13-4049

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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.

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, TIIMOTHY F. GEITHNER, SECRETARY OF THE TREASURY,

Defendants.

On Appeal from the United States District Court
for the Southern District of New York
Honorable Harold Baer, Jr.
Case No. 13-CV-0741

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Alliance Defending Freedom is a Virginia nonprofit corporation that has no parent corporation or stockholders.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Rules

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Alliance Defending Freedom (formerly known as Alliance Defense Fund) is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly in many cases before the United States Supreme Court, including: *Town of Greece v. Galloway*, S. Ct. No. 12-696 (argued Nov. 6, 2013); *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Many of these cases involve the Establishment Clause of the First Amendment. For instance, Alliance Defending Freedom represented Petitioner Arizona Christian School Tuition Organization ("ACSTO") in the United States Supreme Court in a suit involving an Establishment Clause challenge to the State of Arizona's tuition tax credit program. ACSTO achieved victory when the Supreme Court held that the plaintiffs lacked taxpayer standing to file suit and

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1(b), *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ordered the dismissal of the case for want of subject matter jurisdiction. *ACSTO*, 131 S. Ct. at 1440.

Alliance Defending Freedom files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Local Rule 29.1. All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUE

1. Whether Plaintiffs have plausibly alleged sufficient factual matter to establish a concrete, particularized, and judicially cognizable injury in fact capable of satisfying Article III's standing requirements.

INTRODUCTION

A wave of challenges to Congress' decision to include the national motto, "In God We Trust," on United States coins and currency has swept the federal courts over the last forty years. Decisions from courts of appeals spanning 1970 to 2010 have rejected claims substantially similar to those Plaintiffs raise here. *See Kidd v. Obama*, 387 Fed. App. 2, 2010 WL 2930162, at *1 (D.C. Cir. 2010) (unpublished); *Gaylor v. United States*, 74 F.3d 214, 217-18 (10th Cir. 1996); *O'Hair v. Murray*, 588 F.2d 1144, 1144 (5th Cir. 1979); *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970). This persistent litigation is due, first and foremost, to courts' failure to address plaintiffs' Article III standing to bring such lawsuits.

Of the four courts of appeals that have upheld the national motto's use on coins and currency on the merits, two simply assumed that plaintiffs had standing, *Gaylor*, 74 F.3d at 216; *Aronow*, 432 F.2d at 243, one openly questioned whether standing existed but proceeded to assume it anyway, *O'Hair*, 588 F.2d at 1144, and one failed to mention standing altogether, thereby assuming it *sub silentio*, *Kidd*, 2010 WL 2930162, at *1. Thus, no federal appellate court that has independently decided the merits of this important issue has ruled on whether plaintiffs were entitled to invoke its jurisdiction in the first place. *But see Newdow v. Lefevre*, 598 F.3d 638, 642-44 (9th Cir. 2010) (concluding the plaintiff had standing under Ninth Circuit precedent but that his claims were foreclosed by *Aronow*).

That dubious approach is not available to this Court. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), the Supreme Court rejected the practice of "'assuming jurisdiction for the purpose of deciding the merits" of a case. *See id.* at 101 (stating "[h]ypothetical jurisdiction produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion"). Federal courts now have "an independent obligation to assure … that jurisdiction is proper before proceeding to the merits." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008).

This Court must accordingly "determine that [it has] jurisdiction before proceeding to the merits" of Plaintiffs' claims, *Lance v. Coffman*, 549 U.S. 437,

439 (2007), even if the "the parties are prepared to concede" that all such preliminary requirements are met, *Steel Co.*, 523 U.S. at 95. As explained below, Plaintiffs' allegations are insufficient to establish a concrete, particularized, and judicially cognizable injury in fact. This Court should therefore affirm for lack of standing and remand for the district court to dismiss the Amended Complaint.

STATEMENT OF THE CASE

I. Facts.

No recent events precipitated the present case. "In God We Trust," as a national motto, has its origins in The Star Spangled Banner, which Francis Scott Key authored during the War of 1812. Although it may be little known, the fourth verse of our national anthem states: "Then conquer we must, when our cause is just, And this be our motto – 'In God is our trust.'" The Smithsonian, The Star Spangled Banner – The Lyrics, *available at* http://amhistory.si.edu/starspangled banner/the-lyrics.aspx (last visited Jan. 23, 2014).

That phrase's appearance on United States coinage began almost 150 years ago in the 1860s. *See* U.S. Mint, In God We Trust, *available at* http://www.usmint.gov/about_the_mint/fun_facts/?action=fun_facts5 (last visited Jan. 23, 2014). Congress subsequently adopted "In God We Trust" as our national motto in the 1950s, *see* 36 U.S.C. § 302 ("'In God we trust' is the national motto."), and statutorily required that all United States coins and currency bear that

inscription around the same time, *see* 31 U.S.C. § 5112(d)(1) (requiring that "United States coins … have the inscription 'In God We Trust,'" "'Liberty,'" "'United States of America,'" and "'E Pluribus Unum'"); *id.* § 5114(b) (mandating that "United States currency has the inscription 'In God We Trust'"). Unsurprisingly, the national motto also appears in many other official places, including above the main door of the Senate and behind the chair of the Speaker of the House. *See* Pub. L. No. 107-293, § 1(10), 116 Stat. 2057, 2058 (2002).

In February 2013, Plaintiffs, eleven atheist or agnostic adults and seven of their children, along with two private associations that promote atheist or agnostic beliefs, filed this lawsuit challenging the government's use of the national motto on United States coins and currency. Plaintiffs alleged that this longstanding practice has resulted in five types of personal harm: (1) use of their tax dollars to create coins and currency that bear the national motto "In God We Trust," (2) subjective feelings of offense and alienation, (3) refusal to continue purchasing coin sets from the United States Mint, (4) complicity in the promulgation of a religious message with which they disagree, and (5) undermining the religious teaching of their children. Am. Compl. at 2-8.

II. Procedural History.

Plaintiffs initially filed suit against the United States, the United States Congress, and three treasury officials in the United States District Court for the

Southern District of New York. They alleged that the federal government's issuance of coins and currency bearing the national motto, "In God We Trust," violates the Establishment and Free Exercise Clauses of the First Amendment, and the Religious Freedom Restoration Act ("RFRA").

Plaintiffs asked the district court to declare that placing the national motto on coins and currency, in accordance with federal statutory requirements, violates both the First Amendment and RFRA. Am. Compl. at 78; *see* 31 U.S.C. §§ 5112(d)(1) & 5114(b). Based on that declaration, Plaintiffs also requested that the district court issue a permanent injunction barring the federal government "from minting coins and/or printing currency on which is engraved" the national motto, "'In God We Trust.'" Am. Compl. at 78.

In May 2013, the government filed a motion to dismiss the Amended Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). It argued that dismissal was appropriate on a number of grounds, including that (1) Freedom from Religion Foundation and its members are collaterally estopped from bringing the action, (2) Congress was not amenable to suit, (3) Plaintiffs' First Amendment and RFRA arguments lacked merit, and (4) Plaintiffs could not meet the applicable standard for mandamus relief.

The district court granted the government's motion to dismiss in September 2013 because it concluded that Supreme Court dicta rejected Plaintiffs' First

Amendment and RFRA arguments on their merits. In so doing, the court ruled that Congress' decision to place the national motto on United States coins and currency had a secular purpose and effect under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *Newdow v. United States*, No. 13-CV-741, 2013 WL 4804165, at *2 (S.D.N.Y. Sept. 9, 2013). The district court also determined that placing the motto, "In God We Trust," on coins and currency had no impact on Plaintiffs' free exercise rights, as there was no accompanying "government coercion, penalty, or denial of benefits." *Id.* at *4. Plaintiffs noted a timely appeal to this Court.

SUMMARY OF THE ARGUMENT

Federal courts possess limited, not general, jurisdiction and ensuring that a case fits within Article III's bounds assumes singular importance when constitutional questions of national significance are at stake. Plaintiffs' challenge to the Legislative and Executive Branches' decision to incorporate the national motto, "In God We Trust," on coins and currency directly implicates that principle, as well as the essential purpose of Article III's standing requirement—preserving the separation of powers. This Court should accordingly engage in a rigorous standing analysis regardless of whether the parties have raised the issue or the district court ruled upon it.

On a motion to dismiss, this Court asks whether Plaintiffs' Amended Complaint alleges sufficient facts to plausibly suggest that they have standing to

sue. Standing rests on Plaintiffs' ability to show that they have a personal stake in the resolution of the questions presented as a result of an "injury in fact" that is concrete and particularized, actual or imminent, and not conjectural or hypothetical. Not any sharp and acrimonious disagreement will do. Federal courts are not forums for the ventilation of public grievances. They exist solely to enforce the rights of individuals. Accordingly, Plaintiffs must demonstrate an injury that is not only concrete and particularized, but also judicially cognizable.

The allegations of Plaintiffs' Amended Complaint are insufficient to hurdle this bar. Plaintiffs lack taxpayer standing because they cannot show that including the national motto on coins and currency affects their tax burden or that the government's expenditure of tax dollars to create coins and currency furthers any religious ends. Moreover, Plaintiffs' subjective feelings of offense and alienation are merely the psychological consequences of observing conduct with which they disagree and are thus incapable of establishing a cognizable injury in fact.

Any self-imposed harm resulting from Plaintiffs' voluntary acts of political protest, such as ceasing to purchase coin sets from the United States Mint, are similarly incapable of establishing a cognizable Article III injury. The same is true of Plaintiffs' First Amendment allegations under *Wooley* because no reasonable observer would attribute the national motto's message to them. Further, Plaintiffs cannot demonstrate harm to their parental rights because their children's potential

exposure to teaching about coins, currency, and the national motto is purely hypothetical and does not involve any religious activity.

Plaintiffs are undoubtedly committed to their ideals. But Article III standing is not measured by the intensity of their disagreement with the national motto or the fervor of their advocacy. Plaintiffs' Amended Complaint does not contain sufficient factual allegations to establish a concrete, particularized, and judicially cognizable injury in fact. This Court should accordingly affirm for lack of standing and remand for the district court to dismiss this case.

ARGUMENT

I. Subject Matter Jurisdiction is Not Subject to Waiver, Thus This Court Must Ensure That Standing Exists Regardless of Whether the Parties Raised the Issue or the District Court Ruled Upon It.

Federal courts' jurisdiction is inherently limited in nature. *See Wynn v. AC Rochester*, 273 F.3d 153, 157 (2d Cir. 2001) (noting that "[f]ederal courts … are courts of limited jurisdiction"). They have "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Even though the parties to a case may be satisfied with the Court's resolution of a legal question, they are incapable of conferring "subject matter jurisdiction where the Constitution and Congress have not." *Id.* It is thus incumbent on this Court to

determine that subject matter jurisdiction exists "before deciding [the merits of] any case." *Wynn*, 273 F.3d at 157.

This "independent obligation to examine subject matter jurisdiction" arises in every action. *Thompson v. Cnty. of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994). But it is of particular importance in cases like the one at bar that present wide-ranging constitutional questions. *See Bender*, 475 U.S. at 541-42 (discussing subject matter jurisdiction's "special importance when a constitutional question is presented"). In these circumstances, the Court pays particular attention to its "threshold inquiry" into subject matter jurisdiction and will dismiss a case when it "lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (quotation omitted).

Article III of the United States Constitution restricts federal courts' subject matter jurisdiction to "cases and controversies." U.S. Const. art. III, § 2. This limitation is practically realized through the requirements of standing, which consist of (1) an injury in fact, (2) causation, and (3) redressibility. *See Baur v. Veneman*, 352 F.3d 625, 631-32 (2d Cir. 2003). In short, to prevail on their claims, Plaintiffs must allege, and ultimately prove, that they have suffered an injury in fact that is not only fairly traceable to the government's challenged conduct, but also likely to be redressed by their requested relief. *See id.* at 632.

Because subject matter jurisdiction concerns a court's basic power to hear a case, it "'can never be forfeited or waived.'" *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 126 (2d Cir. 2011) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006)). This Court must accordingly consider Plaintiffs' standing even if the district court did "not pass[] on it, and even if the parties fail to raise the issue." *Thompson*, 15 F.3d at 248; *see also Kontrick v. Ryan*, 540 U.S. 443, 444-45 (2004) (recognizing that "a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct"). It is, after all, well established that this Court may "affirm a district court's dismissal of a compliant on any basis supported by the record." *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012) (quotation omitted).

Although it is true that "[c]ourts do not usually raise claims or arguments on their own," the Supreme Court has explained that "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). That duty applies here, particularly as "[t]he command to guard jealously and exercise rarely [the judicial] power to make constitutional pronouncements requires strictest adherence when matters of great national

significance are at stake." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *see id.* at 4-5 (considering a challenge to the Pledge of Allegiance).

Indeed, Plaintiffs' challenge to the national motto's use on United States coins and currency, as established by the Legislative and Executive Branches of government, directly implicates the purposes of Article III's standing. The law of standing "is built on a single basic idea—the idea of separation of powers." *Raines v. Byrd*, 521 U.S. 811, 820 (1997) (quotation omitted). Its purpose is to keep "the Judiciary's power within its proper constitutional sphere," *id.*, by preventing the "judicial process from being used to usurp the powers of the political branches," *Clapper v. Amnesty* Int'l, 133 S. Ct. 1138, 1146 (2013), a malady the Supreme Court has described as "'government by injunction,'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

A federal court's standing inquiry is thus "especially rigorous" when a case would "force [it] to decide whether an action taken by one of the other two branches of the Federal Government [is] unconstitutional." *Raines*, 521 U.S. at 820-21. Plaintiffs' request that this Court invalidate 31 U.S.C. §§ 5112(d)(1) & 5114(b) clearly implicates that principle. The broad scope of those laws also renders the "constitutionally mandated standing inquiry … especially important in a case like this one, in which [Plaintiffs'] own injury is not distinct from that

suffered in general by other taxpayers or citizens." *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (plurality opinion) (quotation omitted).

II. Plaintiffs' Amended Complaint Must Allege Facts That Affirmatively and Plausibly Suggest They Have Standing to Sue.

This Court reviews *de novo* the district court's dismissal of Plaintiffs' Amended Complaint for failure to state a claim. *See In re Amaranth Natural Gas Commodities Litig.*, 730 F.3d 170, 180 (2d Cir. 2013). Plaintiffs may prevail on appeal only if they show that the Amended Complaint contains sufficient factual allegations, accepted as true, to state a clam to relief that is "'plausible on its face.'" *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Accomplishing this task requires Plaintiffs' factual allegations to establish "more than a sheer possibility" that Defendants acted unlawfully. *Id.* (quoting *Iqbal*, 556 U.S. at 678).

Notably, courts are not required to credit every allegation in a complaint. They are free, for example, to disregard "labels and conclusions" "formulaic recitation of the elements of a cause of action," "conclusory statements," or other "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quotations and alteration omitted); *see also Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146 (2d Cir. 2011) (recognizing that the Court "need not credit a complaint's conclusory statements without reference to its factual context." (quotation omitted)). But they must accept all well-pled factual allegations as true

and construe all reasonable inferences from the complaint in Plaintiffs' favor. *See Jackson-Bey v. Hanslmaier*, 115 F.3d 1091, 1095-96 (2d Cir. 1997).

Determining whether Plaintiffs' claims meet the "plausibility" standard is "a context-specific task" that requires this Court to draw on "judicial experience and common sense." *In re Amaranth*, 730 F.3d at 180 (quoting *Iqbal*, 556 U.S. at 679). Facial plausibility is reached when the well-pled facts of the complaint allow the Court "to draw the reasonable inference" that Defendants are "liable for the misconduct alleged.'" *Id.* (quoting *Iqbal*, 556 U.S. at 678). Plaintiffs thus "bear[] the burden of alleging sufficient facts to support standing." *Jackson-Bey*, 115 F.3d at 1095. In short, Plaintiffs' Amended Complaint must "allege facts that affirmatively and plausibly suggest that [they have] standing to sue." *Amidax Trading Grp.*, 671 F.3d at 145.

III. To Affirmatively and Plausibly Demonstrate Standing, Plaintiffs' Amended Complaint Must Allege Sufficient Facts to Establish That They Have Suffered a Concrete and Particularized Injury.

Standing to bring suit depends on Plaintiffs possessing a "personal stake" in the outcome of the controversy that justifies their invoking federal courts' jurisdiction and the exercise of the court's remedial powers on their behalf. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (quotation omitted). Plaintiffs only obtain that level of individualized interest once they have personally "suffered some threatened or actual injury resulting from the putatively illegal action" that forms

the basis of the suit. *Id.* at 499 (quotation omitted). Hence, a so-called "injury in fact" requirement lies at the heart of Article III standing. *See, e.g.*, *Valley Forge Christian Coll. v. Ams. United For Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) (noting "[t]he exercise of judicial power … is … restricted to litigants who can show [an] 'injury in fact'"); *Schlesinger*, 418 U.S. at 218 (characterizing an "'injury in fact'" as the "essence" of an Article III "'case or controversy'" (quotation omitted)).

To establish an injury in fact, Plaintiffs' Amended Complaint must show that they have a "'personal stake'" in the dispute and that their alleged injury "is particularized as to" them. *Raines*, 521 U.S. at 819. Courts most often describe this kind of injury as the "invasion of a legally protected interest" that is not only "concrete and particularized," but also "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotations omitted). If Plaintiffs allege an injury that is "too abstract" or fail to demonstrate a harm that affects them "in a personal and individual way," they lack Article III standing and this Court has no authority to address their claims. *Raines*, 521 U.S. at 819; *see also Valley Forge*, 454 U.S. at 475-76 ("Those who do not possess … standing may not litigate as suitors in the courts of the United States.").

Not any "disagreement, however sharp and acrimonious," will do. *Diamond v. Charles*, 476 U.S. 54, 62 (1986). This Court must "carefully inquire" whether

Plaintiffs have plausibly established an injury that is "personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. As the Supreme Court has cautioned, federal standing requirements "are not satisfied merely because a party requests a court of the United States to declare its legal rights, and has couched that request for forms of relief historically associated with courts of law in terms that have a familiar ring to those trained in the legal process." *Valley Forge*, 454 U.S. at 471.

Federal courts are not "general complaint bureaus," *Hein*, 551 U.S. at 593, or "ombudsmen of the general welfare," *Valley Forge*, 454 U.S. at 487. Nor are they "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Id.* at 473. They exist solely to enforce the rights of individuals and leave the vindication of the public interest, including the public's generalized interest in upholding the rule of law, to Congress and the Chief Executive. *See Lujan*, 504 U.S. at 576.

Plaintiffs must therefore do more than raise "abstract questions of wide public significance which amount to generalized grievances, pervasively shared and most appropriately addressed in the representative branches" of government. *Valley Forge*, 454 U.S. at 475 (quotations omitted). Such broad concerns that are "shared in substantially equal measure by all or a large class of citizens" do not a case or controversy make. *Warth*, 422 U.S. at 499. Instead, Plaintiffs must

demonstrate a cognizable "personal injury suffered by them *as a consequence* of the alleged constitutional error" of imprinting the national motto on United States coins and currency. *Valley Forge*, 454 U.S. at 485 (emphasis in original).

IV. Because Plaintiffs' Amended Complaint Fails to Affirmatively and Plausibly Allege a Cognizable Injury in Fact, They Lack Standing to Bring This Suit and the District Court Was Right to Dismiss It.

Plaintiffs' Amended Complaint alleges five types of personal injury: (1) use of their tax dollars to create coins and currency that bear the national motto "In God We Trust," (2) subjective feelings of offense and alienation, (3) refusal to continue purchasing coin sets from the United States Mint, (4) complicity in the promulgation of a religious message with which they disagree, and (5) undermining the religious teaching of their children. Am. Compl. at 2-8. As explained below, none of these harms are "personal, particularized, concrete, and otherwise judicially cognizable." *Raines*, 521 U.S. at 820. Plaintiffs thus lack standing to bring this suit and the district court was right to dismiss it.

A. Plaintiffs Lack Taxpayer Standing Under *ACSTO*.

Generally speaking, "taxpayers do not have standing to challenge how the federal government spends tax revenue." *In re United States Catholic Conference*, 885 F.2d 1020, 1027 (2d Cir. 1989). Plaintiffs' federal taxpayer status is thus incapable of granting them standing to file this suit unless they are able to fit into the exception *Flast v. Cohen*, 392 U.S. 83 (1968), established for a limited class of

Establishment Clause claims. The Supreme Court's recent decision in *ACSTO* demonstrates that Plaintiffs' challenge to the design of United States coins and currency is outside of *Flast's* "narrow" bounds. 131 S. Ct. at 1440.

In *ACSTO*, the Supreme Court explained that general taxpayer standing cannot "rest on unjustifiable economic and political speculation." *Id.* at 1443. That the government may expend certain funds to print currency and coins bearing the national motto does not mean that "its budget … necessarily suffer[s]." *Id.* Plaintiffs cannot plausibly claim that the inclusion of four words, "In God We Trust," on bills and coins that the government would create regardless "depletes [its] coffers." *Id.* at 1444; *see also id.* at 1445 (recognizing that the "incidental expenditure of tax funds" is not enough (quotation omitted)).

Nor can Plaintiffs plausibly allege that elected officials would increase their "tax bill to make up" for any hypothetical deficits. *Id.* at 1444. Thus, an injunction against the federal government including the national motto on coins and currency would not provide Plaintiffs with "any actual tax relief." *Id.* (quotation omitted). Plaintiffs not only engage in rank speculation on this score, any interest they have in protecting the federal treasury "is still of a general character, not particular to certain persons" and is thus categorically incapable of establishing an injury in fact. *Id.*

Plaintiffs must therefore rely on the standing rule created in *Flast*. But *ACSTO* made clear that this "narrow exception" does not provide the broad opening for Establishment Clause challenges that Plaintiffs seek. 131 S. Ct. at 1440. Indeed, *Flast* involved a congressional statute that allowed the expenditure of federal funds to support the teaching of secular subjects in religious schools. *See id.* at 1445. That statute directly implicated the Founder's concern that citizens not be "required to pay taxes to support religious institutions with whose beliefs they disagreed." *Id.* at 1447 (quotation omitted).

Here, there is no similar congressional use of the taxing and spending power, as none of Plaintiffs' "property is transferred through the Government's Treasury to a sectarian entity." *Id.* at 1446. The federal government is itself using tax revenue to fulfill a secular government function, *i.e.*, the creation of coins and currency. As a result, the only tax revenue at issue here will be expended regardless of the design elements Plaintiffs dispute. Plaintiffs cannot therefore plausibly allege that their property has been "conscripted for sectarian ends," *id.*, or that their tax dollars have been "spent on an outlay for religion," *Id.* at 1445.

There is, quite simply, no "logical link" or "nexus" between Plaintiffs' taxpayer status and the legislative enactments they attack. *Id.* Printing money is one of the federal government's primary jobs. *See* U.S. Mint, History of the Mint, *available at* http://www.usmint.gov/education/historianscorner/?action=history

(last visited Jan. 2, 2014). It has spent tax dollars to carry out that function for 220 years, *id.*, and will continue to do so at approximately the same levels regardless of this Court's ruling and the final outcome of this case. Under these circumstances, Plaintiffs cannot plausibly allege that they are "implicate[d] [as] individual taxpayers in sectarian activities." *ACSTO*, 131 S. Ct. at 1447. They accordingly lack taxpayer standing under *Flast*. *See id.*

B. Plaintiffs' Subjective Feelings of Offense and Alienation Do Not Establish a Cognizable Injury in Fact.

More than "a legal disagreement, however sharp and acrimonious it may be," is necessary for Plaintiffs to have Article III standing. *Diamond*, 476 U.S. at 62. They must establish an injury that is not only personal, particularized, and concrete, but also judicially cognizable. *See Raines*, 521 U.S. at 820. Plaintiffs' generalized claims of subjective feelings of offense and alienation based on a perceived violation of the First Amendment are not up to the task. *See Valley Forge*, 454 U.S. at 482-83 (noting that the Supreme Court "repeatedly has rejected claims of standing predicated on the right possessed by every citizen to require that the Government be administered according to law" (quotation omitted)).

Although Plaintiffs are undoubtedly sincere in their atheist beliefs and their personal opposition to use of the motto "In God We Trust," *cf. id.* at 486 & n.21, ideological frustration is not a cognizable injury in fact. The Supreme Court has held that "the psychological consequence ... produced by observation of conduct

with which one disagrees…. is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Id.* at 485. The Establishment Clause does not provide citizens with "a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Id.* at 487.

Plaintiffs' allegation of psychic trauma produced by the observation of conduct they believe to violate the Establishment Clause boils down to nothing more than a "claim[] of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Id.* at 482-83. This general interest, shared by millions, is incapable of producing an injury in fact. Indeed, as the Supreme Court has recognized, "assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." *Id.* at 483.

Suits, like the one at bar, "that promise no concrete benefit" to Plaintiffs and entail the resolution of "questions of law *in thesi* are most often inspired by the psychological smart of perceived official injustice, or by the government-policy preferences of political activists." *Steel Co.*, 523 U.S. at 103 n.5 (quotation and internal citation omitted). But "subjective 'chill'" based on such ideological frustration is "not an adequate substitute" for a concrete and particularized injury

in fact. *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972); *see also Steel Co.*, 523 U.S. at 107 ("[A]lthough a suitor may derive great comfort and joy from the fact that … a wrongdoer gets his just deserts, or that the Nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury.")

This Court's precedent clearly recognizes that principle. *In re U.S. Catholic Conference*, for example, involved a claim by abortion proponents that the federal government's provision of tax-exempt status to the Catholic Church violated the Establishment Clause's strictures, as well as those of 26 U.S.C. § 501(c)(3). 885 F.2d at 1022-23. Plaintiffs in that case—like those here—alleged that the government's failure to comply with their "sincere and deeply held belief in the separation of church and state" caused them personal harm, *id.* at 1025 (quotation omitted), and resulted in "self-perceived 'stigma,'" *id.* at 1026.

After reviewing the Supreme Court's precedent, this Court likened the complainants' interests to those of "an offended bystander" and dismissed their suit for lack of Article III standing. *Id.*; *see also id.* at 1025-26 (discussing *Valley Forge* and *Allen v. Wright*, 468 U.S. 737 (1984)). "[D]iscomfiture at watching the government allegedly fail to enforce the law" simply could not establish a concrete and personal injury in fact. *Id.* at 1025. The same harm could have been raised "by any member of the public who disagrees with the views of the Catholic Church

and the IRS in granting it a tax exemption." Id. at 1025-26. Nor could plaintiffs' "self-perceived 'stigma' … amount to a particularized injury in fact" absent an objective denial of "equal treatment under the law." *Id.* at 1026; *see also Allen*, 468 U.S. at 755 (refusing to recognize standing "based on [a] stigmatizing injury" without any personal denial of "equal treatment").

That logic directly applies to Plaintiffs' suit. Subjective feelings of offense and alienation based on the government's overarching failure to comply with Plaintiffs' conception of the separation of church and state cannot constitute harm that is personal, particularized, concrete, and judicially cognizable. *Cf. In re U.S. Catholic Conference*, 885 F.2d at 1025 (recognizing the plaintiffs' "primary injury" was "their discomfiture at watching the government allegedly fail to enforce the law"). Plaintiffs' ideological frustration, however intense their interest or fervent their advocacy, does not provide them with Article III standing to file this suit. *Id.* at 1026 (citing *Valley Forge*, 454 U.S. at 486).

C. Self-Imposed Harm, Such as Plaintiffs' Personal Decision to Cease Purchasing Coin Sets from the United States Mint, Cannot Plausibly Establish an Injury in Fact.

Article III standing "requires an injury with a nexus to the substantive character of the statute or regulation at issue." *Diamond*, 476 U.S. at 70. Plaintiffs' personal decision to cease augmenting their collection of coins produced by the United States Mint cannot plausibly hurdle that bar. Am. Compl. at 2-3.

Importantly, Plaintiffs collected coins minted under the same statutory regime challenged here for decades without suffering any harm other than "the psychological consequence ... produced by observation of conduct with which one disagrees." *Valley Forge*, 454 U.S. at 485; *see also* Am. Compl. at 2-3. They cannot morph that non-cognizable injury into a cognizable one simply by engaging in a voluntary act of political protest.

The Supreme Court has long held that no plaintiff "can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Accordingly, this Court has recognized that "a plaintiff may not establish injury for standing purposes based on a self-inflicted injury." *Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013). Plaintiffs' personal choice to stop buying coin sets from the United States Mint falls under that ban because it is an "unreasonable decision" based on mere ideological frustration that Plaintiffs clearly "knew to be avoidable." *St. Pierre v. Dyer*, 208 F.3d 394, 403 (2d Cir. 2000). Indeed, they avoided that unreasonable decision for decades by purchasing the coin sets they now voluntarily eschew and continue to avoid liquidating their existing collections, which are replete with coins bearing the national motto "In God We Trust." *See* Am. Compl. at 2-3.

Under these facts, it is abundantly clear that Plaintiffs seek to "manufacture standing merely by inflicting harm on themselves." *Clapper*, 133 S. Ct. at 1151.

The Supreme Court rejected similar pretextual allegations designed to achieve standing in *Clapper* and this Court should do the same here. *See id.* (concluding that allowing standing in these circumstances "waters down the fundamental requirements of Article III"). Although a favorable ruling would undoubtedly make Plaintiffs "happier" and perhaps even give them "great comfort and joy," "[r]elief that does not remedy" a cognizable Article III injury cannot "bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107.

D. Plaintiffs Cannot Plausibly Allege an Injury to Their First Amendment Rights Under *Wooley*.

Like the claimants in *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), Plaintiffs have the First Amendment right not to foster "an idea they find morally objectionable." But that right only forecloses official conduct that would reasonably attribute another's unwelcome message to them. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 570-73 (1995) (overturning Massachusetts' attempt forcibly to include an unwelcome group in a private parade because "every participating unit affect[ed] the message conveyed by the private organizers," thus the state's mandate impermissibly required the organizers "to alter the expressive content of their" speech). Although Plaintiffs' use of coins and currency bearing the national motto, just like millions of other citizens with diverse opinions, may tell observers about the ideas the government desires to communicate, it tells them nothing about Plaintiffs' own beliefs.

The Supreme Court drew this distinction in *Wooley* itself. In that case, the Maynards objected to a New Hampshire requirement that most passenger vehicles bear license plates that included the state motto "Live Free or Die." 430 U.S. at 706-07. Because the states' message was "repugnant to their moral, religious, and political beliefs," the Maynards refused to "disseminate this message by displaying it on their automobiles." *Id.* at 707. One of them received fines and jail time as a result. *Id.* at 708 (noting that Mr. Maynard served 15 days in jail and was fined $25).

After framing the question as whether New Hampshire could "require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," the Supreme Court held that such a government mandate violates the First Amendment. *Id.* at 713. The Court reached this conclusion not simply because the Maynards strongly objected to the state's message but because they were required to use their vehicle, or "private property," as a "'mobile billboard' for the [s]tate's ideological message or suffer a penalty." *Id.* at 715. And that private property, unlike "coins and currency" bearing the "national motto," was "readily associated with" the Maynards as private citizens. *Id.* at 717 n.15.

In *Wooley*, the Supreme Court thus explicitly distinguished "bearer[s] of currency" containing "the national motto," *id.*, the content of which is not reasonably attributed to individual citizens, *see* 18 U.S.C. § 333 (making it a crime to mutilate "any bank bill … issued by … the Federal Reserve System"), from those like the Maynards who are required "to participate in the dissemination of an ideological message by displaying it" openly on their vehicles—"private property" that is naturally associated with them, *Wooley*, 430 U.S. at 713.

Because no reasonable person would attribute either the national motto or the design of United States coins and currency to Plaintiffs as private persons, they cannot plausibly claim to be "force[d] [as] an individual … to be an instrument for fostering public adherence to an ideological point of view [they find] unacceptable." *Id.* at 715. Plaintiffs' allegations under *Wooley* thus also fail to establish an injury in fact capable of satisfying Article III's standing requirements.

E. Plaintiffs Cannot Plausibly Allege an Injury to Their Parental Rights under *Sullivan*.

In *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1109 (2d Cir. 1992), this Court recognized that a certain "type of parental interest and injury" may give rise to "parental standing in Establishment Clause cases." But Plaintiffs' allegations cannot plausibly fit into that mold. *See* Am. Compl. at 5-7. *Sullivan* involved a child's participation in after-school programs a religious organization provided at a public housing development pursuant to a government contract. *See*

962 F.2d at 1103-04. The plaintiff, who was Native American, alleged that his son was taught to sing hymns at the after-school program and that this exposure to Christian beliefs unconstitutionally interfered with his parental rights. *See id.* at 1105, 1109.

This Court concluded that Sullivan's position was comparable to that of the parents in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), who sued after their children were exposed to Bible readings at a public school. *Sullivan*, 962 F.2d at 1109. In both cases, students' participation in "'unwelcome religious exercises'" harmed their parents' right to direct the upbringing of their children. *Id.* (quoting *Valley Forge*, 454 U.S. at 486 n.22). Accordingly, this Court held that "Sullivan's complaint allege[d] with sufficient clarity the type of parental injury recognized by the Supreme Court for purposes of standing." *Id.* at 1110.

Plaintiffs, in contrast, cannot plausibly allege that the federal government has exposed their children to any type of religious exercise. *See* Am. Compl. at 5-7. They simply claim that someday, somehow their children may be taught about United States coins and currency and discover that they bear the national motto "In God We Trust," which would frustrate Plaintiffs' ideological teachings. *See id.* Not only are these claims abstract and speculative in the extreme, they also fail to implicate the federal actors who make up the only Defendants to this action. *Cf. Valley Forge*, 454 U.S. at 486 n.22 (noting the *Schempp* plaintiffs "had standing,

not because their complaint rested on the Establishment Clause … but because impressionable schoolchildren were subjected to unwelcome religious exercises" and holding Respondents "alleged no comparable injury"). As such, the harm Plaintiffs allege to their parental rights clearly lacks the "concrete adverseness" that is the hallmark of an injury in fact. *Id.* at 486 (quotation omitted).

Learning about the national motto is not a religious exercise, *see, e.g.*, *Aronow*, 432 F.2d at 243 (recognizing that the national motto's inclusion on coins and currency "bears no true resemblance to a governmental sponsorship of a religious exercise"), and Plaintiffs' children may uncover that information in a myriad of ways, none of which would provide Plaintiffs with an injury in fact, *cf. Valley Forge*, 454 U.S. at 486 ("We simply cannot see that respondents have alleged an *injury* of *any* kind … sufficient to confer standing."). The Amended Complaint's allegations of injury to Plaintiffs' parental rights are therefore incapable of providing them standing under Article III. *See Schlesinger*, 418 U.S. at 221 (recognizing that "concrete injury" presents the only "factual context within which a court … is capable of making decisions").

CONCLUSION

Plaintiffs are undoubtedly "firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of [their] interest or the fervor of [their] advocacy." *Valley Forge*, 454 U.S. at 486.

Because the Amended Complaint's allegations fail to establish that Plaintiffs have suffered a plausible injury in fact that is not only concrete and particularized, but also judicially cognizable, the district court was right to dismiss the present suit. This Court should thus affirm for lack of Article III standing.

Respectfully submitted this 23rd day of January, 2014.

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CERTIFICATE OF COMPLIANCE

This *amicus* brief complies with the type-volume limitations of Fed. R. App. P. 29(d) & 32(a)(7)(B), because this brief contains 6,914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 Word in Times New Roman 14-point font.

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I hereby certify that on January 23, 2014, I electronically filed the foregoing *amicus* brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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