


# In God We Trust: The Supreme Court Takes on the Issue of Legislative Prayer

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The United States of America was founded in a climate of thanks and obedience to the Almighty. Without affirming any particular denomination (and sharply rejecting the primacy of The Church in European governments), the Founding Fathers unabashedly invoked a higher power, starting with the first session of Congress.

That tradition played a seminal role in a leading Supreme Court case on legislative prayer, *Marsh v. Chambers*, 463 U.S.783 (1983). There, Nebraska's long-time practice of employing a Christian chaplain to provide invocations at legislative sessions was upheld, because the prayers were not overtly denominational, did not proselytize on behalf of a specific faith or criticize any other. Furthermore, the chaplain had removed all references to "Jesus" or "Christ" in the year before litigation began.

As documented in the excellent article on legislative prayer elsewhere in this issue of *Municipal Lawyer*, varying interpretations have been made of *Marsh* in jurisdictions around the country. Some, like the Ninth Circuit, have found in *Marsh* a reason to uphold "voluntary chaplain" arrangements, where a cornucopia of differing religious beliefs are welcomed behind the lectern. Others, like the Second Circuit, have been less hospitable to voluntary arrangements and look to the overall effect of a given prayer protocol, irrespective of its neutral intent. Virtually every Circuit has construed whether or not sectarian prayers are permissible, with widely divergent conclusions.

Now the Supreme Court will have the opportunity to refine its position. On May 20, it granted certiorari in *Town of Greece v. Galloway*, a Second Circuit opinion handed down in May 2012.

The Town of Greece, New York had followed the *Marsh* tradition for several decades, allowing local representatives to start the monthly five-member Town Board meetings with prayer. The Town ostensibly welcomed any sect or denomination and contacted religious entities within the Town's boundaries to make them aware of the prayer opportunity. But there were virtually no non-Christian places of worship in the Town--not a single synagogue, mosque or temple, and no non-Christian speakers were contacted. In practice, every prayer was delivered by a Christian, and the majority invoked the name of Jesus or Jesus Christ, and ended with "in Jesus' name."

In 2008, Town residents Susan Galloway (who is Jewish) and Linda Stephens (who is an atheist) brought suit against the Town in the form of a Section 1983 action, asserting that the prayer practice violated the Establishment Clause. Although they had each lived in the Town for more than 30 years, and could not identify a single non-Christian place of worship within Town boundaries, they argued that the prayer selection practice was either (1) overtly Christian in nature or (2) at a minimum, clearly sectarian, and constituted a "custom or policy" of excluding non-Christians. (Publicity surrounding their complaint subsequently led to members of the Wicca, Jewish and Ba'hai faiths providing a small number of Town Board prayers).

The Western District of New York had held for the Town (*Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D.N.Y. 2010). It found that, where the prayer forum had been rotated among voluntary speakers, no volunteer had been rejected, the Town did not interfere in the content of prayers, and the prayers did not proselytize or demean, the process was consistent with *Marsh*—notwithstanding references to "Jesus."

The Second Circuit disagreed, reversing and remanding. Noting that the legislative prayer issue was a matter of first impression before it, the Circuit Court acknowledged the seminal role that *Marsh* must play in any such case.

But the Second Circuit then pointed to *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 583 (1989). There, the Court had found *Marsh's* tradition-based paradigm to be insufficient when applied to a public crèche display: "However history may affect the constitutionality of nonsectarian references to religion by the government, history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed."(492 U.S. at 603).

Assessing the Town's practice in its totality, the Circuit Court found little randomness or openness in the prayer program. The Town essentially sought out only Christian speakers, resulting on an overwhelmingly Christian tone to its public meetings. Out of 121 prayers delivered between 1999 and 2010, all but four were Christian, and fully two-thirds had specifically referenced "Jesus," "Christ" or incorporated some other specifically Christian symbol or dogma. This did not comport with *Marsh* and violated the First Amendment: "We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."

The Second Circuit did not ascribe "any animus" to the Town's leaders, and did not state that a single denominational prayer, standing alone, would be constitutionally suspect. But using a "totality of the circumstances" test, the Town's scheme was impermissible.

The holding in *Town of Greece* appeared to be in direct conflict with a Ninth Circuit opinion rendered earlier this year (*Rubin v City of Lancaster*, no. 11-56318 (9th Cir. March 26, 2013)), which upheld

a "voluntary legislative prayer" scheme even though it resulted in an overwhelming percentage of Christian invocations.

This brings the country and the Supreme Court to the crux of the matter: is a legislative prayer process that does not intentionally discriminate in favor of a given sect—but nevertheless results in a near-total dominion of the prayer content by a single denomination, including specific sectarian references, permissible under the Establishment Clause? A loose analogy would seem to lie in "facial" versus "as applied" analyses of other statutes and policies.-

**Question Presented:** The specific issue before the Supreme Court will be: "Whether the court of appeals erred in holding that a legislative prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity."

The Court will consider the matter during its October 2013 Term.

***Town of Greece v. Galloway*, No. 10-3635 (2d Cir. May 17, 2012) cert granted (U.S. May 20, 2013) (No. 12-696).**

**The (Continuing) Rise of Executive Power: Agencies Have Authority to Determine Their Own Jurisdiction Under *Chevron***

*City of Arlington* examined whether an administrative agency (in this case the Federal Communications Commission (FCC)) may determine its own statutory authority. A trade association of wireless providers (CTIA) had petitioned the FCC for an interpretation of provisions of the Telecommunications Act of 1996 (Act). The Act limits the ability of state and local governments to impede the establishment of cell towers in their communities. It specifically requires that localities "shall act . . . within a reasonable period of time" on requests to construct or modify cell towers. 47 U.S.C. § 332(c)(7)(B)(ii).

In responding to the CTIA petition, the FCC had issued a Declaratory Ruling which provided time periods in which states and localities must respond to wireless facility siting applications.

Arlington and San Antonio, Texas (Cities) challenged the FCC's authority to issue the time frames. They argued that because Congress had not clearly delegated such authority in the Act, the FCC was overstepping its jurisdictional bounds.

The Fifth Circuit had applied *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) to assess the FCC's interpretation of the Act. Under *Chevron*, if a court determines that Congressional intent is clear from the wording of a statute, the court's task is simply to assess whether the agency has complied with that expressed intent. And where a statute is not clear, *Chevron* directs that courts should defer to the agency's interpretation of the law, so long as that construction is permissible—even if the court might have interpreted the statute differently.

What had not yet been settled until *City of Arlington* was whether *Chevron* allowed an agency to determine its own jurisdiction under a statute. The FCC and CTIA argued that *Chevron* did give the agency such authority. The Cities urged *de novo* consideration of the jurisdictional question, saying that *Chevron's* scope was more circumscribed. Circuit courts had split on the issue, prompting the Supreme Court to grant certiorari.

The Court agreed with the FCC and affirmed the Fifth Circuit decision that the *Chevron* framework applied and required deference to the agency's interpretation of the Act, and rejected the argument that "jurisdictional" questions were separate from the generalized *Chevron* parameters. Writing for a 6 to 3 majority, Justice Scalia discounted the Cities' argument that "jurisdictional" issues were a discrete species: "[T]he distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, *whether the agency has stayed within the bounds of its statutory authority*." He provided the example of a hypothetical statute, a "Common Carrier Act," written in two versions with minor variations in "jurisdictional" wording; the Cities' approach would lead to the illogical result that an agency had authority to construe the statute in one instance but not in the other.

IMLA had provided a brief as intervenor in support of the Cities' position, propounding that "jurisdictional issues are the *who, what, where* and *when* of regulatory power: which subject matters may an agency regulate and under what conditions." Justice Scalia specifically referenced the IMLA brief but disagreed, finding that each of these elements could also arise when an agency's jurisdiction was clearly established and it was simply considering the *application* of a statute. "In sum," said Scalia "judges should not waste their time in the mental acrobatics needed to decide whether an agency's interpretation of a statute is "jurisdictional" or "nonjurisdictional."

The majority's concern extended beyond the relatively narrow issue at hand. Justice Scalia posited that if courts must determine, *de novo*, the question of an agency's "jurisdiction," the entire *Chevron* architecture would be at risk; and the judiciary would be inserting itself into a huge swathe of legislatively-defined and delegated authority.

Chief Justice Roberts disagreed, joined with justices Kennedy and Alito. He viewed the majority as undermining a critical function of the judiciary and facilitating a massive land-grab by the executive branch. "My disagreement with the Court is fundamental. It is also easily expressed. A court should not defer to an agency until the court decides, on its own, that the agency is entitled to deference." He pointed to a continuing unbridled expansion of administrative power (citing Congress's launching 50 new agencies in the last 15 years) and the imbalance it posed in our constitutional system, and cited the bedrock principle declared in *Marbury v. Madison* that "It is emphatically the province and duty of the judicial department to say what the law is." Noting that an agency's interpretative authority derives legitimacy from a delegation of power by the Legislative branch to the Executive, he wrote "Our duty to police the boundary between the Legislature and the Executive is as critical as our duty to respect that between the Judiciary and the Executive." He referenced a line of cases where the Court, applying *Chevron*, had found that an agency did not have authority to take proposed action.

**NOTE - IMLA Intervenor Brief**: As referenced above, Paul Clement's excellent brief for IMLA as intervenor was quoted in the Court's opinion. His arguments were paralleled by the Chief Justice's but in this instance did not command a majority of the Court.

***City of Arlington v. FCC*, No. 11-1545 (U.S. May 20, 2013).**

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of the story—the vehicle's speed, the time elapsed and the distance traveled—were not physically reconcilable. The fact that the vehicle was a 1991 Mazda MPV van made claims about rapid acceleration within five seconds highly suspect.

He felt strongly that this record clearly called out for more analysis by a jury and that summary judgment for defendants was completely unwarranted.

*Gonzalez v. City of Anaheim*, No. 11-56360 (9th Cir. May 13, 2013).

### Student Apartments Are Not "Lodging Houses" In Worcester, Massachusetts

In Worcester, Massachusetts, like many municipalities across the country, local residents own multi-bedroom units they rent to college students. In common parlance these units – multiple bedrooms with a common kitchen, living area, bathroom, and, potentially, a dining room – are called apartments. In 2009 the City of Worcester determined the defendants, who rented out such multi-bedroom units to students, were operating "lodging houses" in violation of Massachusetts' WWI-era Lodging House Act. The City issued citations ordering the owners to reduce the number of occupants from four unrelated adults (the college students) to no more than three unrelated adults in any one unit to comply with the Act.

The district judge agreed with the City that the units were "lodgings" as defined in the Act and issued preliminary injunctions. When the defendants did not comply with the injunctions, the district judge issued civil contempt orders. While the case was playing out in court, the student-tenants were in the midst of final exams and refused to leave voluntarily.

The Appeals Court affirmed the district court judgment, and denied the defendants subsequent petition for rehearing.

The Massachusetts Supreme Court reversed, holding the units are not "lodgings."

The City argued the buildings at issue were lodging houses, defined in the Act as "a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it, " and that the dwelling units were "lodgings," not apartments. The property owners countered that the City's view essentially ignored the common understanding of "apartment buildings" and the historical and legal difference between lodging houses and apartment buildings.

The Massachusetts Supreme Court wholeheartedly agreed with the property owners that there is a difference between a lodging house and an apartment. First, the interests of tenants and of lodgers are different: tenants have exclusive control and the right to occupy an apartment, thereby acquiring a property interest; while lodge owners retain legal possession and lodgers acquire only a contractual interest. Second, both the Massachusetts sanitary code and fire safety code demonstrate the legislature's intent to distinguish between the two in the statutory scheme. And the licensing requirements for lodging house owners do not apply to apartment building owners.

Finally, the court determined that, to construe lodgings as the City suggested would lead to absurd results and foster selective enforcement. For example, under Worcester's interpretation, a rental unit would change regulatory category depending solely on the relationship of the occupants to one another . The possibility of selective enforcement was evident in that the City "acknowledged that, under its interpretation of 'lodgings,' the Lodging House Act . . . would apply if a new baby were added to a family of three, but asserted [it] would not enforce the statutory provisions in those circumstances."

In the end, the Massachusetts Supreme Court appreciated that the City wanted to protect student safety, but said "such concerns are better addressed through enforcement of applicable zoning ordinances and provisions of the sanitary and fire safety codes" rather than trying to apply such an arcane law.

*City of Worcester v. College Hill Properties*, SJC-11166 (Mass. May 15, 2013). **ML**

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### DNA Samples May Be Taken From An Arrestee Without A Warrant or Probable Cause

In 2009 Alonzo King was arrested in Wicomico County, Maryland on first-and second-degree assault charges for menacing a group of people with a shotgun. On the authority of the Maryland DNA Collection Act (Act), police took a swab of saliva from King's cheek and ran a DNA test. It showed that King had committed a rape in Salisbury Maryland in 2003. He was convicted and sentenced to life without parole.

The Court of Appeals of Maryland reversed the rape conviction on the grounds that the cheek swab constituted an unlawful search. Because various federal and state courts had reached differing conclusions about the constitutionality of taking DNA samples from people arrested for felonies but not yet convicted, the Supreme Court granted certiorari.

On June 3, 2013 the Court reversed by a narrow 5-4 margin, with Justice Kennedy writing an opinion upholding the search and the conviction.

The majority acknowledged that swabbing the inside of an arrestee's mouth clearly constitutes a "search." The relevant Fourth Amendment question was whether such a search was "reasonable," based upon balancing governmental interests against the individual's privacy rights.

Justice Kennedy produced an expansive list of factors weighing in favor of the government. The legitimacy of searching arrestees for weapons and contraband was already beyond question; it served obvious safety imperatives. Here, the taking and analysis of DNA further served the legitimate governmental interest in making safe and effective arrests. First, it clearly identified the person in custody. Second, it linked to databases documenting the arrestee's prior criminal behavior, revealing dangers to the arresting authorities. Third, the prior criminal record provided insights about the arrestee's flight risk. Fourth, it might predict further violent behavior, including retaliation, which endangered other members of the public and should inform incarceration decisions.

Finally, by using DNA to apprehend actual offenders, wrongly-arrested suspects would be freed.

In contrast, the privacy expectations of the individual who had been arrested for a felony based on probable cause were significantly reduced. Touching the inside of the arrestee's cheek with a buccal swab was not excessively intrusive under those circumstances. The majority traced the use by police of technology over the years, including photographs and fingerprints of wanted criminals; DNA was

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**Held – The application was dismissed.** The Municipal Act, 2001 allowed the powers of a council to be interpreted broadly in a manner that enabled the municipality to govern its affairs as it considers appropriate and to enhance its ability to respond to municipal issues. A strict interpretation of the statute was not appropriate. The hiring and termination of employees are administrative functions. While s. 270 of the Municipal Act, 2001 required the county to "adopt" and maintain policies with respect to the hiring of employees it did not specifically require adoption by by-law. The respondent county's policy manual constituted such a policy and it was adopted by the council through a process similar to that required for by-laws, that is, by democratic vote in open council. The power to hire and dismiss employees was therefore delegated to senior management with the adoption of the policy manual in 2005. The policy was in effect prior to the September 2010 nominations day and complied with s. 275(6). The intention of s. 275 was to control the actions of a council that, without limitations, could take certain actions for which it would never be held accountable. The delegation power set out in the policy manual complied with the intent of s. 275 and enabled the county to govern its affairs. In any event, a by-law is not required for every act of a municipality. *Person v. Grey (County)* (May 10, 2013), Doc. 11-065, Bielby J. (Ont. S.C.J.)

### City Wins Injunction to Prevent Use of Trailer as Residence

The plaintiff city brought an application seeking injunctive relief against the individual defendant, who had permitted the residential use of a trailer on his property, contrary to the city's zoning by-law. It was not disputed that the city had not issued an occupancy permit and that the defendant was in violation of the city's zoning by-law. The issue was whether the city should be granted injunctive relief in order to enforce its by-law.

**Held – The application was allowed.** The court has a very limited discretion to deny a statutory injunction to enforce the public right. Where the right to an injunction is created by statute and the public interest must be weighed against any hardship which an order may impose upon a defendant, the scope of that discretion to deny a statutory injunction is narrow. The circumstances of this case fell directly within the scope of the mischief which the legislation sought to prevent. An injunctive order to cease using or allowing the residential use of the trailer was issued. However, due to the fact that the elderly tenant was suffering from cancer, the order would not come into force for six months, allowing the tenant reasonable time in which to relocate. *Powell River (City) v. Sliwinski* (April 16, 2013), Doc. S110981, Maisonville J. (B.C. S.C.)

### Land Use Permit Quashed Where Proposed Use Conflicts With Management

The respondent credit union owned land which was zoned as a public service district under the town's land use by-law. In 2011 the credit union applied for a permit to allow the continued occupation of the premises by a law firm. The development appeal board held that the proposed use fell within the discretionary category of "professional, financial, health and office services" under the land use by-law. The appellant sought to appeal the development appeal board's decision, on the basis that the board erred in interpreting the land use by-law in a manner contrary to or inconsistent with the 2010 Banff National Park of Canada Management Plan.

Held – The appeal was allowed.

The town incorporation agreement specified that every land use by-law must comply with an applicable management plan, and also that every decision made pursuant to such by-law must conform with the management plan. In this case, the development appeal board never considered whether the application complied with the incorporation agreement, whether the law office constituted a commercial use, or whether the amendments to the management plan were decisive. The permit was quashed, as the commercial use proposed was inconsistent with the management plan, which was not permitted under the incorporation agreement. *Canada (Attorney General) v. Banff (Town) Development Appeal Board* (April 17, 2013), Doc. 1201-0098-AC, Slatter, Rowbotham, Veldhuis JJ.A. (Alta. C.A.) ML

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simply the latest step in this evolution.

In an example of unusual bedfellows, Justice Scalia penned a scathing dissent, joined by Justices Kagan, Sotomayor and Ginsburg. Usually a reliable conservative, Scalia found the majority opinion completely without foundation. He reminded his colleagues that "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing that the person is guilty of the crime . . . .The Court's assertion that DNA is being taken, not to solve crimes, but to *identify* those in the state's custody, taxes the credulity of the credulous."

He likened the free-range search for DNA to "general warrants" which had been employed by the King's henchmen in the colonies and were emphatically invalidated more than two centuries ago by the Fourth Amendment. Tracking each step in King's arrest, the taking of the DNA sample and finally, testing the DNA, Scalia documented that the process took more than four months. This revealed that the alleged justification for the DNA swab to begin with—the correct identification of King—was a fabrication. ***Maryland v. King,*** **No. 12-207 (U.S. June 6, 2013).** ML



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