Legislative Prayer (Invocation) Policies in the Wake of the U.S. Supreme Court Ruling in *Greece v. Galloway*

Thursday, September 4, 2014 General Session; 4:00 – 5:15 p.m.

Allison E. Burns, City Attorney, Lancaster

2014 League of California Cities Annual Conference – City Attorneys' Track
Los Angeles Convention Center, Los Angeles

Notes:

Stradling
Attorneys at Law

LEGISLATIVE PRAYER POLICIES IN THE WAKE OF TOWN OF GREECE V. GALLOWAY

PRESENTED TO:
LEAGUE OF CALIFORNIA CITIES

BY:
ALLISON E. BURNS
STRADLING YOCCA CARLSON & RAUTH
660 NEWPORT CENTER DRIVE, SUITE 1600
NEWPORT BEACH, CA 92660
DIRECT TEL.: 949 725 4187
ABURNS@SYCR.COM

I. INTRODUCTION.

In May, 2014, the United States Supreme Court issued its decision on the question of whether sectarian prayers preceding town council meetings, as conducted in the Town of Greece, New York, violated the establishment clause of the United States Constitution. The majority opinion authored by Justice Kennedy and joined by Chief Justice Roberts as well as Justices Alito, Scalia and Thomas held that such prayer practices were constitutionally permissible. This holding is consistent with the recent decision by the Ninth Circuit Court of Appeals in *Rubin v. Lancaster*, 710 F.3d 1087 (9th Cir. 2013). While the *Greece* decision answered the immediate question of whether sectarian prayers before council meetings are permissible under the U.S. Constitution, it left open other questions regarding when and to what extent prayer policies and practices might cross the constitutional line into impermissible coercion or proselytizing. In addition, it remains uncertain whether the same invocation practice would withstand scrutiny under unique provisions of the California Constitution.

II. BACKGROUND.

The First Amendment to the United States Constitution, applicable to states by virtue of the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion…" (the Establishment Clause). More than three decades ago, the United States Supreme Court held in *Marsh v. Chambers*, 463 U.S. 783, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) that the opening of sessions of state legislatures with prayer is deeply embedded in the history and tradition of this country and does not violate the Establishment Clause. *Marsh*, 463 U.S. at 792. After an extensive review and analysis of the history of legislative prayer, the *Marsh* Court ultimately held that legislative prayer does not violate the Establishment Clause, reasoning that:

> In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among people of this country.

Id. at 792.

After holding that legislative prayer in general is constitutional, the *Marsh* Court then considered whether any of the following three specific aspects of the Nebraska Legislature's practice at issue in *Marsh* violated the Establishment Clause: (i) the fact that a clergyman of only one denomination (Presbyterian) was selected for sixteen years; (ii) the fact that the chaplain was paid at public expense; and (iii) the fact that the prayers were in the Judeo-Christian tradition. *Marsh*, 463 U.S. at 792-793.

The Court quickly disposed of any concern related to the chaplain's sixteen-year tenure because the evidence indicated that the chaplain was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. The Court also dismissed any concern related to the fact that the chaplain was paid at public expense because such remuneration was grounded in historic practice initiated by the same Congress that drafted the Establishment Clause. *Id.* at 794.

Lastly, the Court disposed of any concern related to the fact that the prayers were in the Judeo-Christian tradition because, in the words of the Court, "[t]he 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." *Id.* This was true regardless of the fact that the prayers were explicitly Christian for fifteen of the chaplain's sixteen-year tenure. *Id.* at 793-94. The Court refused to "embark on a sensitive evaluation or to parse the content of a particular prayer" because it found that the prayer opportunity had not been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *Id.* at 793 n. 14. However, the Court did observe in a footnote that the chaplain had removed all references to "Christ" after receiving a complaint from a legislator; that footnote became the impetus for a myriad of challenges to prayer policies throughout the Nation on the grounds that the true holding of *Marsh* was that it required legislative prayers to be 'non-sectarian.'

Those who argued against a 'non-sectarian' requirement focused on the *Marsh* Court's refusal to parse the content of any single prayer absent a threshold showing that a legislative body has exploited the prayer ***opportunity*** to proselytize or to disparage a particular faith or belief. *Id.* at 794. While the *Marsh* Court did not explicitly state what constitutes exploitation of the prayer

opportunity, it did provide the standard by which exploitation is determined. When the *Marsh* Court considered whether the selection of a single Presbyterian clergyman by the Nebraska Legislature for sixteen years constituted an exploitation of the prayer opportunity, it looked at the reason for the clergyman's long tenure. The *Marsh* Court found that the clergyman's extended tenure did not constitute an exploitation of the prayer opportunity because the evidence indicated that he was reappointed based upon his performance and personal qualities, not his religious views. *Id.* at 793. By implication, this means that a legislative body exploits the prayer opportunity only if its policy, practice and/or conduct purposefully and intentionally proselytizes, advances or disparages a faith or belief.

Those who argued for a 'non-sectarian' requirement in legislative prayer policies urged that Footnote 14, in which the Court noted that all references to Jesus had been removed by the Nebraska Chaplain in response to a request by one of the legislators, was the deciding factor in the *Marsh* Court's decision to uphold the Nebraska Legislature's practice.

At the time the Supreme 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:

- Second Circuit: In *Galloway v. Town of Greece*, 681 F.3d 20 (2nd Cir. 2012) court held below that "a legislative prayer practice that, however well-intentioned, conveys to a reasonable objective observer under the totality of the circumstances an official affiliation with a particular religion violates the clear command of the Establishment Clause." *Id.* at 34. According to the Second Circuit, such a situation existed in Greece because the predominance of prayers offered were associated with a particular creed. *Id.* The Second Circuit shifted the determinative issue from whether Greece actually exploited the prayer opportunity to whether a reasonable objective observer under the totality of the circumstances would perceive an affiliation with a particular religion. However, the Second Circuit expressly did not "[…] hold that any prayers offered in this context must be blandly 'nonsectarian.'" *Id.* at 33-34.

- Fourth Circuit: In *Joyner v. Forsyth County*, 653 F.3d 341 (4th Cir. 2011), the Forsyth County Board of Commissioners (the "Board") followed a relatively routine practice (which was reduced to writing in 2007) of compiling and maintaining a database of all religious congregations with an established presence in the community. *Id.* at 343. The Board's clerk established and maintained the database by using the Yellow Pages, Internet research, and consultation with the local chamber of commerce. *Id.* No eligible congregation was excluded and a congregation could confirm its inclusion by writing to the clerk. The clerk updated the database on an annual basis and would then mail an invitation to the leader of each congregation informing those individuals that they could

schedule an appointment to deliver an invocation on a first-come, first-served basis. *Id.* The Board would not schedule any leader for consecutive meetings or for more than two meetings in any calendar year. *Id.* Other than requesting that invocation speakers not exploit the invocation opportunity as an effort to convert others, or disparage any other faith or belief, the Board took a hands-off approach to the content of invocations. *Id.* The Court found that since the board formalized its invocation policy in 2007, almost four-fifths (almost 80%) of invocations referred to Jesus, Jesus Christ or Christ and the record included not a single non-Christian prayer. *Id.* at 344. In holding that Forsyth County's invocation policy, as implemented, violated the Establishment Clause, the court reasoned that "…the exception created by *Marsh* is limited to the sort of nonsectarian legislative prayer that solemnizes the proceedings of legislative bodies without advancing or disparaging a particular faith." *Id.* at 349. "Put differently, legislative prayer must strive to be nondenominational so long as that is reasonably possible – it should send a signal of welcome rather than exclusion. It should not reject the tenants of other faiths in favor of just one." *Id.* Notably, however, the court specifically stopped short of holding that *Marsh* permits only nonsectarian invocations when it recognized that "[i]nfrequent references to specific deities standing alone, do not suffice to make out a constitutional case." *Id.* "But legislative prayers that go further – prayers in a particular venue that repeatedly suggest the government has put its weight behind a particular faith – transgress the boundaries of the Establishment Clause." *Id.* Thus, the Fourth Circuit's "frequency test" was born.

- Ninth Circuit: In *Rubin v. City of Lancaster*, the Ninth Circuit rejected the argument that a city's prayer practice, when viewed in context, violated the Establishment Clause because the majority of prayers were Christian. *Id.* at 1097. In *Rubin*, the City of Lancaster for years had an informal practice of opening its city council meetings with a citizen-lead prayer. *Id.* at 1089. In 2009, the city adopted a formal policy that established a two-step process for soliciting prayer-givers. *Id.* First, the city clerk compiled a list of local congregations by searching the Yellow Pages, Internet and newspaper and consulting the local chamber of commerce. *Id.* All congregations located within the city were eligible to be on the list and the clerk made no inquiry concerning the faith, denomination or belief of any person or congregation asking to be placed on the list. *Id.* Second, the city clerk mailed an invitation to each person or congregation appearing on the list to open a city council meeting with a prayer. *Id.* The city exercised no control over the content of prayers and no person who offered to pray had ever been turned down. *Id.* Between the date the city formally adopted its prayer policy in 2009 and the date the plaintiffs filed their complaint, twenty (or 77%) of the prayers were given by Christians and each referred to Jesus by name. *Id.* at 1090. The Ninth Circuit rejected the "reasonable objective observer test" applied by the Second Circuit in

Galloway v. Greece, the Ninth Circuit explained that "[b]ypassing the reasonable observer, the *Marsh* Court instead trained its analysis not only on history but on the government's actions." *Id.* at 1096 (emphasis in original); see also *Pelphrey v. Cobb County*, 547 F.3d 1263 (11th Cir. 2008). The Ninth Circuit concluded that "[…] the question in this case is not simply whether, given the frequency of Christian invocations, the reasonable observer of Lancaster's city-council meetings would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. Responding to the plaintiffs' argument that the frequency of Christian prayers had the effect of advancing Christianity, the Ninth Circuit explained that "[t]his argument misconceives the focus of our inquiry. Whatever the content of the prayers or the denomination of the prayer-givers, the City chooses neither." *Id.* at 1098. The Ninth Circuit stated, "[t]he [legislative body] cannot control which religious congregations settle within its limits. Nor can it compel leaders of those congregations to accept its invitations." *Id.* at 1099.

- Eleventh Circuit: In *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271-72 (11th Cir. 2008), the Eleventh Circuit upheld Cobb County's longstanding tradition of opening meetings with clergy invited on a rotating basis. In Cobb County, the clergy list was compiled from multiple sources (yellow pages and internet) and the clergy were randomly selected, but majority Christian (68-70%). The Eleventh Circuit upheld the County's practice, finding that "Nonsectarian" prayers are not required because such a rule would be contrary to *Marsh's* directive that "courts are not to evaluate the content of prayers absent evidence of exploitation." The *Pelphrey* court explicitly rejected an argument that *Marsh* permits only nonsectarian legislative invocations and cautioned that courts should not evaluate the content of legislative invocations absent evidence of exploitation. *Pelphrey*, 547 F.3d at 1271. In *Pelphrey*, two county commissions had a long standing tradition of opening their meetings with an invocation by volunteer clergy invited by county personnel on a rotating basis, although the majority of those who delivered an invocation were Christian. *Id.* at 1267. The commissions did not compose or censor any invocations and did not compensate any of the clergy. *Id.* During the ten (10) year period preceding the court's decision, seventy percent (70%) of the invocations before one commission and sixty-eight percent (68%) of the invocations before the other contained Christian references. *Id.* Invocations often ended with references to "our Heavenly Father" or "in Jesus' name we pray." *Id.* Generally speaking, a list of religious organizations was compiled from several sources, including the Yellow Pages, the Internet and business cards, and then a speaker was randomly selected. *Id.* Applying *Marsh*, the *Pelphrey* court rejected an argument that legislative invocations must be nonsectarian, explaining that such a rule would be "…contrary to the command of *Marsh* that courts are not to evaluate the content of prayers absent evidence of exploitation" and

that "[t]o read *Marsh* as allowing only nonsectarian prayers is at odds with the clear directive by the Court that the content of a legislative prayer 'is not of concern to judges where…there is no indication that the prayer opportunity has been exploited to proselytize or advance any one…faith or belief.'" *Id.* at 1271. Ultimately, the *Pelphrey* court concluded that the identity of the speakers and the invocations at issue, when compared to what was permitted in *Marsh*, taken as a whole did not advance any particular faith. *Id.* at 1277-1278.

In the context of this split among the Circuits, the Supreme Court granted certiorari in the *Greece v. Galloway* case in 2013.

III. THE TOWN OF GREECE V. GALLOWAY DECISION.

A. Opinion of the Court.

The majority opinion was authored by Justice Kennedy and joined by Chief Justice Roberts as well as Justices Alito, Scalia and Thomas. The Court's analysis centered on the *Marsh* decision and the historical practice throughout the United States of commencing governmental meetings with prayers. The Court focused its analysis on whether the Town's prayer practice fit within the historical tradition upheld in *Marsh*. The Court disposed of the argument that prayers must be nonsectarian as inconsistent with the tradition of legislative prayer described in the Court's cases. The court noted that today Congress continues to allow sectarian prayer, "[Congress] acknowledges our growing diversity not by proscribing sectarian content but by welcoming ministers of many creeds." *Marsh* at 10 (citing prayers by Dalai Lama, Rabbi, Hindu leader, and Imam). The majority dismissed the argument that *Allegheny's* citation to the *Marsh* decision's Footnote 14 to require nonsectarian prayer as dictum "that was disputed when written and has been repudiated by later cases." *Id.* at 11. The Court went on to state *Marsh* "nowhere suggested that the constitutionality of legislative prayer turns on the neutrality of its content." *Id.* at 12.

The Court emphasized that a nonsectarian requirement would force legislatures and courts to become "supervisors and censors of religious speech" and queried whether consensus could ever be "reached as to what qualifies as generic or nonsectarian." *Id.* at 13. The titles, Lord of Lords, King of Kings, God, Lord God and Almighty may alienate nonbelievers and because the "First amendment is not a majority rule… 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 14.

The opinion provided some guidance as to the critical elements of a constitutional prayer policy:

- Given at the session opening;
- To lend gravity to the occasion;
- Reflecting the values of the Nation;
- Given in a solemn and respectful tone;
- Inviting lawmakers to reflect on shared ideals and common ends; and
- No discrimination among faiths.

The plurality also provided guidance as to what pattern of activity will render a policy unconstitutional:

- Denigration/disparagement of any religion;
- Threatened damnation;
- Preaching conversion; or
- Proselytizing or advancing any faith or belief.

The court reiterated that *Marsh* mandates inquiry into the prayer opportunity as a whole, rather than the content of a single prayer.

B. PLURALITY.

The portion of Justice Kennedy's opinion in which he analyzed the coercion argument proffered by the Respondents of was joined only by Chief Justice Roberts and Justice Alito. In this portion of the opinion, Justice Kennedy considered the historical practice of legislative prayers at Greece's town council meetings and found without merit the Respondents' argument that prayers at town meetings are different than prayers at State Legislatures and Congress because of the coercive effect of the intimate setting of local town councils and their role in granting or denying permits, business licenses and zoning variances. While Justice Kennedy reiterated that "government may not coerce its citizens 'to support or participate in any religion or its exercise,'" he found that the practice in Greece of offering a "brief, solemn and respectful prayer to open its monthly meetings [did not compel] its citizens to engage in a religious observance." Id at 18-19.

Justice Kennedy noted that the reasonable observer of legislative prayers understands that their purpose is to lend gravity to public proceedings and acknowledge the role of religion in society…not to proselytize any particular faith or belief. *Id.*

Justice Kennedy provided some guidance as to what councils should ***not*** do as part of their prayer practices:

- Direct the public to participate (e.g. stand, bow head, etc.);
- Single out dissidents for opprobrium;
- Indicate decisions might be influenced by acquiescence in prayer opportunity;
- Classify citizens based on religious views;
- Chastise dissenters;
- Attempt "lengthy disquisition on religious dogma";
- Refuse any request to offer a prayer; and
- Schedule prayer in temporal proximity to administrative or quasi-judicial activities.

C. ALITO CONCURRENCE.

Justice Alito wrote a separate concurrence in which he responded to Justice Kagan's dissent. Justice Scalia joined this concurrence. Justice Alito first focused on the factual background of the *Town of Greece* prayer policy, delineating the salient facts of the Town's practice: a clerical employee randomly called religious organizations listed in the town's "Community Guide" published by the Chamber of Commerce until she located someone willing to give the invocation. She ultimately created a list of those who had agreed to give the invocation. All of the congregations in the Community Guide were Christian churches. Christians predominate the population of the County in which the Town is located. Individuals of the Jewish faith are the next most populous group, at 3% of the County population. There are no synagogues within the borders of the town. As a result, for some time all the prayers were offered by Christian clergy. After complaints were received, "the town made it clear that it would permit any interested residents, including nonbelievers, to provide an invocation, and the town has never refused a request to offer an invocation." The prayers were given at the beginning of the meeting before the 'legislative' portion of the meeting began – and separate from the portion of the meeting at which the council considered formal requests for variances or other adjudicatory matters.

Justice Alito next turned to the dissent's description of the two ways that the town could have avoided any constitutional problem: a) requiring non-sectarian prayers; or b) inviting clergy of many faiths. With regard to the first approach, Justice Alito points out that "there is no historical support for the proposition that only generic prayer is allowed" and notes that "as our country has become more diverse, composing a prayer that is acceptable to all members of the community who hold religious beliefs has become harder and harder." Further, Justice Alito queried how far the town may go in enforcing a non-sectarian prayer policy – screening/editing prayers? Post-delivery review and possible 'discipline' of noncompliant prayer givers?

With regard to the dissent's argument that the town should "invite clergy of many faiths," Justice Alito argues that "the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains." I.e. the employee created the list of congregations using the ***town*** directory "instead of a directory covering the entire greater Rochester area." Justice Alito takes issue with the sweeping tone of the Kagan dissent and argues that the historical practice of legislative prayers is consistent with the *Town of Greece's* approach.

D. THOMAS CONCURRENCE.

Justice Thomas wrote a separate concurring opinion arguing that the establishment clause is a federalism provision that is inapplicable to the states and, therefore, inapplicable to the Town of Greece.

E. BREYER DISSENT.

In his brief dissent, Justice Breyer stated his concurrence with the Second Circuit's decision below and noted that the policy in the Town of Greece was not sufficiently inclusive and the town undertook no significant effort to inform the non-Christian houses of worship located in the vicinity of the town of the prayer opportunity. He urged the town to have its prayer-givers follow the U.S. House of Representatives' guidelines:

> The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.
>
> The length of the prayer should not exceed 150 words.
>
> The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.

F. KAGAN DISSENT.

Justice Kagan wrote a strong dissent in which she was joined by Justices Ginsberg, Breyer and Sotomayor, finding that the town's prayers "violate that norm of religious equality—the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian." Justice Kagan argues that the facts in the *Town of Greece* are distinguishable from *Marsh* in that the participants at town council meetings are all ordinary citizens, the invocations were predominantly sectarian, the town board did nothing to recognize religious diversity or reach out to non-Christians, the prayer-giver addressed the public, not the legislative body, the town board has a quasi-judicial role, the town

board is the primary means by which local citizens have the opportunity to petition their government and the prayers were constantly and exclusively Christian in nature.

Justice Kagan set forth a series of hypotheticals in which prayers from the record before the court are given in various governmental settings: before a trial, at a polling place on election day and at a naturalization ceremony. She argued that the government in each hypothetical "has aligned itself with, and placed its imprimatur on, a particular creed." Justice Kagan focused on the hybrid role of the town council – both legislative and quasi-adjudicatory. This hybrid role required the town council "to exercise special care to ensure that the prayers offered are inclusive – that they respect each and every member of the community as an equal citizen" and she found that they failed to do so. She further argued that a state legislature (as in *Marsh*) differs from the town council in Greece as to the nature and purpose of the meeting, the composition of the audience as well as prayer content and character. These differences caused Justice Kagan to conclude that the prayer policy in Greece failed to meet the principles of religious neutrality such that each person "experience[s] a government that belongs to one and all, irrespective of belief."

Instead, Justice Kagan would require that the town council:

- Require prayers that "Seek to include rather than divide;"
- Invite clergy of all faiths;
- Require non-sectarian prayers;
- Publicize inclusiveness; and
- Offer a role to non-Christians.

G. CALIFORNIA CONSTITUION AND THE *TOWN OF GREECE* DECISION

The *Town of Greece* court did not address the requirements of the California constitution as they impact legislative invocations. Nor has the California Supreme Court taken up this issue. Therefore, a binding decision regarding the constitutionality of legislative invocations under the California Constitution remains to be rendered. However, the Ninth Circuit did recently address challenges to the City of Lancaster's legislative invocation policy based, in part, on the California Constitution. *Rubin v. Lancaster*, 710 F.3d 1087 (9th Cir., 2013). The *Rubin* plaintiffs unsuccessfully challenged the City of Lancaster's invocation policy based on the United States Constitution's Establishment Clause, as well as three provisions of the California Constitution: (i) the California Establishment Clause; (ii) the No Aid clause; and (iii) the No Preference clause. Each of these provisions of the California Constitution is addressed briefly below.

1. The California Establishment Clause

In *Rubin v. Lancaster*, the Ninth Circuit found that the California Establishment clause is coextensive with the Establishment Clause set forth in the United States Constitution. The Ninth Circuit quoted the California Supreme court's decision in *E. Bay Asian Local Dev.Corp. v. California*, 24 Cal. 4th 693 (2000) and stated:

> "The 'protection against the establishment of religion embedded in the California Constitution [does not] create[] broader protections than those of the First Amendment,' given that 'the California concept of a "law respecting an establishment of religion" coincides with the intent and purpose of the First Amendment establishment clause.'" *citing E. Bay Asian Local Dev. Corp. v. California*, *supra*, 24 Cal. 4th at 698.

Based upon this brief analysis and its extensive analysis of the Lancaster policy under Federal Establishment Clause jurisprudence, the Ninth Circuit rejected all of Rubin's challenges to the City of Lancaster's invocation policy based on the California Constitution.

2. The California "No Aid" Clause

The California Constitution's "No Aid" clause is found in Article XVI, Section 5 and states:

> Neither the Legislature, nor any county, ***city*** and county, township, school district, or other municipal corporation, ***shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of*** any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the State, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever . . . .

Legislative prayer programs that meet the *Town of Greece* decision's requirements will not include any appropriation or payment from any public fund to legislative prayer givers; nor will such a program "grant anything to or in aid of any religious sect, church [or] creed." Thus, the analysis will rest upon whether the very existence of legislative invocations constitutes a "grant [of] anything to or in aid of any … sectarian purpose."

To date, while the Ninth Circuit has rejected a challenge to a legislative invocation policy based upon the California Constitution's "No Aid" provision, the California Supreme Court has not taken up this issue. Therefore, recent California caselaw discussing the 'No Aid' provision in contexts other than legislative invocations is the best guidance presently available on this issue. In *East Bay Asian Local Development Corporation v. California, supra,* 24 Cal.4th 693, the California Supreme Court rejected a challenge to provisions of the government code that granted noncommercial property owned by religious organizations an exemption from historic landmark designation and regulation. The Court held that while exempting property from landmark designation requirements grants a benefit as compared to other properties subject to such designation, "neither the state nor the local governmental entity expends funds, or provides any monetary support, for the exempted property or its owner." *Id. at 721*. Similarly, in jurisdictions that adopt legislative invocation programs in compliance with *Town of Greece,* no expenditure of funds or monetary support will be given to prayer-givers.

In *California Statewide Communities Development Authority v. All Persons Interested etc*., 40 Cal. 4th 788 (2007), the California Supreme Court rejected a challenge to a school financing program that would provide funding to build and improve campus facilities on the campus of religious schools in addition to non-religious schools. The Court found no violation of the "No Aid" clause because that clause "has never been interpreted…to require governmental hostility to religion, nor to prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose. …" The Court found that the bond funding program had the secular purpose of providing education in secular subjects, did not result in indoctrination of students, and contained sufficient restrictions to prevent an excessive entanglement between the State and the religious schools.

In the context of legislative invocation programs, the argument in support of constitutionality will center on whether the amply documented historic purpose of solemnizing governmental proceedings, as described in depth in *Marsh v. Chambers* and *Town of Greece v. Galloway,* is adequate to uphold the constitutionality these policies. Instructive in that analysis will be the three part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), i.e. does the government conduct at issue: "(1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion." *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1082-83 (9th Cir. 2012), *citing Lemon, supra.* As noted above, the secular purpose of legislative invocation policies to solemnize governmental proceedings is well and amply documented. Similarly, programs that comply with

the *Town of Greece* decision will not foster government entanglement with religion as the government will have no role in the content of the invocations. The question will thus come down to whether the policy has a "primary effect that neither advances nor inhibits religion." This is a question yet to be litigated; however, a policy that allows atheist or agnostic organizations to provide invocations to solemnize governmental proceedings (as provided in brackets in the form of policy enclosed with this paper) would neither advance nor inhibit religion and, therefore, be most strategically placed to fend of constitutional challenges under the California "No Aid" clause.

3. The California 'No Preference' Clause

The California Constitution's "No Preference" clause is found in Article I, Section 4 and states:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed…

Legislative prayer programs that meet the requirements set forth in the *Town of Greece* decision will, of necessity, meet the standard of 'no discrimination' and 'no preference' among religions as required by the California constitution.

H. WHAT'S NEXT.

Some predictions of the trajectory of future challenges to legislative prayers:

- California Constitution challenges – especially "No Aid";
- Further challenges based on "coercion" theory;
- Challenges directly to *Marsh;*
- Challenges to cities' prohibitions on sectarian prayers and/or references to specific deities in prayers; and
- Challenges as to what constitutes "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose".

POLICY REGARDING INVOCATIONS
AT MEETINGS OF THE CITY COUNCIL OF THE CITY OF _____

WHEREAS, the City Council is an elected legislative and deliberative public body, serving the citizens of the City of _____; and

WHEREAS, legislative bodies in America have long maintained a tradition of solemnizing proceedings by allowing for an opening prayer before each meeting, for the benefit and blessing of the City Council; and

WHEREAS, since the incorporation of the City, the City Council has followed a practice of selecting a member of local clergy to provide invocations at City Council meetings; and

WHEREAS, the City Council now desires to adopt this formal, written policy to clarify and codify its invocation practices; and

WHEREAS, such prayer before deliberative public bodies has been consistently upheld as constitutional by American courts, including the United States Supreme Court; and

WHEREAS, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the United States Supreme Court rejected a challenge to the Nebraska Legislature's practice of opening each day of its sessions with a prayer by a chaplain paid with taxpayer dollars, and specifically 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." *Id.*, at 786; and

WHEREAS, the Supreme Court further held, "To invoke divine guidance on a public body. . . is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.*, at 792; and

WHEREAS, the Supreme Court affirmed in *Lynch v. Donnelly*, 465 U.S. 668 (1984), "Our 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." *Id.*, at 675; and

WHEREAS, the Supreme Court further stated, "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. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.*, at 693 (O'Connor, J., concurring); and

WHEREAS, the Supreme Court also famously observed in *Zorach v. Clauson*, 343 U.S. 306, (1952), "We are a religious people whose institutions presuppose a Supreme Being." *Id.*, at 313-14; and

WHEREAS, the Supreme Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457 (1892), that the American people have long followed a "custom of opening sessions of all deliberative bodies and most conventions with prayer ...," *Id.*, at 471; and

WHEREAS, the Supreme Court has determined, "The content of [such] prayer is not of concern to judges where … 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." *Marsh*, 463 U.S. at 794-795; and

WHEREAS, the Supreme Court also proclaimed that it should not be the job of the courts or deliberative public bodies "to embark on a sensitive evaluation or to parse the content of a particular prayer" offered before a deliberative public body. *Id.*; and

WHEREAS, the Supreme Court has counseled against the efforts of government officials to affirmatively screen, censor, prescribe and/or proscribe the specific content of public prayers offered by private speakers, as such government efforts would violate the First Amendment rights of those speakers. *See, e.g., Lee v. Weisman*, 505 U.S. 577, 588-589 (1992); and

WHEREAS, the Supreme Court has recently held in a plurality opinion in *Town of Greece v. Galloway* 572 U.S. ___ (2014) that "absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose…" a prayer policy passes constitutional muster; and

WHEREAS, the City Council intends, and has intended in past practice, to adopt a policy that upholds an individual's "free exercise" rights under the First Amendment; and

WHEREAS, the Supreme Court has repeatedly clarified 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 Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990); and

WHEREAS, the City Council intends, and has intended in past practice, to adopt a policy that does not proselytize or advance any faith, or show any purposeful preference of one religious view to the exclusion of others; and

WHEREAS, the City Council recognizes its constitutional duty to interpret, construe, and amend its policies and ordinances to comply with constitutional requirements as they are announced; and

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of _____, California that the City Council does hereby adopt the following written policy regarding opening invocations before meetings of the City Council, to wit:

1. In order to solemnize proceedings of the City Council and its subsidiary bodies, it is the policy of the City Council to allow for an invocation or prayer to be offered at its meetings for the benefit of the City Council, commission members and the community.

2. No member of the City Council members of any City Commission or City employee or any other person in attendance at the meeting shall be required to participate in any prayer that is offered.

3. The prayer shall be voluntarily delivered by an eligible member of the clergy/religious leader in the City of _____. To ensure that such person (the "invocational speaker") is selected from among a wide pool of the City's clergy/religious leaders, on a rotating basis, the invocational speaker shall be selected according to the following procedure:

a. The City Clerk shall compile and maintain a database (the "Congregations List") of the religious congregations with an established presence in _____.

b. The Congregations List shall be compiled by referencing the listing for "churches," "congregations," or other religious assemblies [religious, atheist or agnostic groups or assemblies (collectively "Assemblies")] in the annual Yellow Pages phone book(s) published for the City of _____, research from the Internet, and consultation with local chambers of commerce. All [religious congregations] [Assemblies] with an established presence in the local community of _____ are eligible to be included in the Congregations List, and any such congregation can confirm its inclusion by written request to the Clerk.

c. The Congregations List shall also include the name and contact information of any chaplain who may serve one or more of the fire departments or law enforcement agencies of the City of _____ or any nearby military facilities.

d. The Congregations List shall be updated, by reasonable efforts of the City Clerk, in November of each calendar year.

e. Within thirty (30) days of the effective date of this policy, and on or about December 1 of each calendar year thereafter, the City Clerk shall mail an invitation addressed to the "congregation leader" of each congregation listed on the Congregations List, as well as to the individual chaplains included on the Congregations List.

f. The invitation shall be dated at the top of the page, signed by the City Clerk at the bottom of the page, and read as follows:

Dear congregation leader,

> *The City Council makes it a policy to invite members of the clergy in the City of _____ to voluntarily offer a prayer before the beginning of its meetings, for the benefit and blessing of the City Council. As the leader of one of the congregations with an established presence in the local community of the City of _____, or in your capacity as a chaplain for one of the fire departments or law enforcement agencies of the City of _____, you are eligible to offer this important service at an upcoming meeting of the City Council.*
>
> *If you are willing to assist the City Council in this regard, please send a written reply at your earliest convenience to the City Clerk at the address included on this letterhead. Clergy are scheduled on a first-come, first-serve or other random basis. The dates of the City Council's scheduled meetings for the upcoming year are listed on the following, attached page. If you have a preference among the dates, please state that request in your written reply.*
>
> *This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the City Council requests only that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different than that of the invocational speaker.*
>
> *On behalf of the City Council, I thank you in advance for considering this invitation.*

Sincerely,
City Clerk

g. Consistent with paragraph 6 hereof and, as the invitation letter indicates, the respondents to the invitation shall be scheduled on a first-come, first-served or other random basis to deliver the prayers.

h. If the selected invocational speaker does not appear at the scheduled meeting, the Mayor (or commission chairperson) may ask for a volunteer from among the Council (or commissioners) or the audience to deliver the invocation.

5. No invocational speaker shall receive compensation for his or her service.

6. The City Clerk shall make every reasonable effort to ensure that a variety of eligible invocational speakers are scheduled for the City Council meetings. In any event, no invocational speaker shall be scheduled to offer a prayer at consecutive meetings of the City Council, or at more than three (3) City Council meetings in any calendar year.

7. Neither the City Council, City Commissioners, nor the City Clerk shall engage in any prior inquiry, review of, or involvement in, the content of any prayer to be offered by an invocational speaker.

8. This policy shall be intended for all Boards and Commissions of the City of _____, California.

9. This policy in not intended, and shall not be implemented or construed in any way, to affiliate the City Council with, nor express the City Council's preference for, any faith or religious denomination. Rather, this policy is intended to acknowledge and express the City Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of _____.

NOW, THEREFORE, BE IT FURTHER RESOLVED that this policy shall become effective immediately upon approval by the City Council of the City of _____.

ATTEST:

_____
City Clerk

City of _____

APPROVED:

_____
Mayor

City of _____