

Legislative Prayer on the Docket Again?

By: Erich Eiselt, IMLA Assistant General Counsel and Editor

The thorny issue of legislative prayer seemed to have been put to rest, albeit uneasily, two years ago by *Town of Greece v. Galloway*.[1] There, a slim majority of the Supreme Court upheld the Town Board's practice of starting its meetings with invocations by local religious leaders invited by the Board. Greece, New York was located on the shores of Lake Ontario, far from more diverse urban centers and its 95,000 residents were overwhelmingly Christian. Every Board invocation from 1999 to 2007 had been Christian, with many invoking Jesus Christ and the resurrection. Non-Christian residents objected.

A panel of the Second Circuit invalidated the process, finding that "the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint" because Greece had not reached out to a more diverse group of clerics or clearly stated that the prayers were not indicative of the local government's beliefs.[2]

The Supreme Court reversed, upholding the town's policy. A 5-4 conservative majority said legislative prayers need not be stripped of references to a given religion, and prayer-givers should be "unfettered" as to the text of their invocations. Justice Kennedy's opinion cited the admonition that prayers must neither demean nor promote: "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."[3]

Two years later, a new Fourth Circuit decision is again subtly testing the parameters of permissible legislative prayer. *Lund v. Rowan County*[4] assesses the practice by Rowan County, North Carolina's Board of Commissioners of commencing its twice-monthly meetings with a religious invocation. *Rowan County* parallels in many respects the facts in *Town of Greece*. The overwhelming majority of prayers offered invoke the Christian faith; many include references to "Jesus," "Christ," and "Lord." It is typical for the invocation to begin with some variant of "let us pray" or "please pray with me." Although not required to do so, the audience largely joins the speakers in standing and bowing their heads during the prayer.

The salient difference in *Rowan County is* that the invocations are not given by guest chaplains or residents of the community, but by the five members of the Board themselves, on a rotating basis. The content of each prayer is determined by the individual commissioner, and the Board has no role in prayer selection or content. But all Board members are Christian, as are virtually all invocations.

Several non-Christian Rowan County residents filed Establishment Clause challenges alleging the prayers aligned the Board with one faith and caused plaintiffs to feel excluded as "outsiders." They further alleged that the Board meetings coerced them to participate, by making them feel compelled to stand during the invocation so that they would fit in with the majority. Plaintiffs sought a declaratory judgment that the Board's prayer practice violated the Establishment Clause, along with an injunction preventing any similar future prayers.

The district court for the Middle District of North Carolina acknowledged that in *Town of Greece* the Supreme Court had "dismantled" the Fourth Circuit's legislative prayer doctrine which had focused on whether invocations were sectarian. Nonetheless, the district court struck down Rowan County's invocation practice, concluding that "[s]everal significant differences" distinguished it from *Town of Greece*. It found the fact that only commissioners delivered the prayers, instead of invited clergy or volunteers, meant that "The prayers are effectively being given by the government itself."[5] It also found that, in inviting all in attendance to stand during the invocation, the Board created a constitutionally-suspect coercive atmosphere for non-Christian attendees. It granted summary judgment to plaintiffs and permanently enjoined the Board's prayer practice.

The County appealed, drawing the support of thirteen states as amici and retaining well-known appellate practitioner Allyson Ho of Morgan Lewis & Bockius to state its case. The Fourth Circuit reversed in a 2-1 vote.

It recounted the long history of legislative prayer in the United States as outlined in *Marsh v. Chambers*.[6] There, the Supreme Court had noted that the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer. This made it wholly illogical that the Framers would have "intended the Establishment Clause . . . to forbid what they had just declared acceptable" and allowed the Court to uphold Nebraska's 16-year history of utilizing an appointed Presbyterian chaplain to open its state legislative sessions.

The Circuit also reiterated the Supreme Court's statement in *Town of Greece* that legislative prayers need not be neutral or reference only a generic God, rebuffing "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard." And it cited the Court's disagreement in *Town of Greece* with the Second Circuit's finding that the "steady drumbeat of Christian prayer . . . tended to affiliate the town with Christianity."[7]

The Fourth Circuit majority also addressed the district court's conclusion that Supreme Court silence meant legislators should not be the sole prayer-givers in public meetings. It was not relevant that *Town of Greece* involved a rotating group of local clergy and *Marsh* involved a paid chaplain, because the Supreme Court had attached no significance to the speakers' identities and had simply confined its discussion to the facts surrounding the prayer practices before it. "We find the Supreme Court's silence on the issue of lawmaker-led prayer to be simply that: silence." It cited numerous Circuit precedents in support, including its own opinion in *Simpson v. Chesterfield County Board of Supervisors*, where it noted that the Court, "neither in Marsh nor in Allegheny, held that the identity of the prayer-giver, rather than the content of the prayer, was what would affiliate the government with any one specific faith or belief."[8]

The Circuit included statistics to support its position: 31 states, including seven of the ten states within the Circuit's jurisdiction, allow

legislators to offer invocations. It also cited *Town of Greece's* view that the primary audience for such prayers is other lawmakers at the event–who collectively seek contemplation and wisdom before commencing–rather than the public:

> Not only are the legislators themselves the intended "congregation" for legislative prayer, but the practice carries special meaning to the thousands of state and local legislators who are citizen representatives. In this respect, the Supreme Court has specifically singled out "members of town boards and commissions, who often serve part-time and as volunteers," as lawmakers for whom "ceremonial prayer may . . . reflect the values they hold as private citizens."[9]

The district court had found that, because Rowan commissioners authored every prayer, "the government" was controlling the content of the invocations. Again the Circuit disagreed: "The record is devoid of any suggestion that any prayer in this case is anything but a personal creation of each commissioner acting in accord with his or her own personal views."[10]

Similarly, the fact that virtually all prayers were Christian-centric was a function of the Board members' personal beliefs. "Absent proof the Board restricted the prayer opportunity among the commissioners as part of an effort to promote only Christianity, we must view its decision to rely on lawmaker-led prayer as constitutionally insignificant."[11]

Finally, the Circuit dispensed with the district court's finding of coercion. It turned again to *Town of Greece*. There, the Court noted that "reasonable observers are aware of the multiple traditions acknowledging God in this country" and that citizens could appreciate the town's prayer practice without being compelled to participate. As Justice Kennedy had stated, "[o]ffense . . . does not equate to coercion." "Adults often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum."[12]

The Fourth Circuit found that the Rowan County process permitted attendees to avoid joining in prayers if objectionable; for example, they could enter the session after the invocation. And despite plaintiffs' argument that they would be "less effective" advocates for their positions by not joining in the invocation, there was no evidence that non-adherents were prejudiced in the meetings themselves.

Plaintiffs had cited the Board chairman's public statement that "I am sick and tired of being told by the minority what's best for the majority. My friends, we've come a long way – the wrong way. We call evil good and good evil"[13] as indicative of an underlying hostility to non-adherents. The Circuit disagreed: "Such isolated incidents do not come close to showing, as *Town of Greece* requires, "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose."[14]

DISSENT: Judge Wilkinson vociferously dissented. He viewed the majority opinion as cobbling together a spectrum of elements to justify a fact pattern that he found unprecedented:

> Whereas guest ministers led prayers in [Town of Greece], it was public officials who exclusively delivered the invocations in Rowan County. Those prayers served to open a meeting of our most basic unit of government, a local board of commissioners that passes laws affecting citizens in the most daily aspects of their lives. The prayers, bordering at times on exhortation or proselytization, were uniformly sectarian, referencing one and only one faith though law by definition binds us all. I have seen nothing like it.
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> The parties have not cited any legislative prayer decision combining the particular speakers, audience involvement, prayer content, and local government setting presented here. [15]

Wilkinson found the facts—in 139 of 143 Rowan County Board meetings, elected lawmakers had explicitly referenced Christianity in their invocations, and most had closed with "in Jesus' name"—to create an undeniable Establishment Clause violation, blending religion and government. As one commissioner had put it, "Lord, we represent you and we represent the taxpayers of Rowan County." For Wilkinson, "[w]hen the state's representatives so emphatically evoke a single religion in nearly every prayer over a period of many years, that faith comes to be perceived as the one true faith, not merely of individual prayer-givers, but of government itself."[16]

And when the Board members, as governing officials, suggested that attendees "pray with me," it necessarily involved a governmental imprimatur not present when visiting clerics made the same suggestion. In such an atmosphere, the alternatives proffered by the majority—entering the meeting late or sitting during the prayer—would hardly eliminate the risk of coercion.

For Wilkinson, the Rowan County proccess had ominous political implications. Because elected Board members gave all invocations, voters might avoid otherwise qualified non-Christian candidates: "Failure to pray in the name of the prevailing faith risks becoming a campaign issue or a tacit political debit, which in turn deters those of minority faiths from seeking office. It should not be so."[17]

Town of Greece confirmed that, where a variety of speakers are given the opportunity to present invocations before the public, the fact that most prayers invoke one denomination is not constitutionally infirm. The Fourth Circuit seems to advance that boundary in Rowan County, allowing a group of elected Christian municipal lawmakers to give religiously-themed prayers at every commission meeting attended by members of the community–in the process excluding the opportunity for prayers by other denominations.

The Supreme Court has repeatedly emphasized that its legislative prayer determinations, however decisive, are highly fact-specific. Whether Rowan County– which confronts the Establishment Clause with a novel combination of juridical ingredients–elicits the scrutiny of a post-election and reconstituted high court, remains to be seen.

Notes

1. Town of Greece v. Galloway, 134 S.Ct. 1811 (2014).
2. Galloway v. Town of Greece, 681 F.3d 20 (2012).
3. *Town of Greece,* 134 S.Ct. at 1822.
4. Lund v. Rowan County, No. 15-1591, 2016 U.S. App. LEXIS 17064 (4th Cir. Sept. 19, 2016).
5. Lund v. Rowan County, 103 F. Supp. 3d 712, 724 (M.D.N.C. 2015).
6. Marsh v. Chambers, 463 U.S. 783 (1983).
7. *Town of Greece*, 134 S.Ct. at 1818.
8. Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 286 (4th Cir. 2005).
9. *Lund,* 2016 U.S. App. LEXIS 17064, at *27.
10. *Id.* at *38.
11. *Id.* at *30.
12. *Town of Greece,* 134 S.Ct. at 1838.
13. *Lund,* 2016 U.S. App. LEXIS 17064, at *56.
14. *Id.*
15. *Id.* at *59.
16. *Id.* at *67.
17. *Id.* at *69.