



CLAIMS BRIEF

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THE SUPREME COURT RULES ON LEGISLATIVE PRAYER

“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”)

The legislative prayer issue has been the subject of litigation across the Country. As pointed out in our June 2013 Claims Brief, even LGIT members have been sued. Fortunately, the issue came before the Supreme Court of the United States in the case of *Town of Greece, N.Y. v. Galloway*, a case just decided on May 5, 2014.

The Background of the Lawsuit

The Supreme Court framed the specific issue before it as follows: “Whether the town imposed an impermissible establishment of religion by opening its monthly board meetings with a prayer.” The town had re-instituted its prayer practice in 1999. The practice consisted of the town supervisor inviting a local clergyman to the front of the room to deliver an invocation. After the prayer, the town supervisor would thank the minister for serving as the board’s “chaplain for the month” and present him with a commemorative plaque. The prayer was intended to place town board members in a solemn and deliberative frame of mind, invoke divine guidance in town affairs, and follow a tradition practiced by Congress and dozens of state legislatures.

The town followed an informal practice for selecting prayer givers, all of whom were unpaid volunteers. A town employee would call the congregations listed in a local directory until she found a minister available for that month’s meeting. The town eventually compiled a list of willing “board chaplains” who had accepted invitations and agreed to return in the future. Prayers were not reviewed in advance of the meetings nor did the town provide guidance as to the prayer’s content. The town at no point excluded or denied an opportunity to a would-be prayer giver. Its leaders maintained that a minister or layperson of any persuasion, including an atheist, could give the invocation. But nearly all of the congregations in town were Christian; and from 1999 to 2007, all of the participating ministers were too.

This resulted in invocations that generally asked the divinity to abide at the meeting and bestow blessings on the community. The words “Lord,” “Jesus,” and “God” were frequently used in the prayers. Some of the prayers mentioned religious holidays, such as Easter, and expressly referenced the Christian faith. Two persons who were offended by the Christian themes that pervaded the prayers turned to the courts for relief. They sought to limit the town to “inclusive and ecumenical” prayers that referred only to a “generic god” and would not associate the government with any one faith or belief. Eventually, the case, and the passions surrounding

it, made it to the Supreme Court. Simply stated, the Court was called upon to decide if the town's prayer practice had "affiliated" it with Christianity or had "endorsed" Christianity to the exclusion of other religious belief and tenets. The Court concluded that the town's prayer practice did not violate the First Amendment.

What the Supreme Court Decided

In reaching its decision, the Court first traced the long history of legislative prayer at the federal, state, and local levels of government. This led the court to say that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted." With this understanding, the Court then focused specifically on the town's prayer practice and whether it "fits within the tradition long followed in Congress and the state legislatures." The Court found that it did. In doing so, the Court rejected the contention that a prayer's content determined its constitutionality. The Court recognized that ruling the contrary would soon cause courts to become "supervisors and censors" of religious speech, a rule that effectively resulted in government creation of a "civic religion" that stifled "any but the most generic reference to the sacred..." For this compelling reason, the Court rejected the narrow focus on content alone, thus paving the way for legislative prayer to be sectarian.

The Restrictions on Legislative Prayer

Although sectarian prayer at legislative sessions is allowed, it is not without constraint. In this regard, the Court said: "The relevant constraint derives from [the prayer's] 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." **Thus, although sectarian prayer is allowed, the prayer must be solemn and respectful in tone; must invite lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing; and must serve that legitimate function.** If the course and practice over time shows that the prayers denigrate (belittle) nonbelievers or religious minorities, threaten damnation, or preach conversion, the prayers may be deemed to violate the First Amendment. Based on the record in this particular case, the Court concluded that the prayers did not violate the First Amendment.

Where We Go From Here

As to the future of legislative prayer, the Court gave this advice: "**Absent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of prayer will not likely establish a constitutional violation.**" As such, courts must make decisions based on "the prayer opportunity as a whole, rather [than] ... the contents of a single prayer."

As to whom is invited to give the legislative prayer, so long as the town board, or, for that matter, any other legislative body maintains a policy of nondiscrimination, the Constitution does not, in the Court's words, "require [the legislative body] to search beyond its borders" in an effort to achieve religious balancing."

Finally, the prayer practice adopted by the legislature must not apply pressure, direct or indirect, on those in attendance to participate. Whether or not the practice does so is a "fact-sensitive" inquiry, so legislative bodies must be sensitive to this issue. Since the prayers are intended for the legislators, an express statement that those attending the legislative session are not required to participate in any way should alleviate any problem, real or perceived.

Conclusion

The Supreme Court was sharply divided in this case. This means that the issue of legislative prayer is far from being finally settled. However, the Court did tell us that it is unlikely to review cases based on the content of a single prayer. Instead, it will review cases in which the record shows a clear pattern over a period of time (probably years) in which the legislative prayers advance one particular religion or set of beliefs and/or denigrate other religions and/or belief systems. Further, the Court will look for the hallmarks discussed in the cases it chooses to review. As such, legislatures must ensure that prayers are suited to the legislative setting and geared towards the ends of the legislative process.

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