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Agenda Item: ID#17-665 (4:00 P.M.)

Date: 5/11/17

CITY CLERK, FRESNO

## FRESNO CITY COUNCIL



### Supplemental Information Packet

Agenda Related Item(s) – ID#17-665 (4:00 P.M.)

#### **Contents of Supplement: Correspondence from Mark McReynolds, Attorney at Pacific Justice Institute (PJI)**

##### **Item(s)**

RESOLUTION – Implementing the public display of our national motto, “In God We Trust” inside the Fresno City Council Chambers, on the wall behind the dais – Councilmember Bredefeld

##### **Supplemental Information:**

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VIA E-MAIL ONLY TO AVOID DELAY

May 10, 2017

Hon. Garry Bredefeld  
MEMBER, FRESNO CITY COUNCIL  
FRESNO, CALIFORNIA  
E-MAIL C/O: [NICOLE.DEMERA@FRESNO.GOV](mailto:NICOLE.DEMERA@FRESNO.GOV)

**RE:** Display of the National Motto (36 U.S.C. 302)

Dear Councilmember Bredefeld,

#### INTRODUCTION

The purpose of this letter is to discuss the legality of a government entity displaying the national motto and to memorialize the commitment of the Pacific Justice Institute (PJI) to provide the City of Fresno with a defense in the event that a legal action is brought challenging the display of the motto on city property.

This letter will specifically address three matters as follows:

1. the legal validity of the proposed action;
2. the scope of representation of the City of Fresno by PJI in the above-referenced matter; and
3. PJI's relevant background in relation to this subject matter.

#### FACTS

We understand the Fresno City Council will consider this week a proposed resolution whereby the language of the national motto – In God We Trust – would be permanently displayed on property owned by the City. After brief recitation of the historical and patriotic significance of the motto, the resolution is anticipated to direct that the words “In God we trust” be permanently and prominently displayed in the Council Chambers.

## DISCUSSION

### *1. Legality of displaying the motto*

The national motto is codified in three federal statutes. (31 U.S.C. 5112, 5114; 36 U.S.C. 302). Stated simply and directly, 36 U.S.C. 302 reads: “‘In God we trust’ is the national motto.”

The constitutionality of the national motto has been unequivocally established by the courts. The most recent federal case in this jurisdiction involving a direct challenge to the national motto was *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010). The challenge was based on an alleged violation of the First Amendment’s doctrine of the separation of church and state. That Court found the phrase consistent with the Establishment Clause. Because the case is directly on point and provides a thorough discussion of the legal issues, it will be quoted at length here:

It is quite obvious 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. Its use is of a patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise.

¶It is not easy to discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted “In God We Trust” or the study of a government publication or document bearing that slogan. . . . While “ceremonial” and “patriotic” may not be particularly apt words to describe the category of the national motto, it is excluded from First Amendment significance because the motto has no theological or ritualistic impact. As stated by the Congressional report, it has “spiritual and psychological value” and “inspirational quality.”

*Newdow* , 598 F.3d at 644 ( quoting *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970)

Judge Bea, writing for the majority, took further pains to explain that the U.S. Supreme Court has, in passing (known as dicta) found no constitutional infirmity with the motto:

Newdow did not and cannot cite a single Supreme Court case that called into question the motto’s constitutionality or otherwise invalidated *Aronow*’s reasoning or theory. To the contrary, and consistent with *Aronow*, the Supreme Court has noted in dicta the national motto does not violate the Establishment Clause. See *County of Allegheny v. ACLU*, 492 U.S. 573, 602-03 . . . (1989) (noting the motto is “consistent with the proposition that government may not communicate an endorsement of religious belief”); *Lynch [v. Donnelly]*, 465 U.S. 668 at 676 (1984)] (noting the “statutorily prescribed national motto ‘In God We Trust’” is a constitutional “reference to our religious heritage”) . . . .

*Newdow* , 598 F.3d at 644-45.

The Ninth Circuit is not alone. Direct challenges to a standalone display or engraving of the national motto have failed in every federal circuit in which they have been brought. See, generally, *Newdow v. Peterson*, 753 F.3d 105 (2nd Cir. 2014); *Kidd v. Obama*, 387 Fed.Appx. 2, (D.C. Cir. 2010); *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266 (4th Cir. 2005); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. Tex. 1979); and, *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996).

Lest there be any notion that the validity of the display of the motto is limited to coins and currency, but that such a display by a local government violates the Establishment Clause, that notion is easily put to rest. First it is illogical to suggest that the federal statutes memorializing the phrase, "In God we trust" are constitutional but the same language in a state or local government context is unconstitutional. Second, challenge to the display of "In God we trust" on the façade of a county building was brought in *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266 (4th Cir. 2005). In dismissing the complaint, the Court of Appeals for the Second Circuit noted that "...Congress made 'In God We Trust' the national motto in 1956, and the motto is inscribed above the Speaker's Chair in the House of Representatives, and also above the main door of the Senate Chamber." *Id.*, at 273-74.

## *2. Scope of PJI Representation*

In the event that a frivolous lawsuit is filed challenging the legality of the displays of the National Motto, PJI attorneys will represent the named defendants. The legal defense will cover the City, elected officials, and persons employed by the City whether named in their official or individual capacities. Should private citizens be named as defendants in the suit, PJI may represent such person or persons if there is written consent and waiver of potential conflicts of interest by the City and the private citizens.

PJI will provide such representation upon the execution of a retainer agreement for the consideration of One Dollar (\$1.00). The scope of the representation will include defending the City and other defendants during all aspects of litigation as well as all appeals.

## *3. Relevant PJI Background*

PJI has been involved in a number of cases involving the defense of government entities engaged in (actual or perceived) religious acts which are ceremonial or symbolic in nature. Below is a sampling.

### **National Motto:**

A nationally known Atheist, Dr. Michael Newdow, brought suit challenging the national motto.

He sought to have the federal statutes declared unconstitutional and the printing and engraving on currency and coins of the motto enjoined. Because of its organizational interest in the issue, PJI intervened as a defendant. PJI attorneys defended the case in federal district court. The lower court dismissed the complaint. Counsel for PJI participated in oral argument in the Ninth Circuit Court of Appeals along with lawyers from the U.S. Department of Justice. The defense of the motto was successful and the U.S. Supreme Court declined to hear the case. *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) cert. denied 131 S. Ct. 1612 (U.S. 2011).

#### **Prayer at Presidential Inauguration:**

Over 250 Atheists, Agnostics, Humanists, and nineteen like-minded organizations, (e.g. the American Humanist Association, Freedom From Religion Foundation and the Military Association of Atheists & Freethinkers), sued federal officials, the Presidential Inauguration Committee and two well known ministers (Revs. Rick Warren and Joe Lowery). The clergy were personally sued for giving the invocation and benediction at the inauguration of President Obama. (Chief Justice Roberts was also sued for using the phrase, "so help me God" in administering the presidential oath at the request of the President.) PJI represented the ministers and successfully argued against the issuance of an injunction in the D.C. federal district court days before the inauguration. We were also successful on appeal. The U.S. Supreme Court declined to take the case. *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010). cert. denied 131 S. Ct. 2441 (U.S. 2010).

In addition, counsel for the Defendants filed an emergency motion days prior to oral argument in the appellate court in an attempt to prohibit the recitation, by the Clerk of the Court, of the court cry -- "God save the United States and this honorable Court." Department of Justice attorneys did not take a position on the motion. PJI filed the sole opposition and the Court of Appeals for the D.C. Circuit denied the motion. The motion and the denial were discussed in the concurring opinion. *Newdow v. Roberts*, 603 F.3d 1002, 1021-22 (D.C. Cir. 2010) (Kavanaugh, J., concur).

#### **Counsel to Local Governments:**

PJI routinely provides counsel to elected officials and city attorneys on issues involving invocations at government meetings or artwork such as the display of the national motto in council chambers.

#### **CONCLUSION**

In sum, the constitutionality of the national motto has been established in this jurisdiction, as well as every court across the country which has had occasion to rule on the matter. If the City Council passes the proposed resolution, PJI will represent the City for \$1.00.

Please feel at liberty to contact me should you have any questions regarding the contents of this letter.

Sincerely,

Matt McReynolds, PJI Senior Staff Attorney