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

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

BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS

Kelly J. Shackelford*
Justin E. Butterfield*
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
kshackelford@firstliberty.org
* Application for admission *pro hac vice* pending

David C. Tryon
Ohio Bar No. 0028954
PORTER WRIGHT
950 Main Avenue, Suite 500
Cleveland, OH 44113
Telephone: (216) 443-2560
Facsimile: (216) 443-9011
dtryon@porterwright.com

Counsel for Amicus Curiae *The American Legion*

May 17, 2016

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Interest of the *Amicus Curiae*

The American Legion, chartered by Congress in 1919, is a patriotic veterans service organization representing approximately 2.4 million members, plus an Auxiliary of nearly 1 million members. There are over 1,300 American Legion Posts throughout the United States, its territories, and 20 foreign countries, including England, Australia, Germany, Mexico, and the Philippines. Since its inception, The American Legion has maintained an ongoing concern and commitment to veterans and their families. The American Legion helps military veterans survive economic hardship and secure government benefits. The American Legion drafted and obtained passage of the first GI Bill. The American Legion also works to promote social stability and well-being for those who have

honorably served our nation's common defense. And The American Legion strives to ensure that those veterans who have sacrificed their lives for our country are properly remembered in local, state, and national veterans memorials.

The American Legion believes that our National Motto, "In God We Trust," itself originating in Francis Scott Key's poem that would become "The Star-Spangled Banner" and honoring the courage and valor of our servicemembers who defended Fort McHenry during the War of 1812, is a fitting and solemnizing motto for this nation. The American Legion has, therefore—as recognized even in Plaintiffs' First Amended Complaint—regularly advocated for the recognition and honor of our National Motto as well as its history and heritage.

Argument

Plaintiffs' tired attacks on our National Motto—repeatedly dealt with by courts at every level—come to us this time through mischaracterizations of precedent and cynical attacks on The American Legion.

I. Plaintiffs confuse the Free Exercise Clause and the Establishment Clause

While Plaintiffs do not claim that the National Motto violates the Establishment Clause—an argument widely rejected—this newest lawsuit is a legal shell game in which Plaintiffs make Free Exercise Clause arguments only to attempt to slide in Establishment Clause arguments, with Establishment Clause remedies, at the last moment. Effectively, Plaintiffs are asking this Court to find

that Plaintiffs' free exercise rights are violated because the placement of the National Motto on currency impermissibly advances Christianity (an argument sounding in the Establishment Clause) and the remedy to that "free exercise" violation is to remove the National Motto from currency (an Establishment Clause-type remedy). *See* Plaintiffs' First Amended Complaint ¶¶ 447–50 ("Pla. First Am. Compl."); *see also Newdow v. Cong. of the United States,* 435 F. Supp. 2d 1066, 1076 (E.D. Cal. 2006) (noting that, in a substantially similar case, "plaintiff's Free Exercise and RFRA claims appear to simply restate his Establishment Clause claim in an effort to elude Ninth Circuit binding precedent").

Plaintiffs' attempt to import the Establishment Clause into the Free Exercise Clause ignores the distinct roles of the Free Exercise Clause and the Establishment Clause. As Professor Carl Esbeck explained, "The purpose of the Establishment Clause is not to safeguard individual religious rights. That is the role of the Free Exercise Clause, indeed its singular role. The purpose of the Establishment Clause, rather, is as a structural restraint on governmental power." Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses,* 42 J. Church & St. 311, 311 (2000). The Supreme Court has noted "that these two Clauses often exert conflicting pressures, and that there can be internal tension between the Establishment Clause and the Free Exercise Clause." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 132 S. Ct. 694, 702 (2012) (internal cites,

quotes, and ellipses omitted). While these two clauses can work together, they are not interchangeable or even functionally similar. *See id.* at 703 (holding that the Establishment Clause and the Free Exercise Clause work together to create the ministerial exception because the "Establishment Clause prevents the government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own"). Therefore, challenges to the government's involvement in religion—often evidenced by a remedy requiring the government to modify its program without regard to the complainant's conduct or belief—are Establishment Clause challenges. Free Exercise Clause challenges, however, primarily focus on the burdened plaintiff and are usually remedied through individual exemptions or accommodations. *Compare, e.g., Town of Greece v. Galloway,* 134 S. Ct. 1811 (2014) (using the Establishment Clause to analyze and uphold generally prayers before governmental bodies), *Van Orden v. Perry,* 545 U.S. 677 (2005) (using the Establishment Clause to analyze and uphold a governmental display of a Ten Commandments monument), *McCreary County v. ACLU,* 545 U.S. 844 (2005) (using the Establishment Clause to analyze and require the government to remove a Ten Commandments display), and *Larson v. Valente,* 456 U.S. 228 (1982) (using the Establishment Clause to analyze and enjoin disparate treatment of religious groups by the government) *with Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006)

(using free exercise analysis to grant an individualized exception to a generally applicable law), *Employment Div., Dept. of Human Res. of Ore. v. Smith,* 494 U.S. 872 (1990) (using the Free Exercise Clause to reject an individual exemption to a generally applicable law), and *Bowen v. Roy,* 476 U.S. 693 (1986) (using the Free Exercise Clause to analyze and reject a request for an individual exemption to use of a social security number to receive welfare payments).

As Defendants demonstrate, placing "In God We Trust" on U.S. currency does not violate the Establishment Clause. Defendants' Mot. to Dismiss at 6–10. And fortunately for Plaintiffs, there is no law prohibiting them from availing themselves of a remedy like that granted by the Supreme Court in *Wooley v. Maynard:* Plaintiffs may simply cover up "In God We Trust" on their currency, avoiding any burden of bearing messages that are disagreeable to Plaintiffs. *See Wooley v. Maynard,* 430 U.S. 705 (1977) (enjoining New Hampshire from prosecuting persons that cover up "Live Free or Die" on their New Hampshire license plates because they found the idea morally objectionable). Indeed, were U.S. law to prohibit all defacing of currency, Plaintiffs would likely have a free exercise claim to receive an exemption to that prosecution. But happily, 18 U.S.C. § 333 only prohibits defacing bills if done "with intent to render such bank bill, draft, note, or other evidence of debt unfit to be reissued," and 18 U.S.C. § 331 only prohibits defacing coins if done so "fraudulently." 18 U.S.C. §§ 331 and 333.

II. Plaintiffs confuse the purpose of the Religious Freedom Restoration Act.

Plaintiffs make the same fundamental mistake about the nature of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"): RFRA supplements the Free Exercise Clause, not the Establishment Clause. As the Supreme Court explained in *Burwell v. Hobby Lobby Stores, Inc.*:

> Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty. RFRA's enactment came three years after this Court's decision in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990), which largely repudiated the method of analyzing *free-exercise claims* that had been used in cases like *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1972). In determining whether challenged government actions violated the *Free Exercise Clause* of the First Amendment, those decisions used a balancing test that took into account whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest.... In *Smith,* however, the Court rejected "the balancing test set forth in *Sherbert.*" ... Congress responded to *Smith* by enacting RFRA.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014) (internal cites omitted) (emphasis added). RFRA, therefore, prohibits the government, including through rules of general applicability, from substantially burdening a person's religious exercise unless the burden is "in furtherance of a compelling governmental interest" and "is the least restrictive means" of achieving that interest. 42 U.S.C. § 2000bb-1.

Because RFRA protects free exercise rights, the same flaws as exist in Plaintiffs' Free Exercise Clause analysis exist in their RFRA analysis. And again, under RFRA plaintiffs primarily seek and receive individualized exceptions and accommodations. *See, e.g., Burwell,* 134 S. Ct. 2751 (seeking an exception from—not the elimination of—the contractive mandate of the Patient Protection and Affordable Care Act); *Gonzales,* 546 U.S. 418 (seeking an individual religious exemption from—not elimination of—drug laws); *Wisconsin v. Yoder,* 406 U.S. 205 (1972) (seeking an individual religious exemption from school attendance laws under the prior Free Exercise Clause standard that would be adopted in RFRA); *Sherbert v. Verner,* 374 U.S. 398 (1963) (seeking an individual religious accommodation to laws denying unemployment benefits to those who cannot work on Saturdays).

III. Plaintiffs confuse government speech with compelled speech.

Plaintiffs rely on *Wooley,* 430 U.S. 705, and *Walker v. Texas Div., Sons of Confederate Veterans,* 135 S. Ct. 2239 (2015), to support their claim that carrying money bearing government speech is actually compelled speech. Neither of these cases, however, support Plaintiffs' argument that printing a message on money with which the bearer disagrees is therefore compelled speech.

Walker stands for nothing more than the proposition that messages on license plates are government speech, even when the government seeks input from

the public about what messages should be available on those license plates. *Walker,* 135 S. Ct. at 2253. In the same vein as *Walker,* and more pertinent to Plaintiffs' claims is *Pleasant Grove City v. Summum,* in which the Supreme Court held that, when selecting displays for a park, many of which were donated by the public, the government is free to select some religious displays while rejecting others because the end result—displays in a public park—are government speech and not private speech, despite the private origins of many of the displays. *Pleasant Grove City v. Summum,* 555 U.S. 460 (2009). Either way, nothing in this line of cases supports Plaintiffs' argument that placing the National Motto on money compels private speech.

In *Wooley,* the plaintiffs did not want to display New Hampshire's motto, "Live Free or Die," on their license plates because the motto was "repugnant to their moral and religious beliefs." *Wooley,* 430 U.S. 705, 706. In *Wooley,* however, and unlike in this present litigation, New Hampshire law prohibited the *Wooley* plaintiffs from covering the motto on their license plates. The Supreme Court enjoined New Hampshire not from writing "Live Free or Die" on its license plates but from prosecuting those persons who covered up the words "Live Free or Die." Plaintiffs' lawsuit against "In God We Trust" is not analogous to *Wooley* because there is no prohibition on marking out the National Motto on Plaintiffs' money. In

fact, the *Wooley* Court addressed whether that decision would implicate the National Motto's placement on money:

> It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, "In God We Trust" from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Wooley, 430 U.S. at 717 n.15.

Conclusion

For the foregoing reasons, The American Legion respectfully supports Defendants' Motion to Dismiss.

Respectfully submitted,

/s/ David C. Tryon
David C. Tryon
Ohio Bar No. 0028954
PORTER WRIGHT
950 Main Avenue, Suite 500
Cleveland, OH 44113
Telephone: (216) 443-2560
Facsimile: (216) 443-9011
dtryon@porterwright.com

Kelly J. Shackelford*
Justin E. Butterfield*
FIRST LIBERTY INSTITUTE
2001 W. Plano Parkway, Suite 1600
Plano, Texas 75075
Telephone: (972) 941–4444
Facsimile: (972) 941–4457
kshackelford@firstliberty.org

* Application for admission *pro hac vice* pending

Counsel for Amicus Curiae
The American Legion

May 17, 2016

Certificate of Service

This is to certify that, on May 27, 2016, this Brief of The American Legion as *Amicus Curiae* in Support of Defendants was served via the Court's CM/ECF Document Filing System upon the following registered CM/ECF users:

Michael A. Newdow
2985 Lakeshore Blvd.
Upper Lake, California 95485
Tel.: (626) 532–7694
NewdowLaw@gmail.com

Thomas M. Horwitz
1991 Crocker Road, Suite 600
Westlake, Ohio 44145
Tel.: (440) 892–3331
Fax.: (440) 848–8501
tmh@horwitzlpa.com

Counsel for Plaintiffs

Adam A. Grogg
U.S. Department of Justice
Civil Division
20 Massachusetts Ave., NW
Washington, D.C. 20530
Tel.: (202) 514–2395
Fax.: (202) 616–8470
adam.a.grogg@usdoj.gov

Counsel for Defendants

/s/ David C. Tryon
David C. Tryon