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Legal Q&A

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Q. Is an invocation allowed at a city council meeting?

A. Many Texas cities, as well as other governmental entities, open their meetings with a brief prayer. Is this a violation of the doctrine of the separation of church and state? Not usually. Below is a summary of the law relating to prayer at a governmental body's meetings. Of course, each city should consult with local legal counsel regarding whether to open meetings with a prayer.

Q. What is "legislative prayer" and how is it analyzed under the law?

A. A prayer used to open the session of a governmental body is known as "legislative prayer." Legislative prayer is treated as a special issue under the United States Constitution's "Establishment Clause." The Establishment Clause is the part of the First Amendment that reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. CONST., amend I. Usually, the United States Supreme Court (Court) uses a three-part test, known as the *Lemon* test, to determine whether a governmental action violates the Establishment Clause. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). However, in the case of legislative prayer, the Court did not use the *Lemon* test but rather studied the role of legislative prayer in our country's history. In *Marsh v. Chambers*, the governing decision on the issue, the Court upheld the State of Nebraska's practice of opening each day during the legislative session with a prayer. *Marsh v. Chambers*, 463 U.S. 783 (1983).

Q. Why is legislative prayer different?

A. The Court based its reasoning in *Marsh* on the perceived intent of the writers of the Establishment Clause. *Marsh*, 463 U.S. at 790-92. According to the Court, the first Congress passed the First Amendment, including the Establishment Clause, in the same week that a chaplain was hired for the Congress. *Id.* at 790. In the eyes of the Court, this action indicated that legislative prayer was excepted from the Establishment Clause. *Id.* The Court held that legislative prayer created no more government entanglement with religion than: (1) bus transportation to parochial schools (citing *Everson v. Board of Education*, 330 U.S. 1 (1946)); (2) beneficial grants for higher education (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)); or (3) tax exemptions for religious organizations (citing *Walz v. Tax Comm'n*, 397 U.S. 664 (1970)). *Marsh*, 463 U.S. at 791. The Court noted that the content of the prayer itself should be of no concern to judges unless it is proselytizing or is disparaging to other faiths. *Id.* at 794-95.

Q. How is legislative prayer different from school prayer?

A. If legislative prayer is acceptable, why is prayer at school graduations or assemblies often successfully challenged? First, those involved in city council meetings are usually adults. Therefore, courts consider them to be less impressionable and susceptible to religious

indoctrination than children. *Marsh*, 463 U.S. at 795. Second, schools expect children to attend and participate in all aspects of school graduations or assemblies, and stepping out discreetly is difficult, if not impossible. *Lee v. Weisman*, 505 U.S. 577, 597 (1992). In contrast, adults attending a city council meeting may step out quietly for any reason without calling too much attention to themselves, thus choosing not to participate. *Id.*

Q. Can a city be sure that its legislative prayer is appropriate?

A: Previously, it was difficult for cities to determine whether their legislative prayer practices were appropriate. However, after the Court's decision in *Town of Greece v. Galloway*, cities have some clarification that may aid them in gauging whether their legislative prayer practices are appropriate. *Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811 (2014). That being said, it may still be impossible for a city to be **completely** certain, and a city should defer to local legal counsel in adopting a legislative prayer policy.

Q: What changed in the aftermath of *Town of Greece v. Galloway*?

A: In 2014, the United States Supreme Court addressed the question of whether prayers preceding town council meetings violated the First Amendment's Establishment Clause. At the time the Court took up the *Town of Greece* case, a conflict existed among the circuits regarding the scope of the *Marsh* holding and whether and to what extent sectarian prayers before council meetings were constitutionally permissible. In a 5-4 vote, the Court held that the sectarian prayers do not violate the United States Constitution, and are perfectly permissible. *Town of Greece*, 134 S.Ct. at 1828.

Q. What guidance did *Town of Greece v. Galloway* offer regarding legislative prayer?

A: The *Town of Greece* opinion contained guidance regarding when a prayer is and is not constitutional. As a rule, legislative prayer should be assumed constitutional so long as it:

- Is given at the session opening to lend gravity to the occasion;
- Reflects the values of the nation;
- Is given in a solemn and respectful tone;
- Invites lawmakers to reflect on shared ideals and common ends; and
- Is non-discriminatory among faiths.

On the other hand, legislative prayer will most likely not be constitutionally permissible if there is a pattern of:

- Denigrating/disparaging any religion;
- Threatening damnation;
- Preaching conversion; or
- Proselytizing or advancing any faith or belief. *Id.* at 1823-24.

Inquiries about the constitutionality of a prayer should be looked at in terms of the prayer opportunity as a whole, and should not focus on the content of a single prayer. The exact point at which a prayer becomes unconstitutional is uncertain. For instance, the Court did not establish a

bright line rule as to how extensive the denigration or proselytization has to be for a prayer situation to be unconstitutional.

Q: What should a city council avoid if it engages in legislative prayer practices?

A: A city council should avoid:

- Directing the public to participate;
- Singling out dissidents for criticism;
- Indicating that decisions might be influenced by acquiescence in the prayer opportunity;
- Classifying citizens based on religious views;
- Chastising dissenters;
- Attempting “lengthy disquisition on religious dogma;”
- Refusing a request to offer a prayer; and
- Scheduling prayer in temporal proximity to administrative or quasi-judicial activities. *Id.* at 1826-27, 1829.

Q. Should a city make an instruction booklet for religious leaders?

A. No. When a governmental entity tells religious leaders how to pray, even if the intention is to be helpful, that action violates the Establishment Clause. The Supreme Court held that a booklet given to religious leaders outlining what was and was not appropriate for a prayer at a school graduation was effectively a composition of the prayer by the government. *Lee v. Weisman*, 505 U.S. 577, 588 (1992). In the words of the Court, “it is no part of the business of government to compose official prayers of any group of the American people to recite as part of a religious program carried on by government.” *Id.* (quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

Q: What can a city do to update its “prayer policy” if it does engage in legislative prayer practices?

A: A city council that engages in legislative prayer should consider adopting a policy setting out their prayer practices. Policies might include the following information:

- A statement setting out the purpose of the prayer (examples of purposes are, “to lend gravity to public proceedings,” to “acknowledge the place religion holds in the lives of many private citizens,” and “to invite lawmakers to reflect upon shared ideals and common ends before they embark on the business of governing”);
- An explanation of the types of prayers that are allowed, and a statement that those offering prayers shall not proselytize or disparage any other faith or belief;
- A statement that no one is required to participate and that members of the public are free to join the meeting after the prayer or leave the meeting during the prayer;
- A statement that members of the public will not be treated differently based on whether they participate in the prayer; and
- A description of the process used to select who gives an invocation and how to become an invocation giver. ALLISON E. BURNS, LEGISLATIVE PRAYER POLICIES IN THE WAKE OF TOWN OF GREECE V. GALLOWAY (2014), *available at*: <https://texascityattorneys.org/2014-summer-conference-speaker-materials/>.

The Supreme Court stated that, “So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.” This means that a city council does not have to actively seek out potential prayer-givers. *Town of Greece*, 134 S.Ct. at 1814.

Q: What if atheists or other small religious denominations want to offer an invocation?

A: Cities must be prepared to consider requests from any group that may want to give an invocation, including small religious denominations, agnostic organizations, and atheist groups.

Q: Can city council members offer prayers at city council meetings?

A: This is still unclear. The Supreme Court chose not to address that particular question in the legal precedent described above. Thus, a city council that wishes to have a member offer or lead the prayer should consult with local legal counsel prior to doing so.