Appignani Humanist Legal Center

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January 16, 2018

Via Email
Jay Williams – Board Chairman
Saline County Board
10 East Poplar
Harrisburg, IL 62946

Via email: jaydwilliams1960@gmail.com

Re: Unconstitutional Public Meeting Prayer

Dear Mr. Williams,

This office was recently contacted by Jeremy Stroud, First Deputy in the Saline County Clerk's Office, regarding a situation that he correctly perceives as a serious constitutional violation. Mr. Stroud reports that the Saline County Board has been starting its regular meetings with unconstitutional prayers. Specifically, board meetings for years have begun with sectarian Christian prayers led by one particular local minister who also happens to be a board member. As will be explained in more detail below, this practice violates the guidelines for so-called legislative prayer as set forth by the United States Supreme Court.

The American Humanist Association (AHA) is a national nonprofit organization with over 600,000 supporters and members across the country, including many in Illinois. The mission of AHA's legal center is to protect one of the most fundamental principles of our democracy: the constitutional mandate requiring a separation of church and state. Our legal center includes a network of cooperating attorneys from around the country, including Illinois, and we have litigated constitutional cases in state and federal courts from coast to coast.

The First Amendment's Establishment Clause "commands a separation of church and state." *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005). It requires the "government [to] remain secular, rather than affiliate itself with religious beliefs or institutions." *Cnty. of Allegheny v. ACLU,* 492 U.S. 573, 610 (1989). At the most fundamental level, the Establishment Clause prohibits the government from promoting "a point of view in religious matters" or otherwise taking sides between "religion and religion or religion and nonreligion." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted). By implementing a policy and practice that repeatedly allows one individual cleric to commence board meetings with Christian prayers, the county is conveying an endorsement of religion that violates these standards.

Mr. Stroud reports that each county board meeting begins with an instruction from the board chair to rise for a prayer. The prayer is also typically listed on each meeting agenda as one of the first items of business. After the audience is instructed to rise, one particular board member, Rev. Joe Jackson, gives an invocation lasting perhaps two to three minutes, usually invoking the name of Jesus or making other Christian references. When Mr. Stroud pointed out that these practices could be constitutionally problematic, he was admonished by an employee of the clerk's office, who incorrectly insisted that prohibiting this exclusively Christian board practice would violate the religious rights of the participants.

Some background on legislative prayer is in order here. The Establishment Clause usually prohibits the government from sponsoring or promoting prayer. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962). But *Marsh v. Chambers*, 463 U.S. 783 (1983) carved out a narrow exception for legislative prayer based on the long and unique history of the practice dating back to the First Congress.[1] In *Marsh*, the Court cautioned, however, that legislative prayer practices are permissible only if they do not "advance any one . . . faith or belief."

In *Town of Greece v. Galloway*, the Supreme Court reiterated that a legislative prayer practice is unconstitutional if it is "'exploited to proselytize or advance any one, or to disparage any other, faith or belief.'" 134 S. Ct. 1811, 1823 (2014) (citing *Marsh*, 463 U.S. at 794-95). The Court approved of the town's prayer practice because the invocations were "led by guest ministers" and thus board members themselves were not directing the public to participate or leading the prayers. The Court made clear that its holding would "be different if town board members directed the public to participate in the prayers." *Id*. at 1826.

The Court further held that prayer policy must be "nondiscriminatory" and the legislative body must make reasonable efforts to include invocations from all members of the community, including atheists. *Id.* at 1823-25. The Court indicated that a practice would fail if it reflected "an aversion or bias on the part of town leaders against minority faiths." *Id.* at 1824. Critical to the Court upholding the practice in *Town of Greece* was that, unlike here, the town "welcome[d] a prayer by any minister or layman who wished to give one." *Id.* at 1824. The Court stressed that "any member of the public is welcome in turn to offer an invocation reflecting his or her own convictions." *Id.* at 1826. Greece even went out of its way to invite "a Jewish layman and the chairman of the local Baha'i temple to deliver prayers. A Wiccan priestess . . . was granted" an opportunity as well. *Id.* at 1817.[2]

The Saline County Board's practice is "'more than a factual wrinkle on *Town of Greece*.' [] 'It is a conceptual world apart.'" *Lund v. Rowan Cty., N.C.*, 2017 U.S. App. LEXIS 12623, at *19-20 (4th Cir. July 14, 2017) (en banc), *petition for certiorari pending*. To pass muster, a legislative-prayer practice must be an "'an internal act'" to "accommodate the spiritual needs of lawmakers." *Town of Greece*, 134 S. Ct. at 1825-26 (quoting *Marsh*). *Marsh* was "a case 'in

[1] *See Edwards*, 482 U.S. at 583 n.4; *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh exception*"); *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091 n.4 (9th Cir. 2013) ("legislative prayer has enjoyed a 'sui generis status'").

[2] *See also Lakeland*, 713 F.3d at 592 ("Lakeland's current process . . . is even more expansive and inclusive than that found constitutional in *Pelphrey*"); *Rubin*, 710 F.3d at 1090 ("selection process does not discriminate against any faith").

which government officials invoke[d] spiritual inspiration *entirely for their own benefit*.'" *Id.* (citation omitted, emphasis added). A legislative-prayer practice is unconstitutional if it is "an effort to promote religious observance among the public." *Id*.

The Fourth Circuit sitting en banc recently struck down a county's legislative-prayer practice, finding that "because the commissioners were the exclusive prayer-givers, Rowan County's invocation practice falls *well outside* the more inclusive, minister-oriented practice of legislative prayer described in [*Galloway*]." *Lund*, 2017 U.S. App. LEXIS 12623 at *5 (emphasis added). The court noted that *Marsh* and *Galloway* "did not concern lawmaker-led prayer." *Id.* at *15-16. The Fourth Circuit deemed Rowan County's practice a "conceptual world apart" from *Galloway* because it created "a 'closed-universe' of prayer-givers" dependent "solely on election outcomes." *Id.* at *19-20, *32.

The Fourth Circuit's interpretation of *Town of Greece* is consistent with the very first legislative prayer case, *Lincoln v. Page*, 109 N.H. 30, 31 (1968), wherein the court upheld the practice on grounds underlying *Town of Greece*, *supra*, noting: "The invocation at the opening of the town meeting by a guest clergyman is not composed, selected or approved by the defendants. *The invocation is not pronounced by a town officer*." *Id.* (emphasis added).

The Fourth Circuit's reading of *Town of Greece* is also consistent with the conclusions reached by district courts confronted with legislative prayer challenges after *Greece* was decided. *See Lund v. Rowan Cnty*., 2015 U.S. Dist. LEXIS 57840, *17 (M.D.N.C. May 4, 2015); *Hudson v. Pittsylvania Cnty.*, 2015 U.S. Dist. LEXIS 69427, *3 (W.D. Va. May 28, 2015). In *Hudson v. Pittsylvania County*, 2014 U.S. Dist. LEXIS 106401, at *4-7 (W.D. Va. Aug. 4, 2014), the court held that a county's prayer practice violated the Establishment Clause pursuant to *Town of Greece*, noting as relevant here, "[f]irst and foremost, unlike in *Town of Greece*, where invited clergy and laypersons offered the invocations, *the Board members themselves led the prayers* in Pittsylvania County." *Id.* (emphasis added). The court concluded: "the active role of the Pittsylvania County Board of Supervisors in leading the prayers, and, importantly, dictating their content, is of constitutional dimension and falls outside of the prayer practices approved in *Town of Greece*." *Id.* In an earlier proceeding, the court in *Doe v. Pittsylvania County*, 842 F. Supp. 2d 906, 914 (W.D. Va. 2012), found that cases where the elected officials are delivering the prayers: "the Board impermissibly wraps the power and prestige of the [] County government around the personal religious beliefs of individual Board members."

The Saline County Board's practice suffers from the same constitutional infirmities as *Lund* and *Pittsylvania* but is even more problematic than those practices since it only permits *one board member* to deliver the opening prayers, thereby ensuring they will be consistent with Christian doctrine.

The fact that Saline County's practice categorically excludes all non-Christian faiths (by virtue of its appointment of a single Christian board member) is equally problematic. In *Pelphrey*, the Eleventh Circuit held that the county's legislative prayer practice was

unconstitutional because representatives of "certain faiths were categorically excluded."[3] Notably, the Eleventh Circuit rejected the county's argument that "the selection process is immaterial when the content of the prayer is constitutional," because "[t]he central concern of *Marsh* is whether the prayers have been exploited to create an affiliation between the government and a particular belief or faith." 547 F.3d at 1281 (citing *Marsh*, 463 U.S. at 794-95). *See also Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013) (practice of opening city commission sessions with prayer did not violate Establishment Clause because city required that invitations to participate be extended to all ideologies); *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012) ("Even when operating under a facially neutral policy, a legislature may not select invocational speakers based on impermissible motives or sectarian preferences.").

By comparison, in *Rubin v. City of Lancaster*, 710 F.3d 1087, 1097 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 284 (2013), the Ninth Circuit upheld the practice of allowing citizens and clergy to deliver prayers primarily because the city's policy provided that "[n]either *the council* nor the clerk may 'engage in any prior inquiry, review of, *or involvement in*, the content of any prayer to be offered.'" (emphasis added). The court held that the relevant inquiry is "whether the City itself has taken steps to affiliate itself with Christianity." *Id.* at 1097. The court concluded that "[w]hatever the content of the prayers or the denominations of the prayer-givers, the *City* chooses neither." *Id.* at 1098 (italics in original). The court further emphasized that the city had taken "every feasible precaution" to "ensure its own evenhandedness." *Id.* at 1097. The Ninth Circuit made a point to observe that invocations were "given by a self-identified 'metaphysicist,' one was given by a Sikh, and another by a Muslim." *Id.* at 1090. Moreover, the clerk had "never removed a congregation's name from the list of invitees or refused to include one." *Id.* at 1097.

It is our hope that, without our having to take this further, you will do the right thing and discontinue the county board's prayer practice. Should the county decide to initiate another policy in the future, it will be important to ensure that it abides by the appropriate guidelines set forth by law.

Very truly yours,

Monica Miller, Esq.

[3] *Pelphrey v. Cobb County*, 448 F. Supp. 2d 1357 (N.D. Ga. 2006), *aff'd* 547 F.3d at 1279 (affirming the district court's finding that the government violated the Constitution because it "'categorically excluded' certain faiths").