



May 20, 2014

President Roderick Royal
Birmingham City Council
710 North 20th Street
Birmingham, Alabama 35203

Re: A LEGAL UPDATE ON THE LEGALITY OF PUBLIC INVOCATIONS

Dear President Roderick Royal:

In recent years, the historical and cherished American tradition of opening public meetings with prayer has come under attack. Community activists and groups such as the American Civil Liberties Union, Americans United for the Separation of Church and State, and the Freedom from Religion Foundation, have demanded that public invocations be censored or silenced in communities across the country. The Birmingham City Council has faced these challenges. Having previously interacted with community members or leaders about public prayers, Alliance Defending Freedom wanted to write to you specifically to inform you about *Town of Greece v. Galloway*, the Supreme Court decision that protects public prayer and the rights of prayer givers to determine how they pray. 572 U.S. ___, 2014 WL 1757828 (May 5, 2014).

By way of introduction, Alliance Defending Freedom is an alliance-building, non-profit legal organization that advocates for the right of people to freely live out their faith. Our organization exists to educate the public and the government about important constitutional rights, particularly the freedom of religious expression. Alliance Defending Freedom has been called upon to assist and successfully defend many public officials nationwide. As the legal team that successfully defended the Town of Greece, New York before the Supreme Court, we are uniquely qualified to report on the Court's

decision. This letter provides a detailed legal analysis concerning public invocation practices and concludes with an offer of free legal assistance.

I. LEGAL ANALYSIS

In his Farewell Address on September 19, 1796, President Washington famously admonished: “Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.... The mere Politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity.”¹ It is both lawful and wise for public officials to respect and cherish our religious heritage and to invoke God’s protection and guidance over their public work and our nation.

There is simply no question that a public deliberative body may open its meetings with an invocation, even one that includes a prayer that expresses a distinctive faith perspective. Public prayer has been an essential part of our heritage since before this nation’s founding, and our Constitution has always protected that activity. Despite concentrated efforts by activist groups to have prayers silenced or purged of distinctly Christian references, the Supreme Court has—for the second time now—declared that opening prayers do not run afoul of the First Amendment’s Establishment Clause.

A. The Legality of Public Invocations is Beyond Dispute.

The United States Supreme Court has acknowledged that official proclamations of thanksgiving and prayer, and invocations before the start of government meetings, are an essential part of our culture and in no way a violation of the Constitution. This has been a consistent principle in First Amendment jurisprudence, and the Supreme Court has directly addressed the practice of public prayers on two occasions.

The first is *Marsh v. Chambers*, 463 U.S. 783 (1983), where the Court approved the Nebraska Legislature’s practice of opening each day of its sessions with a prayer given by a government official, a chaplain paid with taxpayer dollars. In *Marsh*, Chief Justice Burger concluded:

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.

¹ *Washington’s Farewell Address 1796*, YALE LAW LIBRARY LILLIAN GOLDMAN LAW LIBRARY, http://avalon.law.yale.edu/18th_century/washing.asp (last visited May 15, 2014).

Id. at 786. The Court noted that the final language of the Bill of Rights was agreed upon just three days *after* Congress authorized opening prayers by paid chaplains. *Id.* at 788. Clearly then, “[t]o invoke Divine guidance on a public body ... is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment” *Id.* at 792.

When analyzing a public holiday display in *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), the Supreme Court again affirmed that “[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.” Justice O’Connor opined that such official references encompass “legislative prayers of the type approved in *Marsh* ..., government declaration of Thanksgiving as a public holiday, printing of ‘In God We Trust’ on coins, and opening court sessions with ‘God save the United States and this honorable court.’” *Id.* at 693 (concurring opinion). She explained, “Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Id.*

The Supreme Court has now—for a second time—directly addressed the validity of opening public meetings with prayer. In *Town of Greece v. Galloway*, 572 U.S. ___, 2014 WL 1757828 (May 5, 2013), the town was sued because volunteer citizens opened the town council’s meetings with prayer. Most of the volunteers chose to deliver prayers that were distinctly Christian. The suit aimed to silence the prayers or mandate censored prayers that were generic and void of any references that are distinct to a particular faith. But the Supreme Court upheld the town’s practice and again affirmed that “[a]s practiced by Congress since the framing of the Constitution, legislative prayer 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.” *Id.* at *7.

B. Prayers cannot be religiously censored.

For the past decade, secularist groups have used federal lawsuits, the media, and an aggressive letter writing campaign to intimidate government officials into either abandoning the cherished American tradition of seeking Divine guidance or censoring prayers. The Supreme Court has now definitively spoken—holding that the Constitution not only allows such prayers, but that it precludes government from censoring them.

1. Avoid theological line drawing.

Some activist groups have contended that all references to a distinctive faith, such as Christianity, must be removed from public prayers. Indeed, this was the chief complaint in *Town of Greece*. *Id.* at *5. In response, the Court stated: “To hold that invocations must be nonsectarian would force legislatures that sponsor prayers and the

courts that are asked to decide these cases to act as supervisors and censors of religious speech.” *Id.* at *10. The Supreme Court has now made clear that the Constitution prohibits such censorship:

Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.

Id. at *11 (emphasis added).

This explicit statement reiterates warnings that the Court has issued in prior cases. *See Engle v. Vitale*, 370 U.S. 421, 425 (1962) (noting the government cannot dictate the content of prayers); *Lee v. Weisman*, 505 U.S. 577, 588 (1992) (recognizing that mandating “nonsectarian” prayer involves a dangerous element of governmental control over public prayers).

In addition to the Court’s direction, a review of historical and present day practices demonstrates the nature of constitutionally permissible public prayers. For example, in both *Marsh* and *Town of Greece*, the Supreme Court noted approvingly the prayer offered at the first session of the Continental Congress on September 7, 1774 by the Rev. Jacob Duché. *Marsh*, 463 U.S. at 787; *Town of Greece*, 2014 WL 1757828, at *12. Rev. Duché included these words in his prayer:

Be Thou present; O God of Wisdom, and direct the councils of this Honorable Assembly: enable them to settle all things on the best and [surest] of foundations: that the scene of blood may be speedily closed: that Order, Harmony and Peace may be effectually restored, and Truth, and Justice, Religion, and Piety prevail and flourish among the people. Preserve the health of their bodies and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. *All this we ask in the name and through the merits of Jesus Christ, Thy Son and Our Savior, Amen.*²

The content of Rev. Duché’s prayer is virtually indistinguishable from the content of the typical opening prayer at any public meeting in America today. So in addition to the high court’s announcement of legal precedent, state and local governments can look to the

² September 7, 1774, FIRST PRAYER IN CONGRESS: BEAUTIFUL REMINISCENCE (Washington, D.C. Library of Congress); WILLIAM J. FEDERER, AMERICA’S GOD AND COUNTRY: ENCYCLOPEDIA OF QUOTATIONS 137 (Coppell, TX Fame Publishing, Inc., 1994), GARY DEMAR, GOD AND GOVERNMENT: A BIBLICAL AND HISTORICAL STUDY 108 (Atlanta, GA American Vision Press, 1982); JOHN S.C. ABBOTT, GEORGE WASHINGTON 187 (New York, NY Dodd, Mead & Co., 1875, 1917).

practices of the U.S. Congress for guidance. The legislative prayers offered in Congress often make clear references to a specific deity, such as Jesus.³

2. Honor the purpose of the prayer

The government cannot create a theological litmus test for regulating public prayers. However, the Supreme Court has identified limits for public prayers in order to ensure that invocations serve the purpose for which they are given. *Town of Greece*, 2014 WL 1757828, at *11 (“The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation’s heritage.”). In particular, the Supreme Court stated that the government should avoid a practice that “over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.” *Id.*; see also *Marsh*, 463 U.S. at 794-95 (“The content of the prayer is not of concern to judges where, as here, 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.”). This simple and easily applied rule avoids any theological inquiries and is consistent with the proper decorum for conducting public business.

In summary, legislative prayers—even distinctly Christian ones—are clearly constitutional and “deeply embedded in the history and tradition of this country.” *Marsh*, 463 U.S. at 786.

C. Deliberative public bodies at all levels of government can open public meetings with a prayer.

The first time the Supreme Court considered prayers in public meetings, it did so in the context of a state legislature, but the Court did not limit its holding to state-wide or national public bodies. In fact, the Court opened its analysis by noting that “[t]he opening of sessions of legislative and *other deliberative public bodies* with prayer is deeply embedded in the history and tradition of the country.” *Marsh*, 463 U.S. at 786 (emphasis added). The Court considered historical practices of the U.S. Congress and extended its rationale to any “public body” entrusted with making laws and setting policies for a community. *Id.* at 792. Now, the Supreme Court has explicitly stated that local public bodies may open their meetings with prayer. See *Town of Greece*, 2014 WL 1757828, at *14-17 (approving opening prayers at a town council meeting). Public officials at all levels of government have the liberty and the right to embrace this American tradition and benefit from seeking Divine guidance and blessing on their endeavors.

D. The identity of the prayer giver is not limited.

³ See, e.g., *Newdow v. Bush*, 355 F. Supp. 2d 265, 285 n.3 (D.D.C. 2005) (acknowledging that “the legislative prayers at the U.S. Congress are overtly sectarian”).

Courts across the country have approved varying sorts of public invocation policies. The U.S. Supreme Court, in *Marsh*, approved a practice of using a **chaplain** to deliver a public invocation before a deliberative body. 463 U.S. 783. In *Town of Greece*, the Supreme Court approved **volunteer members of the community** offering the invocation. 2014 WL 1757828. Numerous courts have also affirmed the practice of inviting **local clergy** to deliver a public invocation. See *Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008); *Rubin v. City of Lancaster*, 710 F.3d 1087 (9th Cir. 2013). And in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005), and *Turner v. City Council of the City of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008), *cert. denied*, 555 U.S. 1099 (2009), courts specifically approved practices in which the invocations were delivered by the **elected officials**. In the wake of the *Town of Greece* decision, several groups challenging public prayers have suggested that the legal analysis differs when prayers are offered by elected officials, but no court in the country has agreed with that contention. The Supreme Court found no legal distinction between prayers offered by a government employee in *Marsh* and prayers offered by volunteer citizens in *Town of Greece*. And two courts of appeals have already found that prayers are not unconstitutional simply because they are offered by elected officials. These cases demonstrate that deliberative public bodies are free to adopt a practice that best meets the needs of the local community.

II. OFFER OF *PRO BONO* ASSISTANCE

Alliance Defending Freedom has consulted with many state and local government leaders across the nation to assist in crafting solutions to the recent challenges to public prayer brought by the ACLU and others. And Alliance Defending Freedom is prepared to continue assisting public bodies in developing policies and practices that rightly preserve the American tradition of opening legislative sessions with prayer.

Alliance Defending Freedom is willing to work with any government body to craft invocation policies that pass constitutional muster. For that reason, Alliance Defending Freedom will consult—free of charge—with deliberative bodies in the development of invocation policies. Alliance Defending Freedom will also provide a free legal defense to any local governmental bodies working cooperatively with us if their invocation policy is legally challenged. A sample policy that incorporates practices already approved by federal courts can be downloaded at <http://alln.cc/prayer-policy>.

It is our hope that the information provided in this letter will be helpful in explaining the reasons why governmental bodies can and should continue the tradition of opening their public deliberations with invocations. We encourage each deliberative body to codify its invocation practices with a constitutionally sound written policy.

Please do not hesitate to contact us if Alliance Defending Freedom can provide any further information or assistance, or if we may help respond to any challenge or threat of litigation with regard to religious acknowledgement or expression in your community. As a not-for-profit organization, our services are provided *pro bono*.

Very sincerely yours,



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