No. 16-4345

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NEW DOE CHILD #1 *ET AL.*,

Plaintiffs-Appellees,

v.

CONGRESS OF THE UNITED STATES *ET AL.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio

Brief *Amicus Curiae* of The Becket Fund for Religious Liberty In Support of Defendants and Affirmance

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CORPORATION DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 29(a)(4)(A), *Amicus* states that it does not have a parent corporation, nor does it issue any stock.

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IDENTITY AND INTEREST OF THE *AMICUS*[1]

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

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[1] No party's counsel authored this brief in whole or in part, and no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief pursuant to 6th Cir. R. 29(a)(2).

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

Becket is concerned that were Plaintiffs' theory of "exercise of religion" to be accepted, it would radically expand the scope of the Religion Clauses and the Religious Freedom Restoration Act to cover not just religious beliefs, but philosophical and ideological beliefs as well. That would in turn unnecessarily broaden the scope of church-state conflict in American society. Becket therefore files this brief to point out the distinction between a philosophy that opines on religious questions and actual religious belief.

ARGUMENT

The atheist Plaintiffs cannot raise a claim under RFRA or the Free Exercise Clause because they are not engaged in an "exercise of religion."

There are many reasons why the Court should not strike down the "historical practice[]" of including the National Motto on American currency. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 670 (1989)). The United States ably explains many of these reasons in its brief. *See*, *e.g.*, United States Br. 30-33.

This *amicus* brief focuses instead on one reason not addressed by the parties but at the heart of this case: adhering to a particular philosophy is not the same thing as an "exercise of religion." The atheist Plaintiffs before the Court cannot claim that the National Motto burdens their exercise of religion because their form of atheism is not a religious belief but instead a philosophy; acting upon that philosophy is not an "exercise of religion."[3]

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

Without an "exercise of religion," the atheist Plaintiffs' RFRA and Free Exercise Clause claims must fail. These Plaintiffs claim that using coins with "In God We Trust" violates their "religious" beliefs. Plaintiffs Br. 32.

[3] One of the plaintiffs is not a philosophical atheist; *Amicus* does not address his claim.

But in truth their beliefs are philosophical responses to *others'* religious beliefs, not religious beliefs of their own.

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

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

406 U.S. at 216. The distinction between religious belief and philosophical reasoning can be a "most delicate question," *id.* at 215, but it is a necessary predicate to the question of whether a religious belief has been substantially burdened. Indeed, "the very concept of ordered liberty" requires us to ask it, lest "every person . . . make his own standards on matters of conduct in which society as a whole has important interests." *Id.* at 215-216.

Even a cursory examination of the question bears out *Yoder*'s conclusion. For example, it would be wrong to classify Marxism as a religion, even though most streams of Marxism include opinions on religious questions. Most notably, classical Marxism is strongly atheistic, defining religion as the "opium of the people." *See* Karl Marx, *Zur Kritik der Hegelschen Rechtsphilosophie*, 1 Karl Marx / Friedrich Engels—

Werke 378 (Dietz Verlag, Berlin 1976) ("*Die Religion . . . ist das Opium des Volkes*" – "Religion . . . is the opium of the people"). Yet Marxism is not rooted in any religious belief, nor are its practices in any way linked to the transcendental. Marx might well have been just as offended as Plaintiffs at the sight of "In God We Trust." But he could not have had a claim to an "exercise of religion" even if he found the National Motto distasteful to his philosophy. In fact, he might have felt insulted that anyone thought of his philosophy as in any way religious.

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

- Plaintiffs claim that "the fundamental religious tenet of the Atheist plaintiffs is that G-d does not exist." Opposition to Motion to Dismiss, RE30, Page ID #582.

- Plaintiff New Roe Child #2 "does not trust in G-d. Rather, she trusts in herself and her family." First Amended Complaint, RE8, Page ID #229.
- Plaintiff New Roe Parent's "beliefs require that she trust in her own abilities and a general responsibility to lead an ethical life." *Id.* RE8, Page ID #230. "She wants her children to trust validated science and rational thinking, and to objectively question the existence of a g-d." *Id.*
- Plaintiff Michael Howard's "Atheistic beliefs require that he advocate for logic, reason, and the scientific method." *Id.* RE8, Page ID #242.
- Plaintiff Sarah Maxwell "considers herself a rationalist, *i.e.*, one who does not adhere to the irrational concept of an imaginary supreme being, but instead respects science, reason, and the inherent essence of humans as good, social beings who have respect for others and for the environment." *Id.* RE8, Page ID #250.

None of these statements relies on transcendent truth or religious belief. Indeed, they reject it outright. And one cannot claim that rejecting

religious belief is itself an "exercise of religion," any more than one could claim that refusing to do pushups is a form of athletic training.

Of course, some religions, such as some forms of Buddhism, also teach that there is no God. But atheist Buddhists reach that conclusion based on their religious beliefs and concept of the transcendent, not philosophical beliefs like Plaintiffs'.[4] Similarly, some Christians do not believe that Darwinian evolution is true. That does not mean that the government burdens their "exercise of religion" when it teaches evolution in a science class. *Cf. Crowley v. Smithsonian Inst.*, 636 F.2d 738, 743 (D.C. Cir. 1980) (museum exhibit on evolution did not burden Christian plaintiffs).

There is one class of claim under the Religion Clauses that philosophical atheists can make just as well as religious believers: the right not to be coerced to adopt a particular religious belief. For example, the government cannot coerce belief as a condition of holding public office. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Maryland violated Establishment Clause by requiring belief in God as prerequisite for

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

holding public office). But that claim is not relevant here because Plaintiffs have not brought an Establishment Clause claim, nor are they being coerced by coins.

*   *   *

Plaintiffs want to have it both ways. They want to reject any notion of religious belief and transcendent truth and yet call it an "exercise of religion." Neither the English language nor the law can stretch that far.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

Date: February 16, 2017

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CERTIFICATE OF COMPLIANCE

Type-Volume Limitation, Typeface Requirements,
and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 1453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6 Cir. R. 32(b)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 in 14-point Century Schoolbook font.

Date: February 16, 2017

/s/ Eric Rassbach
Eric Rassbach

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing brief *amicus curiae* with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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