

**STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL**

March 23, 2017

Opinion No. 17-21

Constitutionality of Vehicle Registration Plates Bearing “In God We Trust”

Question 1

Is legislation that requires all Tennessee vehicle registration plates to bear the language “In God We Trust” constitutionally permissible?

Opinion 1

Legislation that requires all vehicle registration plates to bear the language “In God We Trust” would be constitutionally suspect under the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause of the First Amendment, as well as sections 3 and 19 of article I of the Tennessee Constitution.

Question 2

Is legislation that gives Tennessee vehicle owners the option of selecting a vehicle registration plate bearing the language “In God We Trust” constitutionally permissible?

Opinion 2

Legislation that gives vehicle owners the option of selecting a vehicle registration plate bearing the language “In God We Trust” would be constitutionally defensible.

ANALYSIS

Tennessee law generally requires all motor vehicles operating on the streets and highways of this State to display valid registration plates. *See* Tenn. Code Ann. §§ 55-4-101; 55-5-114. Vehicle owners may display the State’s standard plate, *see* Tenn. Code Ann. § 55-4-103; or they may display a “special license plate,” which generally requires the payment of a fee in addition to the applicable standard registration fee. *See* Tenn. Code Ann. § 55-4-201(b).

A standard plate contains the word “Tennessee,” a license plate number, a silhouette of the State, the slogan “The Volunteer State,” and the State’s official travel-planning website address.¹

¹ *See* <https://www.tn.gov/revenue/article/current-tennessee-license-plate> (last visited March 6, 2017).

Special license plates contain the word “Tennessee,” a license plate number, and a design approved by the commissioner of revenue.² There are five categories of special plates: “cultural, specialty earmarked and new specialty earmarked motor vehicle registration plates, memorial motor vehicle registration plates and special purpose motor vehicle registration plates.” *See* Tenn. Code Ann. § 55-4-201(a). The cultural, specialty earmarked, and new specialty earmarked plates typically bear a special logotype or distinctive design of the agency, organization, or purpose that is being honored or recognized by the issuance of the particular plate. *See* Tenn. Code Ann. § 55-4-220(a). All funds from the sale or renewal of these plates benefit specific “departments, agencies, charities, programs and other activities impacting Tennessee.” *See* Tenn. Code Ann. § 55-4-201(i). Examples of these plates include ones recognizing Ducks Unlimited, the Nashville Predators, and the Ronald McDonald House. *See* Tenn. Code Ann. §§ 55-4-265; 55-4-291; 55-4-364. Memorial plates, on the other hand, are issued free of charge to honor certain individuals. *See* Tenn. Code Ann. § 55-4-209(3). *See, e.g.*, Tenn. Code Ann. § 55-4-237 (disabled veterans); Tenn. Code Ann. § 55-4-239 (holders of the Purple Heart). Finally, special purpose plates identify antique motor vehicles and certain citizenry. *See* Tenn. Code Ann. § 55-4-209(8). *See, e.g.*, Tenn. Code Ann. § 55-4-226 (judiciary members); Tenn. Code Ann. § 55-4-270 (Tennessee state guard).

The phrase “In God We Trust” is well known and is steeped in history. Since 1865, the words “In God We Trust” have been impressed upon our coins. *See* 13 Stat. 517, 518 (1865); 35 Stat. 164 (1908) (current version at 31 U.S.C. § 5112(d)(1)). In 1955, the use of the phrase was extended to the national currency. *See* Pub. L. No. 140-303, 69 Stat. 290 (1955) (current version at 31 U.S.C. § 5114(b)). Then, Congress adopted the phrase as our country’s national motto in 1956. 36 U.S.C. § 302. The motto is inscribed above the Speaker’s Chair in the House of Representatives and above the main door of the Senate, among other prominent places. *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002); 4 U.S.C. § 4 note.

But, in addition to having historical significance, the phrase “In God We Trust” clearly has religious overtones, too.³ It is this religious aspect of the phrase that gives rise to questions about the constitutionality of legislation that would require all vehicle registration plates to bear the language “In God We Trust.”⁴

The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” As is plain from its text, the First Amendment curtails

² *See* Tenn. Code Ann. § 55-4-201(a)(4); <https://www.tn.gov/revenue/article/available-license-plates> (last visited March 6, 2017).

³ *See* *McCreary County v. American Civil Liberties Union*, 545 U.S. 844, 888-89 (2005) (observing that the motto “In God We Trust,” along with other phrases containing the word “God” – a Nation “under God” and “so help me God,” for example, – reflects the fact that “[w]e are a religious people whose institutions presuppose a Supreme Being”); *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984) (observing that national motto “In God We Trust” is a reference to our religious heritage). *See also* *Van Orden v. Perry*, 545 U.S. 677, 696 (2005) (Thomas, J., concurring) (“words such as ‘God’ have religious significance”).

⁴ This Opinion assumes that the phrase “In God We Trust” would not be accompanied by any symbol or identifying mark associated with any particular religion and that no proceeds from the sale of the registration plates would, directly or indirectly, go to any religious entity.

the power of Congress to interfere with an individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985). By virtue of the Fourteenth Amendment, the same restraint is placed on the States' power to legislate. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000).

The Tennessee Constitution provides the same or greater protections that are afforded under these clauses, and the legal analysis under the Tennessee Constitution is essentially the same as that under the federal Constitution. See *State ex rel. v. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 761 (Tenn. Ct. App. 2001) (recognizing that the "prohibition against government establishment of religion" contained in article I, section 3 of the Tennessee Constitution provides broader protection than the First Amendment, although applying similar analysis under each provision); *Martin v. Beer Bd. for City of Dickson*, 908 S.W.2d 941, 946 (Tenn. Ct. App. 1995) (article I, section 3 of Tennessee Constitution guarantees a stronger free exercise right than the federal Constitution); *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 288 (Tenn. Ct. App. 2007) (article I, section 19 of the Tennessee Constitution provides at least as much protection of the freedoms of speech and press as the First Amendment).

1. "In God We Trust" as a Requirement. The proposed legislation that would require all vehicle registration plates to bear the language "In God We Trust" implicates all three clauses of the First Amendment: the Establishment Clause, the Free Exercise Clause, and the Free Speech Clause.

Free Speech Clause

The right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-17 (1991); *Wallace*, 472 U.S. at 51. Accordingly, it is well established that the "First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239, 2253 (2015) (citations omitted). For example, the Supreme Court has upheld a person's right to be free from honoring the American flag. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The board of education regulation at issue in *Barnette* required students to recite the Pledge of Allegiance and salute the flag – students were given no opportunity to opt out. Noncompliance resulted in the student's expulsion, which then exposed the student to delinquency proceedings and the student's parents to criminal prosecution, a fine, and a jail term. *Id.* at 629. The Court "held that the First Amendment does not 'le[ave] it open to public authorities to compel [a person] to utter' a message with which he does not agree." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005) (quoting *Barnette*, 319 US. at 634).

Similarly, in *Wooley v. Maynard*, 430 U.S. 705 (1977), the Supreme Court upheld a person's right to not display an ideological message of the State that the person found objectionable. In *Wooley*, a New Hampshire couple challenged statutes that required noncommercial motor vehicles to bear license plates embossed with the state motto, "Live Free or Die," and made it a misdemeanor to obscure the motto. *Id.* at 707. The plaintiffs were followers of the Jehovah's Witnesses faith and viewed the motto as repugnant to their moral, religious and

political beliefs. They filed suit after being criminally prosecuted for covering up the motto on the license plates of their automobiles. *Id.* The Court revisited *Barnette* and acknowledged that compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but noted that “the difference is essentially one of degree.” *Id.* at 715.

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State “invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

Id. (quoting *Barnette*, 319 U.S. at 642).

The Court found that obliging the plaintiffs to “use their private property as a ‘mobile billboard’ for the State’s ideological message or suffer a penalty” implicated the protections afforded to them under the First Amendment. *Id.* at 715. The Court further found that New Hampshire’s stated interests of facilitating the identification of passenger vehicles and promoting appreciation of history, individualism, and state pride were not compelling countervailing interests that outweighed an individual’s First Amendment right to avoid becoming a courier for the State’s ideological message. *Id.* at 716-17.

In concluding its opinion, the Court gave notice that the medium by which the governmental message is conveyed is pivotal. The Court presciently discarded a suggestion that its holding would be read as sanctioning the obliteration of the national motto “In God We Trust” from United States coins and currency. *Id.* at 717 n. 15. The Court explained:

[W]e 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.

Id. Consequently, courts faced with Free Speech and other First Amendment challenges to the use of the phrase “In God We Trust” on coins and currency, following *Wooley*, have rejected those challenges because individuals are not personally associated with coins and currency as they are with their automobiles. *See, e.g., Newdow v. Peterson*, 753 F.3d 105, 109 (2d Cir. 2014); *Newdow v. Congress*, 435 F.Supp.2d 1066, 1077 (E.D. Cal. 2006); *O’Hair v. Blumenthal*, 462 F.Supp. 19, 20 (W.D. Tex. 1978).

In short, the Supreme Court has made clear that the Free Speech Clause prohibits the state from requiring a person to use his vehicle as a “mobile billboard” for an ideological message that he finds unacceptable. *See Wooley*, 430 U.S. at 716-17. Here, the medium by which “In God We Trust” is to be conveyed is the same as in *Wooley*—a vehicle registration plate. And, as in *Wooley*, the proposed legislation would require an individual to operate his or her vehicle with a plate

bearing the language “In God We Trust” or be subject to a penalty. *See* Tenn. Code Ann. §§ 55-4-110(b), (d)(1); 55-5-114 (an owner or operator of a motor vehicle that is required to be registered under Tennessee’s vehicle registration law commits a Class C misdemeanor if he operates the vehicle without a registration plate or if he displays a plate that is not clearly legible and free from foreign material). Accordingly, for the reasons set forth in *Wooley*, legislation that requires motor vehicle owners or operators to display the language “In God We Trust” would implicate the protections afforded individuals under the Free Speech Clause.

Free Exercise Clause

For similar reasons, the proposed legislation requiring motor vehicle owners to display registration plates with the language of “In God We Trust” would also implicate the protections afforded individuals under the Free Exercise Clause of the First Amendment. *See Lee v. Weisman*, 505 U.S. 577, 591 (1992) (Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment).

The Free Exercise Clause extends to all sincere religious beliefs. *United States v. Lee*, 455 U.S. 252, 257 (1982). The free exercise of religion includes the right to believe whatever religious doctrine one desires. 16 Am.Jur.2d Constitutional Law § 433 (2017). The government may not compel affirmation of a repugnant belief, punish the expression of religious doctrine it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma. *Id.* (citations omitted). *See Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

The free exercise inquiry established by the Supreme Court is whether the government has placed a substantial burden on the observation of a person’s central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden. *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141-142 (1987); *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 717-719 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 220-221 (1972). While the Supreme Court departed from this standard in 1990 when it issued *Employment Div., Dep’t of Human Resources of Ore. v. Smith*, 494 U.S. 872 (1990), which held that “religion-neutral” laws of general applicability could burden free exercise without special justification, the departure was short-lived. In response to *Smith*, Congress enacted the Religious Freedom Restoration Act, which provides that no governmental agency can burden the free exercise of religion without justification, thereby restoring the previous “substantial burden” standard. *See City of Boerne v. Flores*, 521 U.S. 507, 512, 532-34 (1997) (citing 42 U.S.C. § 2000bb). *See also Sossamon v. Texas*, 563 U.S. 277, 281 (2011) (noting that by enacting RFRA, Congress intended to restore the compelling interest test).

The Religious Freedom Restoration Act, while intended by Congress to apply to state governmental entities, has been found to apply to the federal government only. *City of Boerne*, 521 U.S. at 534-36. Consequently, this State, like many others, enacted a statute substantially similar to the federal law. *See generally* Christopher C. Lund, *RFRA, State RFRAS, and Religious Minorities*, 53 San Diego Law Rev. 163 (2016). Tennessee’s Preservation of Religious Freedom Act prohibits the State from “substantially burden[ing] a person’s free exercise of religion” unless the State shows that the burden is “[e]ssential to further a compelling governmental interest” and

constitutes “[t]he least restrictive means of furthering that compelling governmental interest.” *See* 2009 Tenn. Pub. Act. ch. 573, §1(c) (2009) (codified at Tenn. Code Ann. § 4-1-407(c)(1)-(2)).

An impermissible substantial burden exists, for example, “[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs[.]” *Thomas*, 450 U.S. at 717-18. In other words, when an individual is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand,” a substantial burden exists. *See Sherbert*, 374 U.S. at 404.

A person who objects to displaying the phrase “In God We Trust” on his registration plate for religious reasons does face a choice between a core belief and a basic benefit. As explained in *Wooley*, an operator of a motor vehicle is “readily associated” with that vehicle, and the vehicle’s license plate is a type of “mobile billboard.” Thus, a person who objects to displaying the phrase “In God We Trust” on his registration plate must choose between fidelity to his belief and the ability to *lawfully* operate his motor vehicle in this State. Accordingly, such a person would be “substantially burdened” by a requirement that his registration plate display the phrase “In God We Trust.” There is no apparent countervailing compelling interest that the State could assert to justify this burden.

Establishment Clause

Finally, legislation that requires all vehicle registration plates to bear the language “In God We Trust” would be constitutionally suspect under the Establishment Clause. While proof of coercion is not a necessary element of an Establishment Clause claim,⁵ it is sufficient to show a violation. *See Lee*, 505 U.S. at 587 (“It is beyond dispute that . . . government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’”).

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. . . .

Everson v. Board of Ed. of Ewing, 330 U.S. 1, 15-16 (1947).

⁵ A violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended. *Sch. Dist. of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 223 (1963). *See Committee for Public Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 786 (1973) (“[P]roof of coercion . . . [is] not a necessary element of any claim under the Establishment Clause.”).

Hence, the Supreme Court has found unconstitutional, for example, a state requirement of a declaration of a “belief in the existence of God” as a religious test to hold office. *Torcaso v. Watkins*, 367 U.S. 488 (1961). In so finding, the Court “repeat[ed] and again reaffirm[ed]” its earlier holding in *Everson*: that “neither a State nor the Federal Government can constitutionally force a person ‘to profess a belief or disbelief in any religion.’ Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.”⁶ *Id.* at 495 (quoting *Everson*, 330 U.S. at 15).

While requiring the display of the phrase “In God We Trust” on one’s vehicle registration plate is not a “religious test” requiring an utterance, as in *Torcaso*, it does require the operator of the vehicle to display a message that the Supreme Court has found sufficiently linked to the operator to implicate First Amendment protections. *See Wooley*, 430 U.S. at 715, 717 n. 15. Under this reasoning, an operator of a vehicle that displays a registration plate bearing the phrase “In God We Trust” conveys a message that could be viewed as a religious affirmation of the operator’s belief in the existence of God. To those who do not believe in God, it would be an affirmation of a belief that they do not possess. Accordingly, legislation that requires all persons to have registration plates bearing the language “In God We Trust” would be constitutionally suspect under the Establishment Clause. *See Torcaso*, 367 U.S. at 495; *Everson*, 330 U.S. at 15-16.

2. “In God We Trust” as an Option. We next consider the constitutionality of legislation that would give vehicle owners the option of selecting a vehicle registration plate bearing the language “In God We Trust.” Removing the requirement that vehicle owners have registration plates displaying the language “In God We Trust” alleviates the Free Speech Clause and Free Exercise Clause concerns discussed above.

The only remaining consideration is the Establishment Clause.⁷ The Supreme Court’s general framework for analyzing Establishment Clause challenges comes from *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The three-pronged test conceived in *Lemon* provides that legislation: (1) must have a secular purpose; (2) must have a principal or primary effect which neither advances nor inhibits religion; and (3) may not foster “excessive government entanglement with religion.” *Id.* at 612-613. As discussed above, the element of coercion is sufficient for a violation of the Establishment Clause but it is not necessary.⁸

⁶ As the Court explained, religions in this country that do not teach what would generally be considered a belief in the existence of God include Buddhism, Taoism, Ethical Culture, Secular Humanism and others. *Torcaso*, 367 U.S. at 495 n. 11 (1961).

⁷ As discussed above, a message on a standard registration plate is a message of the State – “government speech.” *See Wooley*, 430 U.S. at 715-17. Messages on specialty registration plates are “government speech,” too, when the State retains control over the design and the messages displayed on the plates. *See Walker*, 135 S.Ct. at 2248-49. When speech is “government speech,” the governmental entity is “entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), but such speech must still comport with the Establishment Clause. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009).

⁸ *See* note 5, *supra*.

Under applicable Supreme Court precedent, a “legitimate secular purpose” supporting a challenged governmental action will suffice to satisfy the *Lemon* test’s first prong. See *Lynch*, 465 U.S. at 681. The first prong of the *Lemon* test is contravened “only if [the action] is ‘entirely motivated by a purpose to advance religion.’” *Wallace*, 472 U.S. at 56. See *Brooks v. City of Oak Ridge*, 222 F.3d 259, 265 (6th Cir. 2000) (“Unless it seems to be a sham, . . . the government’s assertion of a legitimate secular purpose is entitled to deference.”).

The purpose of the proposed legislation is not known, but the national motto is a symbol of common identity that serves an important secular purpose of reinforcing a citizen’s sense of membership in an identifiable state or nation. That the use of the language may have other purposes that are not exclusively secular does not mean that the use of the motto on vehicle registration plates fails the first part of the *Lemon* test. “Were the test that the government must have ‘exclusively secular’ objectives,” as the Supreme Court noted in *Lynch*, 65 U.S. at 681 n. 6, “much of the conduct and legislation this Court has approved in the past would have been invalidated.” Accordingly, the proposed legislation should satisfy the first prong of the *Lemon* test, assuming the legislation is not “entirely motivated by a purpose to advance religion.” See *Wallace*, 472 U.S. at 56.

Under the second prong of the *Lemon* test, the question is whether the “primary effect” of the usage of the national motto is one that either advances or inhibits religion. The inquiry here is “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval [of religion].” See *Wallace*, 472 U.S. at 56 n. 42. One could argue that use of the phrase “In God We Trust” on registration plates violates the second prong of the *Lemon* test because the phrase does embrace religion and a monotheistic god. But the fact remains that it is a patriotic and ceremonial motto; the phrase has been used as the national motto since 1956 and its use on coins dates back to the 1800’s. The Supreme Court has sustained certain legislation under a “ceremonial deism” theory in a noncoercive setting. See Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 Colum. L. Rev. 2083, 2091-94 (1996). The rationale is that certain phrases and practices that include the invocation of God in nondenominational terms have lost significant religious content over time through rote repetition. See *id.* For instance, the Supreme Court has upheld legislative opening prayers “in light of the unambiguous and unbroken history” of the practice for more than two hundred years, finding that the practice had become “part of the fabric of our society.” See *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

Accordingly, legislation that allows, but does not require, an operator of a motor vehicle to have a registration plate bearing the phrase “In God We Trust” is constitutionally defensible as a form of ceremonial deism under the second prong of the *Lemon* test.

Under the third prong of the *Lemon* test, the question is whether displaying the national motto on registration plates fosters an excessive government entanglement with religion. The kind of excessive entanglement of government and religion precluded by *Lemon* is characterized by “comprehensive, discriminating, and continuing state surveillance” of religious exercise. *Lemon*, 403 U.S. at 619. This prong requires examination of “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Lemon*, 403 U.S. at 615.

In *Lemon*, the state statutes under consideration required extensive state regulation and monitoring to insure that education paid for by state funds but delivered in church schools remained secular in nature. This was deemed to lead to “excessive entanglement.” *Id.* at 621. The proposed legislation at issue here is not comparable. The State’s role in making available as an option a license plate bearing the message “In God We Trust” would not lead to the type of excessive entanglement prohibited by the third prong of the *Lemon* test.

Accordingly, legislation that gives vehicle owners the option of selecting a vehicle registration plate bearing the language “In God We Trust” would be constitutionally defensible.

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