

March 27, 2019

Jeffrey Hanks, Ph.D.
Superintendent
Weatherford ISD
1100 Longhorn Drive
Weatherford, TX 76086
Sent via email and U.S. Mail

Re: Prayer Before Public Meetings is Constitutional

Superintendent Hanks:

First Liberty Institute is the nation's largest law firm dedicated exclusively to defending and restoring religious liberty for all Americans.

According to recent reports,¹ activists have made dubious assertions against the Weatherford Independent School District ("Weatherford ISD") School Board's practice of opening its meeting with public prayer. Specifically, the complaints question the legality school board members themselves offering those prayers.

These assertions are ill-informed. The Fifth Circuit has squarely affirmed the constitutionality of invocations before school board meetings. *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 523 (5th Cir. 2017) (noting that "the practice falls more nearly within the recently reaffirmed legislative-prayer exception to the Supreme Court's Establishment Clause jurisprudence."). The Fifth Circuit's decision is supported by several court decisions approving of legislative prayer, along with the uninterrupted history and tradition in our country of opening public meetings with prayer. The following explanation may provide you with the confidence to continue the practice in Weatherford, rejecting meritless assertions that your practice be ended.

The U.S. Supreme Court affirms the constitutionality of legislative prayer.

The Supreme Court of the United States has upheld the practice of legislative prayer against two challenges. First, in the 1983 decision *Marsh v. Chambers*, the Justices reviewed the use of chaplains to open Nebraska's 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).

¹ See Kaley Johnson, *Nonprofit group urges North Texas school district to stop praying at meetings*. Ft. Worth Star-Telegram, Mar. 27, 2019, <https://www.star-telegram.com/news/local/education/article228260104.html>.

Not only did the Court conclude that legislative prayer was entirely consistent with the Establishment Clause of the First Amendment to the U.S. Constitution, its analysis helped explain why. Chief Justice Burger, writing for the majority of the Court, explained that holding otherwise would be inconsistent with our founding, given 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 failed to 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 Weatherford ISD School Board could violate the Constitution in doing so.

More recently, in 2014, the U.S. Supreme Court again evaluated the practice of a legislature regularly opening its meetings with Christian prayer. *Town of Greece*, 572 U.S. 565. Again, 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.

Moreover, not only did the Court reaffirm the practice of prayers before public meetings, Justice Kennedy’s majority opinion explained that such legislative prayer need not be neutral in its content to satisfy the First Amendment. Sectarian prayers are welcome in the context of legislative prayer. “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. In short, it is inarguable that 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.

The presence of students *does not* preclude legislative prayer.

The analysis does not change for school board meetings simply because children may be present. Indeed, the Supreme Court acknowledged that children were present for the town board meetings at issue in *Town of Greece*. 572 U.S. at 598 (Alito, J., concurring). Consequently, the Fifth Circuit squarely held that “the presence of students at board meetings does not transform [a legislative prayer matter] into a school-prayer case.” *McCarty*, 851 F.3d at 527-28.

In 2017, the Fifth Circuit evaluated whether the practice by the Birdville Independent School District (“BISD”) of “inviting students to deliver statements, which can include invocations, before school-board meetings violates the First Amendment’s Establishment Clause.” *McCarty*, 851 F.3d at 521. Often, the students’ statements were in the form of a prayer—explicitly Christian prayers at that. The Fifth Circuit applied the analysis from *Town of Greece*, giving approval to Birdville ISD’s practice.

The Fifth Circuit’s opinion explains that, like the state legislature and town board at issue in *Marsh* and *Town of Greece*, respectively, “[t]he BISD board is a deliberative body, charged with overseeing the district’s public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative.” *Id.* at 526. “In no respect is [the BISD board] less a deliberative body than was the town board” at issue in *Town of Greece*. *Id.* at 526.

The prayers in question before the Birdville ISD, like those questioned in Weatherford, *Marsh*, and *Town of Greece*, are meant to solemnize the proceedings and intended for the members of the school board. So long as they are meet the guidelines Justice Kennedy outlined in *Town of Greece*, prayers before school board meetings agree with the Constitution as explained by both the U.S. Supreme Court and the Fifth Circuit.

School board members are likely permitted to lead the invocations.

Weatherford ISD is on solid legal grounds to permit student statements that may choose to present an invocation. But, the members of the Weatherford ISD School Board may also be permitted to voice an invocation before the start of their meetings. While the Fifth Circuit did not have that precise question in front of the judges in the Birdville ISD case, the court explained that, if a school board is a legislative body and *Town of Greece* controls, then it would be inconsistent to conclude that individual school board members would violate the U.S. Constitution by offering an invocation. As Judge Smith explained:

Legislative prayers are recited for the benefit of legislative officers. It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way.

Id. at 529. That is consistent, not only with the clear precedent in *Marsh* and *Town of Greece*, but with a recent decision out of the U.S. Court of Appeals for the Sixth Circuit.

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 such, lawmaker-led (or, in this case, school board member-led) prayer—even prayers that are sectarian in nature—do not offend the U.S. Constitution. Judge Sutton, writing in concurrence in *County of Jackson*, explained why:

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).

We would urge the Weatherford ISD to adopt the reasoning of the Sixth Circuit. Legislative prayer, far from being an outlier in the tradition of the United States, has been a part of our country from before we were even formed. Thus, we urge the Weatherford ISD to simply reject any assertion that the practice of opening their meetings with prayer be ended.

Conclusion.

No less than two decisions by the Supreme Court of the United States affirm our nation's longstanding practice of opening meetings with public prayer. Likewise, the Fifth Circuit clearly approves of legislative prayers before school board meetings and would likely extend that to prayers offered by school board members themselves.

In short, the Weatherford ISD should ignore any 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,



Jeremy Dys
Deputy General Counsel