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Recent Developments in First Amendment Law: Exploring Panhandling and Invocations

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Introduction

Panhandling regulations and legislative invocations reach back to the origins of the Republic and beyond. What was once considered a relatively settled area of constitutional law came under significant scrutiny as a result of the Due Process revolution of the 1960s. Since that time, the Supreme Court has attempted to achieve a balance between *First Amendment* protections and the government's desire to achieve certain policy interests. The issue of panhandling can be an intensely local one and policy objectives often differ between communities in neighboring jurisdictions much less between states. The same is true of invocations before local government bodies where their use and content can vary widely depending on the goals and beliefs of the community.

This paper will briefly discuss the history of panhandling regulations and legislative invocations in the United States including the origins of Supreme Court jurisprudence. It will then evaluate the status of recent federal circuit court decisions and provide tips for practitioners to consider when faced with a request to draft a local law or policy regulating panhandling or invocations.

I. PANHANDLING

A. History

Historically, Americans addressed the problems associated with panhandling[1] by simply prohibiting it. In fact, the Articles of Confederation specifically exempted

[1] Although the term "panhandling" is sometimes used interchangeably with the terms "begging" and "soliciting," Merriam-Webster defines the term more narrowly as the specific act of stopping or accosting people on the street and asking for food or money. The terms "begging" and "soliciting" are much broader and used in a variety of contexts other than to ask for charity. See "Panhandling, begging, soliciting" (http://www.merriam-webster.com/dictionary (Aug. 21, 2013)).

Most of the state and local laws covered by the cases discussed in this paper prohibit only certain specific acts of "solicitation" but use any number of terms and phrases to define what that means ("making a request for money", "begging", "panhandling," "soliciting employment, business or contributions," etc.) For the purposes of this paper, the authors adopt the approach of the Eleventh Circuit Court of Appeals and use the terms interchangeably unless the context requires a distinction be made. *Smith v. City of Fort Lauderdale,* 177 F.3d 954, 955

"paupers, vagabonds, and fugitives from justice" from the privileges and immunities guaranteed to all citizens.[2] By the middle of the twentieth century, every state had laws in place regulating vagrancy and a common feature of these laws were prohibitions on begging.[3] These laws were implicitly supported by the United States Supreme Court in decisions such as *Cox v. New Hampshire* which upheld a state law prohibiting parades or processions on public streets without a license.[4] According to the Court, laws assuring the safety and convenience of the people to use the public highways have "never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend."[5] State courts were generally supportive of local vagrancy statutes as well.[6]

Judicial deference began to wither in the second half of the century, however, as petitioners successfully challenged the arbitrary nature of laws that made it a crime merely to be poor or transient. In 1972, for example, the Supreme Court held a Jacksonville, Florida city ordinance unconstitutional due to its vagueness.[7] The ordinance punished acts of vagrancy including, among other things, "habitual loafers," "dissolute persons who go about begging," "common night walkers," and "persons able to work but habitually living upon the earnings of their wives or minor children."[8] According to the Court, no person of ordinary intelligence would contemplate that such conduct would be a crime. In addition, the law had such an expansive definition of vagrancy, the police had unfettered discretion to make arrests for behavior that, in many cases, may have been perfectly legal.[9]

In a series of decisions in the 1980s, the Supreme Court looked more specifically at the issue of solicitation and its interplay with the First Amendment. In

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(11th Cir. 1999)("It is undisputed that "soliciting," "begging," and "panhandling" are interchangeable terms.").

[2] William Mitchell, II, Comment "Secondary Effects" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. Balt. L. Rev. 291, 297-98 n23 (1995).

[3] Robert Teir, Article: Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging, 54 La. L. Rev. 285, 300 (1993). For example, until a recent series of judicial decisions declared the law unconstitutional, it had been unlawful in the State of Michigan since 1929 to be "found begging in a public place." *Mich. Comp. Laws Ann. § 750.167(1)(h).*

[4] 312 U.S. 569 (1941).

[5] Id. at 574.

[6] Mitchell, "Secondary Effects" at 298 n27.

[7] *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).

[8] Id. at 158.

[9] Id. at 162, 168.

Village of Schaumburg v. Citizens for a Better Environment, the Court struck down a local ordinance prohibiting door-to-door or on-street solicitation by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes.[10] While acknowledging that soliciting financial support was subject to reasonable regulation, Justice Byron White opined for the majority that such regulation:

> [M]ust be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.[11]

The City claimed the ordinance was enacted to prevent fraud, protect public safety, and maintain residential privacy but the Court found such substantial interests "only peripherally promoted by the 75 percent requirement."[12] It agreed with the Seventh Circuit Court of Appeals that the ordinance was impermissibly overbroad given the City's interests could be better achieved using measures less intrusive, such as existing penal laws, than a direct prohibition on solicitation by certain charitable groups but not others.

Subsequent Supreme Court decisions found solicitation by other types of organizations to be protected speech although, to date, the Court has not extended such protection to pleas for money by individuals for no other purpose than the individual's own use.[13] Courts in several federal circuits, however, have relied on the Court's analysis in *Schaumburg* and its progeny to conclude that panhandling by individuals is subject to the same First Amendment protection given to solicitation by private charities.[14]

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[10] 444 U.S. 620 (1980)

[11] Id. at 632. White relied, in part, on several Supreme Court decisions (primarily from the 1940s and 50s) involving canvassing and soliciting by religious and charitable organizations. See Id. at 628-32.

[12] Id. at 636.

[13] *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988) (professional fundraisers); *United States v. Kokinda,* 497 U.S. 720 (1990) (political organizations); and *International Society for Krishna Consciousness v. Lee,* 505 U.S. 672 (1992) (non-profit religious organizations).

[14] *Loper v. New York City Police Dep't,* 802 F.Supp. 1029 (S.D.N.Y. 1992), aff'd, 999 F.2d 699 (2d Cir. 1993); *Clatterbuck v. City of Charlottesville,* 708 F.3d 549 (4th Cir. 2013); *Speet v. Schuette,* 2013 FED App. 0226P (6th Cir. 2013); *Gresham v. Peterson,* 225 F.3d 899 (7th Cir. 2000); and *Smith, supra* (11th Cir. 1999).

B. Constitutional Analysis

In *Schaumburg,* the Supreme Court applied an "overbreadth" analysis to find an ordinance was not the least restrictive means for achieving a legitimate governmental interest. At other times the Court has evaluated solicitation ordinances using the "time, place and manner" analysis set forth in *Perry Education Association v. Perry Local Educators' Association*.[15] In *Perry*, the Supreme Court held that in places which by long tradition, or government fiat, have been devoted to assembly and debate (e.g., streets, sidewalks, public parks), the rights of the state to limit expressive activity are sharply circumscribed ("traditional public fora"). To pass constitutional muster, a restriction on speech in a traditional public forum must meet three criteria: (1) it must be content-neutral; (2) it must be narrowly tailored to serve a significant governmental interest; and (3) it must leave open ample alternative channels for communication of the information.[16]

A second category of public property identified by the Court in *Perry* is property which the state has designated or opened for a limited purpose or for the discussion of certain subjects ("limited or designated public fora"). The state can limit speech in a limited public forum to certain purposes or subjects, but cannot discriminate between speakers based on viewpoint. Thirdly, public property which is not by tradition or designation a forum for public communication may be governed by more restrictive standards including the prohibition of all speech. ("nonpublic fora")).[17]

In *International Society for Krishna Consciousness v. Lee,* for example, a divided Court held the Port Authority of New York and New Jersey could prohibit the solicitation and receipt of funds at an airport terminal because the terminal had not historically been made available for speech activity. This made the terminal a "nonpublic forum" and, therefore, the Port Authority's need to restrict speech to reduce passenger congestion was reasonable and unrelated to any particular speaker's viewpoint.[18]

Lower federal courts tend to engage in forum analysis when evaluating the constitutionality of solicitation regulations.[19] In 2000, the Seventh Circuit Court of

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[15] 460 U.S. 37, 45 (1983)

[16] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[17] *Perry,* 460 U.S. at 45-46.

[18] *Krishna,* 497 U.S. at 680-81. See also, *Kokinda,* 497 U.S. at 730 (sidewalk outside post office a nonpublic forum allowing Postal Service to prohibit solicitation in the interest of preventing disruptions to mail service).

[19] But see, *Speet* at 2013 FED App. 0226P (finding Michigan's anti-begging statute substantially overbroad and therefore unconstitutional on its face).

Appeals upheld a City of Indianapolis, Indiana ordinance that prohibited "panhandling" which the City defined as:

> "[A]ny solicitation made in person upon any street, public place or park in the city, in which a person requests an immediate donation of money or other gratuity from another person, and includes but is not limited to seeking donations:
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> (1) By vocal appeal or for music, singing, or other street performance; and,
>
> (2) Where the person being solicited receives an item of little or no monetary value in exchange for a donation, under circumstances where a reasonable person would understand that the transaction is in substance a donation.[20]
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> The ordinance prohibited panhandling:
>
> (a) On any day after sunset or before sunrise;
>
> (b) At bus stops;
>
> (c) In any public transportation vehicle or public transportation facility;
>
> (d) In a vehicle which is parked or stopped on a public street or alley;
>
> (e) In a sidewalk café; or
>
> (f) Within 20 feet in any direction from an automatic teller machine or entrance to a bank.[21]

In addition, the ordinance made it unlawful to engage in panhandling in an "aggressive manner" which it defined to include:

> (i) Touching the solicited person without the solicited person's consent.

[20] *Gresham,* 225 F.3d at 899.

[21] Id. at 901-02.

(ii) Panhandling a person while such person is standing in line and waiting to be admitted to a commercial establishment;

(iii) Blocking the path of a person being solicited, or the entrance to any building or vehicle;

(iv) Following behind, ahead or alongside a person who walks away from the panhandler after being solicited;

(v) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or,

(vi) Panhandling in a group of two (2) or more persons.[22]

Finally, the ordinance specifically excluded from the definition of panhandling "the act of passively standing or sitting, … performing music, singing or other street performance with a sign or other indication that a donation is being sought, without any vocal request other than in response to an inquiry by another person."[23]

The plaintiffs in *Gresham* argued that the definition of "aggressive panhandling" was too vague and that the ordinance failed the *Perry* test for content-neutral time, place and manner restrictions on protected speech.[24] The Court of Appeals agreed that there was a potential the definition of aggressive panhandling could be interpreted too broadly because (i) it was not clear the list of what constitutes aggressive panhandling was exhaustive and (ii) one could violate the act merely by following behind a person who had just been solicited. However, since no lower Indiana court had interpreted the ordinance in that way, the Court held that as long as the list is considered exclusive, rather than illustrative, it was not too vague. In addition, as long as the act of "following" was illegal only in the context of a continued request for money that a victim reasonably interprets as a threat, it would be constitutional.[25]

With regard to the question of time-place-manner, the Court held the City had a legitimate interest in promoting the safety and convenience of its citizens on public streets. It was also narrowly tailored because it restricted panhandling:

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[22] Id.

[23] Id.

[24] Id. at 903.

[25] Id. at 908-09.

> "only in those circumstances where it is considered especially unwanted or bothersome--at night, around banks and sidewalk cafes, and so forth. These represent situations in which people most likely would feel a heightened sense of fear or alarm, or might wish especially to be left alone."[26]

Finally, the ordinance left open ample alternatives for panhandlers to exercise their First Amendment rights. They could panhandle any time during daylight hours on any public street (as long as the panhandling is not "aggressive"), at nighttime as long as the request is not made vocally, and at any other public place in the 396 square mile City except for certain specific locations.[27]

Similarly, in 1999 the Eleventh District Court of Appeals upheld the City of Fort Lauderdale, Florida's ban on panhandling on a five-mile strip of beach and on the sidewalks on either side of the highway that runs along the beach in that area.[28] The Court characterized the area as a traditional public forum and noted its importance to the City's tourism industry which is its chief economic engine. Accordingly, the City had a significant government interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach. Therefore, the City was acting within its discretion when it determined that begging in that area impacts tourism. Furthermore, begging was allowed in streets, sidewalks, and in many other public fora throughout the City.[29]

However, more recent federal court decisions appear to be less deferential to local government interests and more respectful of First Amendment protections and therefore offer a counterbalance to the holdings in *Gresham* and *Smith*. For example, the Ninth Circuit recently ruled the City of Redondo Beach's solicitation ordinance unconstitutional because it was not narrowly tailored to achieve the City's goals.[30] The ordinance prohibited soliciting for employment, business or contributions from the occupants of any vehicle. The City enforced the ordinance as part of its "Day Laborer Enforcement Project" and a pair of day-laborer organizations sued. The Court found the City had a legitimate interest in keeping the streets open and available for movement but that the ordinance was not narrowly drawn because it applied everywhere in the City while the City only provided evidence of traffic problems at a small number of major streets and medians. Furthermore, the ordinance swept within its coverage school children shouting "car wash" at motorists, girl scouts selling cookies on the sidewalk, and even a motorist stopping

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[26] Id. at 906.

[27] Id. at 907.

[28] *Smith,* 177 F.3d at 955.

[29] Id. at 956-57.

[30] *Comite de Jornaleros v. City of Redondo Beach,* 657 F.3d 936 (9th Cir. 2011).

on the side of the street to ask a neighbor's teen ager is available to babysit. The City also had numerous alternative state law provisions at its disposal to achieve its goals while burdening little or no speech.[31]

The Ninth Circuit also found a Seattle, Washington solicitation ordinance an impermissible content-based restriction where it prohibited street performers from actively soliciting donations at an 80-acre public park and entertainment complex but did allow them to passively solicit by setting out a receptacle and using signage.[32] The Court found the very terms of the ordinance to be content-based because they prohibited performers from verbally communicating a particular set of messages – requests for donations – based on the idea expressed. The Court then declared the ordinance unconstitutional even though the City may have had a legitimate interest in reducing the "aggressive solicitation" of street performers since it banned all active solicitation and not just aggressive behavior.[33]

The *Berger* case is also significant in that it struck down the City's content-neutral prohibition against all speech activities at the complex within thirty feet of a captive audience. A "captive audience" was defined as any person or group of persons 1) waiting in line to obtain tickets or food or other goods or services, or to attend an event; 2) attending or being in an audience at any event; or 3) seated in any seating location where foods or beverages are consumed.[34] Interestingly, the Seventh Circuit in *Gresham* found similar restrictions permissible but the Ninth Circuit deemed the prohibition unconstitutional because it found no evidence that the protected class of persons was any different than other visitors to the park. In other words, by waiting in line to buy tickets or sitting at a table having food you are no more "captive" than parents watching their kids at the playground.[35] One possible way to distinguish the two cases is the fact the Indianapolis ordinance prohibited only vocal pleas for money while the Seattle ordinance prohibited all speech no matter how it was communicated.

Recently, the Fourth Circuit Court of Appeals also found a city solicitation ordinance content-based.[36] According to the unanimous opinion of the three-judge panel, the City of Charlottesville's ordinance prohibiting solicitations for immediate donations of money or other things of value in certain areas of the city had the effect of distinguishing between different types of protected speech. While one could not ask for an immediate donation, he or she could ask for a future donation, a

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[31] Id. at 947-51.

[32] *Berger v. City of Seattle,* 569 F.3d 1029 (9th Cir. 2009).

[33] Id. at 1053.

[34] Id. at 1035.

[35] Id. at 1056-57.

[36] *Clatterbuck,* 708 F.3d at 549.

signature, or merely a "kind word."[37] The case has been remanded to the District Court for further proceedings.

C. Tips for Practitioners

When requested to draft an ordinance regulating panhandling, there is not a clear line of consistent federal case law on which a municipal attorney may comfortable rely. Although the Supreme Court has not expressly held that panhandling by individuals is a form of protected speech, the federal courts almost unanimously treat it as protected speech similar to solicitation by organizations. Therefore, attorneys should begin with the assumption that an ordinance regulating panhandling implicates the First Amendment. From there, the analysis should focus on current case law with a particular focus on the corresponding Circuit Court of Appeals decisions in the client's jurisdiction. While not exhaustive, the following is a list of additional tips a practitioner should consider when drafting an ordinance:

1. Treat all forms of solicitation the same way whether by individuals, churches, community organizations, professional fundraisers, etc.

2. Entire city-wide bans are almost certainly impermissible.

3. Identify the interests the ordinance is attempting to achieve. The courts have deemed legitimate such interests as (i) protecting citizens from fraud and crime, (ii) promoting traffic safety, (iii) ensuring citizens feel secure in their surroundings, (iv) eliminating nuisances, and (v) promoting the city's economic welfare and vitality.[38]

4. Review and tightly define the scope of activity you are regulating. For example, if traffic problems only exist in certain areas of the city, narrowly tailor the ordinance to address the specific problem areas rather than banning solicitation on all streets.

5. Banning certain conduct associated with speech rather than the speech itself is more likely to be deemed constitutional. Aggressive panhandling ordinances that prohibit conduct making recipients feel insecure or threatened are more defensible than general bans on all panhandling. Also, what constitutes "aggressive" behavior should be specifically identified in the ordinance and be exclusive.

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[37] Id. at 556.

[38] *Schaumburg,* 440 U.S. at 636; *Gresham,* 225 F.3d at 906; and *Smith,* 177 F.3d at 956.

6. Build your legislative record as completely as possible to identify the government interests at play and why there is a need for government regulation.

II. INVOCATIONS

A. History

On April 25, 1789, the United States Senate elected its first chaplain and the House of Representatives followed suit six days later setting in motion the practice of congressional invocations that continues uninterrupted to this day.[39] Although the practice was questioned by some members of the Senate in the mid-1900s, it would be almost two hundred years before the United States Supreme Court examined whether it was a violation of the First Amendment's Establishment Clause to open a legislative session with a prayer.[40]

The "Establishment Clause" provides that "Congress shall make no law respecting an establishment of religion" and it was incorporated into the states by the Fourteenth Amendment. In 1980, Ernest Chambers, a member of Nebraska's unicameral legislature, brought suit to enjoin his state legislature from commencing each session with a prayer as had been the state's practice since it entered the union in 1867. In the 16 years prior to Chambers' lawsuit, the prayer had been offered by the same Presbyterian minister who was paid out of public funds.[41]

Initially the District Court found the prayers constitutional but deemed it unconstitutional to pay the minister out of public funds.[42] On appeal, the Eighth Circuit found both the prayers and the payments unconstitutional.[43] In a 6-3 opinion authored by Chief Justice Warren Burger, the Supreme Court held the legislature's practice did not violate the establishment clause given "the unbroken practice for two centuries in the National Congress and for more than a century in Nebraska and in many other states." Absent impermissible motives or attempts to proselytize or

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[39] S. Jour., 1st Cong., 1st Sess., 10 (1820 ed.) and H.R. Jour., 1st Cong., 1st Sess. 26 (1826 ed.)

[40] *Marsh v. Chambers,* 463 U.S. 783, 788 n.10 (1983)(The chaplaincy was challenged in the 1850s but after consideration by the Senate Judiciary Committee it was decided the practice did not violate the Establishment Clause. The Senate reasoned, in part, that since prayer was said by the very Congress that adopted the Bill of Rights, the Founding Fathers could not have intended the First Amendment to forbid legislative prayer or viewed prayer as a step toward an established church).

[41] Id. at 784.

[42] *Chambers v. Marsh,* 504 F.Supp. 585 (Neb. 1980).

[43] *Chambers v. Marsh,* 675 F.2d 228 (8th Cir., 1982).

advance any one, or disparage any other, faith or belief, the Court appeared unwilling to examine the content of the invocations.

As pointed out in a dissent authored by William Brennan and joined by Thurgood Marshall, the majority chose to ignore the "most commonly cited formulation of prevailing Establishment Clause doctrine" developed in *Lemon v. Kurtzman* only twelve years earlier in favor of a history-based analysis.[44] Subsequent Supreme Court decisions suggest *Marsh* was, in fact, an exception to traditional Establishment Clause jurisprudence and federal courts appear to treat it the same way. When faced with a similar fact pattern in 1992, for example, the Supreme Court applied the *Lemon* test to declare unconstitutional the use of clerical members who offered prayers as part of official school graduation ceremonies.[45]

B. Interpreting *Marsh*

Perhaps not surprisingly given its highly-charged subject matter, the Supreme Court's decision in *Marsh* failed to settle the field of Constitutional law with regard to legislative prayer. There continues to be disagreement between the Circuit Courts whether *Marsh* stands for the proposition that only non-sectarian prayer is permissible or whether Courts should avoid evaluating content altogether unless there is evidence in the record to suggest the government is unfairly excluding certain denominations. In addition, if content is to be evaluated, where is the line drawn between sectarian and non-sectarian language and do the overt acts of government officials, such as requesting persons bow their heads or stand have any relevance to the question. The difference of opinion stems in part from the fact the Nebraska chaplain had removed all sectarian references in his invocations after 1980 and the Court did not make it clear whether this was an essential fact in its decision.[46]

Two recent Court of Appeals decisions reflect the continuing division among the Circuits. In *Galloway v. Town of Greece,* the Second Circuit Court of Appeals held a town's prayer practice was too closely affiliated with Christianity to survive an Establishment Clause challenge.[47] The Town of Greece had been inviting local

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[44] *Marsh,* 463 at 796 (dissent).

[45] *Lee v. Weisman,* 505 U.S. 577 (1992); see also, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 n.10, (2005) ("Establishment Clause doctrine lacks the comfort of categorical absolutes. In special instances we have found good reason to hold governmental action legitimate where its manifest purpose was presumably religious. See, e.g., Marsh v. Chambers . . ."). For an example of federal district court analysis of Supreme Court's unique approach to legislative prayer, see *Rubin v. City of Lancaster,* 710 F.3d 1087, 1091-92 (2013).

[46] Id. at 1092 ("A cursory read of *Marsh* does not disclose whether all of only some of Palmer's prayers were 'not of concern'.")

[47] 681 F.3d 20 (2nd Cir. 2012).

clergy to offer an opening prayer at Town Board meetings since 1999. The Town contacted the religious organizations published by the Chamber of Commerce and created a list of chaplains willing to perform the task. Each month a Town employee would go down the list until he or she found someone available. Until 2008, without exception, all were of the Christian faith. After the Board began receiving complaints, however, several clergy from non-Christian denominations were added to the City's list and a Wiccan priestess, Baha'i chairman, and lay Jewish man provided invocations in 2008. Eventually, however, for reasons unexplained in the Court's decision, only Christian clergy performed invocations in 2009 and 2010.

According to the Court of Appeals, the Board's policy evinced no religious animus but, rather, the totality of the circumstances reflected an endorsement of a particular religious viewpoint.[48] According to the Court, long before 2008 the Town should have reached out to denominations outside its borders or publicly solicited volunteers to ensure that the religious views of the Town's non-Christians were adequately respected.[49] In addition, while not dispositive, the Court also cited the overtly-Christian content of the prayers, the failure of the Town to advise prayer-givers to conform to an ecumenical message, and overt acts by the Board, such as asking audience members to stand or bow their heads, as supportive of its decision.[50]

On the other side of the country, the Ninth Circuit Court of Appeals found a similar set of facts not a violation of the Establishment Clause. In *Rubin v. City of Lancaster,* plaintiffs' claimed a city council's invocation practice was unconstitutional where a substantial majority of the prayers were Christian in nature employing overtly sectarian references to "Jesus." The City's policy for selecting clergy was similar to that used in the Town of Greece. The city clerk maintained a database of religious congregations with an established presence in the City of Lancaster compiled from the Yellow Pages, internet, chamber of commerce and newspaper. Each organization was invited to participate and informed that the City in no way affiliates itself with a particular religion. Each congregation was limited to three appearances per year.[51]

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[48] Id. at 30.

[49] Id. at 31 ("In our view, whether a town's prayer-selection process constitutes an establishment of religion depends on the extent to which the selection process results in a perspective that contrary, that it would have accepted any and all volunteers who asked to give the prayer. But the town neither publicly solicited volunteers to deliver invocations nor informed members of the general public that volunteers would be considered or accepted, let alone welcomed, regardless of their religious beliefs or non-beliefs. Had the town publicly opened its prayer practice to volunteers in this way, its selection process could be defended more readily as random in the relevant sense.")

[50] Id. at 32-33.

[51] *Rubin,* 710 F.3d at 1089.

According to the Ninth Circuit Court of Appeals, the mere fact sectarian references were used in invocations did not violate *Marsh* since the Supreme Court clearly understood the minister in Nebraska had been using sectarian references throughout most of his 16 years as legislative chaplain.[52] In addition, the City's policies provided adequate safeguards to ensure the City was being evenhanded by (i) not requiring anyone attending council meetings to participate, (ii) ensuring that a variety of invocational speakers are scheduled, and (iii) not reviewing the content of the prayer beforehand.[53]

On the question of whether a court should be reviewing the content of invocations, the Seventh Circuit Court of Appeals interpreted *Marsh* quite differently. In *Hinrichs v. Bosma,* the Court of Appeals refused to stay of a District Court permanent injunction prohibiting the Indiana State Legislature from using denominational appeals in its invocations such as the use of the name Jesus Christ.[54] Although only 29 of 45 invocations were identifiably Christian, the Court took exception to the overtly Christian content of certain prayers as a violation of Marsh's prohibitions against proselytizing or advancing any one belief.[55] The Court contrasted such content with prayers it deemed permissible that are nondenominational in nature and do not use Christ's name or title or any other denominational appeal.[56]

Adding to the confusion, in 2008 the Eleventh Circuit Court of Appeals in *Pelphrey v. Cobb County* expressly rejected *Hinrichs* by refusing to evaluate the content of invocations before a county board even where evidence showed certain non-Christian religions were prohibited from participating.[57] In *Pelphrey,* the county clerk maintained a list of religious organizations from the local Yellow Pages and clergy from various faiths were permitted to provide invocations. Evidence submitted in the case showed that for a period of time the clerk had drawn a light line through the names of certain non-Christian denominations but later a mosque and synagogue were contacted and invited to participate. While the Court deemed the act of crossing off the names of certain denominations based on their beliefs an unconstitutional affiliation of the government with the Christian faith, it refused to

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[52] Id. at 1092.

[53] Id. at 1097-98.

[54] *Hinrichs v. Bosma,* 440 F.3d 393 (7th Cir. 2006).

[55] The evidence disclosed that Christian prayers included numerous supplications to Christ and the power to be saved as well as one example of a prayer followed by a sing-along to the tune of "Just a Little Talk with Jesus" where some legislators and members of the public stood and clapped in time as they sang.

[56] Id. at 402.

[57] 547 F.3d 1263 (11th Cir. 2008).

otherwise evaluate whether the prayers themselves contained improper sectarian references. According to the Court, *Marsh* never contemplated courts would evaluate the content of prayers unless there was sufficient evidence that the prayers had been exploited to advance or disparage a religious belief.[58]

C. *Galloway* before the Supreme Court

On May 20, 2013 the Supreme Court granted the Town of Greece's petition for writ of certiorari which will be argued this fall. The case has engendered a significant number of briefs from friends of the court including the Obama administration which endorsed the Town's policy and recommended the Court overturn the decision of the Second Circuit. For now local government attorneys should comply with *Marsh* and the interpretations of its Circuit court but be aware that the Supreme Court's decision in *Galloway* may directly impact current law. If there is any consistent theme running through the Circuit Court decisions it is that local governments should seek objective standards for selecting person to provide invocations, seek to attain broad inclusiveness, and take a hands-off approach to influencing the content of prayers. In addition, solemnity and dispassionate behavior from elected officials further reinforces the message that the government is not advocating or disparaging a particular religious message.

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[58] Id. at 1271.