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MEMORANDUM

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Public Prayer

As Christians we are called to pray, and many Americans are responding to that call in a powerful way. Unfortunately, despite the long history of official government acknowledgment of the role of religion in American life, some may 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 and Advisory Board 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." 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. at 250 (plurality). 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 Central School*, 533 U.S. 98, 112–20 (2001); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 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.

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 Voluntarily 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. *County of Allegheny v. ACLU*, 492 U.S. 573, 671–72 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also Marsh v. Chambers*, 463 U.S. 783 (1983) (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." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 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.