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CONFIDENTIAL ATTORNEY CLIENT PRIVILEGED
AND ATTORNEY WORK PRODUCT

April 10, 2017

MEMORANDUM

TO: Councilmember Bredefeld

RE: *Placing "In God We Trust" on the Wall Behind the Dais in Council Chambers*

QUESTION

Will placing the expression "In God we trust" on the wall behind the dais in Council Chambers violate the Establishment Clauses of the United States and California Constitutions?

ANSWER

No, the government's use of the expression "In God we trust" is not a violation of the Establishment Clause because the expression is of a patriotic and ceremonial character, and has nothing to do with the establishment of a religion.

ANALYSIS

The Establishment Clause of the First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause prohibits the enactment of a law or official policy tending to establish a religion. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). The establishment clause found in article I, section 4 of the California Constitution has been interpreted by the California Supreme Court as being coextensive and not broader than its federal counterpart. *E. Bay Asian Local Dev. Corp. v. State of California*, 24 Cal. 4th 693, 741 (2000). Accordingly, this analysis will focus on federal Establishment Clause jurisprudence.

Challenges to government actions based on the Establishment Clause are extremely factually driven. Simply stated, context is everything. While one court might approve a legislative invocation being offered in the name of "God," see, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983); another court might invalidate an invocation offered in the name of "Jesus Christ." See, e.g., *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002), as modified on denial of reh'g (Oct. 7, 2002).

Federal and state courts alike have held the government's use of the expression "In God we trust" is not a violation of the Establishment Clause because the phrase is patriotic and ceremonial, and the use of the phrase does not tend to endorse a specific

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religion. Challenges to the government's use of the expression have arisen in the context of the expression's inclusion on the nation's coins and currency. In *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) ("*Aronow*"), a challenger argued the government's use of "expressions of trust in God" on the nation's coins and currency violated the Establishment Clause by endorsing a religion. *Aronow*, 432 F.2d at 243. The Ninth Circuit disagreed, and held:

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.

Aronow, 432 F.2d at 243.

In 2010, a challenger brought a similar challenge to the government's use of the expression on the nation's coins and currency. *Newdow v. Lefevre*, 598 F.3d 638 (9th Cir. 2010) ("*Newdow*"). Again, the Ninth Circuit disapproved of the challenge, and reaffirmed its holding in *Aronow*. *Newdow*, 598 F.3d at 644. In the context of the government's use of the expression of the nation's coins and currency, there is no question the use is permissible and does not offend the Establishment Clause.

Challengers will argue displaying the expression on the wall directly behind the dais in Council Chambers is categorically different than inscribing the expression on the nation's coins and currency. Challengers will also argue there are fundamental differences between federal and state legislative bodies and the City Council that make it particularly offensive to display the expression in Council Chambers. Ultimately, challengers will argue Council Chambers and the role of local government is a unique context in which the use of the expression does offend the Establishment Clause. For the foregoing reasons, these arguments are likely to fail.

There is strong legal support for the position that any differences between local government and the federal government are immaterial in the context of the Establishment Clause. For example, many state legislative bodies begin their sessions with an opening prayer. In *Marsh v. Chambers*, 463 U.S. 783 (1983) ("*Marsh*"), this practice was challenged as a governmental endorsement of religion, and a violation of the Establishment Clause. The United States Supreme Court approved of the practice in light of the longstanding tradition of opening federal and state legislative proceedings with prayer, and provided the government did not preclude any particular religion from offering an invocation.

In 2014, a challenger attempted to distinguish a town's practice of opening its board meetings with prayer on the grounds that the nature and context of a local government meeting was fundamentally different than a federal or state legislative meeting. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1824 (2014) ("*Galloway*"). The challenger argued the town board meetings occurred in a far more intimate setting than Congress and state legislatures such that the invocation delivered in Congress and state

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legislatures differed in fundamental ways from the prayers offered at the town board meetings. *Galloway*, 134 S. Ct. at 1824-25. The challenger further argued, in Congress and the state legislatures:

[T]he public remains segregated from legislative activity and may not address the body except by occasional invitation. Citizens attend town meetings, on the other hand, to accept awards; speak on matters of local importance; and petition the board for action that may affect their economic interests, such as the granting of permits, business licenses, and zoning variances.

Galloway, 134 S. Ct. at 1824-25. Given the unique context of a town board meeting, the challenger argued members of the public likely felt more pressure to participate in the prayers in order to please the board members "from whom they [were] about to seek a favorable ruling." *Galloway*, 134 S. Ct. at 1825.


The United States Supreme Court analyzed the prayer against the "backdrop of historical practice" and significance. The Court held "[a]s a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of [the United States Supreme Court's] sessions." *Galloway*, 134 S. Ct. at 1825. Accordingly, the Supreme Court was not persuaded the differences between federal and local governmental proceedings were substantial enough to warrant not following the precedent set forth in *Marsh*.

Despite the differences between local governmental proceedings and federal governmental proceedings, a court would very likely not treat the differences in contexts as substantial enough to warrant departing from well-established precedent. The longstanding precedent with regard to the expression "In God we trust" is the expression is of a patriotic and ceremonial character and bears no resemblance to a governmental sponsorship of a religion. *Newdow*, 598 F.3d at 644 (reaffirming the holding of *Aronow*).

CONCLUSION

The placement of the expression "In God we trust" on the wall behind the dais in Council Chambers is not a violation of the Establishment Clause because the expression is of a patriotic and ceremonial character.

Respectfully submitted,


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c: Douglas T. Sloan, City Attorney

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