the historically focused "rationale" set out in *Marsh v. Chambers*, 463 U.S. 783 (1983), a case involving legislative prayer. *See Galloway*, 134 S. Ct. at 1824, 1818-19. In the past, *Marsh* had sometimes been "described as carving out an exception to the Court's Establishment Clause jurisprudence, because it sustained legislative prayer without subjecting the practice to any of the formal 'tests' that have traditionally structured this inquiry." *Id.* at 1818 (internal quotation marks omitted). In *Galloway*, however, the Court clarified that "*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings." *Id.* at 1819 (internal quotation marks omitted).

first looked to historical practices as evidence that the town's prayer was permitted by the Establishment Clause. *Id.* at 1818-24. A majority of the Court then considered whether the prayer at issue was unduly coercive, again tying the prohibition against Government coercion of religion to history. *See id.* at 1825 (plurality opinion) (conducting a coercion analysis "against the backdrop of historical practice"); *id.* at 1837 (Thomas, J., concurring in part and concurring in the judgment) (looking at the kind of coercion that was "a hallmark of historical establishments of religion"). This two-fold analysis is complementary: historical practices often reveal what the Establishment Clause was originally understood to permit, while attention to coercion highlights what it has long been understood to prohibit.

Some have read *Galloway* as "a major doctrinal shift" in Establishment Clause jurisprudence. *See Smith v. Jefferson Cty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 602 (6th Cir. 2015) (Batchelder, J., concurring in part and concurring in the result); *see also Felix v. City of Bloomfield*, 847 F.3d 1214, 1219 (10th Cir. 2017) (Kelly, J., dissenting from the denial of rehearing en banc). Given (1) *Galloway*'s unqualified directive that the Establishment Clause "must" be interpreted according to historical practices and understandings, 134 S. Ct. at 1819; (2) its emphasis that this historical approach is not limited to a particular factual context, *id.* at 1818-19; and (3) the

absence of any reference to other tests in the Court's opinion, we agree.[7]

To be sure, the precise implications of this shift are not yet clear.[8] What is clear, however, is that

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[7] Though the concurring opinion maintains that "history alone cannot carry the day" where the Court's other Establishment Clause tests suggest that a practice is unconstitutional, *Galloway* states otherwise: "*Any* test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Id.* at 1819 (emphasis added). Indeed, the Court emphasized "that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." *Id.* The Court reasoned that a "test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." *Id.*

[8] We find *Galloway*'s emphasis on historical understanding difficult to reconcile with some of the Supreme Court's earlier pronouncements on the Establishment Clause. But, as a lower court, and whatever the bounds of *Galloway*, we will continue to apply the Court's earlier tests when directly applicable. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should

Galloway provides the framework for analyzing this case. In the past, this court's approach to Establishment Clause jurisprudence has been to analyze the case before us under the most analogous Supreme Court decision.[9] *See, e.g.*, *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 778 n.8 (8th Cir. 2005) (en banc) (applying one test to the exclusion of others when analyzing the constitutionality of a Ten Commandments monument); *Jackson v. Nixon*, 747 F.3d 537, 541-42 (8th Cir. 2014) (same when analyzing a prison policy that conditioned benefits on attendance at a nonsecular substance abuse treatment program); *Roark v. S. Iron R-1 Sch. Dist.*, 573 F.3d 556, 563 & n.4 (8th Cir. 2009) (same when analyzing the distribution of religious literature to school children). Here, *Galloway* is best suited to the challenge before us because both the prayer at issue in that case and

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follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *cf. Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949 (8th Cir. 2014) (noting that because the monument at issue in the case "is essentially the same as those in *Van Orden v. Perry*," it should "be evaluated under the standard in *Van Orden v. Perry*").

[9] This approach differs from that of courts that attempt to consider all—even sometimes conflicting—tests in a single case. *See, e.g.*, *Smith*, 788 F.3d at 586-87 (majority opinion) (applying "three main jurisprudential threads"); *Mayle*, 891 F.3d at 684-87 (applying at least three distinct Establishment Clause tests).

the inscription of the national motto at issue here represent Government acknowledgments of religion that "strive for the idea that people of many faiths may be united in a community of tolerance and devotion." *See Galloway*, 134 S. Ct. at 1823. Factually, this case falls within *Galloway*'s ambit.

We will therefore analyze the Plaintiffs' Establishment Clause claim under *Galloway* and ask two questions. First, what do historical practices indicate about the constitutionality of placing the national motto on money? Second, is the motto impermissibly coercive?

B.

We begin by looking to historical practices. Where "history shows that the specific practice is permitted," we typically need go no further; the Establishment Clause claim fails. *Galloway*, 134 S. Ct. at 1819; *see also id.* at 1834 (Alito, J., concurring). But where history has not spoken to the "specific practice" at hand, *Galloway* indicates that we look to the historical understandings of the Establishment Clause as informed by other relevant practices. *Id.* at 1819 (majority opinion).

The Plaintiffs—and the concurring opinion—rightly note that the specific practice of placing "In God We Trust" on U.S. money did not begin until 1864 and was not uniform across all currency until almost a century later. But the practice comports with early understandings of the Establishment Clause as illuminated by the actions of the First

Congress. The Supreme Court has long recognized the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. For example, "[t]he First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time." *Galloway*, 134 S. Ct. at 1818. Likewise, the "day after the First Amendment was proposed, Congress urged President Washington to proclaim a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2 (internal quotation marks omitted). "The same Congress also reenacted the Northwest Territory Ordinance of 1787, 1 Stat. 50, Article III of which provided: 'Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'" *McCreary Cty. v. ACLU*, 545 U.S. 844, 887 (2005) (Scalia, J., dissenting). These practices and others shed light on the historical understandings of religion's role in American life. As the Supreme Court has noted, "the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him." *See Schempp*, 374 U.S. at 213; *cf.* The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . .."). Thus, given that our founding documents protect rights that were thought to derive from God, it is

unsurprising that "religion has been closely identified with our history and government," a relationship still "evidenced today in our public life." *Schempp*, 374 U.S. at 212-13; *see also Galloway*, 134 S. Ct. at 1819.

Despite this unbroken history, the Plaintiffs emphasize that the national motto is, on its face, monotheistic and was originally inscribed on currency with an "intention to suffuse our nation with (Christian) Monotheistic religion," as revealed by the statements of various public officials and other evidence. They therefore assert that inscribing coins and currency with the motto violates the Establishment Clause because it (1) privileges monotheism and (2) was impermissibly motivated by a desire to advance that religion.

These contentions fail to state a claim under the Establishment Clause. First, although the motto refers to one God, historical practices confirm that the Establishment Clause does not require courts to purge the Government of all religious reflection or to "evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage." *City of Plattsmouth*, 419 F.3d at 778. Precluding general references to God would do exactly that. In *Galloway*, the Court communicated the same idea when rejecting the challenge to sectarian prayer. 134 S. Ct. at 1822 (suggesting that because "even seemingly general references to God or the Father might alienate nonbelievers or polytheists," that is evidently not the line drawn by the Constitution). In doing so, it cited Justice Scalia's

dissent in *McCreary County v. ACLU*, *see id.*, which explained that "[i]f religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all," 545 U.S. at 893 (Scalia, J., dissenting); *see also Mayle*, 891 F.3d at 687 (rejecting a similar challenge to the placement of the national motto on money "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"). As the Supreme Court has proclaimed time and again, our "unbroken history" is replete with these kinds of official acknowledgments, *see Lynch*, 465 U.S. at 674, which "demonstrate that there is a distance between the acknowledgment of a single Creator and the establishment of a religion." *McCreary Cty.*, 545 U.S. at 893 (Scalia, J., dissenting).[10] A theory that erases that distance necessarily fails.

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[10] Plaintiffs point out that "the individual freedom of conscience protected by the First Amendment" applies equally to "the conscience of the infidel, the atheist, or the adherent of a non-Christian faith" and "embraces the right to select any religious faith or none at all." *See Wallace v. Jaffree*, 472 U.S. 38, 52-53 (1985). This proposition is consistent with our decision today. *See McCreary Cty.*, 545 U.S. at 893 (Scalia, J., dissenting) ("That [principle of not favoring one religion over another is] valid . . . where public aid or assistance to religion is concerned, or where the free exercise of religion is at issue, but it necessarily applies in a more limited sense to public acknowledgment of the Creator." (citations omitted)).

Second, the Plaintiffs' contention that the stated motivations and purposes for placing "In God We Trust" on coins and currency somehow transform an otherwise constitutional practice into an unconstitutional establishment of religion also fails. We agree with the Seventh Circuit that this argument is "too simplistic." *See Mayle*, 891 F.3d at 685. The Constitution does not prevent the Government from promoting and "celebrat[ing] our tradition of religious freedom," even if the means of doing so—here, adding the national motto to U.S. money—was motivated "in part because of religious sentiment." *Id.* at 685-86. Placing "In God We Trust" on coins and currency is consistent with historical practices.

C.

We now consider whether the appearance of "In God We Trust" on U.S. money is coercive. "It is an elemental First Amendment principle that government may not coerce its citizens to support or participate in any religion or its exercise." *Galloway*, 134 S. Ct. at 1825 (plurality opinion) (internal quotation marks omitted). Here, the Plaintiffs argue that they are continually confronted with and coerced into proselytizing a religious idea they oppose.

We need not probe the bounds of the coercion analysis in this case because it is even more apparent than in *Galloway* that the Government does not compel citizens to engage in a religious observance when it places the national motto on money. *See Mayle*, 891 F.3d at 685 ("[I]f, as the Supreme Court has held, public or legislative prayer

does not force religious practice on an audience, 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." (citation omitted)). In *Galloway*, the respondents argued that they felt pressured to participate in the opening prayers at town meetings to curry favorable rulings from board members. 134 S. Ct. at 1825 (plurality opinion). The plurality explained that a "reasonable observer" would understand that by opening board meetings in prayer, the town was not proselytizing or "forc[ing] truant constituents into the pews"; it was not "compel[ling] Bits citizens to engage in a religious observance." *Id.* The Justices disagreed regarding the scope of the appropriate coercion analysis, but a majority agreed that "[o]ffense . . . does not equate to coercion" because "[a]dults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views . . . ." *Id.* at 1826; *id.* at 1838 (Thomas, J., concurring in part and concurring in the judgment).

Here, we recognize that convenience may lead some Plaintiffs to carry cash, but nothing compels them to assert their trust in God. Certainly no "reasonable observer" would think that the Government is attempting to force citizens to express trust in God with every monetary transaction. *See id.* at 1825 (plurality opinion); *Mayle*, 891 F.3d at 685. Indeed, the core of the Plaintiffs' argument is that they are continually confronted with "what they feel

is an offensive religious message." But *Galloway* makes clear that "[o]ffense . . . does not equate to coercion." 134 S. Ct. at 1826 (plurality opinion).

In sum, the Plaintiffs' Establishment Clause challenge in this case flouts *Galloway*'s caution that "Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Id.* at 1822 (majority opinion); *see also Lee v. Wiseman*, 505 U.S. 577, 598 (1992) ("A relentless and all-pervasive attempt to exclude religion . . . could itself become inconsistent with the Constitution."); *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 522 (6th Cir. 2017) (en banc) (Sutton, J., concurring) ("All references to any one faith or to religion in general, [the plaintiff] says, must be removed from governmental proceedings. Who is coercing whom under that approach? And what are we establishing?"). Because the long tradition of placing "In God We Trust" on U.S. money comports with the original understanding of the Establishment Clause, the Plaintiffs' claim fails.

II.

We next turn to the Plaintiffs' claim that inscribing the national motto on currency violates the Free Speech Clause because it compels them "to bear and proselytize what they feel is an offensive religious message." In *Wooley v. Maryland*, the Supreme Court explained that "the State's interest . . . to disseminate an ideology . . . cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message." 430 U.S. 705, 717 (1977). Applying this principle, the Court found that New Hampshire could not require its citizens to display publicly the words "Live Free or Die" on their license plates. *Id.* Here, the Plaintiffs argue that, like the citizens of New Hampshire, they are required to act as couriers of the Government's professed trust in God.

But *Wooley* itself forecloses this argument. In *Wooley*, the Supreme Court assuaged the concern that its holding would implicate the inscription of the motto on currency by highlighting the many differences between currency and license plates. *Id.* at 717 n.15. It explained that currency "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.*

Looking to *Wooley*, we agree with our sister circuits that the use or possession of U.S. money does

not require a person to express, adopt, or risk association with any particular viewpoint. *See Mayle*, 891 F.3d at 686; *New Doe Child #1 v. Congress of the U.S.*, 891 F.3d 578, 593-94 (6th Cir. 2018). The nature of currency is such that any expression thereon is distinctively the Government's own. *Mayle*, 891 F.3d at 686 (explaining that if a person involved in a commercial transaction "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," and "[s]he would not regard the motto as [an individual's] own speech"). The Government's inscription of "In God We Trust" on coins and currency does not compel the Plaintiffs to express any message. Therefore, the Plaintiffs fail to state a claim under the Free Speech Clause.

III.

The Plaintiffs also argue that including the motto on money violates their First Amendment rights under the Free Exercise Clause and statutory rights under RFRA by forcing them to affirm and spread a religious message with which they disagree.

A.

The Free Exercise Clause requires only that the statutes at issue be neutral and generally applicable; incidental burdens on religion are usually not enough to make out a free exercise claim. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). A law is not neutral, however, if its object or purpose is the "suppression of religion or religious conduct." *Church of the Lukumi Babalu*

Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993). Here, nothing in the text of the statutes requiring the inscription of the motto on U.S. coins and currency purports to burden anyone on the basis of religious belief. Nor is there any indication that the statutes were designed to impose such burdens. Thus, the statutes are neutral and generally applicable, and the Plaintiffs fail to state a claim under the Free Exercise Clause. *See Mayle*, 891 F.3d at 686; *New Doe Child #1*, 891 F.3d at 592-93; *Peterson*, 753 F.3d at 109-10.

B.

By its terms, RFRA offers greater protection than the Free Exercise Clause. It provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[11] 42 U.S.C. § 2000bb-1(a). If a party demonstrates that the Government has substantially burdened the exercise of his or her religion, "under the Act that

[11] Although in an *amicus curiae* brief the Becket Fund for Religious Liberty argues that atheists cannot assert a substantial burden on the free exercise of "religion" under RFRA, the Government does not contest the Plaintiffs' general ability to raise a claim under that statute. Thus, for the purposes of this appeal, we assume without deciding that the Plaintiffs are engaged in an exercise of "religion." *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 826-27 n.6 (8th Cir. 2009) (declining to consider an argument raised by *amici* but not by the parties to the case).

person is entitled to an exemption from the rule unless the Government 'demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (quoting 42 U.S.C. § 2000bb-1(b)).

The Plaintiffs claim that they are "forced against their will to perform [a] religiously offensive act" because they must either "bear[] and proselytiz[e] a message that is the antithesis of the central claim of their religious ideology" or forego "full participation in the economic life of the nation." Citing *Hobby Lobby*, 134 S. Ct. at 2783, they argue that this choice—created by the statutes requiring the inscription of the national motto on money—places a substantial burden on the exercise of their beliefs. Moreover, the Plaintiffs argue that the Government has no interest, let alone a compelling interest, in including the phrase on money.

We do not question the reasonableness of the Plaintiffs' belief that carrying and using cash emblazoned with the words "In God We Trust" violates their convictions, nor do we have reason to doubt[12] the sincerity of those beliefs. *See Hobby*

[12] Importantly, we are not suggesting that, as a general matter, carrying money with these words is a coercive religious act or that people using money express or condone any kind of religious message. *See Mayle*, 891 F.3d at 686-87; *ante* Sections I & II.

Lobby, 134 S. Ct. at 2778-79 ("[I]t is not for us to say that [the plaintiffs] religious beliefs are mistaken or insubstantial. Instead, our narrow function in this context is to determine whether the line drawn reflects an honest conviction." (internal quotation marks and alteration omitted)). Thus, we begin our analysis by considering whether the Government has placed a substantial burden on the Plaintiffs' exercise of religion.

A substantial burden exists when the Government forces a person to act, or refrain from acting, in violation of his or her religious beliefs, by threatening sanctions, punishment, or denial of an important benefit as a consequence for noncompliance. *See Hobby Lobby*, 134 S. Ct. at 2775-79; *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981); *see also Priests for Life v. U.S. Dept. of HHS*, 808 F.3d 1, 17 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from the denial of rehearing en banc) ("In most religious liberty cases, the Government has said in essence: 'Do X or suffer a penalty,'" and the "religious objector responds that X violates his or her religious beliefs."). The substantial-burden requirement of RFRA is satisfied if the "penalty" suffered for not complying with the required conduct is so severe as to "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas*, 450 U.S. at 717-18.

Instead, in the RFRA analysis, we credit what the Plaintiffs *believe* to be true. *See New Doe Child #1*, 891 F.3d at 588.

At the outset, we note that the challenged statutes do not direct the Plaintiffs to *do* anything. The statutes read: "United States coins shall have the inscription 'In God We Trust,'" 31 U.S.C. § 5112(d)(1), and "United States currency has the inscription 'In God We Trust' in a place the Secretary decides is appropriate," *id.* § 5114(b). Because the statutes do not govern private conduct, it is not clear that the Plaintiffs have alleged a substantial burden under RFRA, let alone one that could be redressed through an exemption or accommodation. *See Hobby Lobby*, 134 S. Ct. at 2761. But even if we construe the statutes as imposing a kind of implicit directive that individuals carry money, all circuits to have considered the issue have found that the consequence of "noncompliance" is not substantial. *See Mayle*, 891 F.3d at 686-87; *New Doe Child #1*, 891 F.3d at 590-91; *Peterson*, 753 F.3d at 109; *see also Lefevre*, 598 F.3d at 645-46. Here, the complaint alleges that the cost of the Plaintiffs' adherence to their religious convictions is "relinquishing the convenience of carrying the nation's money." While cash may be a convenient means of participating in the economy, there are many alternatives that would not violate the Plaintiffs' stated beliefs. *Cf. Ohio v. American Express*, 138 S. Ct. 2274, 2280 (2018) ("Credit cards have become a primary way that consumers in the United States purchase goods and services."). We are aware of no case that has found a substantial burden on similar facts, and we have often held that not all burdens constitute substantial burdens. *See, e.g.*, *Weir v. Nix*, 114 F.3d 817, 820-22 (8th Cir. 1997). Indeed, the Sixth Circuit recently rejected a parallel RFRA challenge to the motto, finding that the "mere

inconvenience" of relying on the many alternatives to cash does not rise to the level of a substantial burden. *See New Doe Child #1*, 891 F.3d at 590.

In their briefing before this court, the Plaintiffs highlight various cash-only situations they may encounter and also point out that some alternatives to cash, like checks and credit cards, are not available to the child-Plaintiffs. We recognize that, in limited circumstances, there may not be a viable cash alternative. But the complaint does not allege that the Plaintiffs are unable to make necessary or even regular purchases, and we do not think that difficulty buying "a popsicle from the neighborhood ice cream truck" or using a coin-operated laundry machine is what the Supreme Court had in mind when it said that RFRA protects against the denial of "full participation in the economic life of the Nation." *See Hobby Lobby*, 134 S. Ct. at 2775-76, 2779, 2783. Indeed, here, the alleged consequences are different in kind from the consequences that the Supreme Court has found to create substantial burdens on the exercise of religion. *See id.* at 2779 (violating a mandate to arrange for contraceptive coverage would result in an "enormous" fine, as much as $475 million per year); *Holt*, 135 S. Ct. at 862 (contravening a policy that requires prisoners to shave their beards would result in "serious disciplinary action"); *O Centro*, 546 U.S. at 425 (violating a statute that imposes an outright ban on the importation and use of listed substances would result in criminal prosecution); *see also Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963) (violating a requirement that a person accept

available work on the Sabbath would make the individual categorically ineligible for unemployment benefits). Although we do not discount the possibility that even minor consequences levied by the Government, such as a relatively small fine, could constitute a substantial burden, here the asserted burdens are negligible, often avoidable, and not directly compelled by the statutes at issue.

Because the Plaintiffs have failed to allege a substantial burden, we need not proceed further with the RFRA analysis. The Plaintiffs' RFRA claim fails.

IV.

Finally, the Plaintiffs allege that the statutes requiring the inscription of the national motto on U.S. coins and currency violate the Equal Protection component of the Fifth Amendment by marginalizing atheists. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, and it applies to the federal government through the Due Process Clause of the Fifth Amendment, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Equal Protection Clause demands that similarly situated individuals be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Unless a law burdens a fundamental right, targets a suspect class, or has a disparate impact on a protected class and was motivated by a discriminatory intent, we apply rational basis

scrutiny to the challenged law. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979); *Knapp v. Hanson*, 183 F.3d 786, 789 (8th Cir. 1999).

Here, by requiring the inscription of "In God We Trust" on U.S. coins and currency, the statutes do not create any express or implied classifications. Rather they apply equally to all individuals. And even assuming disparate impact, we have already determined that there is no evidence suggesting that the inclusion of the motto on U.S. coins and currency was motivated by a desire to discriminate against atheists. Rather, we find that placing the motto on money is rationally related to the Government's legitimate goal of honoring religion's role in American life and in the protection of fundamental rights. *See, e.g.*, S. Con. Res. 96, 109th Cong. (2006). Thus, the Plaintiffs' equal protection claim fails. *See Mayle*, 891 F.3d at 687; *New Doe Child #1*, 891 F.3d at 594-95.

V.

For the foregoing reasons, we affirm the judgment of the district court.[13]

[13] We deny as moot the Plaintiffs' renewed motion to compel.

KELLY, Circuit Judge, concurring in part, and concurring in the judgment.

I join the court's opinion except as to the Establishment Clause claim. That portion of the opinion, in my view, seeks to remake Establishment Clause jurisprudence in this circuit based on analysis that is overly broad and unnecessary to the resolution of this case. I nonetheless concur in the judgment because the Supreme Court has already all but determined that the motto's placement on our national currency does not offend the Establishment Clause.

The court—citing a concurring and a dissenting opinion from two other circuits—determines that Town of Greece v. Galloway, 134 S. Ct. 1811 (2014), is "a major doctrinal shift in Establishment Clause jurisprudence." Supra at 5 (cleaned up). But Galloway does not read like a sea change; it reads like a clarification. Galloway clarifies that the Establishment Clause is to be interpreted "by reference to historical practices and understandings." Galloway, 134 S. Ct. at 1819 (cleaned up). But it also clarifies that Supreme Court precedent "must not be understood as permitting a practice that *would amount to a constitutional violation* if not for its historical foundation." Id. (emphasis added). In other words, even when history indicates that a practice does not offend the Establishment Clause, but the Court's other Establishment Clause tests suggest that it does, history alone cannot carry the day. Instead, "[a]ny test . . . must acknowledge a practice that was accepted by the Framers and has withstood

the critical scrutiny of time and political change." Id. at 1819. Thus, Galloway itself does not support this court's suggestion, supra at 4–7, that history is now the single most important criterion when evaluating Establishment Clause claims.

And, even if Galloway does make history a prime part of our Establishment Clause analysis, it does not make clear *what* history we should consider in this case. In Galloway, it was the Framers that mattered. See Galloway, 134 S. Ct. at 1819 (noting that "[a]ny test the Court adopts must acknowledge a practice that was accepted by the *Framers*" (emphasis added)); id. at 1818–19 (recounting how the fact that "the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign acknowledgment of religion's role in society"); id. at 1820 (noting that "[t]he Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes"); id. at 1823–24 (citing a letter from John Adams to his wife, Abigail, and discussing how "[f]rom the earliest days of the Nation" legislative prayers "have been addressed to assemblies comprising many different creeds"). This focus on the Framers makes sense because, as the Court explained, practices approved of by the same people who wrote and ratified the First Amendment, and which have survived since ratification, likely do not offend the Establishment Clause. See id. at 1819.

But the placement of "In God We Trust" on currency does not date back to the Founding. Congress placed the motto on money for the first time in 1864 (72 years after the ratification of the Bill of Rights), and did not place it on all coinage until 1955 (163 years after ratification). By contrast, "[t]he motto of the new nation, proposed . . . by Franklin, Adams, and Jefferson, and adopted for use in the Great Seal of the United States in 1782, was 'E Pluribus Unum.'" William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly, 1984 Duke L.J. 770, 774. And "[t]he original legend on new coins, first on continental dollars, then on the fugio cent minted in Philadelphia, in 1787, was 'Mind Your Business.'" Id. Thus, the motto's history of inclusion on the currency tells us nothing about what the Framers thought, and does not say much of anything about what the Establishment Clause means.

Because, in this case, Galloway presents as many questions as it answers, the better approach is to resort to what the Supreme Court has already told us. The Court has expressed a view that—irrespective of the Establishment Clause test applied—printing the motto on currency is permissible. The Court has listed the motto amongst permissible "reference[s] to our religious heritage," Lynch v. Donnelly, 465 U.S. 668, 676 (1984),[14]

[14] Notably, all of the opinions in Lynch—majority, concurrence, and dissent—agreed that the motto is constitutional. Compare Lynch 465 U.S. at 676 (majority), and id. at 692–93 (O'Connor, J., concurring) ("[T]he government's display of the

acknowledged that the motto is "consistent with the proposition that government may not communicate an endorsement of religious belief," Cty. of Allegheny v. ACLU, 492 U.S. 573, 602–03, and explained that "[t]he bearer of currency is . . . not required to publicly advertise the national motto," Wooley v. Maynard, 430 U.S. 705, 717 n.15 (1977). Though none of these cases directly presented the question of the motto's constitutionality, we "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings." Jones v. St. Paul Cos., 495 F.3d 888, 893 (8th Cir. 2007) (cleaned up). The Court's dicta dispose of the Plaintiffs' Establishment Clause claim, as our sister circuits have held. See, e.g., Newdow v. Peterson, 753 F.3d 105, 108 (2d Cir. 2014). As the Seventh Circuit put it: "If the Court proclaims that a practice is consistent

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crèche . . . [is] no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in Marsh . . ., government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'" (cleaned up)), with id. at 716 (Brennan, J., dissenting) ("I would suggest that such practices as the designation of 'In God We Trust' as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood . . . as a form a 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content." (cleaned up)).

with the [E]stablishment [C]lause, we take its assurances seriously. If the Justices are just pulling our leg, let them say so." Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 448 (7th Cir. 1992).

For these reasons, I concur only in the court's judgment that the Plaintiffs' Establishment Clause claim fails. I otherwise concur in the court's opinion.

Item B

Court of Appeals' Judgment
(filed August 28, 2018)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 16-4440

New Doe Child #1; New Doe Child #2; New Doe Child #3; New Doe Parent; New Roe Child; New Roe Parent; New Boe Child; New Boe Parent; New Poe Child; New Poe Parent; New Coe Child #1; New Coe Child #2; New Coe Child #3; New Coe Parent; Gary Lee Berger; Marie Alena Castle; Charles Daniel Christopher; Patrick Ethen; Betty Gogan; Thomas Gogan; Roger W. Kaye; Charlotte Leverette; Dr. James B. Lyttle; Kyle Pettersen-Scott; Odin Smith; Andrea Dawn Sampson; Eric Wells; Atheists for Human Rights (AFHR); Saline Atheist & Skeptic Society

Plaintiffs – Appellants

v.

The United States of America; Jacob J. Lew, Secretary of the Treasury; Rhett Jeppson, Principal Deputy Director, United States Mint; Leonard R. Olijar, Director, Bureau of Engraving and Printing

Defendants - Appellees

The Becket Fund for Religious Liberty
Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota – Minneapolis (0:15-cv-04373-WMW)

JUDGMENT

Before GRUENDER, BEAM and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 28, 2018

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

Item C

Denial of Plaintiff's Petition(s) for Rehearing
(filed Nov. 26, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-4440

New Doe Child #1, et al.
Appellants

v.

The United States of America, et al.
Appellees

The Becket Fund for Religious Liberty
Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota – Minneapolis
(0:15-cv-04373-WMW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 26, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix D

Court of Appeals' Mandate
(filed Dec. 4, 2018)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4440

New Doe Child #1, et al.
Appellants

v.

The United States of America, et al.
Appellees

The Becket Fund for Religious Liberty
Amicus on Behalf of Appellee(s)

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:15-cv-04373-WMW)

MANDATE

In accordance with the opinion and judgment of 08/28/2018, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

December 04, 2018

Clerk, U.S. Court of Appeals, Eighth Circuit

Appendix E

District Court's Order Granting Defendants' Motion to Dismiss (filed Dec. 5, 2016)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

New Doe Child #1, et al. Plaintiffs, v. United States of America, et al. Defendants	Case No. 15-cv-4373 (WMW/KMM) **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

This lawsuit challenges the government's inscription of the words "In God We Trust" on United States currency. Plaintiffs—several individuals who are atheists and two atheist organizations—sued the United States of America and three government officials involved in producing the nation's currency. Plaintiffs allege that inscribing the national motto on United States currency violates certain provisions of the United States Constitution and the Religious Freedom Restoration Act. Defendants move to dismiss all of Plaintiffs' claims. For the reasons addressed below, the Court grants Defendants' motion to dismiss.

BACKGROUND

Plaintiffs in this case—27 individuals who are atheists or the children of atheists and two atheist organizations—assert that their religious freedoms guaranteed by the United States Constitution and federal statute are infringed by the governmental act of printing the words "In God We Trust" on all U.S. currency. Plaintiffs sued the United States of America, Secretary of the Treasury Jacob J. Lew, Principal Deputy Director of the United States Mint Rhett Jeppson, and Director of the Bureau of Engraving and Printing Leonard R. Olijar (collectively "Defendants"),[1] alleging that inscribing "In God We Trust" on U.S. currency violates the First and Fourteenth Amendments to the United States Constitution and the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. Two statutes mandate the inscription of this national motto[2] on U.S. currency. One provides that U.S. coins "shall have the inscription 'In God We Trust.' " 31 U.S.C. § 5112(d)(1). A second requires that "United States currency has the inscription 'In God We Trust' in a place the Secretary [of the Treasury] decides is appropriate." 31 U.S.C. § 5114(b).

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[1] Plaintiffs initially named the Congress of the United States as a defendant, but the Court dismissed the claims against Congress pursuant to the parties' stipulation. (Dkt. 19.)

[2] 36 U.S.C. § 302 (" 'In God we trust' is the national motto.").

In their Second Amended Complaint,[3] Plaintiffs set forth sixteen claims for relief. Plaintiffs contend that the inscription of "In God We Trust" on all U.S. currency impermissibly requires them either to espouse a religious message with which they vehemently disagree or to forgo a variety of commercial transactions using the national currency, which substantially burdens their free exercise of religion, in violation of RFRA (Claim 1) and the First Amendment's Free Exercise (Claim 14) and Free Speech Clauses (Claim 15). Plaintiffs also assert that no enumerated power in the United States Constitution permits Defendants to print religious statements on U.S. currency (Claim 2). Plaintiffs further allege that Defendants' actions violate the First Amendment's Establishment Clause in several ways, including by promoting a particular religious viewpoint and attempting to coerce a belief in God

[3] Defendants filed their motion to dismiss Plaintiffs' Amended Complaint on May 13, 2016. While Defendants' motion was pending, Plaintiffs sought leave to file a Second Amended Complaint to correct an error. Defendants did not oppose Plaintiffs' motion for leave to amend, provided the amendment would not moot Defendants' motion to dismiss. Although filing an amended complaint while a motion to dismiss is pending generally renders moot the motion to dismiss, the Court will consider whether Plaintiffs' Second Amended Complaint can withstand Defendants' motion to dismiss. *See Oniyah v. St. Cloud State Univ.*, 655 F. Supp. 2d 948, 958 (D. Minn. 2009).

(Claims 3-13). Finally, Plaintiffs allege that printing the national motto on U.S. currency violates the Equal Protection Clause of the Fourteenth Amendment because promoting a belief in God denies atheists equal dignity in the eyes of the law (Claim 16).[4]

Plaintiffs seek certain declarations that the national motto violates these tenets of American law and a permanent injunction preventing Defendants from minting coins or printing paper currency bearing the words "In God We Trust." Plaintiffs also seek a declaration that inscribing the national motto on U.S. currency is impermissible "because there is no enumerated power in the United States Constitution that authorizes such a religious claim."

Defendants move to dismiss each of Plaintiffs' claims for failure to state a claim on which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

ANALYSIS

I. Legal Standard

Under Rule 12(b)(6), Fed. R. Civ. P., dismissal for failure to state a claim on which relief can be

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[4] Plaintiffs describe this claim as a violation of the Fifth Amendment. The Equal Protection Clause of the Fourteenth Amendment is applicable to the federal government through the Fifth Amendment's Due Process Clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

granted is appropriate "only where no relief could be granted under any set of facts provable under the allegations." *Universal Coops., Inc. v. AAC Flying Serv., Inc.*, 710 F.3d 790, 794 (8th Cir. 2013). When considering a motion to dismiss, the Court accepts the factual allegations in the complaint as true, but this tenet is inapplicable to legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

II. Establishment Clause Claims

Defendants first move to dismiss Plaintiffs' claims asserted under the Establishment Clause of the First Amendment. Plaintiffs argue that the presence of the national motto on U.S. currency runs afoul of the Establishment Clause.

The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court of the United States repeatedly has stated in dicta that the statutes requiring the national motto to appear on U.S. currency do not violate the Establishment Clause. *See Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 603-04 (1989) ("Our previous opinions have considered in dicta the motto and the [Pledge of Allegiance], characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."), *abrogated on other grounds by Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014). For example, in *Lynch v. Donnelly*, when

rejecting an Establishment Clause challenge to a municipality's inclusion of a crèche in a Christmas display in a private park in the city's shopping district, the Supreme Court explained 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" and cited the inclusion of "In God We Trust" on U.S. currency as one "example[] of reference to our religious heritage." 465 U.S. 668, 674, 676 (1984). In a concurrence, Justice O'Connor described the printing of the national motto on U.S. currency as a permissible governmental acknowledgment of religion that serves "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." *Id.* at 693 (O'Connor, J., concurring). The dissenting justices agreed that the national motto, having acquired "an essentially secular meaning," does not violate the Establishment Clause because it has "lost through rote repetition any significant religious content." *Id.* at 716-17 (Brennan, J., dissenting).

In some instances, the Supreme Court expressly has distinguished the printing of the national motto on U.S. currency from other government actions held to be impermissible endorsements of religion. In *County of Allegheny*, the Supreme Court concluded that a crèche prominently displayed in a county building constituted an impermissible endorsement of religion in violation of the Establishment Clause but stated that "there is an obvious distinction

between crèche displays and references to God in the motto and the pledge." 492 U.S. at 603. In a concurring opinion in *Elk Grove Unified School District v. Newdow*, Justice O'Connor reiterated her view that the government can, "in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution." 542 U.S. 1, 37 (2004) (O'Connor, J., concurring). Justice O'Connor wrote,

> This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust") . . .. 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.

Id.

Although neither the Supreme Court nor the Eighth Circuit has addressed directly the merits of the specific question at issue here—whether the inscription of the national motto on U.S. currency violates the Establishment Clause—the Supreme Court's statements in dicta are dispositive of the issue. *See City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir. 1993) ("[F]ederal courts 'are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement.' " (quoting *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991))). This conclusion is buttressed by the fact that every circuit that has

considered this question has held consistent with Supreme Court dicta—that the national motto does not violate the Establishment Clause. *See, e.g.*, *Newdow v. Peterson*, 753 F.3d 105, 108 (2d Cir. 2014); *Kidd v. Obama*, 387 F. App'x 2 (D.C. Cir. 2010); *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 270-73 (4th Cir. 2005); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970); *see also Newdow v. Lefevre*, 598 F.3d 638, 643-45 (9th Cir. 2010) (reaffirming *Aronow*).

In light of the Supreme Court's repeated statements in dicta that the statutes requiring the printing of "In God We Trust" on U.S. currency do not violate the Establishment Clause, along with the overwhelming weight of authority from other circuits, the Plaintiffs' Establishment Clause claims must be dismissed.

II. Free Exercise Clause and RFRA Claims

Defendants next argue that Plaintiffs' claims under the Free Exercise Clause and RFRA fail as a matter of law. Defendants contend that the statutes requiring inscription of the national motto on U.S. currency do not substantially burden Plaintiffs' exercise of their religion because the government does not compel Plaintiffs to participate in commerce or require Plaintiffs to "use bills and coins instead of, for example, checks, debit cards, or credit cards that do not bear the phrase that Plaintiffs find offensive." Plaintiffs counter that the inscription of the words "In God We Trust" on U.S. currency substantially

burdens their religious beliefs because they are "unable to use the nation's legal tender without violating their religious tenets" when other payment methods are inconvenient or not accepted by the other party to the transaction. In such situations, Plaintiffs contend that they are "placed in the position of either bearing and proselytizing the 'In God We Trust' message or forgoing desired commerce."

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. amend. I. To prevail on a free-exercise claim, a plaintiff first must establish that the challenged governmental policy or action substantially burdens the plaintiff's sincerely held religious belief. *United States v. Ali*, 682 F.3d 705, 709 (8th Cir. 2012). Similarly, RFRA provides that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that its action "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. To be a substantial burden on a person's exercise of religion under either the Free Exercise Clause or RFRA, the government's policy or action

> "must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to

> express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion."

Patel v. U.S. Bureau of Prisons, 515 F.3d 807, 813 (8th Cir. 2008) (quoting *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004)).

The Eighth Circuit has not addressed whether inscribing the national motto on U.S. currency violates the Free Exercise Clause or RFRA, but this Court is persuaded by the reasoning of the Second Circuit's decision in *Newdow v. Peterson*. In *Newdow*, the Second Circuit rejected the argument that the plaintiffs' religious beliefs were substantially burdened by the placement of the national motto on U.S. currency. 753 F.3d at 109-10. In reaching its conclusion, the *Newdow* court relied on the Supreme Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), which held that New Hampshire's compulsory automobile license plates bearing the words "Live Free or Die" violated the First Amendment rights of plaintiffs, who were Jehovah's Witnesses. *Newdow*, 753 F.3d at 109-10. In *Wooley*, the Supreme Court explained that its decision is inapplicable to the nation's currency:

> [C]urrency, 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.

430 U.S. at 717 n.15. Likewise, the *Newdow* court concluded that "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." 753 F.3d at 109.

Plaintiffs' arguments rest on the premise that the inscription of the national motto on U.S. currency constitutes a government endorsement of religion. But the Establishment Clause cases addressed above require the opposite conclusion. Because the inscription of the national motto does not communicate a substantive religious statement by the government, it follows that Plaintiffs or any other individuals who use U.S. currency to transact business are not endorsing a religious viewpoint or communicating a religious message simply by exchanging money.

Because the statutes requiring the inscription of "In God We Trust" on U.S. currency do not substantially burden Plaintiffs in the free exercise of their religious beliefs as a matter of law, the Court need not and therefore declines to address whether any burden imposed on Plaintiffs is in furtherance of a compelling government interest or is the least restrictive means of furthering that compelling interest. *See Patel*, 515 F.3d at 815 n.10. Accordingly, Plaintiffs' Free Exercise and RFRA claims are dismissed.

III. Free-Speech Claim

Defendants next move to dismiss Plaintiffs' claim that the inclusion of the national motto on U.S. currency violates their First Amendment free-speech rights. Plaintiffs' Second Amended Complaint alleges that the inscription of the national motto on U.S. currency violates their free-speech rights by "compel[ing] Plaintiffs to convey the government's speech and express a view with which they vehemently disagree."

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The *Wooley* decision contravenes Plaintiffs' argument that their use of U.S. currency bearing the words "In God We Trust" requires them to convey the government's speech. The *Wooley* Court concluded that New Hampshire could not require its citizens to publicly display the words "Live Free or Die" on their automobile license plates. 430 U.S. at 717. In response to the dissent's criticism that "[t]he 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,' " *id.* at 722 (Rehnquist, J., dissenting), the Supreme Court expressly differentiated currency from a license plate, *id.* at 717 n.15. While acknowledging that the constitutionality of the motto was not before the Court in *Wooley*, the majority nonetheless explained that, unlike an automobile license plate, currency is

neither publicly displayed nor readily identifiable with its user. *Id.*

Here, the Court concludes that the use of U.S. currency to transact business does not require Plaintiffs to convey a statement of religious principle. This rejection of Plaintiffs' claim is consistent with the Supreme Court's statement that its decision in *Wooley* is inapplicable to the inclusion of the national motto on U.S. currency and the fact that the Supreme Court has interpreted the motto as a ceremonial statement that serves "legitimate secular purposes." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). Accordingly, Plaintiffs' free-speech claim is dismissed.

IV.Equal-Protection Claim

Defendants also move to dismiss Plaintiffs' equal-protection claim. Plaintiffs' Second Amended Complaint alleges that by inscribing "In God We Trust" on U.S. currency, Defendants "are clearly not affording . . . 'equal dignity' to Plaintiffs or to their sincerely held religious beliefs as compared to the dignity being shown to the (Christian) Monotheistic majority and the religious beliefs to which its members adhere." Defendants counter that the statutes requiring the national motto to be printed on U.S. currency "[f]undamentally . . . treat all people equally whether they cherish the Motto's message or are offended by it."

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. Although by its

terms the Equal Protection Clause applies only to state governments, the federal government also is bound by its mandate through the Due Process Clause of the Fifth Amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The Equal Protection Clause demands that all similarly situated individuals be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

Generally, the first step in assessing whether a statute violates the Equal Protection Clause is to determine the nature of the classification of individuals created by the statute. *See Dunn v. Blumstein*, 405 U.S. 330, 335 (1972) (explaining that, to decide whether a law violates the Equal Protection Clause, "we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification"). The statutes Plaintiffs challenge in this lawsuit do not create any express or implied classifications of individuals. Instead, Plaintiffs assert that the effect of these statutes is to deprive atheists of equal respect for their religious beliefs by perpetuating prejudice against them.

The First Circuit addressed a similar claim in *Freedom From Religion Foundation v. Hanover School District*, in which the plaintiffs challenged a New Hampshire law requiring public schools to authorize a time during the school day for students to participate voluntarily in reciting the Pledge of Allegiance on the basis that the law violated the Equal Protection Clause. 626 F.3d 1 (1st Cir. 2010).

In affirming the district court's dismissal of the plaintiffs' equal-protection claim, the First Circuit explained,

> [T]he New Hampshire Act does "not require different treatment of any class of people because of their religious beliefs," nor does it "give preferential treatment to any particular religion." *Wirzburger v. Galvin*, 412 F.3d 271, 283 (1st Cir. 2005). Rather, as the district court found, "it applies equally to those who believe in God, those who do not, and those who do not have a belief either way, giving adherents of all persuasions the right to participate or not participate in reciting the pledge, for any or no reason." *Freedom From Religion Found. v. Hanover Sch. Dist.*, 665 F. Supp. 2d 58, 72 (D.N.H. 2009). Therefore, FFRF's equal protection claim fails.

Id. at 14. This reasoning is persuasive.

Like the plaintiffs in *Freedom From Religion Foundation*, Plaintiffs fail to demonstrate that the challenged statutes, which apply equally to all individuals regardless of religious belief, implicate the Equal Protection Clause. For this reason, Plaintiffs' equal-protection claim is dismissed.

VI. Congressional Authority to Mandate the National Motto on U.S. Currency

Finally, Defendants argue that Plaintiffs are not entitled a declaration that Congress lacked the authority to enact statutes requiring the national motto to be printed on U.S. currency. The relief Plaintiffs seek cannot be granted against Congress, as Congress has been dismissed from this action by stipulation of the parties. To the extent the declaration Plaintiffs seek could be directed to any other defendant, Plaintiffs' claim clearly fails as a matter of law. Article I, Section 8, of the United States Constitution gives Congress the power to "coin Money" and to "make all Laws which shall be necessary and proper" for doing so. Plaintiffs' claim that the inscription of "In God We Trust" on U.S. currency is impermissible "because there is no enumerated power in the United States Constitution that authorizes such a religious claim" plainly is without merit and must be dismissed.

ORDER

Based on the foregoing analysis and all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Defendants' motion to dismiss, (Dkt. 13), is **GRANTED**.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 5, 2016

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

Appendix F

District Court's Judgment
(filed Dec. 6, 2016)

UNITED STATES DISTRICT COURT
District of Minnesota

New Doe Child #1, et al.
Plaintiff(s),
v.
United States of America, et al.
Defendant(s)

JUDGMENT IN A CIVIL CASE
Case Number: 15-cv-4373 WMW/KMM

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

Defendants' motion to dismiss, (Dkt. 13), is GRANTED.

Date: 12/6/2016 RICHARD D. SLETTEN, CLERK

s/J. Dunbar Fannemel
(By) J. Dunbar Fannemel,
Deputy Clerk

Appendix G

Statutory Provision
(Pursuant to Rule 14(1)(i)(v)):

Religious Freedom Restoration Act of 1993 ("RFRA")

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21B--RELIGIOUS FREEDOM RESTORATION

Short Title

This Act [enacting this chapter and amending section 1988 of this title and section 504 of Title 5, Government Organization and Employees] may be cited as the "Religious Freedom Restoration Act of 1993".

Sec. 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Sec. 2000bb-2. Definitions

As used in this chapter--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

Sec. 2000bb-3. Applicability

(a) In general
This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction
Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

Sec. 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Sec. 2000cc-5(7)

Religious Exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.