Paypal or Plastic, Don't Matter The Court Won't Have It: Why the Case for Removing "In God We Trust" from the Dollar May Still Gain Traction Under the Religious Freedom Restoration Act

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PAYPAL OR PLASTIC, DON’T MATTER THE COURT WON’T HAVE IT: WHY THE CASE FOR REMOVING “IN GOD WE TRUST” FROM THE DOLLAR MAY STILL GAIN TRACTION UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

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INTRODUCTION

Imagine if Christians had to carry on their body something they disagree with religiously, like “Jesus is a lie,” in order to engage in daily activities. This is exactly how some Atheists, Humanists, and one Jewish plaintiff felt in Ohio, which led to their challenge against federal statutes that require the inscription of the national motto, “In God We Trust,” on U.S. currency. The plaintiffs in New Doe Child #1 v. Congress of the United States, contended that the motto on the currency causes them to bear, affirm, and proselytize an objectionable message in a way that violates their religious beliefs.

In New Doe Child, which the Sixth Circuit decided in 2018, the court held that the use of the United States’ motto “In God We Trust” on U.S. currency did not violate the Religious Freedom Restoration Act of 1993 (RFRA). The majority held that the plaintiffs did not satisfy RFRA’s substantial burden test because some of the plaintiffs could avoid cash transactions.

The plaintiffs contended that the motto on the currency placed a substantial burden on the exercise of their religion in three main ways: by causing

1. Jack Jenkins, How Atheists Are Turning ‘Religious Freedom’ Laws Against Religion, THINK PROGRESS (May 19, 2015, 12:00 PM) (quoting Michael Newdow); https://thinkprogress.org/how-atheists-are-turning-religious-freedom-laws-against-religion-3ae6d8f6680/ (noting that challenges to the nation’s motto under the Establishment Clause have failed but under the Religious Freedom Restoration Act (RFRA) of 1993, may not be susceptible to misapplication of constitutional principles).

2. See New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 583 (6th Cir. 2018) (arguing that the placement of the motto on U.S. currency violates the Free Exercise and Free Speech Clause of the First Amendment and RFRA).

3. See id. at 583 (arguing, for example, that the motto forces the Jewish plaintiff to commit the sin of excessively printing God’s name and destroying God’s printed name).

4. See id. at 590 (finding that the plaintiffs had alternative forms of payment and RFRA does not require the Government protect plaintiffs in the use of their preferred means of payment); see also 42 U.S.C. § 2000bb-1(a)-(b) (noting that RFRA’s purpose is to restore a compelling interest test as set forth by previous case law and to guarantee its application where the free exercise of religion is substantially burdened).

5. See New Doe Child #1, 891 F.3d at 5901 (noting that although several plaintiffs run small businesses or are self-employed and frequently engage in cash transactions to operate their business, they do not allege that they would suffer severe consequences by choosing to not engage in cash transactions); see also Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2779 (2014) (holding that to determine whether a substantial burden on the exercise of religion is in furtherance of a compelling governmental interest, the court must look beyond broadly formulated interests and scrutinize the asserted harm of granting specific exemptions to religious claimants).
plaintiffs to (1) personally affirm a religious sentiment that is opposite of what they consider to be religious fact; (2) affirm as true a statement that they believe to be false (both that God exists and that they as Americans trust in God) when their religious ideologies mandate that they act with honesty; and (3) evangelize a religious belief that is entirely contrary to their personal religious attitudes. The plaintiffs further contended that they were forced to violate their beliefs every time they chose to engage in financial transactions involving cash. Subsequently, the plaintiffs contended, they were substantially burdened by having to choose between violating their beliefs to engage in cash transactions or maintaining their beliefs but denying themselves the opportunity to transact with certain businesses. The government argued, and the Sixth Circuit held that, because the plaintiffs could avoid cash-only transactions, they were not substantially burdened.

This comment argues that the Sixth Circuit erred in its decision in *New Doe Child #1 v. Congress of the United States of America* when it held that the plaintiffs were not substantially burdened by using money on which the nation’s motto is inscribed. Part II describes the theory behind the formation of RFRA and how recent Supreme Court decisions have drifted away from Congress’s original intent in creating the act. Part II also describes the history of the nation’s motto on U.S. currency and the Court’s inconsistency

6. *See New Doe Child #1*, 891 F.3d at 583 (discussing the plaintiff’s allegations that carrying and transacting with cash bearing the national motto is often necessary to participate in everyday commerce and forcing plaintiffs to make a choice to not use cash or to violate their sincerely held religious beliefs is a substantial burden on the exercise of their religion for which the Government does not put forth a compelling interest).

7. *See id.* at 590 (discussing the plaintiffs’ allegation that transacting in cash forces them to bear a religious message that is contrary to their personal religious opinions but is often necessary to engage in certain transactions).

8. *See id.* at 591 (discussing the plaintiffs’ allegations to find whether they have established that they are substantially burdened as required under RFRA).

9. *See id.* at 590 (finding that the plaintiffs were able to conduct the bulk of their purchases with credit cards and checks and holding that because plaintiffs did not allege that they were forced to use cash, they could not be substantially burdened); see, e.g., Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996, 1008-09 (6th Cir. 2017) (holding that the operator of a private religious school, which had agreed to lease church property as the location for its school, had adequate alternative locations for its religious mission and the burden of an additional 12.1 mile car ride each way was a “mere inconvenience”).

10. *See New Doe Child #1*, 891 F.3d at 590 (holding that plaintiff’s preferred form of cash transactions when alternative forms of payment are available is a mere inconvenience).

11. *See infra* Part II (discussing the reasons behind the formation of RFRA and how subsequent cases have shifted its application).
regarding whether the motto is secular. Part II also discusses how the Sherbert two-part test under RFRA has been interpreted since 1993 and the current lack of guidance for future RFRA claims. Part III asserts that the nation’s motto on U.S. currency is not the least restrictive means of furthering a compelling governmental interest. Part IV recommends that courts should lay a framework to assess when a burden becomes a substantial burden under RFRA. Part V concludes by reiterating the need for a standard in determining what constitutes a substantial burden under RFRA in order for the statute to be applied fairly. Part V further concludes by restating that the nation’s motto on U.S. currency is not narrowly tailored to further the government’s asserted compelling interest of proclaiming the fundamental political values the motto represents, and therefore is not valid under RFRA.

I. BACKGROUND

A. The Formation of RFRA and Its Intended Purpose

The Religious Freedom Restoration Act of 1993 was passed in response to the Supreme Court’s decision in Employment Division v. Smith. In Smith, the plaintiffs were terminated from their employment after ingesting peyote for sacramental purposes at their Native American Church service and were subsequently barred from collecting unemployment benefits due to the manner of their discharge. The Court held that the Free Exercise Clause of

12. See infra Part II (discussing the recent history of the nation’s motto on currency and conflicting case law on whether the motto has lost its religious meaning).

13. See infra Part II (highlighting the differences in the courts’ interpretations of what constitutes a substantial burden and compelling governmental interest as defined under RFRA).

14. See infra Part III (arguing that the Government’s asserted interest is not achieved with the least restrictive means as required under RFRA).

15. See infra Part IV (recommending that courts apply a uniform test in determining what qualifies as a substantial burden for claims brought under RFRA).

16. See infra Part V (concluding that without clear boundaries for courts to apply in determining substantial burdens under RFRA, they will continue to misapply RFRA protections).

17. See infra Part V (concluding that placing the nation’s motto on U.S. currency is not the least restrictive means of publicly proclaiming the fundamental political values the motto represents).

18. See generally Emp’t Div. v. Smith, 494 U.S. 872, 890 (1990) (holding that the claimants’ Free Exercise rights were not violated because ingesting peyote was illegal under laws of general applicability).

19. See id. at 882 (holding that to grant plaintiffs a religious exemption would create
the First Amendment permitted the state of Oregon to criminalize religious practices if they violated generally applicable laws. The decision in Smith reversed the long standing holding in Sherbert v. Verner, which allowed plaintiffs to be exempted from federal laws if the laws infringed upon their free exercise rights. Congress responded to Smith by creating RFRA, which stated that governments should not substantially burden religious exercise without compelling justification. The compelling interest test was drawn from the Court’s decision in Sherbert v. Verner and specifically set forth that if a person claims a sincere religious belief and a government action placed a substantial burden on the exercise of that belief, the government would then need to make a showing that a compelling state interest justified the action and that it was being pursued in the least burdensome way.

In order to file a successful claim under RFRA, a plaintiff must show that a government action is a substantial burden on the exercise of their religion. The substantial burden test inquires as to whether the Government is forcing plaintiffs to choose between engaging in conduct that violates their closely held religious beliefs or refraining from that conduct in an effort to avoid such a violation.

an extraordinary right to ignore generally applicable laws on the basis of religious belief).

20. See Smith, 494 U.S. at 890 (finding that the Free Exercise Clause protects the right of individuals to believe whatever they wish but does not necessarily protect the right to act on those beliefs); See also U.S. CONST. amend. I (prohibiting the government from making any law respecting an establishment of religion or taking action that unduly favors one religion over another).

21. See Sherbert v. Verner, 374 U.S. 398, 410 (1963) (holding that South Carolina’s law that a claimant who chooses not to work, although able to, is ineligible for unemployment benefits was unconstitutional where an individual refused to work on Saturdays due to religious beliefs); see also Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that Amish parents who violated Wisconsin’s compulsory education law adequately supported the claim that its enforcement would gravely endanger the free exercise of their religion).

22. See Yoder, 407 U.S. at 220-21 (noting that the compelling interest test was established by prior Federal court ruling).

23. See 42 U.S.C. § 2000bb-1(a)-(b) (noting that the decision in Employment Division v. Smith, 494 U.S. 872 (1990) essentially eliminated the requirement that the government put forth a justification for burdens placed on religious practices even when laws were neutral toward religion).

24. See id. (noting that laws meant to disrupt religious exercise and neutral to religion may both burden religious practice).

25. See Burwell v. Hobby Lobby, Stores, Inc., 134 S. Ct. 2751, 2760 (2014) (finding that the balancing test from Sherbert must be applied to determine whether a governmental action imposes a substantial burden); see also Holt v. Hobbs, 135 S. Ct. 853, 862 (2015) (holding that preventing an inmate from grooming his beard according
Congress’ enactment of RFRA allowed the federal government to bypass the ruling in Smith and revert back to the free exercise exemption outlined in Sherbert.\(^\text{26}\) However, in 1997, the Supreme Court held in City of Boerne v. Flores that RFRA could not be applied to states because Congress could not determine the manner in which states could enforce restrictions under RFRA.\(^\text{27}\) Although the Supreme Court found RFRA unconstitutional as applied to the states, it is still in effect federally.\(^\text{28}\) Subsequently, many states have developed their own RFRA laws.\(^\text{29}\)

### B. History of the Nation’s Motto on Currency

The phrase, “In God We Trust,” was first placed on the two-cent piece coin in 1864 due to an increase in religious sentiment after the Civil War.\(^\text{30}\) Prior to the adoption of this phrase on U.S. currency, the first phrase inscribed on American currency was “Mind Your Business.”\(^\text{31}\) In 1955, Congress mandated that “In God We Trust” be inscribed on all U.S. coins and bills and eventually established the phrase as the national motto.\(^\text{32}\)

Many courts have held that brief religious references such as the words “under God” or “in God we trust” are constitutional because such phrases

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26. See Sherbert, 8374 U.S. at 1794 (holding the law forced the plaintiff to follow the precepts of her religion and forgo benefits or abandon one of the precepts to work).

27. See City of Boerne v. Flores, 521 U.S. 507, 508 (1997) (holding that enforcing RFRA against states is not a proper exercise of Congress’ enforcement power because it contradicts vital principles necessary to maintain separation of powers).

28. See id. at 522 (explaining that many states have enacted state RFRA virtually analogous to the federal RFRA and operating by the standard set forth in Sherbert and Yoder).


30. See History of ‘In God We Trust,’ U.S. Dep’t of the Treasury, https://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx (last visited Mar. 27, 2019) (discussing the call from individuals urging the United States to recognize god on currency).

31. See New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 595 (6th Cir. 2018) (Moore, J., dissenting) (quoting William Van Alstyne, Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall-A comment on Lynch v. Donnelly, 1984 DUKE L.J. 770, 774) (arguing that the original motto on currency was a secular separation assuring individuals that no one should feel alien to the government due to differing religion or philosophy).

32. See id. (discussing the evolution of the national motto on U.S. currency).
have lost their meaning over time and through repetitive use. In Van Orden v. Perry, the Court held that a state action with religious undertones is permissible if the action conveys a historic and social meaning rather than an intrusive religious endorsement. Similarly, in School District of Abington Township v. Schempp, Justice Brennan stated in his concurrence that the national motto has been so entrenched into the country’s traditions that it has lost its specific religious meaning. In Aronow v. United States, the Ninth Circuit held that statutes requiring the inscription “In God we Trust” on U.S. currency had nothing to do with the establishment of religion.

Conversely, in Wooley v. Maynard, the court held that the state of New Hampshire could not require Jehovah’s Witness plaintiffs to display the state motto “live free or die” on their license plates when the plaintiffs Jehovah’s Witness plaintiffs were required by New Hampshire law to bear the state’s motto, “live free or die,” on their license plates obscured the motto as they found it repugnant to their religious beliefs. In Wooley, the court held that the state of New Hampshire could not require plaintiffs to display the state motto on their license plates. Relatedly, in ACLU of Ohio v. Capitol Square Review & Advisory Bd., the Sixth Circuit acknowledged that the national motto does not have a completely secular purpose.

33. See ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 306 (6th Cir. 2001) (holding that the Ohio state motto “With God All Things Are Possible” did not endorse a religious view because it was a symbol of common identity).

34. See Van Orden v. Perry, 545 U.S. 677, 678 (2005) (holding that monuments including a large stone depicting the Ten Commandments were typical of unbroken history dating back to 1789 and although religious, also had historic meaning).

35. See School Dist. of Abington Twp. v. Schempp., 374 U.S. 203, 303 (1963) (Brennan, J., concurring) (arguing that the national motto is interwoven so deeply into the fabric of society that it does not conflict with First Amendment protections).

36. See Aronow v. U.S., 432 F.2d 242, 243 (9th Cir. 1970) (holding that the use of the national motto is patriotic or ceremonial and is not government sponsorship of any certain religion).

37. See Wooley v. Maynard, 430 U.S. 705, 706-07 (1977) (holding that the State had a right to communicate an official view of history, state pride, and individualism but could not force individuals to display a message conflicting with their religion).

38. See id. at 722.

39. See ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 308 (6th Cir. 2001) (“[H]ad the test that the government must have exclusively secular objectives much of the conduct and legislation this Court has approved in the past would have been invalidated” (citing the Supreme Court decision in Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984)).
C. The Court’s Inconsistent Determination of What Constitutes a Substantial Burden and Least Restrictive Means

The text and legislative history of RFRA offer minimal guidance on what constitutes a substantial burden. In Hobby Lobby, the Supreme Court found that the Affordable Care Act’s contraceptive mandate imposed a substantial burden when noncompliance with the contraceptives mandate required under the Affordable Care Act would result in a fine of approximately $475 million dollars per year on the craft store chain, which the court held constituted a substantial burden. In Sherbert, the total amount of potential public benefits Mrs. Sherbert was at risk of losing was not stated in the facts; however, the Court still found that the burden was substantial. Similarly, in Wisconsin v. Yoder, the Court found a substantial burden existed where the plaintiffs were faced with a fine of five dollars for noncompliance with a compulsory education law.

The issue of whether a substantial burden exists has been so undefined by case law that some lawyers avoid discussing it altogether. In Zubik v. Burwell, the plaintiffs argued that the Affordable Care Act’s requirements regarding contraceptives substantially burdened the exercise of their religion. The Supreme Court declined to define whether there was a substantial burden in Zubik and vacated the case to the Court of Appeals in a per curiam decision. The Court’s inability to define when a burden


42. See Sherbert v. Verner, 374 U.S. 398, 410 (1963) (noting that the welfare benefits at risk for the plaintiff constituted a substantial burden on her exercise of religion).

43. Wisconsin v. Yoder, 406 U.S. 205, 208 (recognizing the potential threat compulsory public education past the eighth grade posed to the Amish way of life).

44. See Chad Flanders, Substantial Confusion About “Substantial Burdens,” U. ILL. L. REV. 27, 32 (2016) (discussing the oral argument in Zubik v. Burwell, 136 S. Ct. 1557 (2016), and noting that Justice Kennedy asked the Solicitor General arguing the case whether he conceded that there was a substantial burden based on his avoidance of the issue in his oral argument).

45. See Zubik v. Burwell, 136 S. Ct. 1557, 1559 (2016) (noting that the Act requires businesses to cover certain contraceptives in their health plans for employees or submit a form to their insurer stating that they object due to religious beliefs).

46. See id. at 1561 (remanding the case for further proceedings consistent with the court’s opinion).
becomes substantial has led to conflict between appellate courts due to unsuccessful application of the statute.\footnote{47}

Correspondingly, Federal appellate courts have disagreed on what it means for the Government to act through the least restrictive means.\footnote{48} For instance, the Second Circuit concluded that the Government is not required to exhaust every possible alternative but merely show that there are not significantly less restrictive means.\footnote{49} The Eighth Circuit has also been lenient to the Government, holding that it would be an extraordinary burden to require the Government to refute every conceivable alternative in order to satisfy the least restrictive prong.\footnote{50} In contrast, the Third Circuit has stated that the Government must consider and reject other means before it can conclude that its chosen policy is the least restrictive means.\footnote{51} Similarly, the Fifth Circuit has held that the Government must provide actual evidence demonstrating that the regulatory framework in question is the least restrictive means of furthering its interest.\footnote{52} The Sixth Circuit also tends to impose a stricter burden on the Government.\footnote{53} Accordingly, in New Doe Child #1 v. Congress of the United States of America, the Court neglected to analyze whether the Government acted in the least restrictive means and instead ended their analysis after a determination that the Government did not impose a


48. Alex J. Luchenitser, A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws, 9 HARV. L. & POL’Y REV. 63, 69 (2015) (discussing how the Court’s holding in Hobby Lobby created difficulty in determining how the government should show that their means are least restrictive).

49. See Tabbaa v. Chertoff, 509 F.3d 89, 105 (2nd Cir. 2007) (discussing the precedent and application of the court’s holding in Roberts v. U.S. Jaycees, noting the burden the government must show in a least restrictive means test under RFRA).

50. See Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996) (concluding that, although RFRA places the burden of production and persuasion on the government, the plaintiff must demonstrate what, if any, less restrictive means remain unexplored).

51. See Washington v. Klem, 497 F.3d 272, 284 (3rd Cir. 2007) (noting that the “least restrictive means” is a relative term, implying a comparison with other means that the Government must make as they carry the burden).

52. See McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 475-76 (5th Cir. 2014) (discussing that the existence of a government-sanctioned exception to a regulatory scheme purported to be the least restrictive means can show that less restrictive alternatives exist).

53. See U.S. v. Girod, 159 F. Supp. 3d 773, 783 (E.D. Ky. 2015) (holding that requiring an Amish defendant to pose for a photograph prior to releasing him from custody was not the least restrictive means of furthering the government’s interest).}
substantial burden on the plaintiffs.  

II. ANALYSIS

A. The Plaintiffs in New Doe Child Successfully Alleged a Substantial Burden by the Government on Plaintiffs' Religious Exercise

In New Doe Child, The Sixth Circuit incorrectly held that, because the plaintiffs have access to alternative forms of financial transactions besides cash, they are not substantially burdened.  

Despite conceding that some transactions are cash only, the court found that because the plaintiffs did not allege that they must engage solely in cash-only transactions, but rather that they simply prefer to use cash, they did not establish a substantial burden.  

However, the mere fact that the plaintiffs had an alternative form of payment at their disposal apart from using cash does not eliminate the fact that they are substantially burdened when they do use cash, which our common experience proves is necessary for certain transactions.  

In New Doe Child, the court departed from the compelling interest analysis and analogous case law by holding that the plaintiffs were not substantially burdened as the vast majority of Americans do not take issue with the national motto, viewing the motto as either secular or devoid of its meaning.  

Subsequently, because there is no defined standard for determining substantial burdens, the court exercised their discretion and found that because the plaintiffs hold a point of view different from the majority of Americans, their purported burden of carrying currency with a message they

54. See New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 591 (6th Cir. 2018) (holding that a substantial burden was not imposed by the Government action and concluding the RFRA analysis without determining whether the Government acted in the least restrictive means).

55. See id. at 591 (holding that no substantial burden exists where plaintiffs had alternative forms of engaging in financial transactions).

56. See id. at 590-91 (addressing some plaintiffs’ allegations that they must engage in cash transactions for business or for purchasing items such as books, magazines, treats, and gifts).


58. See ACLU of Ohio v. Capitol Square Review & Advisory Bd., 243 F.3d 289, 306-08 (6th Cir. 2001) (finding that the Ohio state motto “With God All Things Are Possible” had a secular goal to boost morale, was a symbol of common identity, and did not enhance religion).
disagree with did not meet the imaginary test to receive free speech protections. Thus, while previous decisions have found that the presence of alternatives are not determinative in finding whether a substantial burden exists, the Sixth Circuit disregarded this concept due to their minority view that the nation’s motto does not violate the plaintiffs’ religious beliefs.

The plaintiffs in New Doe Child #1 are substantially burdened because the government action forces plaintiffs to choose between either relinquishing their rights to participate in everyday commerce or violating their religious beliefs. Credit cards do not provide an adequate substitute to cash forms of payment because they have not replaced cash in many daily transactions. Nearly 16 million American adults do not have a bank account and approximately 24.5 million Americans are underbanked, meaning that they rely heavily on services such as payday loans and cash advances. Even if a plaintiff has access to alternative forms of payment, a court could logically infer from common sense that the plaintiff may wish to engage in a cash-only transaction. Despite access to noncash forms of currency, cash-only transactions still play a daily role in American lives. Thus, just because


60. See Holt v. Hobbs, 135 S. Ct. at 862 (holding that the district court erred in finding that a prisoner’s religious exercise was not substantially burdened by prohibiting the inmate from growing a beard because he was offered a prayer rug, a religious advisor, the required dietary items, and permitted to observe religious holidays).

61. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (noting that a substantial burden is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions).

62. See Am. Council of the Blind v. Paulson, 525 F.3d 1256, 1270 (D.C. Cir. 2008) (holding that although the blind plaintiffs developed coping mechanisms for dealing with paper currency, such as relying on third parties or using credit cards, the alternative means denied them meaningful access to currency).

63. See FDIC National Survey of Unbanked and Underbanked Households, https://www.fdic.gov/householdsurvey/2015/2015report.pdf (discussing that the rate of underbanked groups was higher for low-income, less-educated, young, and racial minority households).

64. See Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (noting that when well-pleaded facts are unavailable, the court is permitted to draw on its judicial experience and common sense).

there are alternatives to cash does not demonstrate that a plaintiff is not required to engage in cash and coin transactions on a regular basis and therefore, the plaintiffs have shown an unsustainable choice between violating their religious beliefs or being excluded from full participation of economic life, establishing a substantial burden.66

Assuming *arguendo* that the plaintiffs in *New Doe Child* #1 have not established a substantial burden, plaintiffs who do use cash only will successfully demonstrate a substantial burden if they view the national motto as a contradiction to their sincerely held religious beliefs.67 Individuals of lower socioeconomic status will be especially vulnerable to a substantial burden if the national motto violates their religious beliefs as they face more obstacles than individuals do from wealthier socioeconomic statuses to gaining access to credit cards or electronic transactions.68

Thus, the Court erred in concluding that, because these specific plaintiffs had an alternative to cash-only transactions and were not forced to engage in a cash-only commerce, they were not substantially burdened.69 In *New Doe Child* #1, the Court fell victim to the ill-defined standard for determining when a burden becomes substantial and instead based its decision on its

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Notes-The-State-of-Cash-Preliminary-Findings-2015-Diary-of-Consumer-Payment-Choice.pdf (discussing how, even if there are other options available, cash is the most common form of payment, especially in the categories of gifts and transfers, government and nonprofit, auto and vehicle, entertainment and transportation, and medical and education).

66. See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2783 (2014) (holding that the owners of many closely held corporations could not in good conscience provide contraceptive coverage and the HHS would effectively exclude these people from full participation in the economic life of the Nation, which RFRA was enacted to prevent).

67. See Korte v. Sebelius, 735 F.3d 654, 682 (7th Cir. 2013) (noting that, at a minimum, a substantial burden analyzed under a RFRA claim occurs when the government compels a religious person to act in a manner at odds with basic elements of his religion and when the government puts substantial pressure on an adherent to modify his behavior and violate his beliefs).


69. See Haight v. Thompson, 763 F.3d 554, 565 (6th Cir. 2014) (concluding that a substantial burden existed for an inmate where he was permitted some, but not all, of the food required for his religious ceremonies as the inmate was essentially barred from engaging in his religious practice).
perception of reasonableness for the plaintiffs’ beliefs. The Ninth Circuit held that denying a person or institution the ability to follow his or her religious beliefs without exception is a substantial burden. Such is the case in New Doe Child #1, as the plaintiffs cannot carry cash without violating the tenets of their religion. The Court came to its holding through subjective means and erred accordingly.

B. The Nation’s Motto on U.S. Currency Is a Violation of RFRA Because the Motto Is Not in Furtherance of a Compelling Governmental Interest

The Government in New Doe Child #1 did not successfully establish that disseminating the national motto on U.S. currency is a compelling government interest. Under RFRA, the Government shall not substantially burden a person’s exercise of religion, even if the burden results from a rule of general applicability, unless the Government demonstrates that the application of the burden to the person is in furtherance of a compelling governmental interest. In New Doe Child #1, the Government defended the inscription of the national motto on U.S. currency by arguing that it is critical to the public declaration of the primary political values the motto symbolizes. The Government went on to claim that their interest is compelling because the nation’s motto on U.S. currency is a primary form of

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70. See Lloyd H. Mayer, Politics at the Pulpit: Tax Benefits, Substantial Burdens and Institutional Free Exercise, 89 B.U. L. Rev. 1137, 1164 (2009) (noting that the Court suggested a “substantial burden” is substantial pressure on adherents to modify behavior and that the free exercise inquiry is whether government placed a substantial burden on observation of a central religious belief or practice).

71. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1069-70 (9th Cir. 2008) (holding that under RFRA a substantial burden is imposed if individuals must choose to follow the tenets of their religion or to receive a governmental benefit not to).

72. See New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 583 (discussing that the national motto places a substantial burden on the plaintiffs’ religious exercise by forcing them to “personally bear a religious message that is the antithesis of what they consider to be religious truth”).

73. See Alex T. Skibine, Towards a Balanced Approach for the Protection of Native American Sacred Sites, 17 Mich. J. Race & L. 269, 297 (2012) (discussing that in determining when a burden becomes substantial under RFRA, the application of the substantiality test requires a subjective weighing to be sensitive to different contexts).

74. See New Doe Child #1, 891 F.3d at 591 (concluding the analysis after determining that plaintiffs did not establish a substantial burden).


76. See New Doe Child #1, 891 F.3d at 601 (Moore, J., dissenting) (discussing the government’s support for the national motto on currency being a compelling governmental interest).
communicating the country’s fundamental values to the citizens of the United States and to the rest of the world.\textsuperscript{77} However, the Government did not provide evidence to support why or how the role of the motto on U.S. currency is disseminated to Americans and to the rest of the world or why it is a compelling governmental interest to do so.\textsuperscript{78} The lack of support the Government provided to explain how using the nation’s motto on currency proclaims the country’s fundamental political values is likely due to the fact that the most compelling evidence is the prevalence of cash in daily transactions.\textsuperscript{79} However, noting the pervasiveness of cash in the American system belies the Government’s argument that foregoing cash transactions is not a substantial burden for the plaintiffs and that the plaintiffs can easily use alternative forms of payment.\textsuperscript{80} The Sixth Circuit failed to realize that by making this assertion, the Government was essentially supporting the Plaintiffs’ argument that carrying U.S. currency inscribed with the nation’s motto is forced speech that violates the free exercise of their religion.\textsuperscript{81} Where the state’s interest in compelling speech is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.\textsuperscript{82} As the court held in \textit{Wooley}, a state may not constitutionally require a person to engage in the dissemination of

\textsuperscript{77} \textit{See id.} (noting the government’s vague support for their compelling governmental interest).

\textsuperscript{78} \textit{See id.} (noting that any evidence the Government purports would bely their argument that plaintiffs have alternative means of engaging in commerce that does not involve cash or coins).

\textsuperscript{79} \textit{See Wooley v. Maynard}, 430 U.S. 705, 717 (1977) (finding that New Hampshire’s placement of the motto “Live Free or Die” on license plates to communicate to others an official view as to proper appreciation of history, state pride, and individualism cannot outweigh an individual’s right to avoid becoming a courier for such a message).

\textsuperscript{80} \textit{See New Doe Child #1}, 891 F.3d at 601 (Moore, J., dissenting) (noting that the lack of support the Government provides in their argument is likely due to the contradiction it would demonstrate for their argument and that the Government is essentially attempting to “have its cake and eat it too”).

\textsuperscript{81} \textit{See id.} (reasoning that the government likely gave little evidentiary support for its argument that the national motto communicates a message with the country and world because it would undercut its argument that plaintiffs were not forced to communicate a message contrary to their beliefs).

\textsuperscript{82} \textit{See EMW Women’s Surgical Ctr., P.S.C. v. Beshear}, 283 F. Supp. 3d 629, 629 (W.D. Ky. 2017) (holding that the Kentucky Ultrasound Informed Consent Act, which required physicians to perform an ultrasound prior to an abortion procedure, display and describe the images, and auscultate the fetal heartbeat, was analogous to the forced speech outlined in \textit{Wooley} v. \textit{Maynard}).
an ideological message by displaying it on his private property in a manner and with the objective that it is read and communicated to the public.\textsuperscript{83} Nor is the Government free to intervene with speech for the purpose of promoting a message while suppressing another one.\textsuperscript{84}

Accordingly, the government is prohibited from regulating speech in such a way that it prefers one viewpoint compared to or at the expense of another viewpoint.\textsuperscript{85} Thus, the government cannot argue that communicating a message on currency is a compelling governmental interest because the message on U.S. currency is compelled or forced speech in violation of the First Amendment.\textsuperscript{86} The plaintiffs pointed out that the government’s assertion that the nation’s motto on U.S. currency communicates a message to its citizens and the world was unsupported by facts and neglected to address how the world communicated prior to 1955, when Congress mandated that the phrase be printed on all coins and bills.\textsuperscript{87} The Government’s compelling interest must strike a balance between religious liberty and competing prior governmental interests.\textsuperscript{88} Nonetheless, the Court in New Doe Child \#1 did not assess any evidence on how the role of the motto on U.S. currency is disseminated to Americans and to the rest of the world; rather, the analysis ended in the Court’s determination that the plaintiffs were not substantially burdened.\textsuperscript{89}

More importantly, despite the fact that the Government offered no

\textsuperscript{83} See Wooley, 430 U.S. at 714 (reconciling that an individual’ right to speak freely or refrain from speaking is a fundamental right protected by the First Amendment).

\textsuperscript{84} See Stuart v. Loomis, 992 F.Supp.2d 585, 599 (M.D.N.C. 2014) (holding that a state compelling an individual to give the state’s message is compelled ideological speech and warrants the highest degree of protection under the First Amendment).

\textsuperscript{85} Alan E. Brownstein, State RFRA Statutes and Freedom of Speech, 32 U.C. DAVIS L. REV. 605, 622 (1999) (noting that favoritism for or against a religious message violates both the Free Speech Clause and the Establishment Clause of the First Amendment).

\textsuperscript{86} See Wooley, 430 U.S. at 717 (holding that the state did not prove that requiring individuals to carry the state’s motto “Live Free or Die” was a compelling governmental interest as the state’s claimed interest was not ideologically neutral).

\textsuperscript{87} See New Doe Child \#1 v. Cong. of the U.S., 891 F.3d 578, 601 (6th Cir. 2018) (noting that the government’s argument that communicating a message is a compelling interest is contradicted by American history, as the national motto was not consistently on coins and bills until an act of congress in 1955).

\textsuperscript{88} See 42 U.S.C. § 2000bb-1(a)-(b) (finding that the compelling interest test established in the years of federal court decisions is a workable test for finding a balance between religious liberty and competing governmental interests).

\textsuperscript{89} See New Doe Child \#1, 891 F.3d at 591 (dismissing the plaintiffs’ RFRA claims because they did not plausibly allege that the government’s inscription of “In God We Trust” on U.S. currency substantially burdened their free exercise rights).
evidence regarding how the nation’s motto on currency communicates the country’s fundamental political values, the Government does not meet the compelling governmental interest test under RFRA because it cannot explain why disseminating any religious message is a compelling governmental interest.\(^9\)

The Government cannot prove a compelling governmental interest in communicating a message to the nation and the world.\(^9\) In determining whether a compelling governmental interest exists, a generalized assertion that there is a compelling interest will not suffice in establishing that there is indeed a compelling interest.\(^9\) Instead, a case-by-case determination using the relevant facts is necessary for concluding whether a compelling interest exists.\(^9\) Such compelling interests under RFRA in the past have been protecting the endangered species of the American bald eagle, preventing the dissemination of heroin, or enforcing a strict grooming policy in a state prison.\(^9\) In New Doe Child #1, the government’s alleged compelling interest was not of the degree recognized in analogous cases in which the court found

\(^{90}\) Susan D. Franck, Christians v. Crystal Evangelical Free Church: Interpreting RFRA In The Battle Among God, The Government, And The Bankruptcy Code, 81 MINN L. REV. 981, 991 (1997) (noting that although most circuits do not have a general consensus on what governmental interests are compelling, the majority of courts assessing RFRA claims only find compelling governmental interests in regulating health, safety, national security, and social security).

\(^{91}\) See Adams v. C.I.R., 170 F.3d 173, 181 (3rd Cir. 1999) (holding that the government’s failure to accommodate a taxpayer’s religious beliefs and ensure her payments did not fund the military did not violate RFRA because the collection of taxes is a compelling interest); see also U.S. v. Wilgus, 638 F.3d 1274, 1285 (10th Cir. 2011) (holding that the government has a compelling interest to protect eagles sufficient to support the burden imposed by the Bald and Golden Eagle Protection Act on non-Native American practitioners of Native American religions).


\(^{93}\) See id. (noting that context matters when applying the compelling interest test); see also Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 228 (1995) (emphasizing strict scrutiny’s basic purpose to consider relevant differences).

\(^{94}\) See Hamilton v. Schriro, 74 F.3d 1545, 1547 (8th Cir. 1996) (holding that, although against the tenants of a prisoner’s religion, officials did not violate RFRA by requiring he cut his hair and denying access to a sweat lodge for safety reasons); see also U.S. v. Wilgus, 638 F.3d 1274, 1285 (10th Cir. 2011) (finding that the government had a compelling interest to protect eagles to support the burden placed on practitioners of Native American religions who used eagle feathers during worship); U.S. v. Anderson, 854 F.3d 1033, 1033 (2017) (holding that the government had a compelling interest to prevent the transmittal of heroin allegedly used for religious purposes to non-religious groups).
that a compelling interest existed. The government must demonstrate how placing the motto on U.S. currency furthers communicating a message to the country and the world. Because the Government cannot assert a compelling interest for communicating a message on currency for American citizens and the rest of the world, the Government has failed to meet its burden under RFRA and should not be permitted to impose the burden on the plaintiffs.

C. The Nation’s Motto on U.S. Currency Is Not the Least Restrictive Means by Which the Government Could Achieve Its Interest

In addition to failing to provide evidence to support its assertion that the Government has a compelling interest in communicating the motto to its citizens and the world, the Government also failed to establish that it is pursuing this its compelling interest using the least restrictive means. As Judge Moore stated in her dissent in New Doe Child #1, if the Government’s interest is to convey a message to U.S. citizens and to the rest of the world, then the phrase “In God We Trust” is not the only phrase that could be used on currency, and thus the government action is not the least restrictive means of furthering that interest.

95. Caleb C. Wolanek et al., Applying Strict Scrutiny: An Empirical Analysis of Free Exercises Cases, 78 MONT. L. REV. 275, 287 (2017) (discussing that interests are compelling when of the “highest order,” often involving threats to public safety or law and order); see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993) (holding that a non-neutral law must survive strict scrutiny and advance interests of the highest order).

96. See Wolanek, supra note 95 at 288 (noting that it is not enough for a government to state it has a general interest in its action and a law cannot be compelling of the “highest order” when it leaves appreciable damage to the unprotected interest).

97. See Ira C. Lupu, Hobby Lobby and the Dubious Enterprise of Religious Exemptions, 38 HARV. J. L. & GENDER 35, 82 (2015) (discussing how the compelling interest test expires when the government cannot prove a compelling interest and therefore, no inquiry is necessary in determining if the government action was the least restrictive means).

98. See Wilgus, 638 F.3d at 1289 (noting that when government action is challenged as not being the least restrictive means of advancing a compelling interest, its burden is two-fold: it must support its choice of regulation and refute alternatives offered by the challenger, but it must do so with evidence from the record); see also Eternal Word Television Network, Inc. v. Sec’y of U.S. Dept. of Health and Human Servs., 818 F.3d 1122, 1158 (11th Cir. 2016) (holding that the government must show it lacks other, less burdensome means of achieving its goal and if a less restrictive option serves its interest “equally well,” it must use that alternative).

99. See New Doe Child #1 v. Cong. of the U.S., 891 F.3d 578, 601 (6th Cir. 2018) (Moore, J., dissenting) (noting that the government has failed to purport evidence showing that the motto “In God We Trust” is the only phrase that can communicate the country’s fundamental values and subsequently has not proven that the governmental
It is clear that the Government has a less restrictive and equally effective means of disseminating a message about America’s fundamental values by merely using any other phrase.\footnote{See Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2801-02 (2014) (discussing the Government’s burden in showing that they are pursuing the least restrictive means).} In another Sixth Circuit case, the court acknowledged that the phrase “In God We Trust” does not have an exclusively secular meaning.\footnote{See ACLU of Ohio v. Capitol Square Rev. & Advisory Bd., 243 F.3d 289, 307-08 (6th Cir. 2001) (discussing that because the phrase “In God We Trust” is not exclusively secular, it does not necessarily mean the phrase fails the test, rather, like the national anthem and the pledge of allegiance, the phrase is a symbol of a common identity; see also Gaylor v. U.S., 74 F.3d 214, 217 (10th Cir. 1996) (holding that a reasonable observer, who was aware of the history of the nation’s motto as well as its context and purpose, would not consider “In God We Trust” on U.S. currency to be an endorsement of religion).} As such, another phrase that represents American values with a more secular meaning, such as the phrase, E Pluribus Unum, would be equally if not more suited to be the phrase inscribed on U.S. currency, as it has been part of the Great Seal of the United States since 1782.\footnote{See New Doe Child #1, 891 F.3d at 601 (assessing the Government’s least restrictive means in furthering their compelling governmental interest (citing GAILLARD HUNT, U.S. DEP’T OF STATE, THE HISTORY OF THE SEAL OF THE UNITED STATES 7, 41 (1909))).}

The Government did not provide evidence to show how the current motto reflects American fundamental values or even what those fundamental values are.\footnote{See id. at 602 (assessing the Government’s argument that the national motto’s inscription on U.S. currency promotes and disseminates American fundamental political values).} Although Christianity is the predominant religion for approximately 70.6 percent of Americans, other main religions, including Judaism, Islam, Hinduism and Buddhism, encompass millions of American followers.\footnote{Religion & Public Life, PEW RESEARCH CTR., http://www.pewforum.org/religious-landscape-study/ (last visited Nov. 13, 2018) (noting the breakdown of predominate religions in America and the corresponding percentages of their followers).} In terms of population, today approximately 4.2 million Americans are Jewish, about 3.3 million Americans are Muslim, and another 82 million are religiously unaffiliated.\footnote{See Explore Religious Groups In the U.S. by tradition, Family and Denomination, PEW RESEARCH CTR., http://www.pewresearch.org/fact-tank/2013/10/} This is an enormous shift from the 90 percent of the population that identified as Christian in the 1950s.\footnote{See id.} At the time RFRA

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action is the least restrictive means).
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was signed by Congress, church attendance was at the highest levels ever reported in American history.\textsuperscript{107} By 1960, approximately 63.3 percent of the U.S. population was attending church weekly but today, only about 23 percent of Americans attend church or other form of worship every week.\textsuperscript{108} Thus, the current motto, created approximately sixty years ago, does not reflect the nation’s values as they currently stand and consequently does not communicate to the world, or even to the country, America’s fundamental values.\textsuperscript{109}

The values of 1956 are not the values of today. For example, in 1956, when the national motto was placed on currency, at least sixteen states had a ban on interracial marriage and the American Psychiatric Association included homosexuality as a mental disorder.\textsuperscript{110} Accordingly, what were once core American values have now evolved with time and the Government’s

\textsuperscript{107}See Carol Tucker, \textit{The 1950s-Powerful Years for Religion,} USC NEWS (June 16, 1997), https://news.usc.edu/25835/The-1950s-Powerful-Years-for-Religion/ (discussing how the spike in population in the United States correlated with an increase in church attendance).


\textsuperscript{109}See History of ‘In God We Trust,’ \textit{supra} note 30 (discussing that the first appearance of the nation’s motto on U.S. currency was due to a rise in religious sentiment).

\textsuperscript{110}See Loving v. Virginia, 87 S. Ct. 1817, 1817 (1967) (holding that the state of Virginia’s ban on interracial marriage violated the Equal Protection and Due Process clauses of the Fourteenth Amendment); see also Dan Bryan, \textit{The Gay Bars and Vice Squads of 1950’s Los Angeles,} AMERICAN HISTORY USA (Jan. 7, 2013), https://www.americanhistoryusa.com/the-gay-bars-and-vice-squads-of-1950s-los-angeles/ (discussing the near unanimous view in the psychiatric community that homosexuality was a mental disorder caused by emotional traumas in childhood and that genetics were not the cause).
contention in *New Doe Child #1* that the nation’s motto is reflective of these fundamental values ignores that American fundamental values have been completely overhauled since 1956.\(^1\)\(^1\) A different phrase that does not endorse a religious sentiment would be an alternative that would not substantially burden plaintiffs’ religious exercise.\(^1\)\(^2\) The Government argued, however, that the national motto is already the least restrictive means in furthering their governmental interest as it is the only phrase that is the national motto.\(^1\)\(^3\) This argument does not pass the least restrictive means test because the phrase “In God We Trust” has only been the national motto since 1956, when it replaced the unofficial motto, Pluribus Unum.\(^1\)\(^4\) A national motto existed prior to the adoption of “In God We Trust,” showing that any phrase can become the nation’s motto and refuting the government’s argument that the only message that is appropriate is this particular phrase.\(^1\)\(^5\)

In *New Doe Child #1*, the court did not consider whether the Government was using the least restrictive means to further its interest of communicating to the world and U.S. citizens America’s fundamental values.\(^1\)\(^6\) In fact, the Government made a blanket statement that their action was the least restrictive because the motto is a primary way by which the Government communicates to its citizens and to the rest of the world its fundamental values on which our Government is founded.\(^1\)\(^7\) The framework under RFRA

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111. See John Steele Gordon, *The 50 Biggest Changes in the Last 50 Years, American Heritage* (June/July 2004), https://www.americanheritage.com/content/50-biggest-changes-last-50-years (discussing the most drastic changes in America in the last fifty years).

112. See Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2802 (2014) (Ginsburg, J., dissenting) (arguing that the least restrictive means must be equally effective and should not require employees to forfeit the benefits provided to them by federal law so their employer can continue to subscribe to their religious practices).


114. See Sarah Moughty, “*In God We Trust* Reaffirmed as National Motto . . . Again”, FRONTLINE (November 4, 2011), https://www.pbs.org/wgbh/frontline/article/in-god-we-trust-reaffirmed-as-national-motto-again/ (noting that “E Pluribus Unum” was the national motto before the government elected to replace it with “In God We Trust”).

115. See ACLU of Ohio v. Capitol Square Rev. & Advisory Bd., 243 F.3d 289, 301 (6th Cir. 2001) (noting that the federal government adopted the phrase “In God We Trust” as the national motto in 1956 and was later codified as 36 U.S. § 302).

116. See *New Doe Child #1*, 891 F.3d at 591 (holding that the plaintiffs had not plausibly alleged that the Government inscription of the motto on U.S. currency substantially burdens their exercise of religion and therefore affirm the dismissal of the plaintiff’s RFRA claim).

117. See id. at 601 (Moore, J., dissenting) (noting that the government does not put forth any evidence to support its reasoning that its actions are the least restrictive means
encourages pragmatic considerations for alternative means.\textsuperscript{118} Here, the Government has an alternative means of reaching their goal, without imposing a substantial burden on the plaintiffs’ religious exercise.\textsuperscript{119} Had the Government communicated what exactly the fundamental American values being communicated were, there would have undoubtedly been an equivalent phrase that would not burden the plaintiffs’ beliefs but could also communicate the same values as “In God We Trust.”\textsuperscript{120} Instead, the Government presented no such evidence and the court failed to conduct a thorough analysis of the RFRA factors.\textsuperscript{121} The court in \textit{New Doe Child \#1} did not consider whether the Government’s action was the least restrictive means of communicating a message to the world, and consequently did not find that the Government had alternative and less restrictive means available to it.\textsuperscript{122} The Government does not bear the burden of disproving all possible alternatives to prove that it is acting in the least restrictive means by communicating a message to the country and to the world; rather, the Government must consider at least some alternative means to demonstrate that they are pursuing the compelling interest pursuant to the standard set forth under RFRA.\textsuperscript{123} The most obvious alternative, for the Government to

and therefore permitted under RFRA); see also \textit{Washington v. Klem}, 497 F.3d 272, 284 (3rd Cir. 2007) (invoking the Supreme Court’s suggestion that the government must consider and reject other means before concluding that the action taken is the least restrictive means).

\textsuperscript{118} See \textit{U.S. v. Wilgus}, 638 F.3d 1274, 1284 (10th Cir. 2011) (noting that the court must make an independent examination of the facts as a whole to ensure the governmental action does not intrude too much on the free exercise of religion (citing \textit{Citizens for Peace in Space v. City of Colo. Springs}, 477 F.3d 1212, 1219 (10th Cir. 2007)).

\textsuperscript{119} See \textit{U.S. v. Epstein}, 91 F. Supp. 3d 573, 586 (D.N.J. 2015) (concluding that the least restrictive means requires the government to show there is no alternative for achieving the interest, wherefore, imposing a burden on an individual’s exercise of religion is permitted) (citing \textit{Burwell v. Hobby Lobby Stores, Inc.}, 134 S. Ct. 2751, 2780 (2014)).

\textsuperscript{120} See \textit{New Doe Child \#1}, 891 F.3d at 601 (Moore, J., dissenting) (noting the Government failed to show its action was the least restrictive in achieving a compelling interest and sidestepped the compelling interest test the Government had asserted).

\textsuperscript{121} See id. at 591 (finding that the plaintiffs had not met their burden establishing the presence of a substantial burden without assessing the Government’s burden).

\textsuperscript{122} See \textit{Bible Believers v. Wayne Cty., Mich.}, 805 F.3d 228, 248 (6th Cir. 2015) (discussing that no state action that limits protected speech will survive strict scrutiny under the First Amendment unless it is narrowly tailored to be the least restrictive means available to serve the compelling governmental interest).

\textsuperscript{123} See \textit{Wilgus}, 638 F.3d at 1289 (holding that the government is not required to rebut a perpetual list of alternatives to support its action, but it is required to support that its chosen method of action is least restrictive and no alternative would not be less
substitute the current motto for another phrase, would surely satisfy the least restrictive means analysis. At the bare minimum, the government should be required to prove why an alternative phrase on the U.S. currency would not be a less restrictive alternative. The Government’s use of an alternative, secular phrase would most certainly not impose a burden on those who do not find the phrase offensive. Although whether the Government acted in the least restrictive means was not analyzed in New Doe Child #1, in subsequent cases, if the Government cannot prove that they are pursuing an action in the least restrictive means, then the court must find a RFRA violation.

The Government in New Doe Child #1 did not prove that it had used the least restrictive means because it did not assess or disprove whether there was an alternative to placing the phrase “In God We Trust” on U.S. currency. Accordingly, the Sixth Circuit erred by ending their analysis with the substantial burden element of RFRA and an analysis of each element is necessary to decide if a RFRA claim is viable.

III. POLICY RECOMMENDATION

There are a few potential solutions for solving the ambiguity surrounding RFRA cases. In order for potential plaintiffs to gain clarity on how courts will decide on claims brought under the Religious Freedom Restoration Act, 

124. See McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 477 (5th Cir. 2014) (quoting Burwell v. Hobby Lobby, Stores, Inc. 134 S. Ct. 2571, 2758 (2014)) (holding that the Government fails the least restrictive means test when it fails to provide evidence proving that a suggested alternative is not viable).

125. See Burwell, 134 S. Ct, at 2758 (holding that the government failed the least restrictive means test under RFRA because it had an alternative to the contraceptive mandate under the Affordable Care Act).

126. See id. at 2760 (noting that courts analyzing RFRA claims must take into consideration whether the suggested modification is a burden on nonbeneficiaries and that consideration should be used in the balancing test of the government’s compelling interest and the option of acting in the least restrictive means of advancing that interest).

127. See Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1068 (9th Cir. 2008) (citing to the two elements of claims brought under RFRA and discussing the government’s burden in establishing it is acting in furtherance of the compelling governmental interest).

128. See id. at 1079 (noting the Government failed to consider reasonable alternatives to the use of recycled wastewater).

129. See New Doe Child #1 v. Congress of the U.S., 891 F.3d 578, 591 (6th Cir. 2018) (finding that the plaintiffs had not demonstrated how they would encounter a substantial burden by carrying currency inscribed with the national motto).
the courts must be subject to a specific and defined standard for determining when a burden becomes substantial and by what means the governmental action serves a compelling interest.\(^\text{130}\) Without a standard for determining substantial burdens and compelling governmental standards, courts will continue to apply subjective standards based on biased views.\(^\text{131}\)

A rational standard for determining whether a burden has become substantial is to apply a two-part test.\(^\text{132}\) To determine whether a substantial burden exists, the burdened party would have to first sincerely, subjectively believe they are burdened by the governmental action and second, would have to show that the burden is objectively substantial.\(^\text{133}\) A two-part test would add a safety net against cases where a substantial burden exists but it would be unreasonable to force the government to act in an alternative way depending on the reasonableness of the burden.\(^\text{134}\) An example of such a test can be found in *Katz v. United States*, where a two-prong test was established to determine reasonableness of a person’s expectation of privacy.\(^\text{135}\) Such a

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\(^{130}\) See *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (holding that a prison’s grooming policy substantially burdened a Muslim inmate’s exercise of religion by preventing him from growing his beard in accordance with his religion); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993) (holding that the plaintiffs were substantially burdened by the government’s implementation of a law preventing animal sacrifice, which prevented plaintiffs’ free exercise of religion); *Cf. U.S. v. Anderson*, 854 F.3d 1033, 1035 (8th Cir. 2017) (holding that the government had a compelling interest in preventing the dissemination of heroin purportedly used for religious purposes).

\(^{131}\) See *New Doe Child #1*, 891 F.3d at 591 (dismissing plaintiff’s RFRA claims for not sufficiently establishing that their religious exercise was substantially burdened by carrying cash inscribed with the national motto); see also *Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2797 (2014)* (Ginsberg, J., dissenting) (finding “Little doubt that RFRA claims will proliferate, for the Court’s expansive notion of corporate personhood-combined with its other errors in construing RFRA-invites for profit entities to seek religious-based exemptions from regulations they deem offensive to their faith”).


\(^{133}\) See *id.* at 362-63 (White, J. concurring) (discussing that a test of reasonableness is warranted to determine constitutionality of Fourth Amendment cases).

\(^{134}\) See *U.S. v. Girod*, 159 F. Supp. 3d 773, 780 (E.D. Ky. 2015) (holding that compelling the Amish defendant to be photographed in processing procedure at the prison prior to release would force him to violate his sincerely held religious beliefs); see also *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 521 (holding that ordinance that prohibited ritual slaughter of animals substantially burdened plaintiffs’ free exercise rights).

\(^{135}\) See *Katz*, 389 U.S. at 363 (1967) (Harlan, J. concurring) (discussing that generally the level of privacy one expects is based on the place and creating a two-part test for one’s expectation of privacy).
test when dealing with a term that could have varying definitions from person to person would be imperative for claims under the RFRA.

The government must also be subject to a clear standard for determining a compelling interest.136 A compelling governmental interest should be defined as a measurable interest that is for the betterment of society.137 By adding an interest measuring requirement, the government will be prevented from asserting that the government interest is compelling without providing substantive and measurable support proving so.

Despite Justice Alito’s claims in his majority opinion in *Hobby Lobby* that the government’s burden in proving that they are acting in the least restrictive means is exceptionally demanding, presently there is no workable test to determine when the government is pursuing the least restrictive means.138 With claims arising under RFRA, courts should be forced to analyze at least one alternative means and dispute the effectiveness of the alternative means before proving that the current government action is the least restrictive.

Lastly, if a suitable test cannot be determined or agreed upon for determining a substantial burden, compelling governmental interests, and least restrictive means, then Congress should consider repealing RFRA altogether. Application of RFRA claims have drastically deviated from the legislature’s intent.139 Accordingly, the way courts determine RFRA claims needs to be assessed to make sure the law is acting in accordance with Congress’ intent.

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136. See Franck, *supra* note 90, at 991 (noting that the RFRA statute does not define a compelling governmental interest beyond stating it is a concern of the highest order).

137. See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 432 (2006) (holding that the government could not ban a religious group’s sacramental use of hallucinogenic tea because it had not shown a compelling interest in preventing the use of hoasca); see also U.S. v. Wilgus, 638 F.3d 1274, 1285 (10 Cir. 2011) (holding that the government has a compelling interest to protect birds that represent national symbols or endangered species).


CONCLUSION

While there remains room for RFRA to be more narrowly defined, recent case law has demonstrated a trend of moving farther away from the response to Employment Division v. Smith and towards something entirely new and uncharted. As parameters for validating substantial burdens and compelling governmental interests remain elusive, RFRA will need to be refined or repealed.

Without a standard for determining the elements in RFRA, courts will continue to apply subjective and biased qualifications for what constitutes a substantial burden and determining compelling governmental interests.

Since RFRA’s enactment in 1993, it has only been defined by case law and has not once been revisited by Congress. Accordingly, Congress must revisit the statute and provide clarity for future claims arising under RFRA.

140. See, e.g., Zubik v. Burwell, 136 S. Ct. 1557, 1561 (2016) (vacating judgment and remanding to the Court of Appeals to consider non-profit employer’s challenge to the mandate to provide its employees with health insurance coverage, including for contraceptives, pursuant to the Patient Protection and Affordable Care Act and that the government met the religious exemption requirements).

141. See Katha Pollitt, Why It’s Time to Repeal the Religious Freedom Restoration Act, THE NATION (July 30, 2014), https://www.thenation.com/article/why-its-time-repeal-religious-freedom-restoration-act/ (discussing that RFRA is not being applied as it was designed by Congress).

142. See New Doe Child #1 v. Congress of the U.S., 891 F.3d 578, 591 (finding that a substantial burden did not exist because the plaintiffs had an option to use alternatives to transacting in cash and merely preferred using in cash).
