13-4049

To Be Argued By:
MICHAEL J. BYARS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-4049

ROSALYN NEWDOW, KENNETH BRONSTEIN, BENJAMIN DREIDEL, NEIL GRAHAM, JULIE WOODWARD, JAN DOE, PAT DOE, DOE CHILD 1 and DOE CHILD 2, ALEX ROE, DREW ROE, ROE CHILD 1, ROE CHILD 2, ROE CHILD 3, VAL COE, JADE COE, COE CHILD 1 and COE CHILD 2, NEW YORK CITY ATHEISTS, FREEDOM FROM RELIGION FOUNDATION,

Plaintiffs-Appellants,

—v.—

(*caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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JACOB J. LEW, Secretary of the Treasury,

Defendants-Appellees,

CONGRESS OF THE UNITED STATES OF AMERICA,
TIMOTHY F. GEITHNER, Secretary of the Treasury,

Defendants.

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Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA, RICHARD A. PETERSON, DEPUTY DIRECTOR, UNITED STATES MINT, LARRY R. FELIX, DIRECTOR, BUREAU OF ENGRAVING AND PRINTING, JACOB J. LEW, SECRETARY OF THE TREASURY,

Defendants-Appellees,

CONGRESS OF THE UNITED STATES OF AMERICA, TIMOTHY F. GEITHNER, SECRETARY OF THE TREASURY,

Defendants.

BRIEF FOR DEFENDANTS-APPELLEES

Preliminary Statement

Rosalyn Newdow, Kenneth Bronstein, Benjamin Dreidel, Neil Graham, Julie Woodward, Jan and Pat Doe and their children, Alex and Drew Roe and their children, Val and Jade Coe and their children, New York City Atheists, and Freedom From Religion Foundation (together, "plaintiffs") appeal from a judgment of the United States District Court for the Southern District of New York (Hon. Harold Baer) entered on September 10, 2013. That judgment was entered in accordance with an Opinion and Order dated September 9, 2013, granting the motion to dismiss filed by defendants-appellees the United States of America, Jacob J. Lew, as Secretary of the Treasury, Richard A. Peterson, as Deputy Director of the United States Mint, and Larry R. Felix, as Director of the Bureau of Engraving and Printing (the "government").

Plaintiffs are atheists who assert that the inscription of the national motto, In God We Trust, on United States money violates the Establishment Clause and the Free Exercise Clause of the Constitution, as well as the Religious Freedom Restoration Act ("RFRA"). Their challenge faces an insurmountable hurdle, as the Supreme Court has repeatedly described the motto's presence on the nation's money as a model of a constitutionally permissible reference to religion, and the several courts of appeals to have ruled on the question have squarely rejected plaintiffs' arguments.

The district court correctly followed those precedents. While the First Amendment prohibits an "es-

tablishment" of religion, the Supreme Court has held that it does not forbid every governmental reference to religion, nor does it create a constitutional regime of total separation between church and state, such that all religious matters must be purged from the public square—a regime that would depart starkly from the historical understanding of the First Amendment and the nation's established traditions. Thus, the Constitution has always been understood to permit such practices as legislative prayer, ceremonial calls for divine protection, public oaths referring to God, and the like. As the Supreme Court and other courts have recognized, the motto's placement on our money falls in this category, as a permissible reference to God that does not convey approval of religious belief but rather serves substantial secular purposes, including acknowledging the historical role of religion in our society, formalizing our medium of exchange, fostering patriotism, and expressing confidence in the future.

Plaintiffs' challenge is inconsistent with these long-recognized constitutional principles, and accordingly was properly rejected by the district court.

Statement of Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as the action arises under the Constitution and laws of the United States. On October 21, 2013, plaintiffs filed a timely notice of appeal (JA 288) from the final judgment of the district court, entered on September 10, 2013 (JA 287). Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291.

Issues Presented for Review

1. Whether the district court correctly held that the statutes requiring the motto to be placed on United States money did not violate the Establishment Clause.

2. Whether the district court correctly held that the statutes requiring the motto to be placed on United States money did not violate the Free Exercise Clause or RFRA.

Statement of the Case

A. Procedural History

Plaintiffs brought this action against Congress, the United States, and three federal officials, seeking a declaratory judgment that the placement of the motto on the nation's money violates the Constitution, as well as RFRA, and requesting an injunction against such placement. (JA 12-105). On May 8, 2013, the government moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (JA 129). On May 29, 2013, plaintiffs cross-moved for summary judgment pursuant to Federal Rule of Civil Procedure 56. (JA 131). On June 26, 2013, plaintiffs voluntarily dismissed Congress as a defendant. (JA 269). In an Opinion and Order filed September 9, 2013, the district court (Hon. Harold Baer) granted the government's motion to dismiss.

(JA 280).[1] Judgment was entered on September 10, 2013. (JA 287). This appeal followed.

B. The National Motto

The national motto In God We Trust has its origins in The Star-Spangled Banner, written by Francis Scott Key during the War of 1812, the fourth verse of which includes the phrase, "And this be our motto, 'In God is our Trust.'" *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 30 (2004) (Rehnquist, C.J., concurring in the judgment).

In 1864, Congress authorized the Director of the United States Mint and the Secretary of the Treasury to fix "the shape, mottoes, and devices" of one- and two-cent coins. Act of Apr. 22, 1864, ch. 66, § 1, 13 Stat. 54, 54-55; *see also* H.R. Rep. No. 60-1106, at 1-2 (1908) (discussing the history of the motto's inscription on United States coins). Secretary of the Treasury Salmon P. Chase chose to include the phrase In God We Trust on the coins, beginning with the 1864 two-cent coin. *See* H.R. Rep. No. 60-1106, at 2-3; History of "In God We Trust," U.S. Dep't of the Treasury, http://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx (last visited January 17, 2014) ("Treasury History"). The following year, Congress authorized the United States Mint, with approval of the Secretary of the Treasury, to include In God We Trust on all coins that "shall admit of such legend

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[1] The decision is available at *Newdow v. United States*, No. 13 Civ. 741, 2013 WL 4804165 (S.D.N.Y. Sept. 9, 2013).

thereon." Act of Mar. 3, 1865, ch. 100, § 5, 13 Stat. 517, 518.[2] The phrase was accordingly added to various other U.S. coins. *See* Treasury History.

In 1908, Congress enacted legislation requiring the phrase In God We Trust on all coins on which it had previously appeared. *See* Act of May 18, 1908, ch. 173, § 1, 35 Stat. 164, 164. This legislation came in response to numerous petitions objecting to the omission of the phrase from the ten-dollar ("eagle") and twenty-dollar ("double-eagle") gold coins placed in circulation in 1907. *See* H.R. Rep. No. 60-1106, at 2; Treasury History. As the House Report explained, "[t]hese petitions have covered so wide an area and have so invariably urged the restoration of the motto that the committee believes itself justified in concluding that these requests fairly voice the general sentiment of the nation." H.R. Rep. No. 60-1106, at 1. Thus, the committee unanimously recommended passage of the bill, "in confidence that the measure simply reflects the reverent and religious conviction which underlies American citizenship." *Id.* Since 1938, all coins have borne the inscription. *See* Treasury History.

In 1955, Congress required the inscription In God We Trust on all coins. *See* Act of July 11, 1955, ch. 303, 69 Stat. 290 (codified as amended at 31 U.S.C. § 5112(d)(1)). The House Banking and Currency

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[2] Congress renewed authorization for the use of In God We Trust on coins in 1873. *See* Act of Feb. 12, 1873, ch. 131, § 18, 17 Stat. 424, 427.

Committee recommended the inscription because it reflects "tersely" and with "dignity" the religious heritage of our nation and the "spiritual basis of our way of life." H.R. Rep. No. 84-662, at 4 (1955). The Committee Report noted that the history of religious references on coins predated the American Revolution:

> In the early days of the country coins bearing an inscription referring to the Deity are found as early as 1694. The Carolina cent minted in 1694 bore the inscription "God preserve Carolina and the Lords proprietors." The New England token of the same year bore the inscription "God preserve New England." The Louisiana cent coined in 1721-22 and 1767 bore the inscription "Sit nomen Domini benedictum"—Blessed be the name of the Lord. The Virginia halfpenny of 1774 bore an inscription in Latin which translated meant "George the Third by the grace of God." Utah issued gold pieces in the denominations of $2.50, $5, $10, and $20 in 1849 bearing the inscription "Holiness to the Lord."

Id. at 2.

The 1955 legislation requiring the inscription In God We Trust on all United States coins also extended to printed currency, on which the phrase had generally not previously appeared. *See* Act of July 11, 1955, ch. 303, 69 Stat. 290 (codified as amended at 31

U.S.C. § 5114(b)); Treasury History.[3] Because of the expense of changing printing plates, Congress allowed the Bureau of Engraving and Printing to comply over time. *See* Treasury History. In God We Trust appeared on the one-dollar silver certificate in 1957, and was introduced to other dollar denominations between 1964 and 1966. *See id.*[4]

In 1956, Congress passed legislation "establish[ing] a national motto of the United States," and thereafter enacted a joint resolution adopting In God We Trust as that motto. Act of July 30, 1956, ch. 795, 70 Stat. 732 (codified at 36 U.S.C. § 302). As the House Judiciary Committee Report noted, that phrase "has a strong claim as our national motto" because it appears in our national anthem and "has received official recognition for many years," such as by its placement on United States money. H.R. Rep. No. 84-1959, at 1-2 (1956); *see also Engel v. Vitale*, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) (noting that In God We Trust appears in the national anthem and on coins); S. Rep. No. 84-2703, at 2 (1956) (same). The committee also considered the phrase "E pluribus unum," which "has also received wide usage in the United States," but concluded that

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[3] In the statute's usage, "currency" refers to paper money, rather than coins.

[4] *See also* http://moneyfactory.gov/faqlibrary.html, noting that the phrase had appeared on some 1935 silver certificates, but did not appear on Federal Reserve Notes until series 1963.

In God We Trust was "a superior and more acceptable motto for the United States." H.R. Rep. No. 84-1959, at 2.

In 2002, Congress reaffirmed the language of the motto, making detailed findings about the history of the motto and similar statements of religious conviction but making no change to the law. *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002). In connection with that legislation, the House Judiciary Committee observed that "government acknowledgment of our Nation's religious heritage is entirely consistent with . . . the meaning of the Establishment Clause." H.R. Rep. No. 107-659, at 4 (2002). In 2006, the Senate passed a resolution to "commemorate, celebrate, and reaffirm" the motto on the fiftieth anniversary of its formal adoption, noting numerous examples of official acknowledgments of God. *See* S. Con. Res. 96, 109th Cong. (2006). In 2011, the House again reaffirmed the motto as "an integral part of United States society since its founding," specifically citing religious references by Presidents Washington, Madison, Lincoln, Franklin D. Roosevelt, Kennedy, and Reagan. H.R. Con. Res. 13, 112th Cong. (2011).

The motto not only appears on United States money, but also is found on other prominent governmental property. In findings accompanying the 2002 legislation, Congress remarked that the motto is inscribed above the main door of the Senate and behind the Chair of the Speaker of the House of Representatives. *See* Pub. L. No. 107-293, § 1(10), 116 Stat. 2057, 2058 (2002). In 2009, Congress passed legislation directing the Architect of the Capitol to "engrave . . .

the National Motto of 'In God we trust' in the Capitol Visitor Center." H.R. Con. Res. 131, 111th Cong. (2009).

C. The Complaint

In their amended complaint, plaintiffs assert various harms flowing from the inclusion of the motto on United States money. For example, they allege that the motto substantially burdens their ability to practice atheism or secular humanism and to raise their children, because it forces them to make a false declaration as to their religious views. (JA 29-34). The motto also purportedly compels them to feel alienated and to be subjected to ridicule at home, and to proselytize when they travel abroad. (JA 29-34). The plaintiffs who are numismatists allege that the motto interferes with their enjoyment of their coin collections. (JA 29-30). The minor plaintiffs allege that the placement of the motto on U.S. money promotes views that undermine their parents' teachings regarding religion and causes them to make a false declaration as to their "likely" future beliefs regarding religion. (JA 33-34). Plaintiffs further contend that the motto's inclusion on money contributes to disparagement and exclusion of atheists. (JA 84-85). Plaintiffs claim that their rights to free exercise of religion are substantially burdened because they disagree with the motto's alleged "religious message" and so must either abstain from or find an alternative to using money, or be "forced to proselytize" for a claim contrary to their beliefs. (JA 86-88).

Plaintiffs' amended complaint asserts that the placement of the motto on United States money violates the Establishment and Free Exercise Clauses, as well as RFRA, the equal protection component of the Fifth Amendment, and the limitation of Congress's powers to those enumerated in the Constitution. (JA 92-104). Plaintiffs principally seek a declaratory judgment that the statutes requiring that the motto appear on United States money, 31 U.S.C. §§ 5112(d)(1) and 5114(b), violate the Establishment Clause and the Free Exercise Clause of the First Amendment as well as RFRA, and an injunction preventing defendants from issuing money containing the motto. (JA 105).[5]

D. The District Court's Decision

In its Opinion and Order, the district court determined that it should apply the three-pronged analysis for Establishment Clause challenges set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (JA 282). The district court noted that the Supreme Court had "repeatedly assumed the motto's secular purpose and effect" (*i.e.*, the first two prongs of the *Lemon* analysis) and that plaintiffs had not raised a challenge under *Lemon*'s third prong (*i.e.*, whether the act at issue

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[5] Plaintiffs thus did not challenge 36 U.S.C. § 302, which specifies the national motto but does not authorize or require its inscription on any object. *See Lefevre*, 598 F.3d at 643 (holding that the plaintiff's allegations of "abstract stigmatic injury" were insufficient to confer standing to challenge § 302).

excessively entangles government and religion). (JA 282). The district court further noted that all of the federal courts of appeals to have considered the issue had concluded that the motto's use on United States money did not violate the Constitution. (JA 282).

In rejecting plaintiffs' Establishment Clause challenge, the district court looked to Supreme Court opinions that "repeatedly assumed" that the motto's use on money was constitutional. (JA 282-83). The district court understood that it should give such opinions "'considerable weight'" and "'great deference.'" (JA 282). The district court then reviewed the decisions of the four courts of appeals that had directly confronted the question presented here, noting that these decisions had held that the motto's use on money was "of a patriotic or ceremonial character" that bore "no true resemblance to a governmental sponsorship of a religious exercise," "served . . . the obviously secular function of providing a medium of exchange," and did not "otherwise . . . have a [p]rimary effect of advancing religion." (JA 284 (internal quotation marks omitted)).

The district court held that the case law, as well as the history and context of the motto's use on the money, "support[ed] only one conclusion," namely, that the challenged use of the motto "satisfies the purpose and effect tests enunciated in *Lemon*, and does not violate the Establishment Clause." (JA 284). The district court also rejected plaintiffs' Free Exercise and RFRA claims on the ground that plaintiffs had failed to allege any "government coercion, penal-

ty, or denial of benefits linked to the use of currency or the endorsement of the motto." (JA 285). Thus, the district court granted the government's motion to dismiss. (JA 286).

Summary of Argument

The phrase In God We Trust has a long history and occupies a unique place in American civic life. Although the Supreme Court has never directly considered a challenge to the motto's constitutionality, numerous opinions of the Court and its individual Justices over fifty years have referred to the motto as an exemplar of a constitutional religious reference. This Court should follow the consistent instruction of these cases, as well as the Supreme Court's more general explanation in other cases, that the Establishment Clause does not preclude all governmental acknowledgments of religion and its role in our nation's history. *See infra* Points I.A, .B.

Alternatively, if considered under the three-pronged *Lemon* analysis, the motto's use on United States money should be upheld. First, the motto serves legitimate secular purposes, including acknowledging the religious traditions and beliefs of our nation and its founders, solemnizing public occasions, expressing confidence in the future, and formalizing our medium of exchange. *See infra* Point I.C.1. Second, given the motto's history, it is not reasonably construed to primarily convey government approval of religious belief or otherwise endorse religion. *See infra* Point I.C.2. And third, the motto does not excessively entangle the government and religion

because it does not offer aid to religious institutions or otherwise foster an improper relationship between church and state. *See infra* Point I.C.3. Plaintiffs attempt to overcome the precedent against them by asserting a strict "neutrality principle" that would preclude the government from even mentioning religion, but that contradicts the law of the Supreme Court. *See infra* Point I.D. In addition, plaintiffs' claims under other provisions of the Constitution that essentially restate their Establishment Clause theories must fail for the same reason. *See infra* Point I.E.

As for plaintiffs' claims under the Free Exercise Clause or RFRA, plaintiffs cannot demonstrate that there is any aspect of the motto's placement on money that coerces them to do anything contrary to their religious beliefs. *See infra* Point II. Accordingly, the judgment of the district court should be affirmed.

ARGUMENT

Standard of Review

A district court's dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed *de novo*. *See, e.g.*, *N.Y. Life Ins. Co. v. United States*, 724 F.3d 256, 261 (2d Cir. 2013), *petition for cert. filed* (U.S. Jan. 14, 2014) (No. 13-849).

POINT I

The Statutes Requiring the Placement of "In God We Trust" on United States Money Do Not Violate the Establishment Clause

A. The Establishment Clause

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. As the Supreme Court has noted, there is no "single test or criterion" for determining if the Clause has been violated. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984); *accord Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment) ("no single mechanical formula that can accurately draw the constitutional line in every case");[6]

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[6] This Court has stated that Justice Breyer's concurring opinion in *Van Orden* is "controlling," as it provided the necessary fifth vote for the result in that case and offered the narrowest ground for decision. *Bronx Household of Faith v. Board of Educ. of City of New York*, 650 F.3d 30, 49 (2d Cir. 2011); *see Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." (internal quotation marks omitted)); *Green v. Haskell County Board of Comm'rs*, 568 F.3d 784, 807 & n.17 (10th Cir. 2009) (applying *Marks* to Justice Breyer's

id. at 686 (plurality opinion) (declining to apply test); *School District of Abington Township v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring) ("no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible"). Instead, recognizing that the "constitutional standard" of "separation of Church and State" is "one of degree," the Court has conducted fact-specific inquiries into the "specific situation before the Court." *Zorach v. Clauson*, 343 U.S. 306, 314, 315 & n.8 (1952).

To assess an asserted Establishment Clause violation, the Court has looked to the "basic purposes," *Van Orden*, 545 U.S. at 698 (op. of Breyer, J.), or "substantive end," *Lemon*, 403 U.S. at 614, of the Clause. Those include the guarantee of "religious liberty and equality" for adherents of all creeds, *County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989), the avoidance of strife and conflict that can result from religious disagreements, *Engel*, 370 U.S. at 429-30, and the prohibition of governmental interference in religion or conscience. *Van Orden*, 545 U.S. at 698 (op. of Breyer, J.) (listing Clause's purposes); *see Marsh v. Chambers*, 463 U.S. 783, 803-05 (1983) (Brennan, J., dissenting) (purposes include preserving individual right to conscience, preventing state interference in religious autonomy, preventing deg-

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Van Orden concurrence); *Card v. City of Everett*, 520 F.3d 1009, 1017-18 n.10 (9th Cir. 2008) (same); *Staley v. Harris County*, 485 F.3d 305, 308 n.1 (5th Cir. 2007) (same).

radation of religion through attachment to government, and assuring religious issues are not occasion for political battle). In determining if these values have been compromised, the Supreme Court has been careful to "'distinguish between real threat and mere shadow.'" *Marsh*, 463 U.S. at 795 (quoting *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring)).

While no single Establishment Clause formula exists, one thing is clear from decades of Supreme Court case law: the placement of the national motto on the money of the United States is constitutional. Without applying a formal test, this Court may look to the nation's history and the motto's nature, and note that the Supreme Court has repeatedly described the motto and its presence on U.S. money as an exemplar of a constitutional reference to religion. *See Marsh*, 463 U.S. 783 (declining to follow *Lemon* test); *Lee v. Weisman*, 505 U.S. 577 (1992) (same). Or it may follow the "signposts" of the test articulated in *Lemon v. Kurtzman*, and conclude that the motto's placement on the money is valid in light of its purposes, effects, and lack of entanglement with religion. Either way, the result is the same: the inscription In God We Trust on the coins and currency of the United States does not violate the Establishment Clause.

B. The Supreme Court Has Concluded That the Use of "In God We Trust" on the Nation's Money Is Permissible Under the Establishment Clause

The motto's long history as a national symbol, with special significance in our society, speaks power-

fully to its constitutional validity. As the Supreme Court has recognized, a religious reference that is "deeply embedded in the history and tradition of this country" and that has "coexisted with the principles of disestablishment and religious freedom" throughout that time does not threaten the values of religious freedom and tolerance embodied in the Establishment Clause. *Marsh*, 463 U.S. at 786. As with the practice of opening legislative sessions with a prayer upheld in *Marsh*, or the call of this Court's courtroom deputy that "God save the United States and this Honorable Court," the motto's constitutional significance is informed by historical evidence, and that history shows that those practices pose "no real threat to the Establishment Clause"—they are not (and are not seen as) "proselytizing activity" or as "placing the government's 'official seal of approval on one religious view.'" *Id.* at 790-92; *accord Elk Grove*, 542 U.S. at 26-30 (Rehnquist, C.J., concurring in the judgment) (listing religious references, including Pledge of Allegiance and national motto on money, as permissible "public recognition of our Nation's religious history and character").

To the contrary, those practices have "become part of the fabric of our society," and as such are not "an 'establishment' of religion or a step toward establishment . . . [but] simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. In short, the "unbroken practice" of these traditions provides "abundant assurance" that they do not "risk[ ] the beginning of the establishment the Founding Fathers feared." *Id.* at 795; *see Van Orden*, 545 U.S. at 702-03 (op. of Breyer,

J.) (forty years of monument's presence without significant controversy shows that "few individuals . . . are likely to have understood the monument as amounting . . . to a government effort" to establish religion, but instead it is viewed as "part of what is a broader moral and historical message reflective of a cultural heritage").

The Supreme Court's repeated references to the motto and its inscription on our money amply demonstrate that they are similarly an unthreatening part of our national societal fabric—and that the inscription is constitutional. Indeed, the Court has used the motto's placement on our coins and currency as a benchmark to measure the constitutionality of other government action. Two Supreme Court cases dealing with challenges to the constitutionality of certain holiday displays are emblematic of the Court's approval of the motto. These cases, *Lynch* and *County of Allegheny*, both involve "direct exposure" claims, *i.e.*, allegations that a person was harmed by encountering a public display of a facially religious symbol or text, like a crèche, menorah, or the Ten Commandments, much like the allegation here that plaintiffs are harmed by encountering the motto.

In *Lynch*, the Court held that the inclusion of a nativity scene in a holiday display was permissible because, although the crèche itself was a religious symbol, in the context of the display it "depict[ed] the historical origins of this traditional event long recognized as a National Holiday." 465 U.S. at 680. In reaching this conclusion, the Court noted that "[t]here is an unbroken history of official acknowl-

edgment by all three branches of government of the role of religion in American life from at least 1789," and listed "the statutorily prescribed national motto 'In God We Trust,' which Congress and the President mandated for our currency," as one example of such a permissible "reference to our religious heritage." *Id.* at 674, 676.

In a concurring opinion, Justice O'Connor explained that "governmental 'acknowledgments' of religion," including the "printing of 'In God We Trust' on coins," serve "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." 465 U.S. at 692-93 (O'Connor, J., concurring). Because of those secular purposes, and because of its history and ubiquity, the motto's presence on coins, like legislative prayer and similar practices, is "not understood as conveying governmental approval of particular religious beliefs" and does not violate the Constitution. *Id.*; *accord Elk Grove*, 542 U.S. at 36-37 (O'Connor, J., concurring in the judgment) (reasonable observer, aware of history and origins of practices including motto, "would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion").

The four dissenting Justices in *Lynch* also expressly agreed that the motto was a quintessential example of a religious reference that is permissible under the Establishment Clause:

> such practices as the designation of "In God We Trust" as our national motto . . .

> are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases.

465 U.S. at 716-17 (Brennan, J., dissenting).

Five years later, the Supreme Court relied on *Lynch*'s discussion of the motto (and the Pledge of Allegiance and other accepted traditions) as "consistent with the proposition that government may not communicate an endorsement of religious belief," contrasting that lack of endorsement with the sectarian Christian display it invalidated. *County of Allegheny*, 492 U.S. at 598, 602-03. Going further, four Justices opined that any Establishment Clause test that "would invalidate longstanding traditions," such as the motto and its placement on money, "cannot be a proper reading of the Clause." *Id.* at 670, 673 (Kennedy, J., concurring in part and dissenting in part).

The Supreme Court's Justices have recognized the validity of the motto in other cases as well. In *Elk Grove*, where the majority held the plaintiff lacked standing and therefore did not reach the merits, two concurring Justices specifically approved of the motto, reciting the history of its adoption by Congress and the requirement that it be inscribed on United States money, and concluding that "[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character." 542 U.S. at 30 (Rehnquist, C.J.,

concurring in the judgment). Justice O'Connor likewise observed in a concurring opinion that "[i]t is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths. Eradicating such references would sever ties to a history that sustains this Nation even today." *Id.* at 35-36 (O'Connor, J., concurring) (footnote omitted). Justice O'Connor further explained that the motto fell outside of the concerns of the Establishment Clause: "Ceremonial deism most clearly encompasses such things as the national motto ('In God We Trust')," whose "history, character, and context prevent them from being constitutional violations at all." *Id.* at 37 (internal quotation marks and alterations omitted).

These opinions demonstrate the Supreme Court's view—consistently and essentially unanimously held over decades—that certain official references to God, specifically including the motto and its use on United States money, are constitutional.[7] *See Van Orden*, 545 U.S. at 699 (op. of Breyer, J.) (discussing "the Establishment Clause's tolerance . . . [of] public refer-

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[7] As the district court noted (JA 284 n.3), the only exception appears to be Justice Douglas's concurrence in *Engel*, which enumerated the use of In God We Trust on the currency in a list of activities that constituted unconstitutional "financ[ing] of a religious exercise." 370 U.S. at 437 & n.1 (Douglas, J., concurring). As the cases discussed above make clear, the Supreme Court has not adopted that view.

ences to God on coins"); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (en banc) ("The Supreme Court has never questioned the proposition that the national motto can survive scrutiny under the Establishment Clause, and we should be utterly amazed if the Court were to question the motto's constitutionality now."). Although the Court's statements did not come in the context of a direct challenge to the motto, they nevertheless deserve the highest deference, as the district court correctly recognized. (JA 282); *see United States v. Colasuonno*, 697 F.3d 164, 178-79 (2d Cir. 2012) (noting courts' "usual obligation to accord great deference to Supreme Court *dicta*"); *Donovan v. Red Star Marine Servs.*, 739 F.2d 774, 782 (2d Cir. 1984). This is particularly true here because (contrary to plaintiffs' assertion that the Court's opinions are "tangential[]" or "equivocal" (Br. 41)) the Court's understanding of the motto was central to its recognition in these cases that secular references to the deity do not offend the Constitution. *See Lambeth v. Board of Comm'rs*, 407 F.3d 266, 271 (4th Cir. 2005) (Supreme Court's observations regarding the motto in *Lynch* and *County of Allegheny* "interpret[] the First Amendment and clarify[] the application of its Establishment Clause jurisprudence," and thus "constitute the sort of dicta that has considerable persuasive value in the inferior courts"); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the [Supreme] Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound.").

Nor, contrary to plaintiffs' views (Br. 41), is the Supreme Court historically misinformed. *See, e.g.*, *Lynch*, 465 U.S. at 673-78 (discussing the "practical aspects" of the relationship between church and state and the "unbroken history of official acknowledgment . . . of the role of religion in American life" since our nation's founding); *Marsh*, 463 U.S. at 786-95 & nn.5-10, 12, 13 (discussing historical practices regarding legislative prayer). Many of the opinions cited above include lengthy discussions of the history of the nation's traditions of governmental references to God. *E.g.*, *Elk Grove*, 542 U.S. at 25-30 (Rehnquist, C.J., concurring in the judgment). And Justice O'Connor has opined that a practice's "history and ubiquity" is central to how a reasonable observer would evaluate whether that practice "'conveys a message of endorsement of religion.'" *Id.* at 37-38 (O'Connor, J., concurring in the judgment) (quoting *County of Allegheny*, 492 U.S. at 630-31 (O'Connor, J., concurring)). Consistent with that view, it is the history of how "the practice has been employed," not just how the practice came about, that matters. *Id.* at 38.

While plaintiffs cite statements by government officials from around the time the motto was first placed on the nation's coins (Br. 3-4, 11, 15), apparently viewing them as dispositive, Justice O'Connor has explained that (as an earlier Court majority held) "the *subsequent* social and cultural history" of a practice is critical: "a government may initiate a practice 'for the impermissible purpose of supporting religion' but nevertheless 'retain the law for the permissible purpose of furthering overwhelmingly secular ends.'" *Id.* at 41 (quoting *Schempp*, 374 U.S. at 263-64

(Brennan, J., concurring) (describing *McGowan v. Maryland*, 366 U.S. 420, 431, 433-34, 444 (1961) (upholding Sunday closure laws: "There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces"; but "nonreligious arguments . . . began to be heard . . . and the statutes began to lose some of their totally religious flavor," such that "presently they bear no relationship to establishment of religion")) (alterations omitted)). The fact that the purpose may now be seen as permissible is confirmed by the 2002 reenactment, where in the legislative history Congress expressly referred to Supreme Court cases allowing "government acknowledgment of our Nation's religious heritage." H.R. Rep. No. 107-659, at 4 (2002). Thus, for the motto as well as for the Pledge of Allegiance, "[a]ny religious freight the words may have been meant to carry originally has long since been lost." *Elk Grove*, 542 U.S. at 41 (O'Connor, J., concurring in the judgment).

For these reasons, the motto's placement on American money does not offend the purposes of the Establishment Clause, and should be upheld by this Court.

C. The Motto Satisfies the Requirements of *Lemon v. Kurtzman*

That the motto, and its inscription on money, have such a place in the American social fabric that they cannot be seen as threatening an establishment of religion—and that the Supreme Court has repeatedly endorsed the motto's inscription on U.S. money as acceptable—is sufficient for this Court to affirm the district court's judgment. But other avenues lead to the

same result. If this Court were to apply the three-pronged analysis in *Lemon v. Kurtzman*, which in many cases "provides the framework for evaluating challenges under the Establishment Clause," *Bronx Household of Faith v. Board of Educ. of City of New York*, 650 F.3d 30, 40 (2d Cir. 2011), it should still uphold the challenged statutes.

Under *Lemon*, "government action which interacts with religion (1) must have a secular purpose, (2) must have a principal or primary effect that neither advances nor inhibits religion, and (3) must not foster an excessive government entanglement with religion." *Id.* (internal quotation marks and alterations omitted). "Although the *Lemon* test has been much criticized, the Supreme Court has declined to disavow it and it continues to govern the analysis of Establishment Clause claims in this Circuit." *Id.* at 40 n.9; *accord Skoros v. City of New York*, 437 F.3d 1, 17 n.13 (2d Cir. 2006). *But see Galloway v. Town of Greece*, 681 F.3d 20, 26, 30 (2d Cir. 2012) (finding "'no test-related substitute for the exercise of legal judgment'" in legislative prayer case, and declining to apply *Lemon* (quoting *Van Orden*, 545 U.S. at 700 (op. of Breyer, J.))), *cert. granted*, 133 S. Ct. 2388 (May 20, 2013) (No. 12-696) (argued Nov. 6, 2013).

As the district court correctly concluded, the use of the motto on United States money satisfies all three elements of this test. (JA 282-84).

1. The Motto Serves Legitimate Secular Purposes

Under the *Lemon* test, "government action must have 'a secular purpose.'" *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 864 (2005) (quoting *Lemon*, 403 U.S. at 612; alteration omitted). This first prong of the *Lemon* test "is not intended to favor the secular over the religious, but to prevent government from 'abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.'" *Skoros*, 437 F.3d at 18 (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 335 (1987)). This prong is satisfied so long as government action is not "motivated *wholly* by religious considerations," *Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 205-06 (2d Cir. 2012) (internal quotation marks omitted): "all that *Lemon* requires" is "*a* secular purpose," not that the government have "exclusively secular objectives," *Lynch*, 465 U.S. at 681 n.6 (emphasis added; internal quotation marks omitted); *accord McCreary County*, 545 U.S. at 859 n.10 (noting Court has held "governmental action legitimate even where its manifest purpose was presumably religious").

Courts generally defer to "the legislature's stated reasons," although "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary County*, 545 U.S. at 864. While *Lemon*'s purpose prong originally had been understood to look only to actual purpose, the Supreme Court has "recently instructed that the inquiry must further extend to how the government's

purpose is perceived by an objective observer, one who takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute." *Skoros*, 437 F.3d at 22 (internal quotation marks omitted).

Judged by this standard, the motto has a secular purpose. Indeed, the Supreme Court has said as much: in *Lynch*, where all nine Justices agreed the motto's placement on the nation's money was constitutional, the various opinions expressly described the permissible secular purposes of that practice. 465 U.S. at 676 (maj. op.) ("reference to our religious heritage"), 692-93 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy in society"), 716-17 (Brennan, J., dissenting) ("serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases").

Plaintiffs seek to overcome these secular purposes by referring to statements of government officials at the time of the decision to inscribe In God We Trust on coins. (Br. 11). But as noted above, even if the original motivation were, at least in part, religious, the long subsequent history is also relevant. *See supra* at 24-25. And in any event, the purpose of a practice need not be "exclusively secular" to be constitutional. *Lynch*, 465 U.S. at 681 n.6. Plaintiffs also suggest that the motto's purpose is "evident in its text" (Br. 3) —but the Supreme Court has explicitly rejected the

approach of "infer[ring] . . . no secular purpose" from "the religious nature" of a practice. *Id.* at 681. Indeed, the practice of governmental acknowledgment of religion has been repeatedly upheld by the Supreme Court, and does not necessarily indicate an unconstitutional legislative purpose. *See, e.g.*, *id.* at 676; *id.* at 692-93 (O'Connor, J., concurring).

The courts that have adjudicated direct challenges to the motto have reached the same conclusion. The Ninth Circuit determined in *Aronow v. United States* (which predated *Lemon*) that the motto's "use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise. . . . [I]t has spiritual and psychological value and inspirational quality." 432 F.2d 242, 243-44 (9th Cir. 1970) (internal quotation marks and footnotes omitted). In *Gaylor v. United States*, the Tenth Circuit held that the motto "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." 74 F.3d 214, 216 (10th Cir. 1996) (citations omitted); *see O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979), *aff'g on district court's op. O'Hair v. Blumenthal*, 462 F. Supp. 19, 19-20 (W.D. Tex. 1978) (motto "served a secular ceremonial purpose in the obviously secular function of providing a medium of exchange"). These judicial conclusions are consistent with the legislative history. *See* H.R. Rep. No. 84-662, at 4 (1955) (inscription reflects "tersely" and with "dignity" religious heritage of our Nation and the "spiritual basis of our way of life").

Plaintiffs contend that "(Christian) Monotheistic references" in the congressional actions reaffirming the motto in 2002, 2006, and 2011—by which they appear to mean any use of the word "God"—demonstrate that any assertion of the motto's secular purpose is a sham. (Br. 30-31). But those same actions, and their legislative history, make clear Congress's purpose to "acknowledg[e] . . . the religious heritage of the United States of America" and to "recogni[ze] . . . the fact that many Americans believe in God," goals that are (and that Congress described as) fully consistent with Supreme Court precedent. *E.g.*, H.R. Rep. No. 107-659, at 4-8 (2002). Plaintiffs' conclusory assertion that Congress acted only to further religion disregards this evidence, as well as the numerous statements of the Supreme Court and other courts of appeals that the motto, and its placement on money, have permissible purposes.

2. The Motto Does Not Have the Primary Effect of Advancing or Inhibiting Religion or Otherwise Conveying Endorsement or Disapproval of Religion

The second *Lemon* inquiry considers whether the primary effect of the challenged action is to promote or inhibit religion by taking sides in a religious matter. *Commack Self-Service Kosher Meats*, 680 F.3d at 209. The inquiry also has been cast as asking "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (not-

ing "endorsement" test proposed in *Lynch* concurrence was a "refinement" of *Lemon*'s second prong); *Skoros*, 437 F.3d at 14 n.12 (noting that Supreme Court majority adopted endorsement test in *County of Allegheny*). As with *Lemon*'s first prong, the endorsement inquiry examines the challenged action from the perspective of "an objective observer [who is] acquainted with the text, legislative history, and implementation of the statute." *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring). A plaintiff's "mistaken inference of endorsement" is not sufficient to support an Establishment Clause claim. *Board of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 251 (1990).

Again, the Supreme Court has spoken to this question, characterizing the motto as "consistent with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny*, 492 U.S. at 602-03. Other courts have agreed that "[t]he motto's primary effect is not to advance religion" and it "cannot be reasonably understood to convey government approval of religious belief." *Gaylor*, 74 F.3d at 216-17; *accord O'Hair*, 462 F. Supp. at 20 ("the use of the motto on the currency or otherwise does not have a *primary* effect of advancing religion"), *aff'd on opinion below*, 588 F.2d 1144. Those conclusions accord with the Supreme Court's approach in other cases: there is no impermissible effect or endorsement if a practice's "'reason or effect merely happens to coincide or harmonize with the tenets of some religions,'" and it is acceptable that "on occasion some advancement of religion will result from

governmental action." *Lynch*, 465 U.S. at 682-83 (quoting *McGowan*, 366 U.S. at 442).[8]

Nothing in the motto's placement on American money "coerce[s] anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a state religion or religious faith, or tends to do so,'" *Lee*, 505 U.S. at 587 (quoting *Lynch*, 465 U.S. at 678)—whether because the motto, through long usage and societal acceptance, has "lost any true religious significance," *Marsh*, 463 U.S. at 818 (Brennan, J., dissenting), its religious content is "highly circumscribed" and "minimal," *Elk Grove*, 542 U.S. at 42-43 (O'Connor, J., concurring in the judgment), or because the mere act of using coins and currency inscribed with In God We Trust cannot reasonably be viewed as adopting or participating in any religious aspect of that motto, *see Lee*, 505 U.S. at 594 (state "in effect required participation in a religious exercise" by sponsoring school graduation prayer; distinguishing *Marsh*, where legislators were free to

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[8] Plaintiffs assert that the case of *In re Plywacki*, 107 F. Supp. 593 (D. Haw. 1952), "exemplifie[s]" the effect of the motto of "increased discrimination against Atheists." (Br. 12). Their brief fails to disclose that *Plywacki* was quickly reversed, on the government's concession. *Plywacki v. United States*, 205 F.2d 423 (9th Cir. 1953). The mere fact that plaintiffs must reach back to a sixty-year-old erroneous decision of a single district judge to attempt to demonstrate the motto's invidious effect proves the paucity of their argument.

leave); *Marsh*, 463 U.S. at 792 (noting Samuel Adams's response to coercion argument: that he could "hear a prayer" at legislative session with which he disagreed without offense); *Elk Grove*, 542 U.S. at 40 (O'Connor, J., concurring in the judgment) ("one nation under God" "cannot be seen . . . as an expression of individual submission to divine authority"). Plaintiffs suggest that the motto's use of the word "we" attributes a religious belief to all Americans (Br. 14, 21, 25), but that first-person reference is fully consistent with the types of "tolerable acknowledgment of beliefs widely held among the people of this country," *Marsh*, 463 U.S. at 792, "official acknowledgment . . . of the role of religion in American life," or "reference to our religious heritage," *Lynch*, 465 U.S. at 674, 676, that the Supreme Court has repeatedly upheld.

In addition, plaintiffs maintain that because the children among them are "impressionable," a more stringent analysis of the effects of the motto should be applied. (Br. 17, 24-25). But while the Supreme Court has stated that courts must be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), the cases plaintiffs rely on all involved state-funded education, where coercive pressures are inherent, *id.* at 584 ("[t]he State exerts great authority and coercive power through mandatory attendance requirements"); *School District of Grand Rapids v. Ball*, 473 U.S. 373, 385-88 (1985) (noting "risk of state-sponsored indoctrination," "pressures of the environment," and "indoctrinating effect" on students), *overruled in part by Agostini v. Felton*, 521 U.S. 203

(1997); *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (upholding university program that Court distinguished from other cases involving younger "impressionable" children, and finding no "coercion directed at the practice or exercise of [plaintiffs'] religious beliefs").

The pressures in schools are entirely different from the complete lack of coercion in a case, like this one, where a child's exposure to a government-endorsed message is wholly passive.[9] *See Elk Grove*, 542 U.S. at 16 (school's requirement that child recite the Pledge of Allegiance did not "impair[father's] right to instruct his daughter in his religious views"). Indeed, were plaintiffs' theory correct, all a person seeking to bring a direct exposure case would need to do to lower the constitutional standard would be to implead a child as a plaintiff—just as plaintiffs have attempted to do here.

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[9] In an apparent effort to avoid this point, plaintiffs point out that schools may use money in teaching mathematics. (Br. 25). But the use of everyday objects like coins and banknotes cannot reasonably be called "religious indoctrination." *See Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) ("Public schools are not obliged to shield individual students from ideas which potentially are religiously offensive, particularly when the school imposes no requirement that the student agree with or affirm those ideas, or even participate in discussions about them.").

3. The Motto Does Not Impermissibly Entangle Government and Religion

Lemon's third prong considers whether the challenged government action "foster[s] excessive state entanglement with religion." *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 425 (2d Cir. 2002). As the district court correctly observed, plaintiffs do not contend that this prong is violated. (JA 282).

In any event, *Lemon*'s third element plainly is satisfied here. "'Entanglement is a question of kind and degree.'" *Skoros*, 437 F.3d at 36 (quoting *Lynch*, 465 U.S. at 684). "[T]he First Amendment does not prohibit all interaction between church and state." *Id.* Entanglement is unconstitutionally "'excessive'" when it has "'the effect of advancing or inhibiting religion,'" and thus the "entanglement analysis is properly treated as 'an aspect' of *Lemon*'s second-prong 'inquiry into a statute's effect.'" *Id.* (quoting *Agostini*, 521 U.S. at 232-33). The Court should look to "'the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Id.* (quoting *Agostini*, 521 U.S. at 232). Here, the motto does not provide "aid" to any institutions, religious or otherwise; it thus does not raise entanglement concerns. *Gaylor*, 74 F.3d at 216 ("[T]he motto does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state.").

D. The Motto's Inscription on U.S. Money Does Not Violate the Neutrality Principle

In the face of this case law, either holding or strongly suggesting that the motto's placement on the nation's money is constitutional, plaintiffs assert a "neutrality principle" under which any religious references in the public sphere purportedly are unconstitutional because they "'favor religious belief over disbelief.'" (Br. 8 (quoting *County of Allegheny*, 492 U.S. at 590), 20-21, 41-43, Addendum B). Their argument misunderstands the Establishment Clause's neutrality requirement, and would distort it into a rigid line of demarcation that contradicts the Supreme Court's jurisprudence.

As Justice Breyer has explained, "[w]here the Establishment Clause is at issue, tests designed to measure 'neutrality' alone are insufficient." *Van Orden*, 545 U.S. at 699 (op. of Breyer, J.). This is so for two reasons: first, "because it is sometimes difficult to determine when a legal rule is 'neutral'" and, second, because

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious."

Id. (quoting *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring)). An approach that looks only to whether the challenged action has any "religious nature" would "lead the law to exhibit a hostility toward religion that has no place in our Establishment Clause traditions" and risks "creat[ing] the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid." *Id.* at 704 (op. of Breyer, J.); *accord County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring) ("The Court has avoided drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion."). Put differently, the "total separation between church and state" that plaintiffs call for "is not possible in an absolute sense," and "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614; *accord Lynch*, 465 U.S. at 678-79 ("The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test."). Thus, rather than serving as a rule that can "draw the line in all the multifarious situations," the neutrality principle "provide[s] a good sense of direction"—but "given its generality as a principle, an appeal to neutrality alone cannot possibly lay every issue to rest, or tell us what issues on the margins are substantial enough for constitutional significance." *McCreary County*, 545 U.S. at 876; *accord Skoros*, 437 F.3d at 16-17.

That the Supreme Court's "neutrality principle" does not require reversal here is clear from the multiple cases in which the Court or its Justices approve of the motto or its presence on money, while at the same time reiterating that the Establishment Clause requires neutrality. *County of Allegheny*, 492 U.S. at 590-91 (summarizing neutrality requirements of Establishment Clause), 602-03 (describing motto as permissible ceremonial deism and nonsectarian reference to religion); *Lynch*, 465 U.S. at 676 (describing motto as part of tradition of permissible references to religion), 691 (O'Connor, J., concurring) ("[f]ocusing on the evil of government endorsement or disapproval of religion"), 692-93 (O'Connor, J., concurring) (approving motto), 698 (Brennan, J., dissenting) (Clause "seeks to guarantee that government maintains a position of neutrality with respect to religion"), 716-17 (Brennan, J., dissenting) (approving motto). More generally, in *Van Orden* and *McCreary County*, which, like this case, are direct exposure cases, the Supreme Court similarly recognized that the Establishment Clause both requires neutrality and permits some level of government recognition of religion. *Van Orden*, 545 U.S. at 683-84 (plurality opinion) (noting "risk of fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires" (internal quotation marks and alteration omitted)), 716 (Stevens, J., dissenting) (distinguishing Ten Commandments from motto, described as "an appendage to a common article of commerce"); *McCreary County*, 545 U.S. at 859 n.10 (observing that "Establishment Clause doctrine lacks the comfort of categorical absolutes" and noting

Marsh's upholding of legislative prayer), 860 (discussing neutrality). And while plaintiffs repeatedly rely on *McCreary County*'s description of the neutrality principle as the "touchstone" of the Court's analysis, they disregard the fact that that description occurred in the limited context of assessing the purpose of the challenged display—which the Court held was plainly to advance religion—and that *McCreary County* was decided the same day as *Van Orden*, which upheld a state-sponsored monument of the Ten Commandments while accepting its religious nature. *Van Orden*, 545 U.S. at 690 (plurality opinion) ("Of course, the Ten Commandments are religious . . . ."); *id.* at 700-01 (op. of Breyer, J.) ("the Commandments' text undeniably has a religious message, invoking, indeed emphasizing, the Deity").

The Supreme Court cases in Addendum B to plaintiffs' brief are not to the contrary. Only two of these forty-one cases involve direct exposure claims, namely, *Van Orden* and *McCreary County*, which for the reasons discussed above do not support plaintiffs' view. The remaining thirty-nine opinions deal with issues such as funding for non-public schools, accessibility of public facilities to religious groups, eligibility for tax-exempt status, church involvement in liquor licensing, and eligibility for elected office—*i.e.*, cases where the issue of the ability of the government to make religious references is not in question.

Similarly, plaintiffs are incorrect that this Court's precedent "overwhelmingly supports" their case. (Br. 13-20). *Skoros* directly contradicts their neutrality argument. *See supra* at 37. Moreover, Establish-

ment Clause cases turn on their specific facts, *see Zorach*, 343 U.S. at 314, 315 & n.8, and the cases cited by plaintiffs are easily distinguishable. *Cooper v. United States Postal Service* involved a postal facility operated by a church where religious materials were offered to customers, 577 F.3d 479, 487-88 (2d Cir. 2009); *Kaplan v. Burlington* followed *County of Allegheny* in invalidating a religious display, 891 F.2d 1024, 1025 (2d Cir. 1989). Given the nature and contexts of the displays in those cases, the Court's statements regarding their effect cannot provide the yardstick for measuring the constitutionality of the motto, contrary to plaintiffs' argument. (Br. 14-16, 20). The remaining five cases cited by plaintiffs are even more readily distinguishable, as they involved claims of more than direct exposure to religious statements. *See Commack Self-Service Kosher Meats*, 680 F.3d 194 (state laws regarding labeling and marketing of kosher foods); *Bronx Household of Faith*, 650 F.3d 30 (use of school facilities by church); *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156 (2d Cir. 2001) (right of state employee to discuss religious beliefs while performing duties); *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49 (2d Cir. 2001) (school activities); *Russman by Russman v. Sobol*, 85 F.3d 1050 (2d Cir. 1996) (school services for disabled student), *vacated*, 521 U.S. 1114 (1997).

E. The Motto's Presence on Money Does Not Otherwise Violate the Constitution

Plaintiffs also allege violations of other provisions of the Constitution. But in essence, these claims de-

pend on plaintiffs' Establishment Clause theories, and should be rejected for the same reasons.

Plaintiffs suggest that Congress has acted outside its enumerated powers in placing the motto on American money. *See United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."). But, plainly, Congress has the power "[t]o coin Money," U.S. Const. art. I, § 8, cl. 5, and, whether under that power itself or under its authority "[t]o make all Laws which shall be necessary and proper" for doing so, *id.* cl. 18, may specify the appearance of the nation's money. *See United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013) ("The scope of the Necessary and Proper Clause is broad. . . . The Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution." (internal quotation marks omitted)). To the extent plaintiffs are asserting that no enumerated power authorizes the government to make religious claims, they have essentially restated their unsuccessful Establishment Clause argument.

Similarly, plaintiffs allude to an equal protection challenge—although, as they have not developed the argument in their brief, it has been waived and the Court need not address it. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal. . . . [S]tating an issue without advancing an argument

. . . [does] not suffice."). Whatever equal protection claim there may be, it depends on the same "neutrality" argument that underlies the Establishment Clause claim, and accordingly cannot succeed.

POINT II

The Statutes Placing the Motto on United States Money Do Not Violate the Free Exercise Clause or RFRA

A. The Free Exercise Clause and RFRA

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. The Clause "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). Thus, the "government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Division v. Smith*, 494 U.S. 872, 877 (1990) (internal quotation marks and citations omitted). The Free Exercise Clause embraces both the "freedom to believe and freedom to act on one's beliefs. The former freedom, which forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship, is absolute; in the nature of things, the second cannot be." *Skoros*, 437 F.3d at 39 (internal quotation marks and citation omitted).

"It is well established that a generally applicable law that does not target religious practices does not violate the Free Exercise clause." *Universal Church v. Geltzer*, 463 F.3d 218, 227 (2d Cir. 2006); *accord Smith*, 494 U.S. at 877-82. After the Supreme Court established that rule in *Smith*, Congress enacted RFRA, 42 U.S.C. § 2000bb *et seq.*, restoring a strict scrutiny standard for actions of the federal government that substantially burden the exercise of religion. Thus, RFRA "prohibits the Federal Government from substantially burdening a person's exercise of religion, unless the Government 'demonstrates that application of the burden to the person' represents the least restrictive means of advancing a compelling interest." *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 423 (2006) (quoting 42 U.S.C. § 2000bb-1(b)); *accord Tabbaa v. Chertoff*, 509 F.3d 89, 105 (2d Cir. 2007). "[A] substantial burden [is] a situation where the [government] puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *McEachin v. McGuinnis*, 357 F.3d 197, 202 n.4 (2d Cir. 2004).

B. The Motto Is Lawful Under the Free Exercise Clause and RFRA

The district court correctly applied these standards, concluding that plaintiffs failed to allege any showing of government coercion, penalty, or denial of benefits as a result of the placement of the motto on United States money. (JA 285).

Plaintiffs cannot show that the inscription of the motto on United States money is coercive in violation

of the Free Exercise Clause. Their claims center on the allegation that they "are required to bear on their persons . . . a statement they believe to be false, . . . [and] that attributes to them personally a perceived falsehood that is the antithesis of the central tenet of their religious system"; therefore "they are conscripted into assisting in the proselytization of a religious notion that they explicitly reject." (Br. 25-26). But the Supreme Court has noted that the motto does not compel people who use money to advance religion because they are not required to publicly display the motto. *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977) ("Currency is generally carried in a purse or pocket and need not be displayed by the public. The bearer of currency is thus not required to publicly advertise the national motto."). Moreover, as explained above, there is no religious compulsion in the motto's placement on American money: the religious content of the message is minimal, and in context it cannot reasonably understood as an endorsement of religion. *See supra* at 32. As the Ninth Circuit has held, the claim that carrying money is equivalent to proselytizing the message In God We Trust depends on the premise that that inscription constitutes the government's endorsement of religion, and accordingly is foreclosed for the same reasons the Establishment Clause claim is foreclosed. *Newdow v. Lefevre*, 598 F.3d 638, 646 & n.12 (9th Cir. 2010).

The district court's judgment should be affirmed for other reasons as well. Plaintiffs' constitutional claim cannot overcome the fact that the motto appears on United States money by means of a generally applicable law that does not target plaintiffs' athe-

istic practices or beliefs; it is therefore barred by *Smith*, 494 U.S. at 878-79; *see Universal Church*, 463 F.3d at 227. And while RFRA abolished the *Smith* rule regarding actions of the federal government, plaintiffs' statutory claim must fail as well.

First, RFRA cannot reasonably be interpreted to repeal the federal statutes requiring the motto to be placed on coins and currency. Although it is true that RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise," 42 U.S.C. § 2000bb-3(a), and accordingly "amends the entire United States Code," *Rweyemamu v. Cote*, 520 F.3d 198, 202 (2d Cir. 2008), what plaintiffs seek is not the amendment but the implied repeal of 31 U.S.C. §§ 5112(d)(1) and 5114(b), as there is simply no way those statutes can be modified to accommodate plaintiffs' claims. But courts should "not infer a statutory repeal unless the later statute expressly contradicts the original act or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (internal quotation marks and alterations omitted); *accord Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) ("repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest"). Had Congress meant to repeal the specific commands of the motto statutes, it would have said so clearly, rather than obliquely. *See Francis v. Mineta*, 505 F.3d 266, 273 (3d Cir. 2007) (Stapleton, J., concurring) (even though RFRA "applies"

to all federal law, it should not be read to "effectively supplant" preexisting specific statute).

In any event, RFRA provides plaintiffs with no relief. None of plaintiffs' alleged burdens are "substantial" under RFRA, as they do not "put[] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *McEachin*, 357 F.3d at 202 n.4. Plaintiffs' allegations that the placement of the motto on the currency requires them to bear a religious message and to proselytize for a religious claim fail for the same reasons as their Establishment Clause and Free Exercise Clause claims. *See Skoros*, 437 F.3d at 41 (explaining that menorah's use in a secular display did not burden free exercise rights). Even if the motto were to be deemed a substantial burden on plaintiffs' exercise of their religious beliefs, plaintiffs' RFRA claim still fails because the motto's "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy in society," *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring), are sufficiently compelling, and because the motto tersely and with dignity expresses these sentiments, making it the least restrictive means of doing so. *See Tabbaa*, 509 F.3d at 105.

CONCLUSION

The judgment of the district court judgment should be affirmed.

Dated: New York, New York
January 17, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 10,923 words in this brief.

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