Local Government Insurance Trust
LGIT

CLAIMS BRIEF

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WHAT TO PRAY OR WHAT NOT TO PRAY AT LEGISLATIVE SESSIONS - THAT IS THE QUESTION

"*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*…."

Constitution of the United States, First Amendment ("the Establishment Clause")

A case decided by the United States Court of Appeals for the Fourth Circuit in 2011 should be the subject of discussion for all Maryland local governments. The case dealt with the intersection of legislative prayer and the Establishment Clause. The case, *Joyner v. Forsyth County, North Carolina*, concerned the practices of the local legislative body, the County Board of Commissioners ("the Board") in Forsyth County. Meetings of the Board historically began with an invocation delivered by a local religious leader. And, at almost every meeting, that prayer usually closed with the phrase, "For we do make this prayer in Your Son Jesus' name, Amen." The prayer also made references to specific tenets of Christianity, from "the Cross of Calvary" to the "Virgin Birth" to the "Gospel of the Lord Jesus Christ." Janet Joyner and Constance Lynn Blackmon attended the meeting of the Board on December 17, 2007. They took offense because the overall atmosphere made them feel distinctly unwelcome and coerced by their government into endorsing a Christian prayer.

Plaintiffs sued in federal court, alleging that the prayer they heard represented one instance of the Board's broader practice of sponsoring sectarian opening prayers at its meetings. The federal district court agreed, finding that the Board's "legislative prayer" violated the Establishment Clause by advancing and endorsing Christianity to the exclusion of other faiths. The county appealed to the United States Court of Appeals for the Fourth Circuit. That court affirmed the judgment of the federal district court. In doing so, the appeals court relied on its own prior decisions as well as prior decisions of the United States Supreme Court which held that, to survive constitutional scrutiny, invocations given at the opening of legislative sessions must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide.

In reaching its decision, the court acknowledged that the historical roots of "legislative prayer" are deep. There is a clear line of precedent not only upholding the practice of legislative prayer, but acknowledging the ways in which it can bring together citizens of

all backgrounds and encourage them to participate in the workings of their government. Despite this history, however, the court warned that clear boundaries must be placed on invocations. As the Supreme Court has said, whatever else the Establishment Clause may mean, "it certainly means at the very least that government may not demonstrate a preference for one particular religious sect or creed." This is especially true since so many communities have become more pluralistic ethnically, politically, and religiously.

So, since it really is not the role of courts to write the content of prayers, what are local governments to do? The options are myriad: (1) adopt a prayer that identifies that it is intended to solemnize the legislative proceedings and embraces a non-sectarian ideal; (2) adopt a moment of silent prayer/reflection; or (3) ban prayer at the opening of legislative sessions. If prayer is chosen, the prayer must be nondenominational or religiously pluralistic and embracing of all tenets and beliefs. The overriding objective is to make the prayer one that does not reject the tenets of other faiths in favor of just one. However, the extremes urged by some seeking to modify legislative prayer have been rejected. For example, mere infrequent references to specific deities, standing alone, do not suffice to make out a constitutional case. Further, a local legislative body cannot insulate itself from liability simply by inviting a third person to give the invocation. If the invocation given is routinely denominational, the potential for problems exists. This is because it is the governmental setting for the delivery of the prayer, *i.e*., the legislative chamber, which gives rise to litigation and liability.

If the local government has adopted a policy governing legislative prayer, that policy must be religiously neutral. Here is one example of an acceptable policy: "Each invocation must be non-sectarian with elements of the American civil religion (a term given to a shared set of certain fundamental beliefs, values, non-religious holidays, and rituals by those who live in the United States) and must not be used to proselytize or advance any one faith or belief or to disparage any other faith or belief or to disparage any other faith or belief." An alternative would be to adopt a policy that allows volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious expressions. Such a policy must actually involve the rotation of religious leaders in fact, and not just on paper. In other words, the policy must not only be facially neutral, it must be applied in a neutral manner. The specific religious demographics of the community hold no sway.

In sum, prayer immediately before the conduct of official government business cannot create an environment in which the government prefers - or appears to prefer - particular sects or creeds at the expense of others. To this end, courts, as did the one in *Joyner*, urge prayer to embrace a non-sectarian ideal that recognizes the similarities of different creeds - not their differences.

The legislative prayer issue discussed here has been the subject of litigation across the Country. Even LGIT members have been sued, and it is important to keep in mind that attorney's fees are a driving force in these cases. Fortunately, the issue is now before the

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Supreme Court of the United States in a case emanating from Greece -Greece, New York, that is (*Greece, N.Y. v. Galloway*). The plaintiffs in that case documented that between 1999 and 2010, two-thirds of prayers delivered at town board meetings contained references to "Jesus Christ, Your Son, the Holy Spirit of Jesus." The lower appellate court held that the town board's practice violates the Establishment Clause. It ruled that the town's habit of inviting clergy only from churches in Greece could be construed as government endorsement of a particular religion because houses of worship in the town are almost exclusively Christian. The town sought review in the Supreme Court, and the Court recently granted the request. The case will be argued this fall and an opinion is expected early next year. LGIT will report on the outcome.

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