FIRST LIBERTY

March 26, 2019

The DuPage County Board
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Sent via email and USPS, postage prepaid

RE: Affirming the Constitutionality of Prayers Before Public Meetings

DuPage County Board members:

I write on behalf of First Liberty Institute, the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans. It is my understanding that on March 26, 2019, you voted to affirm (CB-R-0158-019 (the "Resolution")) the practice of opening your board meetings with legislative prayer. We write to affirm that decision.

As an organization that works to protect the religious liberty of people of all faiths, we agree with the Board that religious practices that accommodate, rather than stifle, religion best serve to preserve our constitutional rights. The Constitution demands no less. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) ("The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

As the Resolution states, the practice of opening public meetings with prayer is "deeply embedded in the history and tradition of this country." All Americans are free to pray (or not) before public meetings according to the dictates of their consciences. This is true of legislators no less than other citizens. As many witnesses speaking both in support of and against the Resolution attested, the United States is a country of great religious diversity; this diversity arose in a climate of religious accommodation and tolerance, not in a climate that seeks to eliminate all vestiges of faith.

The Supreme Court has repeatedly affirmed the constitutionality of legislative prayer.

The Supreme Court of the United States has upheld the practice of legislative prayer against two challenges. First confronted with the use of chaplains to open legislative sessions in prayer, the Court concluded that "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations," practices the Court has long upheld as constitutional. *Marsh v. Chambers*, 463 U.S. 783, 791 (1983) (internal citations omitted).

The Court rooted its analysis in the very framing of our country, noting that "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment . . .." *Id.* At 788. If the authors of the First Amendment did not see a conflict in opening their own meetings with legislative prayer, either personally or with a paid chaplain, it is difficult to conceive how the Constitution could be violated by the board members of DuPage Count for doing so.

More recently, the Supreme Court again evaluated the practice of a legislature regularly opening its meetings with Christian prayer. *Town of Greece*, 572 U.S. 565. The Court held that such prayers were permissible "[s]o long as the town maintains a policy of nondiscrimination" that would allow persons of other faiths to also open up legislative sessions with prayer. *Id.* at 585-86. The testimony during the Board's hearing reflected that people of many faiths, and even people of no faith, have accepted invitations to deliver the invocation before DuPage County Board meetings.

Justice Kennedy, writing for the Court, explained that legislative prayer need not be neutral in its content to satisfy the First Amendment. Rather, sectarian prayers demonstrate the growing diversity of our country. "The decidedly Christian nature of these prayers," Justice Kennedy wrote, "must not be dismissed as a relic of a time when our Nation was less pluralistic than it is today." *Town of Greece*, 572 U.S. at 579. In so holding, the Court offered guidance on the constitutionality of such prayers:

> In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. The relevant constraint derives from its 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. Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function.

Id. at 582-83. The Supreme Court has affirmed that prayer is an appropriate and constitutional means of solemnizing a legislative session, even when the majority of prayers are Christian.

Legislators in support of more religious diversity during invocations may offer such invocations themselves.

The U.S. Court of Appeals for the Sixth Circuit, which borders Illinois, recently affirmed the constitutionality of legislator-led prayer. In *Bormuth v. County of Jackson*, 870 F.3d. 494 (6th Cir. 2017) (en banc), the Sixth Circuit affirmed that the decisions in *Marsh* and *Town of Greece* apply not only to paid clergy and volunteers from the community, but to the lawmakers themselves. As Judge Griffin, writing for the Sixth Circuit, wrote, "It is clear from *Marsh* and *Town of Greece* that creed-specific prayers

alone do not violate the First Amendment." Judge Sutton explained it even more thoroughly in his concurring opinion:

> History judges us in this area. We do not judge history. For all of American history, such prayers have been allowed, whether invoking Jesus, God, or something else, whether by government-paid chaplains or by the elected officials themselves. And for all of American history, the United States Supreme Court has authorized such prayers. No one doubted the practice for most of our history. And when challenges to the practice first arose about thirty-five years ago, the Supreme Court made clear that such prayers are constitutional so long as they do not coerce non-believers.

Id. at 521-22 (Sutton, J. concurring).

Precedent from the Seventh Circuit, which covers Illinois, supports the Sixth Circuit's reasoning. In an opinion issued merely two weeks ago, the Seventh Circuit adopted the historical significance test that the Supreme Court applied in *Town of Greece*. *Gaylor v. Mnuchin*, No. 18-1277, __ F.3d ___ (7th Cir. 2019); *see also Mayle v. United States*, 891 F.3d 680, 685 (7th Cir. 2018) (noting that "public or legislative prayer does not force religious practice on an audience.").

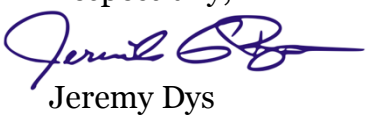
Conclusion.

In short, religious diversity is affirmed through an environment that allows all people to express their faith, not one that attempts to eliminate any expression of faith. It is this environment, not one that seeks to eliminate all public recognition of religion, that has allowed religious diversity to thrive.

Not only is the DuPage County Board's practice of opening in prayer lawful, it is reflective of one of the very best traditions of our nation's long history. As such, we urge you to ignore complaints to the contrary. As Judge Sutton said, "No one doubted the practice [of legislative prayer] for most of our history." Neither should you.

Should you have any questions related to this topic, you are welcome to contact me at any time.

Respectfully,



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