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601 Lakeside Avenue, Room 220
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Via email and USPS, postage pre-paid

RE: Affirming the Constitutionality of Prayers Before Cleveland City Council Meetings

Councilmembers:

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.

According to a recent story at Cleveland.com, the Cleveland City Council is interested in opening "its regularly scheduled meetings with a prayer, as it routinely did years ago."[1] We write to affirm the practice of opening public meetings, including the Cleveland City Council meetings, with prayer.

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

As you may know, the Supreme Court of the United States has routinely upheld the practice of legislative prayer. First, it approved a chaplaincy program that used paid chaplains to open legislative sessions in prayer in *Marsh v. Chambers*, 463 U.S. 783 (1983). As the Court concluded "legislative prayer presents no more potential for establishment than the provision of school transportation, beneficial grants for higher

[1] *See* Robert Higgs, *Councilman Wants to bring God back into Cleveland City Council chambers*, June 6, 2019, https://www.cleveland.com/cityhall/2019/06/councilman-wants-to-bring-god-back-into-cleveland-city-council-chambers.html

education, or tax exemptions for religious organizations," practices the Court has long upheld as constitutional. *Marsh* at 791 (internal citations omitted).

The Court went on to explain that using the First Amendment to the U.S. Constitution to challenge legislative prayer would be foreign to the Founders because "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, neither should the Cleveland City Council or anyone else.

Then, for a second time, the Supreme Court approved the practice of opening a legislative meeting with prayer, this time featuring a regular, sectarian prayer led by a local volunteer. In *Town of Greece*, 572 U.S. 565 (2014), the Court clarified that such prayers—even clearly sectarian 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.

Justice Anthony Kennedy's majority opinion noted that legislative prayer need not be neutral in content to satisfy the First Amendment. Indeed, it is guarding and welcoming the sectarian nature of legislative prayers that demonstrates the growing diversity of our country. "The decidedly Christian nature of these prayers," wrote Justice Kennedy, "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. Thus did the Court provide commonsense guidance to legislative bodies across the country concerning 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.

Just recently, the Supreme Court of the United States buttressed its prior decisions in *The American Legion v. AHA*, 588 U.S. __ (2019). Not only did the Court severely limit the holding in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which is often used to undermine religiously expressive content in public, the Justices confirmed that practices rooted in American tradition are protected by the U.S. Constitution. As Justice Samuel Alito explained in his majority opinion, "The passage of time gives rise to a strong presumption of constitutionality" for "religiously expressive monuments, symbols, and practices." *The American Legion*, 588 U.S. at Slip Op. 21.

Just a few days ago, the United States Court of Appeals for the Third Circuit upheld the practice of the Pennsylvania House of Representatives opening its meetings with prayer. Judge Thomas Ambro, writing for the majority of the panel, explained that the "presumption of constitutionality" articulated in *The American Legion* extends "to the longstanding practice of theistic prayer in the United States" as well. *Fields v. Speaker of the Pa. House of Representatives*, __ F3d. __, 2019 U.S. App. LEXIS 25310, at 11-12 (3d Cir. Aug. 23, 2019).

Few "religiously expressive practices" have been more time-honored than prayer before public meetings. In fact, in *Marsh*, the Court observed that, "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society." *Marsh* at 792.

In short, the U.S. Supreme Court affirms the constitutionality of prayer before public meetings. While some may cite the mythical "wall separating church and state" as a reason to forbid the practice of legislative prayer, the Justices of the U.S. Supreme Court reject that thinking. Indeed, according to the Supreme Court, not only is the practice of legislative prayer constitutional, those who would end the practice of prayers before public meetings bear the high burden of disproving the presumptive constitutionality of the longstanding practice.

Sixth Circuit Approves of Legislative Prayer, Including Legislator-Led Prayer

The U.S. Court of Appeals for the Sixth Circuit, in which Cleveland resides, recently noted its agreement with the U.S. Supreme Court. But, not only did the Sixth Circuit simply agree with *Marsh* and *Town of Greece*, in a decision from the Sixth Circuit, sitting en banc, the court further concluded that the First Amendment permits the lawmakers themselves to lead legislative prayers prior to their own meetings.

In *Bormuth v. County of Jackson*, 870 F.3d. 494 (6th Cir. 2017) (en banc), Judge Richard Allen 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." *Id.* at 513. Indeed, the Sixth Circuit expressly rejected a "narrow reading of the Supreme Court's legislative-prayer jurisprudence and our history" that would suggest that legislator-led prayer is unconstitutional *per se*. *Id.* at 509.

Judge Griffin explained that such prayers are an American tradition and part of this nation's history and heritage: "That tradition includes offering prayers, even those that reflect beliefs specific to only some creeds, that seek peace for the Nation, wisdom for its lawmakers, and justice for its people, values that count as universal and that are embodied not only in religious traditions, but in our founding documents and laws." *Id.* at 503 (internal quotations omitted).

Moreover, if the U.S. Supreme Court granted that chaplain-led prayers before legislative meetings were meant to put lawmakers at ease and solemnize those who were about to engage in the "fractious business of government," *Town of Greece* at 583, then certainly those for whom the prayers were meant ought to be tolerated in giving their own prayers. Quoting, with approval, the district court's reasoning, Judge Griffin explained "that if 'the constitutionality of a legislative prayer is predicated on the identity of the speaker, potentially absurd results would ensue.'" *County of Jackson* at 512. Judge Griffin reasoned that it would be nonsensical to approve a prayer issued by a chaplain, but disapprove the same prayer issued by an elected official. Thankfully, the U.S. Constitution makes no distinction; lawmakers, as well as chaplains, are permitted to provide legislative prayers.

Likewise, the content of the prayers are not of concern to the Constitution, provided such prayers "lend gravity to the occasion and reflect values long part of the Nation's heritage." *Town of Greece* at 583. The Sixth Circuit acknowledged that the prayers in question in *County of Jackson* were largely Christian in nature. But the individual, religious beliefs of the prayer-giver was of little concern to the Sixth Circuit, because "creed-specific prayers alone do not violate the First Amendment." *County of Jackson* at 513. Thus, the Constitution not only permits legislative prayer, but includes such prayers that reflect the religious beliefs of the prayer-giver. So long as the Cleveland City Council maintains a neutral prayer policy, it may welcome prayers from a variety of faith traditions.

Judge Jeffrey Sutton, concurring in Judge Griffin's majority opinion, noted that:

> Good manners might have something to say about all of this and how it is done. So too might the Golden Rule. But the United States Constitution does not tell federal judges to hover over each town hall meeting in the country like a helicopter parent, scolding/revising/okaying the content of this legislative prayer or that one.

Id. at 521. For Judge Sutton, the idea that the Constitution forbids the individual expression of religious belief by way of a legislative prayer simply because the speaker is an elected official simply does not accord with history. As he further explained:

> 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.
>
> . . .

> If the explanation for an invocation prayer is the humble act of seeking divine guidance before a session of government, is it not strange for judges to interfere with the content (e.g., God, Allah, or Jesus) or symbols (e.g., making the sign of the cross or not) of that official's prayer? Why permit legislative prayers, then call them a trespass when done sincerely in the manner traditionally used by that individual? So long as the prayer giver does not try to coerce anyone into adopting their faith, so long in other words as the individual gives an invocation, not an altar call, I see no meaningful role for judges to play.

Id. at 521-22 (Sutton, J. concurring). Thus, to the U.S. Supreme Court's general approval of legislative prayer, the Sixth Circuit adds its blessing of legislator-led prayers before public meetings.

Conclusion

The Cleveland City Council is on solid legal footing to welcome legislative prayer prior to its public meetings. Those prayers, subject to the commonsense guidelines announced by the U.S. Supreme Court that inform a neutral policy, may be led by a member of the community or the council members themselves. Such prayers are not only lawful, they reflect the very best of traditions of our nation's long history.

Should you have any questions related to this topic, you are welcome to contact me at any time at 972-941-4444 or .

Respectfully,

Jeremy Dys
Deputy General Counsel
First Liberty Institute