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

NEW DOE CHILD #1, *et al.*, *Plaintiffs,* v. CONGRESS OF THE UNITED STATES OF AMERICA, *et al.*, *Defendants*.	No. 5:16-cv-59 Judge Benita Y. Pearson

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Plaintiffs dismiss the decisions of three courts of appeals and numerous district courts rejecting claims identical to theirs as resting entirely on "baseless *ipse dixits*." Pls.' Opp'n to Defs.' Mot to Dismiss ("Pls.' Opp'n") at 8 (June 29, 2016), ECF No. 36.[1] However, Plaintiffs fail to identify any deficiencies in, or draw any distinctions with, this uniform authority. Those courts applied well-established precedent to hold that the claimants' religious exercise was not substantially burdened by the presence of the National Motto on United States money. This Court should likewise conclude that Plaintiffs' Religious Freedom Restoration Act and free exercise claims fail as matters of law. In arguing to the contrary, Plaintiffs conflate the question whether their beliefs are sincere—which is not challenged here—with the separate, legal question whether the laws they challenge substantially burden their religious exercise. That latter question—the relevant question—is for the Court to determine, and there is no substantial burden here. Defendants respectfully request that the Court dismiss all of Plaintiffs' claims.

ARGUMENT

I. PLAINTIFFS' RELIGIOUS FREEDOM RESTORATION ACT AND FREE EXERCISE CLAIMS FAIL AS MATTERS OF LAW

A. It Is The Province Of This Court To Consider Whether The Laws Plaintiffs Challenge Substantially Burden Their Religious Exercise

Plaintiffs make no serious effort to distinguish or even disagree with the holdings of the Second and Ninth Circuits that the laws Plaintiffs challenge do not substantially burden religious

[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).

exercise. *See Peterson*, 753 F.3d at 109 (dismissing RFRA and free exercise claims identical to Plaintiffs'); *Lefevre*, 598 F.3d at 646 (same, RFRA). Instead, Plaintiffs insist (at 3-5, 11) that the Court must defer to their determination that the laws they challenge impose a substantial burden. Plaintiffs are incorrect. Whether a law imposes a substantial burden is a question of law courts must answer objectively. Were that not the case, every provision of the U.S. Code would be subject to strict scrutiny review whenever challenged on the basis of a sincere religious belief.

Congress enacted RFRA "'to restore the compelling interest test'" for free exercise claims that prevailed prior to *Employment Division v. Smith*, 494 U.S. 872 (1990). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (quoting 42 U.S.C. § 2000bb(b)(1)); *see* 42 U.S.C. § 2000bb(a)(4), (5). In *Smith*, the Supreme Court held that the Free Exercise Clause does not require religion-based exemptions from neutral laws of general applicability. *See* 494 U.S. at 876-90. RFRA later "adopt[ed] a statutory rule comparable to the constitutional rule rejected in *Smith*." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 424 (2006). Accordingly, RFRA requires that government action "not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a).

The initial version of RFRA prohibited the government from imposing any "burden" on free exercise. Congress added the word "substantially" "to make it clear that the compelling interest standards set forth in the act" apply "only to Government actions [that] place a substantial burden on the exercise of" religion, as contemplated by pre-*Smith* case law. 139 Cong. Rec. S14350-01, S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy); *see id.* (statement of Sen. Hatch); *see also Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C. Circ. 2001) ("[O]nly *substantial* burdens on the exercise of religion trigger the compelling interest requirement." (emphasis added)). Consistent with RFRA's restorative purpose, Congress

expected courts considering RFRA claims to "look to free exercise cases decided prior to *Smith* for guidance." S. Rep. No. 111, 103d Cong., 1st Sess. 8-9 (1993); *see* H.R. Rep. No. 88, 103d Cong., 1st Sess. 6-7 (1993) (same).

Defendants are not challenging the sincerity of Plaintiffs' beliefs. And although a court likewise accepts a litigant's sincerely held religious beliefs, *see, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779, it must assess the nature of a claimed burden on religious exercise to determine whether, as a legal matter, that burden is substantial, *see, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (explaining that "[i]n addition to showing . . . a sincerely held religious belief," plaintiffs "also b[ear] the burden of proving" that the challenged law imposes a substantial burden). Plaintiffs cannot preclude that inquiry by collapsing the question of substantial burden into the sincerity of their beliefs. Were that allowed, any individual would be able not only to declare a sincerely held religious belief but also to demand absolute deference to his or her own assessment of what constitutes a substantial burden on that belief.

Nevertheless, Plaintiffs are clear that they believe that this Court is bound to accept their position that the laws they challenge "substantially burden [their] exercise of religion." 42 U.S.C. § 2000bb-1; *see, e.g.*, Pls.' Opp'n at 4 (asserting that "what matters" for purposes of the substantial burden inquiry "is what [p]laintiffs believe"). Plaintiffs' view does not accord with settled law. Whether a burden is "substantial" under RFRA is a question of law, not a "question[] of fact, proven by the credibility of the claimant." *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011); *see, e.g.*, *Bowen v. Roy*, 476 U.S. 693, 701 n.6 (1986) ("Roy's religious views may not accept this distinction between individual and governmental conduct" but the law "recognize[s] such a distinction."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448 (1988) (similar); *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C. Cir. 2008) ("[a]ccepting as true the factual allegations that Kaemmerling's beliefs are sincere and of a religious nature—

but not the legal conclusion, cast as a factual allegation, that his religious exercise is substantially burdened"). In short, while the government does not contest, and does not invite the Court to scrutinize, the sincerity of Plaintiffs' beliefs, it is for the Court—not Plaintiffs—to determine whether the challenged laws impose a substantial burden on those beliefs as provided for by RFRA and pre-*Smith* free exercise law.

B. There Is No Substantial Burden Here

Plaintiffs have still not identified any federal law, or other source of governmental coercion or pressure, that requires them to use United States bills or coins instead of alternate means of payment. *See, e.g.*, *Lyng*, 485 U.S. at 451 ("The crucial word in the constitutional text [of the Free Exercise Clause] is 'prohibit' . . . ."); *Bowen*, 476 U.S. at 700 (free exercise "affords an individual protection from certain forms of *governmental compulsion*" (emphasis added)); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223 (1963) ("a violation of the Free Exercise Clause is predicated on coercion"). Plaintiffs claim (at 5) not to be able "to use [United States bills and coins] without violating their religious tenets" but they cite no legal requirement compelling such use; they allege (at 6) "coercive pressure" but they remain silent as to its source. Nor, tellingly, have Plaintiffs offered any citations for their assertions (at 1, 6) that toll roads, public transit systems, garage sales, farmers' markets, laundromats, and street vendors, for example, do not accept checks, debit cards, or credit cards. But in any event, even assuming that such businesses accept only cash or coins, Plaintiffs do not, and cannot, allege that such businesses' choices in that regard are compelled by the federal government.[2]

[2] That Plaintiffs' RFRA and free exercise claims fail is further illustrated by the fact that the typical remedy for such claims—an exemption to allow the claimant to engage in his or her religious exercise unhindered by the challenged governmental law or action—would make no sense here. It would be impossible for Plaintiffs to be awarded an "exemption" from the statutes

The Supreme Court's pre-*Smith* decisions demonstrate that the laws Plaintiffs challenge do not impose substantial burdens. In *Bowen*, for example, the Court considered a free exercise claim asserted by parents who objected to a law requiring the government to use a Social Security number to identify their daughter in processing a claim for welfare benefits filed on her behalf. 476 U.S. at 695-97. The Court did not question or minimize the parents' belief that the government's use of the Social Security number would inflict grave spiritual harm. *Id.* at 701 n.6. But the Court explained that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens," and that the parents thus could not "demand that the Government join in their chosen religious practices by refraining from using a number to identify their daughter." *Id.* at 699-700.

The Supreme Court applied a similar principle in *Lyng*, which rejected a free exercise challenge to the construction of a road through a National Forest that would have prevented members of several Native American tribes from continuing to use sacred sites for religious rites. 485 U.S. at 447-58. Again, the Court did not question or denigrate the claimants' beliefs. And the Court acknowledged that the challenged project would have "devastating effects on traditional Indian religious practices." *Id.* at 451. But the Court emphasized the countervailing principle that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires," because "[a] broad range of government activities . . . will always be considered essential to the spiritual well-being of some citizens" yet "deeply offensive" to others. *Id.* at 452. Even though the "Government action" the *Lyng* plaintiffs challenged "interfere[d] significantly with [their] ability to pursue spiritual fulfillment according to their

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prescribing the inscription of the Motto on United States money: those statutes do not apply to Plaintiffs or regulate any of their personal conduct in the first place.

own religious beliefs," the plaintiffs could not demonstrate a substantial burden because the government had neither "coerced" them "into violating their religious beliefs" nor "penalize[d] [their] religious activity by denying [them] an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id*. at 449.

Crucially, the Supreme Court rejected the *Lyng* plaintiffs' attempt to distinguish *Bowen* on the ground that the government's use of Social Security numbers for processing was "at some physically removed location where it place[d] no restriction on what a practitioner may do," whereas the *Lyng* plaintiffs alleged that the government actions they challenged would "physically destroy" a landscape that was indispensable to their religious practice. *Id.* The Court found this distinction "unavailing": what linked *Lyng* to *Bowen* was that both cases involved "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 449-50.

Likewise here: the statutes Plaintiffs challenge are directives from Congress to the Treasury Department respecting the form and appearance of money. *See* 31 U.S.C. §§ 5112(d)(1), 5114(b). These laws do not regulate Plaintiffs' conduct, coerce them to engage in any kind of religious exercise, prohibit them from engaging in any such exercise, pressure them into acting contrary to their religious beliefs, or attach conditions to the receipt of any benefit. To the extent Plaintiffs are exposed to a phrase they find offensive as an incidental effect of Congress's directive to the Treasury Department, that exposure is certainly no more cognizable than the "devastating effects" that timber harvesting and road construction had on the *Lyng*

plaintiffs' religious practice, 485 U.S. at 451, or the *Bowen* plaintiffs' subjection to government action that they sincerely believed "robb[ed] the spirit," 476 U.S. at 696.[3]

The decisions of the courts of appeals in *Peterson*, 753 F.3d at 109-10, and *Lefevre*, 598 F.3d at 645-46, are consistent with these principles. There, the Second Circuit and the Ninth Circuit, respectively, rejected alleged substantial burdens that are identical to Plaintiffs'. In *Lefevre*, as here, the plaintiff "allege[d] the inscription of 'In God We Trust' on coins and currency substantially burden[ed] the free exercise of his religion . . . because [his] religion prohibit[ed] him from carrying currency that bears the motto," such that he was "impeded in his ability to engage in religious activities that require cash payments," and because [he could not] entirely avoid using money in his daily life," such that "the inscription of the motto on coins and currency force[d] him to violate a basic tenet of his religion and require[d] him to evangelize for a religious belief he expressly decrie[d]." 598 F.3d at 645-46; *see, e.g.*, Pls.' Opp'n at 7 (the "inscriptions of [the Motto] on all coins and currency" require "Plaintiffs . . . to engage in conduct proscribed by [their] religious faith in order to use any of that legal tender" (second alteration in the original)); *id.* at 8 ("Plaintiffs are placed in the position of either bearing and proselytizing the 'In G-d We Trust' message or forgoing desired commerce.").

First, the Ninth Circuit observed that the substantial burdens the *Lefevre* plaintiff alleged "rest[ed] on a single premise": that the Motto "represents a purely religious dogma and constitutes a government endorsement of religion." 598 F.3d at 646. Plaintiffs try to claim that the same is not true of the substantial burdens they allege, Pls.' Opp'n at 3, but the remainder of

[3] Plaintiffs' reliance (at 6) on *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), is misplaced. Both cases concerned Establishment Clause challenges to prayers performed in the unique school setting and did not so much as mention the substantial burden inquiry.

their argument belies that contention, *see id.* at 9-14 (arguing that the "Motto represents a religious dogma and constitutes governmental sponsorship of religion" (capitalization omitted)).

The Ninth Circuit then went on to reject the *Lefevre* plaintiff's RFRA challenge as foreclosed by that court's prior decision in *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970). *See Lefevre*, 598 F.3d at 646; *see also id.* at 643-45 (rejecting the plaintiff's Establishment Clause claim for the same reason). In *Aronow*, the Ninth Circuit explained that the inscription of the Motto "on coinage and currency . . . has nothing whatsoever to do with the establishment of religion." 432 F.2d at 243. Rather, "[i]ts use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise." *Id.*

The Ninth Circuit's holding is correct for the reasons Defendants—and the Supreme Court and Sixth Circuit—have previously explained. *See* Defs.' Mot. to Dismiss ("Defs.' Mot.") at 6-10 (May 10, 2016), ECF No. 9; *see, e.g.*, *Cty. of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 602-03 (1989) (refusing to revisit dicta in the Court's "previous opinions" affirming that the Motto is "consistent with the proposition that government may not communicate an endorsement of religious belief" (collecting cases)); *Am. Civil Liberties Union of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 307-08 (6th Cir. 2001) (en banc) (the National Motto "is a symbol of a common identity" and its "primary effect . . . is not to advance religion"); *see also id.* at 310 (Clay, J., concurring) (the Supreme Court "has clearly signaled, at least by implication, that the national motto is not at odds with constitutional principles" (collecting cases)).

In *Aronow*, the Ninth Circuit stated that its holding was "direct[ed]" by the Supreme Court's decision in *Engel v. Vitale*, 370 U.S. 421 (1962), in which the Supreme Court struck down a state law requiring school prayer. *Aronow*, 432 F.2d at 244. The *Engel* Court explained that its decision was not "inconsistent with the fact that school children and others are officially

encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God." 370 U.S. at 435 n.21. "Such patriotic or ceremonial occasions," the Supreme Court said, "bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." *Id.*

Engel compels this Court, like it did the Ninth Circuit, to conclude that the National Motto and its placement on currency are not religious dogma, and therefore that Plaintiffs have not alleged a substantial burden on their religious exercise. Inscribing the Motto on United States money is no different from the patriotic or ceremonial references to religion highlighted as permissible in *Engel*: as the Ninth Circuit held, "[i]t is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust.'" *Aronow*, 432 F.2d at 243; *see id.* (the Motto "is excluded from First Amendment significance because [it] has no theological or ritualistic impact").

Finally, the Second Circuit's decision in *Peterson* reveals yet another reason why Plaintiffs have failed to allege a substantial burden. The *Peterson* plaintiffs—again, just like Plaintiffs here—"argue[d] that they [were] substantially burdened by the necessity of using currency because doing so require[d] them 'to bear on their persons . . . a statement that attribute[d] to them personally a perceived falsehood that is the antithesis of the central [tenet] of their religious system.'" 753 F.3d at 109 (quoting the plaintiffs' brief); *see, e.g.*, Pls.' Opp'n at 4 ("As it pertains to [Plaintiffs'], [the National Motto] is a falsehood, which their tenets preclude them from perpetuating."); *id.* at 6 (characterizing the inscription of the Motto on United States money as requiring Plaintiffs to "bear[] on their persons a religious claim they find to be false

and offensive, as well as [to] proselytiz[e] that message"). And yet the Second Circuit concluded, as a matter of law, that the *Peterson* plaintiffs had not demonstrated a substantial burden—that they "face[d] no . . . stark choice between a basic benefit and a core belief"—because "the carrying of currency, which is fungible and not publicly displayed, does not implicate concerns that its bearer will be forced to proclaim a viewpoint contrary to his own." 753 F.3d at 109 ("'The bearer of currency is . . . not required to publicly advertise the national motto.'" (quoting *Wooley v. Maynard*, 430 U.S. 705, 717 n.15 (1977)).

C. Plaintiffs' RFRA And Free Exercise Claims Fail In Any Event

Even if the Court were to conclude that the laws Plaintiffs challenge substantially burden their religious exercise, Plaintiffs' RFRA and Free Exercise claims would still fail. Statutes requiring "United States coins" to "have the inscription 'In God We Trust,'" 31 U.S.C. § 5112(d)(1), and requiring United States bills to have "the inscription 'In God We Trust' in a place the Secretary [of the Treasury] decides is appropriate," *id.* § 5114(b), are neutral laws of general applicability; accordingly, they do not violate the Free Exercise Clause, *see* Defs.' Mot. at 12-13 & n.3. In arguing to the contrary, Plaintiffs attempt to conflate Establishment Clause inquiries, *see* Pls.' Opp'n at 13-14 (citing *McCreary Cty. v. Am. Civil Liberties Union*, 545 U.S. 844 (2005)), with the applicable questions under the Free Exercise Clause, *i.e.*, whether the laws "infringe upon or restrict practices because of their religious motivation" and whether they selectively "impose burdens only on conduct motivated by religious belief," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993). As the Ninth Circuit has noted, "the law is unsettled" regarding whether "the historical background" and "legislative history" of the challenged laws—on which Plaintiffs (at 14) exclusively rely—has any relevance to the free exercise inquiry. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1131-33 (9th Cir. 2009). Regardless, the text of the challenged laws is sufficient to demonstrate that they admit of

no exceptions and apply equally—*i.e.*, not at all—to individual conduct regardless of whether or not it is religiously motivated.

Moreover, the laws Plaintiffs challenge satisfy strict scrutiny for the reasons Defendants have previously explained. *See* Defs.' Mot. at 14. There is a compelling governmental interest in maintaining a National Motto that "symbolizes the historical role of religion in our society, formalizes our medium of exchange, fosters patriotism, and expresses confidence in the future." *Gaylor v. United States*, 74 F.3d 214, 216 (10th Cir. 1996). Any argument that there might be less restrictive means of furthering this compelling interest amounts to, essentially, a proposal for a different, alternative motto, *see* Pls.' Opp'n at 16, but such proposals contradict the very concept of a *national*, ceremonial statement.

II. PLAINTIFFS' FREE SPEECH AND EQUAL PROTECTION CLAIMS ARE NOT COGNIZABLE

Plaintiffs' remaining claims must likewise be dismissed. In arguing that the laws they challenge violate the Free Speech Clause, Plaintiffs lean heavily on the Supreme Court's decision in *Wooley v. Maryland*, 430 U.S. 705; *see* Pls.' Opp'n at 18, but neglect to acknowledge that *Wooley* itself disavowed the very proposition that Plaintiffs advance. *Wooley* held that a state law requiring motorists to display the state motto, "Live Free or Die," on their license plates violated the First Amendment by coercing the motorists' speech, 430 U.S. at 717, but expressly cautioned that its holding did not extend to the appearance of the National Motto on United States currency and coins, *see id.* at 717 n.15 ("[C]urrency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public."). Plaintiffs' contention that when they choose to carry and use currency and coins "they are forced

to proselytize what they believe is a message completely at odds with [their] sincere religious belief," Pls.' Opp'n at 18, cannot be squared with *Wooley*.

Plaintiffs' equal protection claim fares no better. *See* Defs.' Mot. at 15-16. Fundamentally, the laws Plaintiffs challenge, which require the Motto to be inscribed on all United States bills and coins, treat all people equally whether they cherish the Motto's message—a message that multiple courts have held to contain minimal religious content—or are offended by it. Moreover, as evidenced by Plaintiffs' citation to Establishment Clause cases in support of their equal protection claim, *see* Pls.' Opp'n at 19 (citing *Cty. of Allegheny*, 492 U.S. 573; *Lynch v. Donnelly*, 465 U.S. 668 (1984)), that claim is a repackaged version of an Establishment Clause claim that Plaintiffs have not raised here given the Sixth Circuit's decision in *American Civil Liberties Union of Ohio, see id.* at 13; *Am. Civil Liberties Union of Ohio*, 243 F.3d at 301 ("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."); *see also id.* at 308-10.

CONCLUSION

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

Dated: July 5, 2016

Respectfully Submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CAROLE S. RENDON
Acting United States Attorney

LESLEY FARBY
Assistant Director, Federal Programs Branch

/s/ *Adam Grogg*
ADAM GROGG
BAILEY W. HEAPS
Trial Attorneys
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave. NW
Washington, DC 20530
phone: (202) 514-2395
fax: (202) 616-8470
email: adam.a.grogg@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 5, 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 this Reply in Support of Defendants' Motion to Dismiss adheres to the page limits set forth in Local Civil Rule 7(f).

/s/ *Adam Grogg*
ADAM GROGG