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

NEW DOE CHILD #1, *et al.*,

Plaintiffs,

v.

THE CONGRESS OF THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

No. 5:16-cv-59

DEFENDANTS' MOTION TO DISMISS

Defendants the United States of America; Jacob J. Lew, in his official capacity as the Secretary of the Treasury; Rhett Jeppson, in his official capacity as the Principal Deputy Director, United States Mint; and Leonard R. Olijar, in his official capacity as the Director, Bureau of Engraving and Printing, hereby move to dismiss Plaintiffs' lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(6).[1] A memorandum of points and authorities in support of Defendants' motion is attached.

Dated: May 10, 2016

Respectfully Submitted,

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[1] Defendant the Congress of the United States of America is being voluntarily dismissed from this action with prejudice pursuant to a stipulation Defendants are filing concurrently with the present motion.

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MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Three courts of appeals and numerous district courts have already repudiated challenges like Plaintiffs' to the inscription of "In God We Trust"—our National Motto—on United States currency and coins.[1] In so doing, these courts have applied established First Amendment principles set forth in a litany of Supreme Court decisions—decisions that time and again have highlighted the placement of the Motto on our money as permissible. Plaintiffs' claims cannot overcome this well-settled, uniform jurisprudence, and they must be dismissed.

STATEMENT OF THE ISSUES

Plaintiffs' suit presents the questions whether the Second Circuit, Fifth Circuit, and Ninth Circuit, among other courts, have correctly rejected Free Exercise and Religious Freedom Restoration Act challenges like Plaintiffs' to the federal statutes prescribing the inscription of the National Motto on United States money; whether those statutes violate the Free Speech Clause, notwithstanding that they neither compel nor restrict speech; and whether those statutes violate the Equal Protection Clause, notwithstanding that they apply equally to all.

BACKGROUND

The National Motto has its origins in the Star-Spangled Banner. Written by Francis Scott Key during the War of 1812, the fourth verse of what is now our National Anthem includes the

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[1] *See Newdow v. United States*, No. 13-cv-741, 2013 WL 4804165 (S.D.N.Y. Sept. 9, 2013) (Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb *et seq.*, and Free Exercise and Establishment clauses), *aff'd sub nom. Newdow v. Peterson*, 753 F.3d 105 (2d Cir. 2014) (same), *cert. denied*, 135 S. Ct. 1008 (2015); *Newdow v. Congress*, 435 F. Supp. 2d 1066 (E.D. Cal. 2006) (RFRA and Free Exercise, Free Speech, Equal Protection, and Establishment clauses), *aff'd sub nom. Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) (RFRA and Establishment Clause); *O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Tex. 1978) (Free Exercise and Establishment clauses), *aff'd sub nom. O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (per curiam) (same); *see also Kidd v. Obama*, 387 F. App'x 2 (D.C. Cir. 2010) (per curiam) (Establishment Clause); *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996) (Establishment Clause).

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 God We Trust" first appeared on a United States coin in 1864, pursuant to Congress's authorization of the Director of the United States Mint and the Secretary of the Treasury to fix "the shape, mottoes, and devices of . . . coins." Act of April 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). Then-Treasury Secretary Salmon P. Chase, who would later become Chief Justice of the United States, authorized use of the phrase. *Elk Grove Unified Sch. Dist.*, 542 U.S. at 29 (Rehnquist, C.J., concurring); *see also* 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 May 10, 2016).

The following year, Congress authorized the United States Mint, with approval of the Secretary of the Treasury, to include the phrase "In God We Trust" on all coins that "shall admit of such legend thereon." Act of March 3, 1865, ch. 100, § 5, 13 Stat. 517, 518. Pursuant to that Act, "In God We Trust" was placed on the gold double-eagle coin, the gold eagle coin, and the gold half-eagle coin. *See* History of "In God We Trust." The next year, the phrase was placed on additional coins. *Id.* Congress renewed authorization for the use of "In God We Trust" on coins in 1873. *See* Act of February 12, 1873, ch. 131, § 18, 17 Stat. 424, 427.

In 1908, Congress enacted legislation requiring inclusion of 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 that phrase from the double-eagle and eagle gold coins placed in circulation in 1907. *See* H.R. Rep. No. 60-1106, at 2; History of "In God We Trust." As the House Report explains, "[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. *Id.* As a result, the Motto has been in continuous use on the one-cent coin since 1909, and on the ten-cent coin since 1916. *See* History of "In God We Trust." It also has appeared on all gold coins and silver dollar, half-dollar and quarter-dollar coins struck since July 1, 1908. *See id.*

In 1955, Congress required the inscription of "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 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 as background 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 Act requiring inscription of "In God We Trust" on all United States coins also extended to printed currency. *See* Act of July 11, 1955, ch. 303, 69 Stat. 290 (codified as amended at 31 U.S.C. § 5114(b)). Because of the expense of changing printing plates, Congress allowed the Bureau of Engraving and Printing to comply over time. *See* History of "In God We Trust." "In God We Trust" was first used on paper money in 1957, when it appeared on the one-

dollar silver certificate, and was introduced to other dollar denominations (specifically, the $1, $5, $10, $20, $50 and $100 Federal Reserve Notes) between 1964 and 1966. *See id.*

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 as amended 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 coins and currency. 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 "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 our Nation's religious heritage but making no change to the law. *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002). And 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 observed 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." *See* H.R. Con. Res. 131, 111th Cong. (2009).

SUMMARY OF THE ARGUMENT

Plaintiffs—atheists and secular humanists, among others, as well as children being brought up in households adhering to such traditions—allege that the inscription of the Motto on United States currency and coins violates the Free Exercise Clause, RFRA, the Free Speech Clause, and the Equal Protection Clause. Plaintiffs' claims hinge on their assertion that the Motto is a religious message, ignoring the Supreme Court's repeated teaching that it is not. Plaintiffs' claims must be dismissed. The constitutionality of the Motto has been upheld by each of the five courts of appeals, among other courts, to have addressed it, *see supra* n.1, and the Sixth Circuit has left no doubt what its views are: "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." *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 301 (6th Cir. 2001) (en banc).[2]

Under the Free Exercise Clause and RFRA, Plaintiffs cannot show that the statutes that they challenge substantially burden their religious exercises. A substantial burden exists where the government coerces individuals to violate their religious beliefs, conditions receipt of an

[2] In a parallel case brought by counsel for Plaintiffs in the District of Minnesota, as well as in counsel's prior cases concerning the Motto, the plaintiffs argued that the Motto's inscription on United States money violated the Establishment Clause. *See* Am. Compl., *New Doe Child #1 v. Congress of the United States of Am.*, No. 15-cv-4373 (D. Minn. filed Feb. 29, 2016); *supra*, n.1 (citing decisions rejecting Establishment Clause claims in counsel's cases from the Second Circuit, the Ninth Circuit, the Southern District of New York, and the Eastern District of California). Given the Sixth Circuit's decision in *ACLU of Ohio*, Plaintiffs have wisely not pursued such a challenge here. Yet the "Free Exercise and RFRA claims," in particular, that counsel has brought on Plaintiffs' behalf in this case "appear to simply restate [the] Establishment Clause claim" that counsel has brought elsewhere "in an effort to elude [Sixth] Circuit binding precedent." *See Newdow v. Congress*, 435 F. Supp. 2d at 1076–78 (nonetheless proceeding to "briefly address," and reject, the plaintiff's Free Exercise and RFRA claims).

important benefit upon conduct proscribed by their faith, or denies such a benefit because of conduct mandated by religious belief. None of these has occurred here. Indeed, contrary to Plaintiffs' position, the Motto does not represent a religious dogma or constitute governmental sponsorship of religion. Moreover, even if Plaintiffs could establish a substantial burden, their claims must still be dismissed because the statutes they challenge are neutral laws of general applicability and, in any event, they satisfy strict scrutiny.

Plaintiffs' remaining claims also lack merit for additional reasons. Their Free Speech claim must be dismissed because the challenged statutes neither compel nor curtail speech by Plaintiffs or by anyone else. And their Equal Protection claim is not cognizable because the statutes at issue do not differentiate between individuals or groups, as is generally required to state such a claim.

Consequently, for the reasons set forth below, Plaintiffs have failed to state a claim upon which relief can be granted and their Complaint should be dismissed.

ARGUMENT

I. THE SUPREME COURT HAS ADOPTED "IN GOD WE TRUST" AS A BENCHMARK FOR PERMISSIBLE REFERENCES TO RELIGION

In two landmark Establishment Clause decisions and in numerous opinions of individual Justices, the Supreme Court has consistently held out the Motto as an exemplar of a constitutional reference to religion. Those decisions do not *per se* preclude Plaintiffs' claims in this case but they reveal one reason, at least, that none of them can succeed. As the Ninth Circuit held in rejecting claims that are nearly identical to certain of those that Plaintiffs raise here, Plaintiffs' arguments against the Motto "depend[] on [their] contention that [it] represents a religious dogma and constitutes governmental sponsorship of religion." *Lefevre*, 598 F.3d at 646; *see* Am. Compl. ¶¶ 440, 449, 456 (referring to the Motto as a "religious message"); *id.*

¶¶ 30, 34, 40, 47, 60, 441 (referring to the Motto as a "religious claim"); *id.* ¶ 460 (alleging that the Motto's presence on United States money implicates "choices relating to religious belief"). But this contention flies in the face of decades of Supreme Court jurisprudence affirming that the religious content of the Motto is minimal, and holding that, in context, the Motto cannot reasonably be understood as a religious endorsement.

In *Lynch v. Donnelly*, the Court held that the inclusion of a nativity scene in a holiday display did not violate the Establishment Clause because the crèche permissibly "depict[ed] the historical origins of this traditional event long recognized as a National Holiday." 465 U.S. 668, 680 (1984). The Court explained that there had been "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 674.

All nine Justices recognized that the Motto and its placement on our currency accords with the Establishment Clause. Noting that "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders," *id.*, the Court cited "the statutorily prescribed national motto 'In God We Trust,' . . . which Congress and the President mandated for our currency," as but one example, *id.* at 676 (citations omitted); *see also Van Zandt v. Thompson*, 839 F.2d 1215, 1221 (7th Cir. 1988) (acknowledging the list in *Lynch* as "generally accepted and constitutionally permissible acknowledgments of the role of religion in American life"). In her concurrence, Justice O'Connor stated that,

> [G]overnment acknowledgements of religion . . . , [including] printing of 'In God We Trust' on coins, . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying governmental approval of particular religious beliefs.

Lynch, 465 U.S. at 692–93 (O'Connor, J., concurring). Even the four dissenting Justices in *Lynch* expressly cited the Motto as a quintessential example of a reference to religion that is permissible under the Establishment Clause:

> [S]uch 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 nonreligious phrases.

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

In *County of Allegheny v. ACLU*, the Supreme Court cited to *Lynch*'s discussion of the Motto to sustain the inclusion of a menorah as part of a holiday display, but invalidate the isolated display of a crèche in a prominent location at a county courthouse. 492 U.S. 573, 621 (1989). The Court noted that all of the Justices in *Lynch* viewed the Motto, as well as the Pledge (including the phrase "one nation under God"), as "consistent with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 602–03. The Court expressly declined to revisit that assessment, *see id.* at 603, notwithstanding the partial dissent's concern that the "endorsement" test might require a contrary result, *see id.* at 673 (Kennedy, J., concurring in the judgment in part and dissenting in part). The Court also used the Motto, the Pledge, and the general holiday display approved in *Lynch* as benchmarks for what the Establishment Clause permits, *id.* at 602–03 (majority opinion), and concluded that the display of the crèche by itself was unconstitutional because, unlike the references to God in the Motto and Pledge, the crèche gave "praise to God in [sectarian] Christian terms," *id.* at 598.

In other cases, the Supreme Court and its individual Justices have reaffirmed that official use of patriotic and ceremonial references to God, such as in the Motto, do not offend the Establishment Clause. In invalidating the official school prayer at issue in *Engel*, the Court contrasted that "unquestioned religious exercise" with the permissible "patriotic or ceremonial" references to God contained in the Declaration of Independence and "officially espoused" anthems. 370 U.S. at 435 n.21. The next term, Justice Brennan wrote that the Pledge "may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to" the "historical fact that our Nation was believed to have been founded 'under God.'" *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring). With respect to the use of the Motto "on currency, on documents and public buildings and the like," Justice Brennan concluded that the Motto has become "interwoven . . . so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits." *Id.* at 303.

Most recently, in *Elk Grove Unified School District*, which the Supreme Court resolved on standing grounds, three concurring Justices specifically approved of the Motto. 542 U.S. at 30 (Rehnquist, C.J., concurring in the judgment). After reciting, among other things, the history of Congress's adoption of the Motto and of the requirement that it be inscribed on United States currency, *see id.* at 25-29, these Justices concluded that "[a]ll of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character," *id.* at 30. Justice O'Connor likewise observed in her concurrence 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). As Justice O'Connor further explained,

"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 (alterations omitted).

These decisions and opinions demonstrate the Supreme Court's consistent teaching that certain official references to God, such as the Motto, do "not communicate an endorsement of religious belief," *Cty. of Allegheny*, 492 U.S. at 602–03, because they acknowledge that the Nation was founded by individuals who believed in God and that the Constitution's protection of individual rights and autonomy reflects those religious convictions. Such acknowledgments—acknowledgments that are essentially ceremonial in nature—"'are not understood as conveying government approval of particular religio[ns].'" *Id.* at 596 n.46 (quoting *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring)). Rather, as the *en banc* Sixth Circuit has held, they (the Motto among them) are "a symbol of a common identity" that do not "advance religion." *ACLU of Ohio*, 243 F.3d at 307–08. The Second Circuit has likewise held that the "motto, and its inclusion in the design of U.S. currency, is a [mere] 'reference to our religious heritage'" that "neither advance[s] nor inhibit[s] religion." *Peterson*, 753 F.3d at 108 (quoting *Lynch*, 465 U.S. at 676). The Tenth Circuit, too, has concluded that "[t]he motto's primary effect is not to advance religion; instead, it is a form of 'ceremonial deism' which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief." *Gaylor*, 74 F.3d at 216–17 (quoting *Cty. of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring)). All of these holdings reflect "the role religion has played in our governmental institutions," and confirm that it is "historically appropriate and traditionally acceptable for [the government] to include religious influences," such as "the national motto," "in honoring American legal traditions." *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 639–40 (6th Cir. 2005).

II. PLAINTIFFS' FREE EXERCISE AND RFRA CLAIMS FAIL

Understood through the lens of this history and considered in light of this well-established jurisprudence, Plaintiffs' Free Exercise and RFRA claims, Am. Compl. ¶¶ 445–50 (Claim 2); *id.* ¶¶ 436–44 (Claim 1), fail as a matter of law. Plaintiffs claim that the statutes they challenge require them to, for example, "bear a *religiously* offensive" or "*Monotheistic* message," *id.* ¶ 32 (emphasis added), or "bear a *religious* message that is contrary to what they believe," *id.* ¶ 400 (emphasis added), or "bear a *religious* message that is the antithesis of what they consider to be religious truth," *id.* ¶ 440 (emphasis added), or "bear a *religious* message they believe to be untrue and completely contrary to their sincerely held religious beliefs (or, in the case of [one Plaintiff], sin)," *id.* ¶ 449 (emphasis added). But as detailed above, numerous courts—including the Supreme Court—have held that the Motto is "of a patriotic or ceremonial character"; it has "no theological or ritualistic impact, and does not constitute governmental sponsorship of a religious exercise." *See, e.g.*, *Lefevre*, 598 F.3d at 646 (citing *Aronow v. United States*, 432 F.2d 242, 234–44 (9th Cir. 1970)) (rejecting RFRA challenge on these grounds), *aff'g Newdow v. Congress*, 435 F. Supp. 2d at 1077–78 (rejecting RFRA and Free Exercise challenges in part "[b]ecause the national motto has been held to be secular in nature").

For this reason and others, Plaintiffs cannot make the threshold showing that is required for both their Free Exercise and RFRA claims: that the statutes they challenge substantially burden their religious exercise. *See Wilson v. NLRB*, 920 F.2d 1282, 1289–90 (6th Cir. 1990) ("[T]o establish a violation of the free exercise clause an individual must first show that the government has placed a substantial burden on the practice of his religion." (citing *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989))); 42 U.S.C. § 2000bb-1(a) (same, RFRA). A substantial burden exists "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by

religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). But government action does not constitute a substantial burden if it does not coerce individuals to violate their religious beliefs or deny them the "rights, benefits, and privileges enjoyed by other citizens," even if it "interfere[s] significantly with [their] ability to pursue spiritual fulfillment according to their own religious beliefs." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). As the Sixth Circuit has summarized,

> In short, while the Supreme Court generally has found that a government's action constituted a substantial burden on an individual's free exercise of religion when that action forced an individual to choose between following the precepts of her religion and forfeiting benefits or when the action in question placed substantial pressure on an adherent to modify his behavior and to violate his beliefs, . . . it has found no substantial burden when, although the action encumbered the practice of religion, it did not pressure the individual to violate his or her religious beliefs.

Living Water Church of God v. Charter Twp. of Meridian, 258 F. App'x 729, 734–35 (6th Cir. 2007) (citations omitted).

The "Supreme Court has made clear that the 'substantial burden' hurdle is high." *Id.* at 734. Here, where there is no governmental coercion, pressure, or deprivation of rights, Plaintiffs cannot overcome it. While RFRA and the Free Exercise Clause "'afford[] an individual protection from certain forms of governmental compulsion,'" they do "'not afford an individual a right to dictate the conduct of the Government's internal procedures.'" *Lyng*, 485 U.S. at 448 (quoting *Bowen v. Roy*, 476 U.S. 693, 700 (1986)). Yet Plaintiffs cite no law compelling their participation in commerce or requiring them to use bills and coins instead of, for example, checks, debit cards, or credit cards that do not bear the phrase that Plaintiffs find offensive. Rather, the statutes Plaintiffs challenge are directives from Congress to the Secretary of the

Treasury; they neither require Plaintiffs to do, nor prohibit Plaintiffs from doing, anything.[3] Simply put, Plaintiffs do not "face . . . [a] stark choice between a basic benefit and a core belief." *Peterson*, 753 F.3d at 109.

Furthermore, even if Plaintiffs could establish governmental compulsion, no violation of the Free Exercise Clause or RFRA would lie: as the Second Circuit and other courts have held, "the carrying of currency, which is fungible and not publicly displayed, does not implicate concerns that its bearer will be forced to proclaim a viewpoint contrary to his own." *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977)); *see id.* at 109–10 (rejecting RFRA and Free Exercise challenges to 31 U.S.C. §§ 5112(d)(1), 5114(b) because the plaintiffs' "system of beliefs is not substantially burdened by the placement of the motto on currency"), *aff'g Newdow v. United States*, 2013 WL 4804165, at *4–5 (same; "[T]here is no showing of government coercion, penalty, or denial of benefits linked to the use of currency or the endorsement of the motto."); *Newdow v. Congress*, 435 F. Supp. 2d at 1077–78 & n.12 (same; no substantial burden because, among other reasons, "there is no proper allegation that the government compelled plaintiff to affirm a repugnant belief in monotheism"). Indeed, individuals "are not personally associated with the currency they spend" and they do not personally vouch for any words or messages engraved thereon. *Id.* at 1077 n.12. As the Supreme Court stated, in distinguishing this type of situation from a message on a license plate that *could* reasonably be imputed to the

[3] For similar reasons, even if Plaintiffs could establish a substantial burden their Free Exercise claim still could not succeed because the statutes Plaintiffs challenge are neutral laws of general applicability. *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (under the Free Exercise Clause, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"). The challenged statutes are neutral because they do not "infringe upon or restrict practices because of their religious motivation," *id.* at 533, and they are generally applicable because they do not "in a selective manner impose burdens only on conduct motivated by religious belief," *id.* at 543.

vehicle owner, "Currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto." *Wooley*, 430 U.S. at 717 n.15.

Finally, even if the challenged statutes were not neutral laws of general applicability, and even if they did substantially burden Plaintiffs' religious exercise, Plaintiffs' Free Exercise and RFRA claims would still fail. *See Lukumi*, 508 U.S. at 546 (under the Free Exercise Clause, "A law burdening religious practice that is not neutral or not of general application . . . must advance [compelling interests] . . . and must be narrowly tailored in pursuit of those interests." (citation omitted)); 42 U.S.C. §§ 2000bb(a)(5), 2000bb-1(b) (under RFRA, laws that substantially burden religious exercise are subjected to this "compelling interest" test). The Motto's "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring), are sufficiently compelling, and the inscription of the Motto on U.S. currency tersely and with dignity expresses these sentiments, making the statutes that Plaintiffs challenge the least restrictive means of doing so.

III. PLAINTIFFS' FREE SPEECH CLAIM IS NOT COGNIZABLE

The right to freedom of speech "prohibits the government from telling people what they must say." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); *see Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). But contrary to Plaintiffs' claim, Am. Compl. ¶¶ 451–56 (Claim 3), the statutes Plaintiffs challenge do not "compel speech"—by Plaintiffs or any other persons—in violation of the Free Speech Clause. Indeed, as demonstrated above, the statutes do not compel Plaintiffs to do or say anything. Again, "the carrying of currency, which is fungible and not publicly displayed, does

not implicate concerns that its bearer will be forced to proclaim a viewpoint contrary to his own." *Peterson*, 753 F.3d at 109; *see United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Unsurprisingly, therefore, in *Wooley* the Supreme Court rejected (albeit in *dicta*) a compelled speech challenge to the Motto like Plaintiffs'. *See* 430 U.S. at 716 n.15; *see also id.* at 722 (Rehnquist, J., dissenting) ("The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto 'In God We Trust.'"). And although it is *dicta*, and therefore "not necessarily binding," this conclusion is "entitled to considerable weight." *See Metro. Hosp. v. U.S. Dep't of Health & Human Servs.*, 712 F.3d 248, 274 (6th Cir. 2013) ("appellate courts consider themselves bound by [the] Supreme Court's considered *dicta* almost as firmly as by its holdings" (citation omitted)).

Nor do the statutes Plaintiffs challenge limit, in any way, what Plaintiffs may say. Plaintiffs remain free to express whatever views they may have on American history, religion, God, etc. Plaintiffs have not established that the statutes violate the First Amendment's Free Speech Clause.

IV. PLAINTIFFS' EQUAL PROTECTION CLAIM MUST BE DISMISSED

Not least because Plaintiffs have failed to identify any way in which the statutes they challenge treat some individuals or groups differently than others, Plaintiffs' Equal Protection claim, Am. Compl. ¶¶ 457–63 (Claim 4), must be dismissed. "The threshold element of an equal protection claim is disparate treatment." *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006). Accordingly, unless Plaintiffs show that the challenged statutes "treat[] people who are in the same position differently," their "equal-protection claim" cannot "succe[ed]." *Dog Pound, LLC v. City of Monroe*, 558 F. App'x 589, 592 (6th Cir. 2014); *see*

Knapp v. Hanson, 183 F.3d 786, 789 (8th Cir. 1999) ("Equal protection analysis turns on the classification drawn by the statute in question."); *Sturm v. Clark*, 835 F.2d 1009, 1016 (3d Cir. 1987) ("Government action cannot violate the equal protection clause if it does not create classifications among, or discriminate between, those affected." (citing *Palmer v. Thompson*, 403 U.S. 217, 219–26 (1971))). The lone case upon which Plaintiffs rely, *Obergefell v. Hodges*, illustrates this point. 135 S. Ct. 2584 (2015). The plaintiffs there challenged state statutes that "bar[red] same-sex couples from marriage on the same terms as accorded to couples of the opposite sex." *Id.* at 2607.

In this case, by contrast, Plaintiffs have not alleged—and, indeed, they cannot allege—that the statutes requiring the inscription of the Motto on all U.S. currency "treat[] [Plaintiffs] differently from others similarly situated." *See Dog Pound, LLC*, 558 F. App'x at 592–93 (affirming rejection of Equal Protection claim where the plaintiffs failed this "threshold" test). Because Plaintiffs do not even claim that the statutes they challenge draw any classifications or distinctions, their Equal Protection claim cannot go forward.

CONCLUSION

Defendants respectfully request that the Court dismiss all of Plaintiffs' claims.

Dated: May 10, 2016

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2016, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

/s/ *Adam Grogg*
ADAM GROGG

CERTIFICATE OF TRACK ASSIGNMENT

Pursuant to Local Civil Rule 7(f), I hereby certify that this case has not yet been assigned to a track.

/s/ *Adam Grogg*
ADAM GROGG

CERTIFICATE OF COMPLIANCE

I hereby certify that Defendants' Memorandum of Points and Authorities adheres to the page limits set forth in Local Civil Rule 7(f).

/s/ *Adam Grogg*
ADAM GROGG