

CASE NO. 06-16344

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

THE REV. DR. MICHAEL A. NEWDOW,

Plaintiff-Appellant, pro se,

v.

**THE CONGRESS OF THE UNITED STATES OF AMERICA; PETER
LEFEVRE, Law Revision Counsel; UNITED STATES OF AMERICA; JOHN
W. SNOW, Secretary of the Treasury; HENRIETTA HOLSMAN FORE,
Director, United States Mint; THOMAS A. FERGUSON, Director, Bureau of
Engraving and Printing,**

Defendants-Appellees,

PACIFIC JUSTICE INSTITUTE,

Defendant-Intervenor-Appellee

**On Appeal from the United States District Court
for the Eastern District of California
(District Court #2:05-cv-02339)**

**PLAINTIFF-APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE
IN PETITION FOR PANEL REHEARING OR FOR REHEARING EN
BANC**

Michael Newdow, in pro per
CA SBN 20444
PO Box 233345
Sacramento CA 95823

Phone: (916) 424-2356
Email: NewdowLaw@gmail.com

Pursuant to Federal Rules of Evidence Rule 201(b)(2), Rule 201(c), and/or Rule 201(d), Plaintiff-Appellant respectfully requests that the Court take judicial notice of the attached Appendix D, listing, by year, the approximate case load of the U.S. Supreme Court since October 6, 1970. Additionally, the associated number of cases referencing the Establishment Clause and the specific cases containing the phrase, “In God We Trust” are provided.

A Declaration of the undersigned is attached. The Declaration describes the methodology used for obtaining the information in Appendix D.

The undersigned has contacted opposing counsel. Counsel for the Federal Defendants has stated that the United States “plans to take no position” on the Motion. Counsel for Intervenor-Defendant Pacific Justice Institute has stated his client does not have any objections.

Respectfully submitted,

April 22, 2010

s/ - Michael Newdow
Michael Newdow
Plaintiff-Appellant, *in pro per*
CA SBN: 220444
PO Box 233345
Sacramento, CA 95823
Phone: (916) 424-2356
E-mail: NewdowLaw@gmail.com

CERTIFICATE OF SERVICE

CASE NO. 06-16344

I HEREBY CERTIFY that a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE IN PETITION FOR PANEL REHEARING OR FOR REHEARING EN BANC** was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on this 22nd day of April, 2010. Assumedly, counsel for all parties (registered CM/ECF users) will be automatically served by the system.

April 22, 2010

s/ - Michael Newdow

Michael Newdow
Plaintiff-Appellant, *in pro per*

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**On Appeal from the United States District Court
for the Eastern District of California
(District Court #2:05-cv-02339)**

**DECLARATION OF MICHAEL NEWDOW IN REGARD TO PLAINTIFF-
APPELLANT'S MOTION REQUESTING JUDICIAL NOTICE IN
PETITION FOR PANEL REHEARING OR REHEARING EN BANC**

Michael Newdow, in pro per
CA SBN 20444
PO Box 233345
Sacramento, CA 95823

Phone: (916) 424-2356
Email: NewdowLaw@gmail.com

I, Michael Newdow, declare as follows:

- (1) I am competent to testify to the matters stated herein.
- (2) On April 3, 2010, I performed a series of Lexis searches of the “U.S. Supreme Court Cases, Lawyers’ Edition” database.
- (3) Starting with a date range of 10/06/1970 through 09/30/1971, I searched for the words, “Opinion of the Court.” I then repeated this search for each year from 10/01 of each subsequent year through 09/30 of the following year, and placed the resulting numbers of cases in an Excel spreadsheet.
- (4) I also reviewed Peter A. Hook, *The aggregate harmony metric and a statistical and visual contextualization of the Rehnquist court: 50 years of data*. 24 Constitutional Commentary 221 (March 2007). In that article, the number of Supreme Court cases decided each year is given (at pages 241-42). Using that resource, I transposed the data to the aforementioned spreadsheet.
- (5) Page 1 of Appendix D has the results of this process, with the total number of cases provided for each method. Although the procedure is somewhat inexact, it seems a fair approximation of the actual number of cases the high court has heard each year. Surely it suffices for the point made in the Petition for Panel Rehearing or for Rehearing En Banc. *See* Petition at 4.
- (6) Page 2 of Appendix D shows the first page of the results of a Lexis search on “Establishment Clause” in the same “U.S. Supreme Court Cases, Lawyers’ Edition” database within the date range of 10/06/1970 through 04/03/2010. As can be seen, there are 121 cases that contain “Establishment Clause.”
- (7) Pages 3-4 of Appendix D shows the results of a Lexis search on “In God We Trust” in the same “U.S. Supreme Court Cases, Lawyers’ Edition” database within the date range of 10/06/1970 through 04/03/2010. As can be seen, there are nine cases that contain “In God We Trust.”
- (8) I then searched each of the nine cases for “Establishment Clause.” Two of the cases, *Regan v. Time, Inc.*, 468 U.S. 641 (1984) and *Wooley v. Maynard*, 430 U.S. 705 (1977), did not contain “Establishment Clause.”
- (9) In *Regan*, there is one reference to “In God We Trust.” It is as follows:

As appellee notes:

“[Equally] banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent’s birthday gift of a \$ 20 bill; a green, six-foot enlargement of the portrait of George Washington on a \$ 1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, ‘In God We Trust’, on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist’s rendering of a ‘shrinking’ dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation.” Brief for Appellee 5-6.

Regan v. Time, Inc., 468 U.S. 641, 683-84 (1984) (Brennan, J., concurring and dissenting).

- (10) In *Wooley*, three references to “In God We Trust” can be found. Chief Justice Burger, in his majority opinion, was obviously responding to the dissent when he wrote:

It has been suggested that today’s holding will be read as sanctioning the obliteration of the national motto, “In God We Trust” from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Wooley, 430 U.S. at 717 n.15.

- (11) In dissent, then-Justice Rehnquist used the phrase twice:

The logic of the Court’s opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes “In God We Trust” and “E Pluribus Unum”

appear on the coin and currency of the United States. I cannot imagine that the statutes, see 18 U.S.C. §§ 331 and 333, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto “In God We Trust.” Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2010 in New York, NY.

s/ - Michael Newdow

Michael Newdow

APPENDIX D

United States Supreme Court Cases since October 6, 1970

(when *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) was decided)

Cases Decided by the United States Supreme Court (by year since 10/06/1970)

Start Date	End Date	Lexis Search "Opinion of the court"	Hook Article*
10/6/1970	- 9/30/1971	100	-
10/1/1971	- 9/30/1972	130	151
10/1/1972	- 9/30/1973	138	164
10/1/1973	- 9/30/1974	139	157
10/1/1974	- 9/30/1975	124	137
10/1/1975	- 9/30/1976	138	159
10/1/1976	- 9/30/1977	121	142
10/1/1977	- 9/30/1978	127	135
10/1/1978	- 9/30/1979	130	138
10/1/1979	- 9/30/1980	133	149
10/1/1980	- 9/30/1981	123	138
10/1/1981	- 9/30/1982	145	167
10/1/1982	- 9/30/1983	147	162
10/1/1983	- 9/30/1984	157	163
10/1/1984	- 9/30/1985	143	151
10/1/1985	- 9/30/1986	143	159
10/1/1986	- 9/30/1987	142	152
10/1/1987	- 9/30/1988	136	142
10/1/1988	- 9/30/1989	125	143
10/1/1989	- 9/30/1990	120	139
10/1/1990	- 9/30/1991	106	120
10/1/1991	- 9/30/1992	106	114
10/1/1992	- 9/30/1993	105	114
10/1/1993	- 9/30/1994	80	87
10/1/1994	- 9/30/1995	83	86
10/1/1995	- 9/30/1996	71	75
10/1/1996	- 9/30/1997	80	86
10/1/1997	- 9/30/1998	89	93
10/1/1998	- 9/30/1999	75	81
10/1/1999	- 9/30/2000	73	77
10/1/2000	- 9/30/2001	79	86
10/1/2001	- 9/30/2002	74	81
10/1/2002	- 9/30/2003	68	78
10/1/2003	- 9/30/2004	70	80
10/1/2004	- 9/30/2005	74	79
10/1/2005	- 9/30/2006	67	81
10/1/2006	- 9/30/2007	68	-
10/1/2007	- 9/30/2008	65	-
10/1/2008	- 9/30/2009	74	-
10/1/2009	- 9/30/2010	25	-
Total number of cases:		4193	4266

* Peter A. Hook, *The aggregate harmony metric and a statistical and visual contextualization of the Rehnquist court: 50 years of data*. 24 Constitutional Commentary 221, 241-42 (March 2007)

Lexis Search #1

Time of Request: Saturday, April 03, 2010 17:40:53 EST

Client ID/Project Name:

Number of Lines: 957

Job Number: 1842:213726657

Research Information

Service: Terms and Connectors Search

Print Request: All Documents 1-121

Source: U.S. Supreme Court Cases, Lawyers' Edition

Search Terms: "Establishment Clause" and date(geq (10/06/1970) and leq (04/03/2010))



Lexis Search #2

Time of Request: Saturday, April 03, 2010 17:50:19 EST

Client ID/Project Name:

Number of Lines: 102

Job Number: 1842:213727028

Research Information

Service: Terms and Connectors Search

Print Request: All Documents 1-9

Source: U.S. Supreme Court Cases, Lawyers' Edition

Search Terms: "In God We Trust" and date(geq (10/06/1970) and leq (04/03/2010))

1. *McCreary County v. ACLU*, No. 03-1693, SUPREME COURT OF THE UNITED STATES, 545 U.S. 844; 125 S. Ct. 2722; 162 L. Ed. 2d 729; 2005 U.S. LEXIS 5211; 15 A.L.R. Fed. 2d 865; 18 Fla. L. Weekly Fed. S 532, March 2, 2005, Argued , June 27, 2005, Decided , The LEXIS pagination of this document is subject to change pending release of the final published version. , Partial summary judgment denied by, Summary judgment denied by *ACLU v. McCreary County*, 2007 U.S. Dist. LEXIS 77338 (E.D. Ky., Sept. 28, 2007)

... the national motto, "**In God We Trust**"; a page from ...
 ... bears the motto, "**IN GOD WE TRUST.**" And our Pledge ...
 ... the National Motto ("**In God We Trust**") and stating that ...
 ... the United States ("**In God We Trust**"), the Preamble to ...

2. *Van Orden v. Perry*, No. 03-1500, SUPREME COURT OF THE UNITED STATES, 545 U.S. 677; 125 S. Ct. 2854; 162 L. Ed. 2d 607; 2005 U.S. LEXIS 5215; 18 Fla. L. Weekly Fed. S 494, March 2, 2005, Argued , June 27, 2005, Decided , The LEXIS pagination of this document is subject to change pending release of the final published version.
 ... article of commerce ("**In God we Trust**") or an incidental ...

3. *Elk Grove Unified Sch. Dist. v. Newdow*, No. 02-1624, SUPREME COURT OF THE UNITED STATES, 542 U.S. 1; 124 S. Ct. 2301; 159 L. Ed. 2d 98; 2004 U.S. LEXIS 4178; 72 U.S.L.W. 4457; 17 Fla. L. Weekly Fed. S 359, March 24, 2004, Argued , June 14, 2004, Decided , US Supreme Court rehearing denied by *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 961, 125 S. Ct. 21, 159 L. Ed. 2d 851, 2004 U.S. LEXIS 4886 (U.S., Aug. 23, 2004)

... file). The motto "**In God we Trust**" first appeared on ...
 ... States would be "**In God We Trust.**" Act of July 30, 1956, ch. 795, 70 Stat. 732 ...
 ... Still Sustains"); Florida ("**In God We Trust**"); Ohio ("With God ...
 ... includes the motto "**In God We Trust.**" The oaths of ...
 ... the national motto ("**In God We Trust**"), religious references in ...

4. *County of Allegheny v. ACLU*, No. 87-2050 , SUPREME COURT OF THE UNITED STATES, 492 U.S. 573; 109 S. Ct. 3086; 106 L. Ed. 2d 472; 1989 U.S. LEXIS 3468; 57 U.S.L.W. 5045, February 22, 1989, Argued , July 3, 1989, *Decided* Together with No. 88-90, *Chabad v. American Civil Liberties Union et al.*, and No. 88-96, *City of Pittsburgh v. American Civil Liberties Union, Greater Pittsburgh Chapter, et al.*, also on certiorari to the same court.

... our national motto ("**In God We Trust**") and our Pledge ...
 ... the printing of "**In God We Trust**" on our coins ...
 ... our national motto, "**In God we trust**," 36 U.S.C. § 186 ...

5. *Regan v. Time, Inc.*, No. 82-729 , SUPREME COURT OF THE UNITED STATES, 468 U.S. 641; 104 S. Ct. 3262; 82 L. Ed. 2d 487; 1984 U.S. LEXIS 147; 52 U.S.L.W. 5084, November 9, 1983, Argued , July 3, 1984, Decided
 ... of the legend, '**In God We Trust**', on the leaflets ...

6. *Lynch v. Donnelly*, No. 82-1256 , SUPREME COURT OF THE UNITED STATES, 465 U.S. 668; 104 S. Ct. 1355; 79 L. Ed. 2d 604; 1984 U.S. LEXIS 37; 52 U.S.L.W. 4317, October 4, 1983, Argued , March 5, 1984, Decided , Petition for Rehearing Denied May 14, 1984.

... prescribed national motto "**In God We Trust**," 36 U. S. C. § 186 ...
 ... holiday, printing of "**In God We Trust**" on coins, and ...
 ... holiday, the legend "**In God We Trust**" on our coins, ...
 ... the designation of "**In God We Trust**" as our national ...

7. Marsh v. Chambers, No. 82-23 , SUPREME COURT OF THE UNITED STATES, 463 U.S. 783; 103 S. Ct. 3330; 77 L. Ed. 2d 1019; 1983 U.S. LEXIS 107; 51 U.S.L.W. 5162, April 20, 1983, Argued , July 5, 1983, Decided ... this Honorable Court," **"In God We Trust,"** "One Nation Under ...

8. Stone v. Graham, No. 80-321, SUPREME COURT OF THE UNITED STATES, 449 U.S. 39; 101 S. Ct. 192; 66 L. Ed. 2d 199; 1980 U.S. LEXIS 2; 49 U.S.L.W. 3369, November 17, 1980, Decided , Petition for Rehearing Denied January 12, 1981.
... with the motto **"In God We Trust"** in public schools ...

9. Wooley v. Maynard, No. 75-1453, SUPREME COURT OF THE UNITED STATES, 430 U.S. 705; 97 S. Ct. 1428; 51 L. Ed. 2d 752; 1977 U.S. LEXIS 75, Argued November 29, 1976 , April 20, 1977
... the national motto, **"In God We Trust"** from United States ...
... example, the mottoes **"In God We Trust"** and "E Pluribus ...
... in the motto **"In God We Trust."** Similarly, there is ...

**GRAVAMEN OF SUPREME COURT CASES SINCE 1970
IN WHICH “IN GOD WE TRUST” APPEARS**

- (1) *McCreary County v. ACLU*, 545 U.S. 844 (2005) (Whether Ten Commandments displays violated the Establishment Clause)
- (2) *Van Orden v. Perry*, 545 U.S. 677 (2005) (Whether Ten Commandments monument violated Establishment Clause)
- (3) *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (Whether “under God” in Pledge of Allegiance violated Establishment and Free Exercise Clauses)
- (4) *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Whether displays of crèche and menorah violated Establishment Clause)
- (5) *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (Whether statute restricting reproductions of currency violated Free Speech clause).
- (6) *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Whether display of crèche violated Establishment Clause)
- (7) *Marsh v. Chambers*, 463 U.S. 783 (1983) (Whether legislative prayer violated Establishment Clause)
- (8) *Stone v. Graham*, 449 U.S. 39 (1980) (Whether posted copy of Ten Commandments violated Establishment Clause)
- (9) *Wooley v. Maynard*, 430 U.S. 705 (1977) (Whether forcing individuals to display state motto violated Free Speech Clause)

As can be seen, all these cases except *Regan v. Time, Inc.*, 468 U.S. 641 (1984) and *Wooley v. Maynard*, 430 U.S. 705 (1977) primarily involved challenges under the Establishment Clause.

***REGAN V. TIME, INC.*, 468 U.S. 641 (1984)**

In *Regan v. Time, Inc.*, 468 U.S. 641 (1984), there is one reference to “In God We Trust.” It is as follows:

As appellee notes:

“[Equally] banned by the statute are a Polaroid snapshot of a child proudly displaying his grandparent’s birthday gift of a \$ 20 bill; a green, six-foot enlargement of the portrait of George Washington on a \$ 1 bill, used as theatrical scenery by a high school drama club; a copy of the legend, ‘In God We Trust’, on the leaflets distributed by those who oppose Federal aid to finance abortions; and a three-foot by five-foot placard bearing an artist’s rendering of a ‘shrinking’ dollar bill, borne by a striking worker to epitomize his demand for higher wages in a period of inflation.” Brief for Appellee 5-6.

Regan v. Time, Inc., 468 U.S. 641, 683-84 (1984) (Brennan, J., concurring and dissenting).

WOOLEY V. MAYNARD, 430 U.S. 705 (1977)

In *Wooley v. Maynard*, 430 U.S. 705 (1977), three references to “In God We Trust” can be found. Chief Justice Burger, in his majority opinion, wrote:

It has been suggested that today's holding will be read as sanctioning the obliteration of the national motto, “In God We Trust” from United States coins and currency. That question is not before us today but we note that currency, which is passed from hand to hand, differs in significant respects from an automobile, which is readily associated with its operator. Currency is generally carried in a purse or pocket and need not be displayed to the public. The bearer of currency is thus not required to publicly advertise the national motto.

Wooley, 430 U.S. at 717 n.15.

In dissent, then-Justice Rehnquist used the phrase twice:

The logic of the Court's opinion leads to startling, and I believe totally unacceptable, results. For example, the mottoes “In God We Trust” and “E Pluribus Unum” appear on the coin and currency of the United States. I cannot imagine that the statutes, see 18 U.S.C. §§ 331 and 333, proscribing defacement of United States currency impinge upon the First Amendment rights of an atheist. The fact that an atheist carries and uses United States currency does not, in any meaningful sense, convey any affirmation of belief on his part in the motto “In God We Trust.” Similarly, there is no affirmation of belief involved in the display of state license tags upon the private automobiles involved here.