ACLJ

MEMORANDUM

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Public Prayer

As Christians we are called to pray, and many Americans respond to that call in a variety of ways. Unfortunately, despite the long history of official government acknowledgment of the role of religion in American life, there are still organizations that challenge the right of private citizens to participate in prayer on public property. At the ACLJ, we continue to fight for your right to pray in public, according to the dictates of your conscience.

Private religious speech, including prayer, is protected by the First Amendment.

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. Subsequent Supreme Court "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Thus, one's participation in activities such as prayer, worship, and other religious speech, is protected under the First Amendment. *See Widmar v. Vincent*, 454 U.S. 263, 269 (1981) (specifically including "religious worship and discussion" as forms of protected speech).

One of the most frequently advocated positions for restrictions on religious speech is that of achieving the "separation of church and state." Achieving that objective, however, cannot justify suppressing private speech, because the Establishment Clause only forbids Congress from making a law "respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court has recognized that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Bd. of Educ. of the Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality).

Last term, the Supreme Court reinforced this principle in *Kennedy v. Bremerton Sch. District*, 142 S. Ct. 2407 (2022):

> Both the Free Exercise and Free Speech Clauses . . . protect [private religious] expressions [in a public place]. Nor does a proper understanding of the . . . Establishment Clause require the government to single out private religious speech

> for special disfavor. The Constitution and the best of our traditions counsel mutual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike. . . . Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head.

Id. at 2416, 2432–33. Therefore, a private citizen may engage in prayer in public without fear of violating the Establishment Clause.

Furthermore, the government may not deny equal access to a public forum (such as a public library meeting room or school auditorium made available for public use) for prayer and worship based on concerns about violating the Establishment Clause. Recent Supreme Court pronouncements render untenable any suggestion that speech by private parties, in public fora available for use by a variety of private organizations, could somehow trigger a violation of the Establishment Clause. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112–20 (2001); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995). Thus, when a municipal government allows non-religious speakers to engage in protected speech activities on courthouse lawns, steps, or the like, it is simply acting in a neutral manner, rather than violating the Establishment Clause, when it affords religious speakers the same rights.

The Supreme Court has stated, "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens*, 496 U.S. at 248 (plurality) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment)). Accordingly, the First Amendment precludes any governmental effort to single out, censor, or otherwise burden one's private speech solely because that speech is religious.

Legislative Sessions and other State and Local Government Meetings Can Be Constitutional If Done Properly.

Many communities nationwide include a short prayer as a part of school board meetings, town council meetings, legislative sessions, and other public functions. The Supreme Court has acknowledged the fact that:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.

Marsh v. Chambers, 463 U.S. 783, 786 (1983). However, the constitutionality of public prayer has become a prominent issue in recent years because the major Supreme Court decision in this area—Marsh—has not been interpreted uniformly by the lower federal courts across the country. While Marsh upheld the centuries-old practice of opening legislative sessions with a prayer, it did not clearly answer important questions about the content of permissible prayers, the kind of public

events at which prayer may occur, and whether it is permissible to limit the prayer to one particular person.

In 2014, the Court expounded on *Marsh's* holding. *See generally Town of Greece v. Galloway*, 572 U.S. 565 (2014). The *Galloway* court rejected the notion that *Marsh* "suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 580. Instead, the Court found that *Marsh* held that the content of the prayer is irrelevant as long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith, or belief." *Id.* at 581 (quoting *Marsh*, 463 U.S. at 794–95). Further, the Supreme Court noted that the "[g]overnment may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy." *Id.*

However, *Galloway* noted that a court may have grounds to restrict legislative prayer "[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion . . ."; the prayer extends beyond the intended "mean[ing] to lend gravity to the occasion and [fails to] reflect values long part of the Nation's heritage"; or the persons present are not "adult citizens, firm in their own beliefs, [who] can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." *Id.* at 583–84. Thus, without the presence of a pattern of prayers that "denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation." *Id.* at 585. Furthermore, if a town "maintains a policy of nondiscrimination," a town is not constitutionally required to search outside its borders for people of different faiths to give prayers to maintain neutrality. *Id.* at 586.

The circuits have considered the applicability of the legislative prayer exception in a variety of circumstances. However, following *Galloway's* decision, only a few circuits have addressed public prayer issues while some circuits' holdings only reflect the *Marsh's* Court's applicability and others remain silent. Thus, though the circuits' view of the *Marsh-Greece* exception is split, it is also somewhat limited.

In the school-prayer context, the Ninth, Third, and Sixth circuits have held that the *Marsh-Greece* exception was inapplicable to a public-school board meeting. *Freedom from Religion Found., Inc. v. Chino Unified Sch. Dist. Bd. of Educ.*, 896 F.3d 1132, 1145, 1148 (9th Cir. 2018) (noting that the "audience and timing of the prayers, as well as the religious preaching at the Board meetings, diverge from the legislative-prayer tradition"); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 278–79 (3d Cir. 2011) (holding that *Marsh's* legislative prayer exception does not apply to school board meetings because a school board's "entire purpose and structure . . . revolves around public school education"); *Coles ex. rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 377, 383 (6th Cir. 1999) (holding that *Marsh* is inapplicable to innovations in the school board meeting context because these meetings "might be of a 'different variety' than other school-related activities"). Meanwhile, the Fifth Circuit held that the legislative prayer exception did apply to a school board meeting. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 526, 528–29 (5th Cir. 2017) (analogizing a school board's meeting where students led an invocation that included prayer to a

legislature's meeting in *Galloway* even though children were present and members of the board bowed their heads during the invocation).

In the government-prayer context, the Third, District of Columbia, and Sixth Circuits have upheld prayer in the legislative and municipality context as a valid constitutional historical tradition. *See Fields v. Speaker of the Pa. House of Representatives*, 936 F.3d 142, 163 (3d Cir. 2019) (holding that "the House's policy preferring theistic over nontheistic prayers does not violate the Establishment Clause because it fits squarely within the historical tradition of legislative prayer"); *Barker v. Conroy*, 921 F.3d 1118, 1132 (D.C. Cir. 2019) (holding that the legislator's requirement that a prayer must be somehow religious was valid under the legislative prayer exception); *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 519 (6th Cir. 2017) (holding that "Jackson County's invocation practice is consistent with *Marsh v. Chambers* and *Town of Greece v. Galloway* and does not violate the Establishment Clause."). Relying heavily on *Galloway*, the Fifth Circuit has extended the legislative prayer exception to courtroom prayers given prior to the start of judicial business. *Freedom from Religion Found., Inc. v. Mack*, 49 F.4th 941, 961 (5th Cir. 2022) (holding that a judge who chooses to open his daily court sessions with prayer "must ensure that (1) he has a policy of denominational discrimination and that (2) anyone may choose not to participate and suffer no consequences"). Meanwhile, the Fourth and the Eleventh Circuits have struck down the practice of offering prayer during invocations before government bodies. *See Lund v. Rowan Cnty., N.C.*, 868 F.3d 268, 285, 291–92 (4th Cir. 2017) (holding that these invocations were unconstitutional because they characterized Christianity as "the one and only way to salvation" and urged attendees to embrace Christianity); *Williamson v. Brevard Cnty.*, 928 F.3d 1296, 1317 (11th Cir. 2019) (holding that a board of commissioners' practice for holding prayer was unconstitutional because they failed to exercise neutrality when selecting speakers and scrutinized some religions more than others).

As such, schools, legislatures, municipalities and other governmental bodies considering opening their meetings with a word of prayer should consult their own attorney(s) directly for legal advice specific to their situation.

Public Officials May Call on the Public for a Time of Voluntary Prayer.

From the nation's founding to the present day, presidents and governors have called for voluntary prayer or reflection in response to natural disasters, tragedies, and other significant events. For example, those who signed the Declaration of Independence believed that God hears and answers prayer, as they "appeal[ed] to the Supreme Judge of the world to rectify their intentions." *Declaration of Independence* (U.S. 1776). The Declaration recognizes that human liberties are a gift from "Nature's God," as "all men . . . are endowed by their Creator with certain unalienable Rights." *Id.* Public proclamations of thanksgiving and prayer are a longstanding part of American history. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 671–72 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also Marsh*, 463 U.S. at 783 (recognizing that historic practice is relevant to Establishment Clause analysis).

As the Supreme Court has noted, "To invoke Divine guidance on a public body entrusted with making laws is not, in these circumstances, an 'establishment' of religion or a step toward

establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792.

It is important to note that the Constitution cannot be interpreted to purge all religious reference from the public square. "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

Since "[t]here is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," it is important to remember that "[a] State has not made religion relevant to standing in the political community simply because a particular viewer of [religious activity] might feel uncomfortable." *Pinette*, 515 U.S. at 780 (1995) (O'Connor, J, concurring). The Establishment Clause "is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." *Id.* at 779. Thus, the fact that some individuals may disagree with public prayer resolutions does not make the practice unconstitutional.

Last updated: January 18, 2023