



MEMORANDUM

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National Motto

It has always been the ACLJ's position that while the First Amendment affords atheists complete freedom to disbelieve, it does not compel the federal judiciary to redact religious references in every area of public life, including the national motto, in order to suit atheistic sensibilities. While the Supreme Court has never ruled directly on the constitutionality of the national motto, "In God We Trust," "[it] has noted in dicta the national motto does not violate the Establishment Clause." *Newdow v. Lefevre*, 598 F.3d 638, 645 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1612 (U.S. 2011). In addition, every court that has decided the issue has held that the national motto presents no Establishment Clause concerns, and the Supreme Court has consistently declined to hear appeals of decisions upholding the constitutionality of the national motto. *Lefevre*, 598 F.3d 638, *cert. denied*, 131 S. Ct. 1612 (U.S. 2011); *Lambeth v. Bd. of Comm'rs of Davidson County, North Carolina*, 407 F.3d 266, 270–73 (4th Cir.), *cert. denied*, 546 U.S. 1015 (2005); *Gaylor v. United States*, 74 F.3d 214 (10th Cir.), *cert. denied*, 517 U.S. 1211 (1996); *O'Hair v. Murray*, 462 F. Supp. 19 (W.D. Tex.), *aff'd per curiam*, 588 F.2d 1144 (5th Cir. 1978), *cert. denied*, 442 U.S. 930 (1979).

Our nation's history is replete with religious references, and our national motto is no exception. The history of the national motto "In God We Trust" goes back to 1814. In September of that year, during the British bombardment of Fort McHenry in Baltimore, Francis Scott Key composed the poem the "Star Spangled Banner," of which one line in the final stanza is "And this be our motto – 'In God is our trust.'" Steven B. Epstein, *Rethinking The Constitutionality Of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2122 (1996). In 1865, Congress enacted legislation authorizing the phrase "In God We Trust" to be placed on certain coins. 17 Stat. 424, 427 (1865). However, it was not until the height of the Cold War in 1955 that Congress mandated the inscription of "In God We Trust" on all coins and paper currency. *See* 31 U.S.C. § 5114 (2001). The following year, Congress codified "In God We Trust" as the national motto. 36 U.S.C. § 302 (2001) (stating "'In God we trust' is the national motto").

In 1892, the Supreme Court stated that “this is a religious nation.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892). The Court has discussed the historical role of religion in our society and concluded that “[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984). As Justice Douglas observed, it is only through this accommodation that government can “follow the best of our traditions” and “respect the religious nature of our people.” *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

In its Establishment Clause jurisprudence, the Supreme Court has suggested on numerous occasions that the national motto poses no Establishment Clause problems. In *Engel v. Vitale*, striking down school prayer, the Court implied that display of the national motto in public school would not violate the Establishment Clause, stating that “[s]uch patriotic or ceremonial occasions bear no true resemblance to ... religious exercise” 370 U.S. 421, 435 n.21 (1962). In *Lynch v. Donnelly*, Justice O’Connor observed that government acknowledgments of religion, such as the “declaration of thanksgiving as a public holiday, *printing ‘In God We Trust’ on coins*, and opening court sessions with ‘God Save the United States and this honorable court’” could not be reasonably perceived as a government endorsement of religion. 465 U.S. 668, 693 (1984) (O’Connor, J., concurring) (emphasis added); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 603–04 (1989) (Justice O’Connor again expressed belief that national motto posed no Establishment Clause problems).

Justice Brennan, perhaps one of the Court’s most strict separationists, also thought that the national motto was constitutional, stating that “such practices as the designation of ‘In God We Trust’ as our national motto . . . can best be understood . . . as a form of ‘ceremonial deism’ protected from Establishment Clause scrutiny chiefly because [it] ha[s] lost through rote repetition any significant religious content.” *Lynch*, 465 U.S. at 716 (Brennan, J., dissenting) (citations omitted); *see also Abington v. Schempp*, 374 U.S. 203, 303 (1963) (Justice Brennan opined that the national motto was “so deeply interwoven into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits”).

Each lower court that has directly addressed the constitutionality of the national motto has held that it does not violate the Establishment Clause. Most recently, in *Newdow v. Lefevre*, a case in which the ACLJ represented nearly 50 members of Congress in an amicus brief, the Ninth Circuit Court of Appeals reaffirmed its holding that “‘the national motto and the slogan on coinage and currency ‘In God We Trust’ has nothing whatsoever to do with the establishment of religion.’” 598 F.3d at 644 (quoting *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970)). Interestingly, the Court also noted that opponents of the national motto “cannot cite a single Supreme Court case that called into question the motto’s constitutionality.” *Id.*

Similarly, the Tenth Circuit rejected an Establishment Clause challenge to the national motto and its reproduction on United States currency. The Court considered itself bound by the Supreme Court’s various dicta on the constitutionality of the national motto “almost as firmly as the Court’s outright holdings, particularly when the dicta is recent and not enfeebled by later statements.” *Gaylor*, 74 F.3d at 217.

As the Tenth Circuit (as well as the Fourth and Fifth Circuits) have held, the national motto passes both of the Supreme Court's most frequently applied Establishment Clause tests, the *Lemon* test and the endorsement test. *Id.* at 216–17; *accord Lambeth*, 407 F.3d 266 (analyzing endorsement test as an enhancement of second prong of *Lemon* test); *O'Hair*, 462 F. Supp. 19 (applying *Lemon* test), *aff'd per curiam*, 588 F.2d 1144 (5th Cir. 1978).

Under the *Lemon* test:

1) the motto had the clear secular purposes of symbolizing the historical role of religion in our society, formalizing the medium of exchange, and expressing confidence in the future; 2) its primary effect was not to advance religion because it is a form of “ceremonial deism” which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief; and 3) it does not create an intimate relationship of the type that suggests unconstitutional entanglement with religion.

Gaylor, 74 F.3d at 216. Moreover, under the endorsement test, the reasonable observer, aware of the purpose, context, and history of the motto, would not consider its use or its reproduction on U.S. currency to be an endorsement of religion. *Id.* at 217.

In sum, all authority on point supports the constitutionality of the national motto and its use on currency and government displays. However, as enterprising lawyers can find support for just about any proposition in the Supreme Court's multifarious Establishment Clause pronouncements, the ACLJ will continue to aggressively defend “In God We Trust” as our national motto.