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MEMORANDUM

TO: The Honorable Council President Clay Yarborough

FROM: Jason R. Gabriel, General Counsel

RE: City Council Invocations

DATE: September 20, 2014

I. Background.

The City Council has been contacted by certain organizations and individuals with questions about, or support for, legislative invocations. Accordingly, the Office of General Counsel has reviewed the subject issues and has prepared this memorandum providing legal advice on this matter. The term invocation is used interchangeably with the term prayer in this memo.

II. Questions Asked.

(1) May the City Council open its meetings with a prayer?

(2) If so, how do United States Supreme Court decisions impact City Council Rules with respect to legislative invocations, the process for selecting an invocation, or the process for selecting a Council Chaplain?

III. Short Answers.

(1) The City Council may open its meetings with a prayer for the legislative body, so 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."

(2) The Supreme Court's decisions indicate that Council Rules may be implemented as follows: (1) a designated Chaplain may give the invocation on

behalf of the legislative body, or (2) the legislative body may open the process to rotating ministers and theologians, on behalf of the body. Either approach may be employed, so long as it is on behalf of and for the benefit of the legislative body (i.e., an internal act) and the chosen method does not disparage, proselytize, or advance one religion. The City Council Rule[1] permits the Council President to select a colleague to serve as Chaplain, and the Establishment Clause does not limit the Council President's choice of Chaplain.

IV. Discussion.

The First Amendment to the U.S. Constitution includes an Establishment Clause, as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A legal analysis of legislative invocations falls into a narrow area of First Amendment, Establishment Clause case law governed by *Marsh v. Chambers*,[2] rather than the typical Establishment Clause cases governed by *Lemon v. Kurtzman.*[3]

Marsh v. Chambers

One of the lead decisions by the United States Supreme Court regarding legislative invocations is *Marsh v. Chambers*, 463 U.S. 783 (1983)[4]. Here, the Supreme Court looked to the country's long history and tradition of opening legislative (and other deliberative body) meetings with prayer, as it noted the coexistence of such practice with the principles of disestablishment and religious freedom. The Supreme Court noted that the very Congress which adopted the Bill of Rights also approved the use of paid chaplains:

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[1] City Council Rule 1.106 (Chaplain) states the following: "The President may appoint one Council Member to be Chaplain of the Council, who shall arrange to open each meeting of the Council with a prayer/invocation. The President or Chaplain may invite or designate others to provide appropriate ceremonies." This rule grants the Council President discretion to choose any of the current Council Members to serve as Chaplain.

[2] 463 U.S. 783 (1983).

[3] Aside from legislative invocation cases, the Lemon test governs Establishment Clause cases. There must be: (1) a legitimate secular purpose, (2) primary effect is not to endorse religion, and (3) no excessive entanglement. See Lemon v. Kurtzman, 403 U.S. 602 (1975).

[4] *Town of Greece, NY v. Galloway*, 134 S.Ct. 1811 (2014) is the other lead decision by the U.S. Supreme Court with respect to legislative invocations.

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. 463 U.S. at 790.

In *Marsh,* a state legislator challenged the constitutionality of a practice of the Nebraska legislature of opening each of its sessions with a prayer by a chaplain paid with public funds. The Supreme Court held that such practice did not violate the Establishment Clause, even though a clergy member of only one denomination (Presbyterian) had been selected for 16 years, in Nebraska, and even though the prayers were in the "Judeo-Christian" tradition.

The Supreme Court in one portion of its opinion stated that the opening of legislative sessions with prayer is "part of the fabric of society" as follows:

> In light of the unambiguous and unbroken history of more than two hundred 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 the people of this country.
> 463 U.S. at 792.

In short, the Court held that so long as "no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief," 463 U.S. 794-95, the legislative invocation did not violate the Establishment Clause of the United States Constitution. The Court closed its decision with a conclusory remark as to the importance of history and tradition in this context creating a presumptive validity of the invocation, stating: "The unbroken practice for two centuries in the National Congress, for more than a century in Nebraska and in many other states, gives abundant assurance that there is no real threat 'while this Court sits.'" 463 U.S. at 795.

Town of Greece

On May 5, 2014, the United States Supreme Court decided the *Town of Greece* case. *Town of Greece, NY v. Galloway*, 134 S.Ct. 1811 (2014). Since 1999, the monthly town board meetings in Greece, New York have opened with a roll call, a recitation of the Pledge of Allegiance, and a prayer given by clergy selected from the congregations listed in a local directory. While the prayer program is open to all creeds, nearly all of the local congregations are Christian and thus nearly all of the participating prayer givers have been too. Citizens who attended meetings to speak on local issues filed suit alleging that the town violated the First Amendment's Establishment Clause by preferring Christians over other prayer givers and by sponsoring sectarian prayer. They sought to limit the town to "inclusive and ecumenical" prayers that referred only to a "generic God." The District Court upheld the prayer practice on summary judgment: finding no

impermissible preference for Christianity; concluding that the Christian identity of most of the prayer givers reflected the predominantly Christian character of the town's congregations, not an official policy or practice of discriminating against minority faiths; finding that the First Amendment did not require the town to invite clergy from congregations beyond its borders to achieve religious diversity; and rejecting the theory that legislative prayer must be nonsectarian. The Second Circuit reversed, holding that some aspects of the prayer program, viewed in their totality by a reasonable observer, conveyed the message that Greece was endorsing Christianity. The Supreme Court disagreed with the Second Circuit and reversed the judgment.

In *Town of Greece*, the Supreme Court found that (in referencing the *Marsh* case) the respondent (citizen's) insistence on nonsectarian prayer was not consistent with the long tradition followed by Congress and state legislatures:

> The Court found the prayers in *Marsh* were consistent with the First Amendment not because they espoused only a generic theism but because the Nation's history and tradition have shown that prayer in this limited context could "coexis[t] with the principles of disestablishment and religious freedom." 134 S.Ct. at 1820.

The Court here distinguished dictum from the *County of Allegheny*[5] case which suggested that *Marsh* permitted only prayer with no overtly Christian references. The Court noted that such stance would be irreconcilable with the facts, holding and reasoning of *Marsh*, which instructed that the "content of the prayer is not of concern to judges," provided "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." 463 U.S., at 794–795 (*Marsh*), and 134 S.Ct. at 1814 (*Town of Greece*).

The Court reasoned that:

> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact. 134 S.Ct. at 1814 and 1822.

The Court warned against government prescribing prayers to be recited in public institutions in order to promote a preferred system of belief or behavior. In such respect a government 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." 134 S.Ct. 1822. "The First Amendment is not a majority rule, and government may not seek to define permissible categories of religious speech. Once it invites prayer into the public

[5] *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573 (1989).

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." 134 S.Ct. at 1823.

In rejecting the suggestion that legislative prayer must be non-sectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from the prayer's place at the opening of the legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage. The Court concluded that prayer that is solemn and respective in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that function. Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation. 134 S.Ct. at 1814.

It must be noted once more that the analysis would be different if a town board (City Council) directed the public to participate in prayers, or solicited audience members to engage in any aspect of prayer. Any action of prayer/invocation by the Council though it may be intended to be inclusive, must never be coercive. 134 S.Ct. at 1826.

As the Court concluded in the *Town of Greece* case:

> [C]eremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgement of their belief in a higher power, always with due respect for those who adhere to other beliefs. 134 S.Ct. at 1827-1828.

This ceremonial prayer however need not be prayer devoid of religious content. Throughout its opinion, the Court in *Town of Greece* reiterated the validity of a sectarian invocation, completely rejecting the argument that the Town of Greece council should create rules for prayers. In reaffirming its holding in *Marsh*, the Court reiterated the notion that chaplains have the right to pray to the dictates of their own beliefs, this being true even if, as was true in *Marsh*, the same chaplain had delivered the invocation for more than 15 years:

> The tradition reflected in *Marsh* permits chaplains to ask their own God for blessings of peace, justice, and freedom that find appreciation among people of all faiths. That a prayer is given in the name of Jesus, Allah, or Jehovah, or that it makes passing reference to religious doctrines, does not remove it from that tradition. These religious themes provide particular means to universal ends. 134 S.Ct. at 1823.

As for legislatively chosen chaplains, they may choose their own invocations, "so long as the practice over time is not 'exploited to proselytize or advance any one, or to disparage any other, faith or belief.' *Marsh*, 463 U.S., at 794-95." 134 S.Ct. at 1823.

Other Legislative Invocation / Establishment Clause Cases

This is not to say, however, that all practices of prayer at the opening of all sorts of public legislative meetings are constitutional. In fact, the opposite has been held to be true here in the Eleventh Circuit, the federal judicial appellate court which controls in Florida (and Alabama and Georgia) at the intermediate federal appellate level. In *Pelphrey v. Cobb County, Georgia,* 547 F. 3d 1263 (11th Circuit 2008), a taxpayer filed suit against a county as to the offering of religious invocations at the beginning of sessions of the county commission, and at the beginning of county planning commission meetings. The United States District Court below had found at trial that a process that the county planning commission had used to select clergy persons to give opening prayers at commission meetings violated the Establishment Clause. The Eleventh Circuit reversed and found to the contrary, but within certain important limitations.

The Eleventh Circuit held that the Cobb County Commission was a public body entrusted with making laws for the county. It also held that the Cobb County Planning Commission, as an entity that assisted the County Commission with its work, likewise was a legislative body. Similarly, the Jacksonville City Council unquestionably is the principal legislative body for the Consolidated Government here in Duval County. The Eleventh Circuit held that use of opening prayers in the two legislative bodies in Georgia did not violate the Establishment Clause as long as the prayers "did not advance or disparage a belief or affiliate government with a specific faith." 547 F.3d at 1269-78. See also, *Aetheists of Florida v. City of Lakeland*, 713 F.3d 577 (11th Cir. 2013).

The Court in *Town of Greece* confirmed the reasoning of the 11th Circuit. In discussing the Town of Greece policy of inviting ministers, the Court stated that "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one." 134 U.S. at 1824. It then added two somewhat conflicting statements:

> [1] So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing. [2] The quest to promote "a 'diversity' of religious views" would require the town "to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each," *Lee v. Weisman*, 505 U.S., at 617, 112 S.Ct. 2649 (Souter, J., concurring), a form of government entanglement with religion that is far more troublesome than the current approach. 134 U.S. at 1824.

The Court suggests that nondiscrimination is important, but that the search for diversity contains its own constitutional risks. This should be taken as a warning that if a legislative body chooses to invite speakers, then it should be careful not to engage in discrimination. These comments do not, however, modify the Court's clear confirmation that a legislative body may choose its own chaplain, and the chaplain may choose her or his own invocation.

V. Conclusion.

The constitutionality of legislative invocations is considered on a case by case basis with judicial outcomes that are contingent upon the detailed facts of each case. There are no bright-line rules and everything is subject to interpretation based on express or implied purposes, history and tradition, context and the process that the City employs.

Until the Supreme Court says otherwise, there are essentially two constitutionally protected ways to handle a brief invocation at the commencement of meetings: (1) a designated Chaplain may give the invocation on behalf of the legislative body, or (2) the legislative body may open the process to rotating ministers and theologians, on behalf of the body. Either approach may be undertaken, so long as it is on behalf of and for the benefit of the legislative body (i.e., an internal act) and the chosen method does not disparage, proselytize, or advance one religion.

Finally, Council Rule 1.106 (Chaplain), grants the Council President discretion to choose any of the current Council Members to serve as Chaplain. The Establishment Clause does not create rules for selecting the Council Chaplain. As noted with respect to choosing an invocation, the Establishment Clause prohibits discrimination against religion and also prohibits governmental efforts to define appropriate religion. The Council Rule does not by its terms discriminate against or define appropriate religion. The Rule simply permits the Council President to select a colleague. The Establishment Clause does not limit the Council President's choice of Chaplain.

Absent a pattern of prayers that over time denigrate, proselytize, or betray impermissible government purpose, a challenge based solely on the content of a prayer will not likely establish a constitutional violation under the Establishment Clause.

I trust that this opinion provides the guidance you seek. I am available to discuss this with you at your convenience.