No. 16-4440

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NEW DOE CHILD #1, ET AL.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
District Court No. 0:15-cv-04373

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty in Support of Defendants-Appellees and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(4)(A), *amicus* The Becket Fund for Religious Liberty states that it does not have a parent corporation and does not issue any stock.

April 18, 2017

/s Eric C. Rassbach
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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved—both as counsel of record and as *amicus curiae*—in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference. Becket has also long argued that atheists should not be discriminated against for their rejection of the belief that God exists.[2]

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[1] No party's counsel authored this brief in whole or in part, and no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a)(2).

[2] *See, e.g.*, Letter from Eric C. Rassbach, Nat'l Dir. of Litig., The Becket Fund, to Robbie Wills, Speaker of the House, Ark. House of Representatives (Feb. 17, 2009), http://www.becketfund.org/wp-content/uploads/2013/09/02-17-09-Letter-to-Rep.-Robbie-Wills.pdf (urging Arkansas legislature to eliminate anti-atheist provision); Letter from Eric C. Rassbach, Nat'l Dir. of Litig., The Becket Fund, to Bob Johnson, President Pro Tempore, Ark. Senate (Feb. 17, 2009), http://www.becketfund.org/wp-content/uploads/2013/09/02-17-09-Letter-

Becket is concerned, however, about attempts to stretch church and state law so as to exile religion from public life, which is the admitted goal of Plaintiffs' lawsuit. Becket has defended against Establishment Clause challenges to a multi-faith religious display, *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (3d Cir. 1999) (represented city), privately-owned highway monuments erected to honor fallen state highway troopers, *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (represented *amici* States), and a historic religious statue on land leased from the government. *Freedom From Religion Found. v. Weber*, 628 F. App'x 952 (9th Cir. 2015).

Becket has also defended the Pledge of Allegiance and other government references to God from "offended observers." *See New Doe Child #1 v. Congress of the United States*, No. 16-4345 (6th Cir.) (*amicus curiae*); *Am. Humanist Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist.*, 115 A.3d 292 (N.J. Super. Ct. Law Div. 2015) (represented intervenors); *Doe v. Acton-Boxborough Reg'l Sch. Dist.*, 8 N.E.3d 737 (2014) (represented intervenors); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th

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to-Sen.-Bob-Johnson.pdf (same).

Cir. 2010) (represented intervenors); *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1 (1st Cir. 2010) (represented intervenors).

Becket is concerned that, were Plaintiffs' arguments to prevail in this case, church-state conflict would be unnecessarily intensified on a number of fronts. Plaintiffs' theory of "exercise of religion" would radically expand the scope of the Religion Clauses and the Religious Freedom Restoration Act to cover not just deeply-held religious beliefs, but philosophical and ideological beliefs of all kinds, giving rise to any number of claims from anyone who disagrees with the government for any reason. Likewise, Plaintiffs' theory of the Establishment Clause would allow anyone to challenge references to God in the public square, a result the Founders did not intend.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

There are many reasons why the Court should not strike down the "'historical practice[ ]'" of including the national motto on American currency. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)). The United States ably explains many of those reasons in its brief. *See, e.g.*, United States Br. 21, 24, 29. This *amicus* brief focuses on three foundational problems with the Plaintiffs' arguments. First, Plaintiffs do not present an injury in fact sufficient to convey standing for purposes of the Equal Protection Clause or the Establishment Clause. Second, their Establishment Clause claim fails on the merits because it does not comport with the historical meaning of an establishment of religion as understood by the Founders. Finally, Plaintiffs' free exercise claims fail because what they describe as religious beliefs are in fact philosophical beliefs that do not receive the "special solicitude" of the Religion Clauses. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

ARGUMENT

I. Plaintiffs have no injury in fact sufficient to establish Equal Protection standing.

To establish Article III standing, Plaintiffs must demonstrate that they have suffered (1) an "injury in fact" that is (2) "traceable" to the defendant's conduct, and (3) likely to be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). An "injury in fact" is "an invasion of a legally protected interest which is . . . concrete and particularized," and "actual or imminent, not conjectural or hypothetical." *Id.* (citations omitted). Plaintiffs have suffered no such injury here.

In the equal protection context, courts have long held that the injury-in-fact requirement is not satisfied by mere psychological harm—such as the stigma resulting from racially discriminatory laws. Rather, Plaintiffs must demonstrate that they have been "*personally denied equal treatment* by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (emphasis added; internal quotations omitted). But the national motto does not subject anyone to discriminatory treatment. Thus, Plaintiffs have failed to establish an injury in fact under the Equal Protection Clause.

In *Allen*, the parents of African-American public school children sued the Internal Revenue Service (IRS), claiming that the IRS had violated its obligation to deny tax-exempt status to racially discriminatory private schools. According to the parents, as a result of the IRS's discriminatory practices, they and their children suffered "stigmatic injury, or denigration," on the basis of their race. *Id.* at 754.

The Supreme Court denied standing because the plaintiffs did not allege that they had been "personally denied equal treatment" by the IRS. *Id.* at 755. As the Court explained, "[t[here can be no doubt that [the stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing. Our cases make clear, however, that such injury accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *Id.* (quoting *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)).

The cases that have analyzed standing under the Equal Protection Clause to challenge offensive government displays (such as Confederate flags) have confirmed this rule. For example, in *Mississippi Division of*

United Sons of Confederate Veterans v. Mississippi State Conference of NAACP Branches, 774 So. 2d 388 (Miss. 2000), several civil rights groups sued under Mississippi's Equal Protection Clause to enjoin the display of the state flag, which contained a depiction of the Confederate Battle Flag. Although the plaintiffs alleged that the flag stigmatized them on the basis of race, and although Mississippi's standing rules are "quite liberal" compared to the federal courts, *Burgess v. City of Gulfport*, 814 So. 2d 149, 152 (Miss. 2002), the Mississippi Supreme Court denied standing, explaining that "[n]either the flying of the State Flag, nor the flag itself, causes any constitutionally recognizable injury." 774 So. 2d at 390.

Likewise here, Plaintiffs have shown no sufficient injury in fact or differential treatment beyond the perceived stigma of handling money with the word "God" on it. Indeed, they have staked their claims on the stigma they believe attaches to them as atheists. *See, e.g.*, Second Amended Complaint ("Complaint") ¶ 564, Appendix ("App.") 115 ("Defendants not only violate that obligation to show 'equal dignity' to the adults involved, but they impose upon the children of Atheists 'the stigma of knowing their families are somehow lesser'"). But a disagree-

ment with what to put on currency does not mean that atheists are treated differently, just as those who object to Andrew Jackson's treatment of African-Americans and American Indians cannot claim injury sufficient to challenge his face on the twenty-dollar bill. Plaintiffs have alleged no discriminatory treatment and therefore lack standing to bring an Equal Protection claim.

II. Plaintiffs have no injury in fact sufficient for Establishment Clause standing.

For similar reasons, Plaintiffs also lack standing under the Establishment Clause. Although they claim that the national motto "violate[s] [their] rights under the Establishment Clause," they allege no injury other than feelings of offense. Plaintiffs' Br. 30. But just as feelings of stigma are insufficient to confer standing under the Equal Protection Clause, feelings of offense are insufficient to confer standing under the Establishment Clause.

This lawsuit is one of over a dozen that Plaintiffs' lawyer Michael Newdow has brought challenging government references to God, all based on his theory that the Constitution offers a remedy whenever his

beliefs are offended by the government's speech. All of these lawsuits have been rejected.[3] This wasteful litigation underscores the im-

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[3] Dr. Newdow has sued to try to remove the phrase "under God" from the Pledge several times:

- *Newdow v. United States*, No. 98-cv-6585 (S.D. Fla. Dec. 1, 1998), *aff'd*, 207 F.3d 662 (11th Cir. 2000) (table case);
- *Newdow v. Congress of the U.S.*, No. 2:00-cv-0495-MLS-PAN, (E.D. Cal. July 21, 2000), *rev'd*, 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004);
- *Newdow v. Congress of the U.S.*, 383 F. Supp. 2d 1229 (E.D. Cal. 2005), *rev'd sub nom. Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010);
- *Freedom From Religion Found. v. Hanover Sch. Dist.*, 665 F. Supp. 2d 58 (D.N.H. 2009), *aff'd*, 626 F.3d 1 (1st Cir. 2010).

In addition to this case, he has sued to try to remove "In God We Trust" from United States currency:

- *Newdow v. U.S. Congress*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006), *aff'd sub nom. Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010);
- *Newdow v. United States*, No. 1:13-cv-00741, 2013 WL 4804165 (S.D.N.Y. Sept. 9, 2013), *aff'd sub nom. Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014), *cert. denied,* 1003 S. Ct. 1008 (2015).
- *New Doe Child # 1 v. U.S. Congress*, No. 16-4345 (6th Cir. appeal docketed Dec. 1, 2016).

portance of the Article III limits on standing.

The Supreme Court has long held that mere feelings of offense are not a cognizable injury for purposes of the Establishment Clause. The leading case is *Valley Forge Christian College v. Americans United for*

He has sued to try to ban any invocation or benediction at inaugural ceremonies, and to prevent Presidents Bush and Obama from saying "So help me God" at the end of the inaugural oath:

- *Newdow v. Bush*, No. 2:01-cv-00218-LKK (E.D. Cal. May 23, 2002), *aff'd*, 89 Fed. App'x. 624 (9th Cir. 2004) (regarding 2001 inauguration);
- *Newdow v. Bush*, 355 F. Supp. 2d 265 (D.D.C. 2005);
- *Newdow v. Roberts*, No. 1:08-cv-02248-RBW (D.D.C. Mar. 12, 2009), *aff'd*, 603 F.3d 1002 (D.C. Cir. 2010), *cert. denied,* 563 U.S. 1001 (2011).

And he has sued to try to prohibit Congress from hiring legislative chaplains, engaging in legislative prayer, and referencing religious themes in resolutions:

- *Newdow v. Eagen*, 309 F. Supp. 2d 29, 34 (D.D.C. 2004) (claiming right to observe government without being forced to "confront religious dogma he finds offensive."), *dismissed for want of prosecution*, No. 04-5195, 2004 WL 1701043 (D.C. Cir. July 29, 2004).
- *Newdow v. Congress of the U.S.*, No. 2:01-cv-01924-EJG-GGH (E.D. Cal. Aug. 8, 2002) (challenge to resolutions of Congress dismissed for lack of subject matter jurisdiction).

Separation of Church & State, Inc., 454 U.S. 464, 482 (1982). There, the plaintiffs challenged the transfer of federal property to a religious college after hearing about the transfer in the news. 454 U.S. at 468, 487. The Supreme Court concluded that the plaintiffs lacked standing. As the Court explained, "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III." *Id.* at 485. There must be a "personal injury" beyond mere psychological harm. *Id.*

Since *Valley Forge*, some courts, including this one, have occasionally relaxed the requirements for standing under the Establishment Clause. For example, in *ACLU Nebraska Foundation v. City of Plattsmouth*, 419 F.3d 772 (8th Cir. 2005) (en banc), the en banc Court adopted the panel's reasoning that the plaintiffs had established standing because they had "direct and unwelcome personal contact with the alleged establishment of religion," and they altered their "behavior to avoid the allegedly unconstitutional display." *See ACLU Neb. Found. v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004), adopted at 419 F.3d at 775 n.4. But this analysis, which is commonly known as "offended observer" standing, is in tension with the rest of the Supreme Court's

standing jurisprudence and its more recent Establishment Clause decisions. It also undermines the purposes of Article III.

First, the "injury" suffered by an "offended observer" is ultimately the same injury held insufficient in *Valley Forge*—namely, psychological offense at the government's conduct. The fact that an offended observer may have personally seen the government's message, or may have taken steps to avoid it, is simply window dressing—it is ultimately no more injurious than hearing about the display in the news. As Justice Alito has explained, feelings of "resentment" upon seeing a religious display in person are at least arguably "tantamount to the 'psychological consequence[s]'" that were "insufficient to establish standing" in *Valley Forge*. *ACLU-N.J. v. Twp. of Wall*, 246 F.3d 258, 265 (3d Cir. 2001) (Alito, J.) (quoting *Valley Forge*, 454 U.S. at 485).

Second, the "offended observer" test is easily manipulated, transforming the standing inquiry into nothing more than an invitation to artful pleading. A citizen who reads a newspaper report about a government display can just as easily visit the display to initiate direct contact. *See, e.g.*, *Harris v. City of Zion*, 927 F.2d 1401, 1420 (7th Cir. 1991) (Easterbrook, J., dissenting) (when no local residents objected to

the city's seal, the plaintiff "moved to a boarding house within the city's limits and lent his name to the litigation"). Easier yet, plaintiffs can simply claim that they are avoiding the location because of their offense. *See, e.g.*, *Buono v. Norton*, 371 F.3d 543, 547 (9th Cir. 2004) (out-of-state plaintiff claimed that he would "tend to avoid" a cross in a remote portion of the Mojave Desert eleven miles from the nearest highway). The Supreme Court has understandably held in other contexts that these kinds of "self-inflicted" injuries—injuries attributable to the plaintiff's "personal choice" in response to the defendant's conduct—do not create standing. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (Privileges and Immunities Clause); *McConnell v. FEC*, 540 U.S. 93, 228 (2003) (campaign finance). The same is true here. Plaintiffs' offense at the national motto is no different than the offense held inadequate in *Valley Forge*. *See Harris*, 927 F.2d at 1420 (Easterbrook, J., dissenting) (plaintiffs cannot skirt *Valley Forge* by offering "new and better ways to prove" their psychological offense).

Nor is it any response to say that if Plaintiffs can't challenge the national motto, then maybe no one can. Even if "no one would have standing" to challenge a government action, that "is not a reason to find

standing." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 227 (1974). Rather, it is an indication that the subject matter is more appropriately committed "to the surveillance of Congress, and ultimately to the political process." *United States v. Richardson*, 418 U.S. 166, 179 (1974).

Thus, it is no surprise that recent Supreme Court cases—decided *after* this Court's decision in *Plattsmouth*—have cut back on Establishment Clause standing. For example, two recent cases have significantly narrowed the closely related doctrine of "taxpayer standing." *See Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125 (2011). In those cases, the Court held that it is not enough that a plaintiff be offended by the way the government is spending its tax dollars. Rather, the taxpayer must show "'that *his* tax money is being *extracted and spent* . . . in aid of religion.'" *Winn*, 563 U.S. at 140 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)).

Similarly, in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Court explained why the plaintiffs' offense at legislative prayers did not rise to the level of an Establishment Clause violation. Although the

plaintiffs claimed that "the prayers gave [them] offense and made them feel excluded and disrespected," the Court rejected that argument, explaining that "an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views." *Town of Greece*, 134 S. Ct. at 1826.

These cases significantly undermine the standing analysis in *Plattsmouth*. If "'the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree,'" the claim that a citizen is confronted with "'ideas with which they disagree'" cannot be a sufficient injury to invoke a case or controversy within any federal court's jurisdiction. *Id.* (quoting *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44 (2004) (O'Connor, J., concurring)). The Plaintiffs' complaint describes their Establishment Clause injury as offense at being "unwillingly confronted" with a message with which they are "offended." *See, e.g.*, Complaint ¶ 13, App. 23. "Offense, however, does not equate to coercion." *Town of Greece*, 134 S. Ct. at 1826. And without coercion, there can be no injury beyond the psychological injury rejected as insufficient in *Valley Forge*. Under the Supreme Court's most recent precedent, then, Plaintiffs lack standing.

III. The national motto does not violate the Establishment Clause.

Even if Plaintiffs did have standing, their Establishment Clause claim fails. As the Supreme Court has recently explained, "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added; internal quotation omitted). As explained below, the historical meaning of the Establishment Clause is fully consistent with the government's use of the national motto.

A. The Establishment Clause must be interpreted by reference to its historical meaning.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I, cl. 1. To interpret this clause, the Supreme Court has employed various "tests," depending on the context of the dispute and the inclinations of the Justices.

In some of its older cases, the Court has applied the *Lemon* test, which asks whether the government's action (1) has a religious "purpose," (2) has the "primary effect" of "advancing" or "endorsing" religion; and (3) fosters "excessive government entanglement with religion." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384,

395 (1993) (describing *Lemon* test); *Lynch v. Donnelly*, 465 U.S. 668, 688-89 (1984) (O'Connor, J. concurring) (first articulating "no endorsement" test). But this test has been heavily criticized by courts and commentators as malleable, self-contradictory, and ahistorical.[4] At least seven current or recent Justices have called for its rejection.[5] And in re-

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[4] *See, e.g.*, *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 869-77 (7th Cir. 2012) (Easterbook, J. & Posner, J., dissenting from *en banc* decision) (calling *Lemon* and the "no endorsement" test "hopelessly open-ended"); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 Calif. L. Rev. 5 (1987); Michael McConnell, *Accommodation of Religion*, Sup. Ct. Rev., 1985, at 1.

[5] *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) (calling the endorsement test "antiquated"); *Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence is undoubtedly in need of clarity"); *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 13, 14-15, 17, 19, 21-22 & n.3 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles," "nebulous," "erratic," "no principled basis," "Establishment Clause purgatory," "impenetrable," "ad hoc patchwork," "limbo," "incapable of consistent application," "our mess," "little more than intuition and a tape measure,"); *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) (comparing the *Lemon* test to a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); *Lee v. Weisman*, 505 U.S. 577, 644 (1992) (Scalia, J., joined by Rehnquist, J., White, J., and Thomas, J., dissenting); *County of Allegheny*, 492 U.S. at 655-57 (Kennedy, J. concurring in judgment in part and dissenting in part); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (O'Connor, J.,

cent cases, the Court has treated the *Lemon* factors, at best, as "no more than helpful signposts." *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (plurality). More often—and without exception in the last decade—it has not applied *Lemon* at all. *See Town of Greece*, 134 S. Ct. 1811 (2014) (not applying *Lemon*); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (same); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (same).

Instead, as with other parts of the Bill of Rights, the Court has increasingly returned to a focus on the historical meaning of the Establishment Clause. An early example of this approach is *Marsh v. Chambers*, where the Court upheld the practice of legislative prayer because it was "deeply embedded in the history and tradition of this country." 463 U.S. 783, 786 (1983). The history, the Court said, "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." *Id.* at 790.

This historical approach is now the norm. In *Van Orden v. Perry*, a

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concurring in judgment); *Wallace v. Jaffree*, 472 U.S. 38, 107-13 (1985) (Rehnquist, J., dissenting); *id.* at 90-91 (White, J., dissenting).

plurality of the Court upheld a Ten Commandments display by applying an analysis "driven both by the nature of the monument and by our Nation's history." 545 U.S. 677, 686 (2005) (plurality opinion); *see also id.* at 699-700 (Breyer, J., concurring) (looking to "national traditions" and the monument's historical context). Similarly, in *Hosanna-Tabor*—the Court's first decision addressing the ministerial exception, which is rooted in the Establishment Clause—the Court examined the history of colonial "[c]ontroversies over the selection of ministers," as well as "two events involving James Madison," to determine that "[t]he Establishment Clause prevents the Government from appointing ministers." 565 U.S. at 183-84. And in *Town of Greece*—the Court's most recent Establishment Clause decision—the Court held that "the Establishment Clause *must* be interpreted by reference to historical practices and understandings." *Town of Greece*, 134 S. Ct. at 1819 (emphasis added). Thus, the Court's current jurisprudence clearly gives preference to historical analysis over the discredited *Lemon* test.

This historical analysis was adopted and elaborated in a Ten Commandments case earlier this year in an opinion by Judge Kelly of the Tenth Circuit, joined by Chief Judge Tymkovich. *See Felix v. City of*

Bloomfield, 847 F.3d 1214, 1221 (10th Cir. 2017) (Kelly, J., dissenting). Drawing on *Town of Greece* and Professor Michael McConnell's historical research, Judge Kelly's opinion identifies six "general features" of an historical establishment of religion: "'(1) [state] control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church.'" *Id.* at 1216 (quoting Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of a Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003)); *see also* Eric Rassbach, Town of Greece v. Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S. Ct. Rev. 71, 91 (2014). Judge Kelly concluded that because the Ten Commandments monument "met none of the traditional elements of what the original public meaning of 'establishment' likely meant[,]" there was no Establishment Clause violation. *Felix*, 847 F.3d at 1221 (Kelly, J., dissenting) (citing McConnell, 44 Wm. & Mary L. Rev. at 2131).

As explained below, the national motto also features none of the six

elements of an establishment of religion, and thus does not violate the Establishment Clause.

B. The national motto does not violate the historical meaning of the Establishment Clause.

1. Control over doctrine and governance of the church

One element of an establishment is state control over the institutional church. At the time of the founding, this control manifested itself in two ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. McConnell, 44 Wm. & Mary L. Rev. at 2132. For example, Anglican colonies like Virginia followed the example of English rules providing that Parliament could determine the articles of faith for the Church of England and approve the text of the Book of Common Prayer, made it doctrine that the King must be Supreme Governor of the Church, and mandated that all ministers accept the Church of England's doctrines. *See* 1 William Blackstone, *Commentaries on the Laws of England* 364-83; *see also* Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). In these colonies, the power of appointment and removal also ended up in government hands, albeit colonial ones, and that power still

rendered religious groups "subservient" to their state masters. McConnell, 44 Wm. & Mary L. Rev. at 2140; *see also Hosanna-Tabor*, 565 U.S at 182-83 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Hosanna-Tabor*, 565 U.S. at 183 (citing 1 Annals of Congress 730-31 (1789)).

The words "In God We Trust" do not constitute government control over doctrine because they exert no control over anyone. The words on our currency have no bearing on the religious beliefs of any church or individual. Moreover, "offense . . . does not equate to coercion." *Town of Greece*, 134 S. Ct. 1826. Words on currency do not constitute coercion of anyone, any more than a prayer in the presence of an adult. Similarly, there can be no claim that the printing of currency affects the personnel or governance of any religious body.

2. Compelled church attendance

A second element of an establishment is compulsory church attendance. Prior to the founding, England fined those who failed to attend Church of England worship services. McConnell, 44 Wm. & Mary L.

Rev. at 2144. The colonies then followed suit. Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of hard-labor imprisonment. George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* 412 (1947). While Virginia eased those laws, versions of them remained in force until 1776. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 521 (Burt Franklin 1970) (1902). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. *See id.* at 513; Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in . . . religion").

The motto's presence on currency, of course, does not involve church attendance, compulsory or otherwise.

3. Financial support of the church

Another element of an establishment is public financial support of the church. At the founding, this support took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. McConnell, 44 Wm. & Mary L. Rev. at 2147. Land grants, the most significant form of public support, provided not only

land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148.

The national motto does not put money into any church's coffers or remove any money from the state's treasury. Plaintiffs do not argue that printing the words increases the cost of printing the coins—indeed, their request to remove the motto from our currency would be a much larger cost—but in any case, "a vanishingly small burden on taxpayers" does not amount to an Establishment Clause violation. *Town of Greece*, 134 S. Ct. at 1819. Rather than financing the church or religion, the national motto recognizes that there is something more important than money that the government recognizes.

4. Prohibition of dissenting worship

A fourth element of establishment consists of laws restricting worship in dissenting churches. Under the guise of heresy laws, England targeted the practices of Puritans, Baptists, Presbyterians, and especially Catholics. McConnell, 44 Wm. & Mary L. Rev. at 2160-61. Massachusetts notoriously enacted similar provisions that, for a short time, it used to banish, whip, mutilate, and even hang some non-Puritans. *Id.* at 2162. Virginia imprisoned some thirty Baptist preachers between

1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2118, 2166. Several states banned Catholic churches altogether. *Id.* at 2166.

Here, obviously, the motto's presence on currency does not involve any restrictions on worship in disfavored churches.

5. Use of the church for governmental functions

A fifth element of establishment is government assignment of important civil functions to church authorities. At the founding, states used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. *Id.* at 2169-76. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Virginia ministers were tasked with keeping vital statistics; and South Carolina recognized only marriages performed in an Anglican church. *Id.* at 2173, 2175, 2177.

Here, no church is involved with the government's decision to include the national motto on currency, and there is no governmental function that has been delegated to anyone outside of the government.

6. Restrictions on political participation

The final feature of establishment is the restriction of political participation based on church affiliation or the lack thereof. At the time of the founding, England allowed only Anglicans to hold public office and vote; many states took comparable measures. *Id.* at 2177. Although religious tests were prohibited at the federal level by the Religious Test Clause of Article IV, *id.* at 2178, Maryland's version of religious disqualification lasted until 1961, when the Supreme Court struck it down. *See Torcaso v. Watkins*, 367 U.S. 488 (1961).

The national motto does not come close to any of these practices. Plaintiffs are free to disagree with the motto and criticize its use on currency—just as others are free to disagree that Andrew Jackson should be honored on the twenty-dollar bill—and no one will face any political penalty for doing so.

* * *

In sum, the national motto does not contain any of the elements that characterize an establishment of religion. Rather, it is one of the benign references to the divine with which our "history is replete." *Lynch*, 465 U.S. at 675 (O'Connor, J. concurring); *see* United States Br. 22-23. It

thus does not violate the Establishment Clause.

IV. Atheist Plaintiffs have not raised a claim under RFRA or the Free Exercise Clause because they are not engaged in an "exercise of religion."

The United States explains why the Plaintiffs' arguments under RFRA and the Free Exercise Clause should fail on the merits. United States Br. 29-40. But it is not necessary to reach the merits of those claims for one simple reason: the atheist Plaintiffs cannot claim that the national motto burdens their exercise of religion. That is because their form of atheism is not a religious belief, but is instead a philosophy; acting upon that philosophy is not an "exercise of religion."

The Religious Freedom Restoration Act requires that "[g]overnment shall not substantially burden a person's *exercise of religion*." 42 U.S.C. 2000bb-1(a) (emphasis added). The Religion Clauses likewise protect only claims "rooted in religious belief." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *see* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of *religion*, or prohibiting the free exercise thereof") (emphasis added).

Without an "exercise of religion," the atheist Plaintiffs' RFRA and Free Exercise Clause claims must fail. These Plaintiffs claim that using

coins with "In God We Trust" violates their "religious" beliefs. Plaintiffs Br. 11. But in truth, their beliefs are philosophical responses to *others'* religious beliefs, not religious beliefs of their own.

The Supreme Court explained the distinction in *Wisconsin v. Yoder*:

> [I]f the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis.

406 U.S. at 216. The distinction between religious belief and philosophical reasoning can be a "most delicate question," *id.* at 215, but it is a necessary predicate to the question of whether a religious belief has been substantially burdened. Religious beliefs receive "special solicitude" under the Constitution. *Hosanna-Tabor*, 565 U.S. at 189. To expand that solicitude beyond religious belief would do violence to the constitutional text. Of course this does not mean that the government cannot protect secular conscience; it simply means that the Free Exercise Clause and RFRA do not apply to Plaintiffs' offense here.

Even a cursory examination of the question bears out *Yoder's* conclusion. For example, it would be wrong to classify Marxism as a religion, even though most streams of Marxism include opinions on religious

questions. Most notably, classical Marxism is strongly atheistic, defining religion as the "opium of the people." *See* Karl Marx, *Zur Kritik der Hegelschen Rechtsphilosophie*, 1 Karl Marx / Friedrich Engels—Werke 378 (Dietz Verlag, Berlin 1976) ("*Die Religion . . . ist das Opium des Volkes*" – "Religion . . . is the opium of the people"). Yet Marxism is not rooted in any religious belief, nor are its practices in any way linked to the transcendental. Marx might well have been just as offended as Plaintiffs at the sight of "In God We Trust." But he could not have had a claim to an "exercise of religion" even if he found the national motto distasteful to his philosophy. In fact, he might have felt insulted that anyone thought of his philosophy as in any way religious.

The same is true here. At bottom, taking a position on a religious question—thinking that religion is false or made up—is very different from holding a religious belief or acting on religious principles. The atheist Plaintiffs do not believe that God exists, but they did not reach that conclusion based on religious belief or transcendent experience. The atheism espoused by Plaintiffs is instead a philosophy that rejects the transcendent and proudly proclaims its reliance on reason alone. For example:

- Plaintiff New Boe Parent alleges his "personal faith is non-theist, with no belief in any gods or supernatural deities." Complaint ¶ 14, App. 24.
- Plaintiff New Poe Parent claims that a "religious message . . . is the complete antithesis of his Atheistic beliefs" Complaint ¶ 16, App. 25.
- Plaintiff Gary Lee Berger "bases his decisions, morals and behavior on the fact that no gods have ever existed in reality. He places no trust in any god." Complaint ¶ 21, App. 28.
- "Pursuant to their religious beliefs, Plaintiffs specifically do not trust in any 'God.' In fact, NOT trusting in God is a basic tenet of their religious belief systems." Complaint ¶ 44, App. 38.

None of these statements relies on transcendent truth or religious belief. Indeed, they reject it outright. And one cannot claim that rejecting religious belief is itself an "exercise of religion," any more than one could claim that refusing to do pushups is a form of athletic training.

Of course, some religions, such as some forms of Buddhism, also teach that there is no God. But atheist Buddhists reach that conclusion based on their religious beliefs and concept of the transcendent, not philosophical beliefs like Plaintiffs'.[6] Even then, merely holding a religious belief that is contrary to a government policy or message does not

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[6] *See, e.g.*, Paul Williams, *Mahāyāna Buddhism: The Doctrinal Foundations* 78 (Routledge 2d ed. 2009) (for "enlightened beings" "theistic Creator God" is a "complete fiction[ ]").

mean that there is a "substantial burden" on religious exercise. *Cf. Crowley v. Smithsonian Inst.*, 636 F.2d 738, 743 (D.C. Cir. 1980) (museum exhibit on evolution did not burden Christian plaintiffs). Rather, the government must impose some sort of pressure to act contrary to one's religious beliefs—which Plaintiffs do not allege here. *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) ("burden upon religion exists" "[w]here the state conditions receipt of an important benefit . . . or where it denies such a benefit because of conduct mandated by religious belief").

There is one class of claims under the Religion Clauses that philosophical atheists can make just as well as religious believers: the right not to be coerced to adopt a particular religious belief. For example, the government cannot coerce belief as a condition of holding public office. *See, e.g.*, *Torcaso*, 367 U.S. 488 (Maryland violated Establishment Clause by requiring belief in God as prerequisite for holding public office). But, as discussed above, Plaintiffs are not coerced by coins and the national motto does not violate the Establishment Clause.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,248 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point typeface.

Pursuant to Circuit Rule 28(A)(h)(2), I further certify that the brief has been scanned for viruses, and the brief is virus free.

April 18, 2017

/s Eric C. Rassbach

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CERTIFICATE OF SERVICE

I certify that on April 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 18, 2017

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