



Legislative Prayer

THE PRACTICE OF LEGISLATIVE PRAYER has been present throughout our nation's history. The Supreme Court has repeatedly upheld the right of government bodies to have prayers during their legislative meetings.¹ While the practice is clearly religious, it also "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society."² The United States Supreme Court recently provided additional direction on how a governing body may open its meeting with an invocation without proselytizing or disparaging any faith or belief in violation of the Establishment Clause of the First Amendment.³ While this recent decision has clarified particular parts of the legislative prayer debate, there are still ambiguities that local governments should be aware of.

Town of Greece

In *Town of Greece v. Galloway*, the Court upheld a local government legislative prayer practice that allowed sectarian prayers.⁴ The Court reasoned that it is not the job of courts or local governments to censor religious speech. Those who deliver legislative prayers are allowed to make references to a particular religion or religious figures.⁵ However, the prayer practice is still limited by the *Marsh* prohibition on proselytizing or disparaging any faith or belief.⁶ Local governments should not censor or review legislative prayers nor should they allow the overall prayer practice to either denigrate or proselytize.

Local governments do not need to look past their borders in order to gather a varied group of prayer-givers. That being said, the locality must welcome prayers from all members of the community that wish to deliver a prayer regardless of their religious affiliation. Local governments need not be concerned if the majority of their invocations represent a particular religion as long as the locality follows a policy of non-discrimination.⁷ Localities

should create a written policy governing their legislative prayer policy. This policy should mention that the prayer opportunity is open to speakers of all religious backgrounds and that prayers are not permitted to proselytize or disparage any faiths or beliefs.

Governments may not coerce anyone to engage in the prayer practice. The lawmakers are meant to be principal audience for these prayers and members of the public must be allowed to choose to participate in them or not, without pressure or embarrassment. However, what qualifies as coercion is not clearly set out. The court noted that "[t]he analysis would be different if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity."⁸

Here are a few examples of best practices that would ensure the localities is not engaged in coercion. Not all of these suggestions must be followed but they may help in developing a legislative prayer policy. Have the speaker face the city or town council and speak at the opening, more ceremonial portion of the meeting before any business is taken up. This will help to make it clear that the purpose of the prayer is to create a solemn atmosphere. The public must not be required to participate in any way. If possible, the governing body should allow a moment for the public and members of the council to leave and then return if they don't feel comfortable engaging in the invocation.

Council members delivering prayers

The Supreme Court, in *Town of Greece v. Galloway*, did not directly address the constitutionality of invocations delivered by members of the city or town council as opposed to members of the public because the public, not the council members delivered the prayers. Prior to the *Galloway* decision, the Western District of Virginia ruled on the facts in one case that this practice can be a violation of the Establishment Clause. That case, *Hudson v. Pittsylvania County*, is pending before the Fourth Circuit Court of Appeals. As of the date of this publication, there has been no decision in *Hudson*.

1 See *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014), *Lynch v. Donnelly*, 465 U.S. 668 (1984).

2 *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1811 (2014).

3 *Id.*

4 *Id.* at 1813-14.

5 *Id.*

6 *Id.* at 1814.

7 *Id.* at 1824.

8 *Id.* at 1825-26.

While the Fourth Circuit considers *Hudson*, public bodies who open their meetings with invocations delivered by council members must review their practice carefully in light of the *Galloway* decision. In *Galloway*, the public body took no role in determining the content of the prayers. The *Galloway* opinion held that a requirement that prayers be nonsectarian would impermissibly involve the government in religious matters. When council members deliver the prayers, that goes beyond regulating the prayers and directly involves the members in determining the content of the prayers; this could easily be seen by a Court as impermissibly “involv[ing] government in religious matters.”

The Town of Greece allowed persons of all faiths to volunteer to give a prayer and the prayers were directed at the members of the council by a person facing the council. These were important facts in determining that the practice in the Town of Greece did not advance one faith or belief. Council members usually face the public, rather than their fellow members. When the Council members themselves are delivering the invocations, especially while facing the public, it gives the impression that the council is not acting with the permissible purpose of lending gravity to the proceedings and reminding the lawmakers to act in the community’s best interests. Additionally, with council member-led prayers, persons of faiths not represented on the council have no opportunity to offer an invocation. This preference for particular faiths may be deemed a violation of the Establishment Clause.

The upcoming Fourth Circuit decision should clarify this issue. In the meantime, localities should be very cautious about relying on *Galloway* to support the practice of council members delivering prayer invocations.