City of Carson
Report to Mayor and City Council

May 21, 2013
NEW BUSINESS DISCUSSION

SUBJECT: CONSIDER DIRECTING THE PREPARATION OF A LEGISLATIVE INVOCATION POLICY & REVISING THE CITY COUNCIL AGENDA FACE TEMPLATE

Submitted by William W. Wynder
City Attorney

Approved by David C. Biggs
City Manager

I. SUMMARY

This item was continued from the last Council meeting at the request of the Mayor and City Council.

A recent Ninth Circuit Court of Appeals ("Ninth Circuit") decision in *Rubin v. City of Lancaster,* U.S. Ninth Circuit Court of Appeal Case No. 11-56318, released on March 26, 2013, provides a new and very different position on legislative invocations than that in *Rubin v. City of Burbank*, (2002) 101 Cal.App.4th 1194, a state court appellate decision that California cities have relied on for over 10 years in determining the proper procedures for allowing legislative invocations.

In light of this new federal decision, we are of the opinion the City Council should direct the preparation of a formal legislative invocation policy consistent with the opinion in *City of Lancaster*, and revise the agenda face template to remove the "Burbank prayer decision" admonition.

II. RECOMMENDATION

1. REFER this subject to an appropriate COUNCIL COMMITTEE for study, recommendation, and consideration of a possible City legislative invocation policy which would be brought back for consideration by the full City Council, and DIRECT the elimination of the existing admonition in the City's current agenda face template.

III. ALTERNATIVES

1. DIRECT the preparation of a revised legislative invocation policy, and that the same be presented to the full City Council at a future meeting for consideration and possible action;
2. Take such OTHER ACTION as is permitted by law.
3. RECEIVE and FILE this report and take no action on the same.

IV. BACKGROUND

In 2009, the City of Lancaster ("City") was served with a cease and desist letter from the ACLU challenging the invocations. In response, the City took a number of steps, including the adoption of a written policy and placing a nonbinding measure on the city ballot. As the Ninth Circuit eventually upheld the City's policies on the basis of everything the City had done to stay neutral, we will go into detail in describing them.

The written policy contained a number of elements, including a process for selecting volunteers to give the invocation and a statement of the Council's intent with the policy. The policy set forth a two-step process for soliciting volunteers to give the invocation. Step one required the City Clerk to prepare a database of "religious congregations with an established presence" in Lancaster.

The City Clerk used the yellow pages, the internet, the chamber of commerce and the newspaper and such descriptions as, churches, congregations, synagogue, temple, chapel, or mosque and other religious assemblies.[1] In compiling the list, the Clerk was expressly required to not probe the faith, denomination or religious belief before adding a congregation's name.

Under the policy, all congregations were eligible to be placed on the list. Step two required the City Clerk to mail to all those on the list an invitation to open a council meeting. The invitation read as follows:

> This opportunity is voluntary, and you are free to offer the invocation according to the dictates of your own conscience. To maintain a spirit of respect and ecumenism, the City Council requests that the prayer opportunity not be exploited as an effort to convert others . . . nor to disparage any faith or belief different [from] that of the invocational speaker.[2]

The policy also provided that, it "is not intended, and shall not be implemented or construed in any way, to affiliate the City Council with, nor express the City Council's preference for, any faith or religious denomination. . . ." and "is intended to acknowledge and express the City Council's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Lancaster."[3] Each congregation was limited to three, nonconsecutive invocations a year.

---

[1] *See City of Lancaster, supra* n.1 at 5.
[2] *See id.*
[3] *See id.*

On April 27, 2010, the former mayor for the City, Bishop Henry Hearns, delivered an invocation ("Hearn's prayer") in which he stated:

> *Bring our minds to know you and in the precious, hold any righteous and matchless name of Jesus I pray this prayer. Amen and Amen. God bless you.*[4]

Plaintiffs filed a lawsuit, claiming both Hearn's prayer and the City's policy violated the Establishment Clause. Before Hearn's prayer, and after the City's new invocation policy was adopted, twenty-six invocations had been given, twenty by Christian denominations (each mentioned Jesus's name), four were given by metaphysicists, one by a Sikh, and another by a Muslim. No person who had volunteered to pray had been turned down, and no government official attempted to influence the clerk's selection or scheduling.[5]

The Ninth Circuit in *City of Lancaster* found that neither Hearn's prayer nor the City's invocation policy violated the Establishment Clause. In rejecting the plaintiffs' arguments, the Ninth Circuit relied principally on the seminal Supreme Court decision of *Marsh v. Chambers, ("Marsh").*[6] In *Marsh*, the Court upheld a practice by the State of Nevada Legislature to open each meeting with an invocation given by a state-employed chaplain, a Presbyterian minister who had held the position for over 16 years.[7]

The Ninth Circuit rejected Plaintiffs' reading of *Marsh* and the effect of the *Alleghany* decision. First, the Ninth Circuit found that nowhere in *Marsh* did the Court limit itself to a review to only those invocations given after the chaplain removed references to Christ, and in fact a thorough review of the type of language used and the analysis provided argued against this proposition.

Specifically, the Ninth Circuit noted that the *Marsh* Court rejected the traditional test for Establishment Clause violations when the governmental action under review was legislative prayers or invocation because of the long history and tradition of invocations, including Christian-based invocations, in this Country.[8]

The *Marsh* Court noted again and again the Christian prayers given to our Founding Fathers during the creation and forming of the Constitution and Bill of Rights and the long practice since then of using legislative prayers before opening legislative sessions in state and federal houses. Based upon looking at the *Marsh* Court's reasoning in coming up with a new test for invocations, the Ninth Circuit

---

[4] *See id.*at 6-7.
[5] *See id.* at 7.
[6] 463 U.S. 783 (1983).
[7] *See id.*
[8] *See City of Lancaster, supra* n.1 at 14.

found that it demonstrated that there was no intent in limiting itself to the Nebraska chaplains prayers that removed all reference to Christ.[9]

Additionally, the Ninth Circuit rejected the idea that *Alleghany* modified the decision in *Marsh*. In *Alleghany,* the Court was considering whether a city's yearly display of a Christmas crèche and a Hanukkah menorah violated the Establishment Clause. Unlike in *Marsh*, the Court applied the traditional Establishment Clause and only mentioned the *Marsh* case in discussion without directly addressing the rules it established related to invocations.[10]

The Ninth Circuit found that the *Alleghany* decision did not supplant or restrict the scope of *Marsh*. Additionally, the Ninth Circuit found that the *Alleghany* decision did not, "in fact say that a legislative prayer is constitutional only if nonsectarian."[11] Instead, *Alleghany* reiterated the lesson from *Marsh*, that legislative prayers should not demonstrate a government preference for one particular religion.

Ultimately, the Ninth Circuit found that under the rule established in *Marsh,* so long as an invocation—whether sectarian or not—does not proselytize, advance, or disparage one religion or affiliate government with a particular faith it withstands scrutiny.[12] Based upon this, the Ninth Circuit found that Hearns' prayer did not per se violate the Establishment Clause because it mentioned Jesus.

The Ninth Circuit next looked at whether the City's policy "viewed in its entirety advanced a single religious sect. Plaintiffs argued that Lancaster's policy violated the Establishment Clause because the fact that a majority (20 out of 26 invocations) were Christian, and explicitly Christian, demonstrated the policy that gave preference to one religion. In rejecting the plaintiffs' arguments, the Ninth Circuit also rejected a "frequency analysis" test adopted by two other circuits, which found a violation of the Establishment Clause whenever an invocation practice results in too large a proportion of sectarian invocations from one religious group.

The Ninth Circuit, instead found that the test under *Marsh* as to when a policy or practice "advances" one religion over others, is "whether the government has placed its imprimatur deliberately or by implication, on any one faith or religion."[13] In finding that Lancaster's policy did not violate the Establishment Clause, the Ninth Circuit again noted the history of legislative prayer and the

[9] *See id.* at 13-14.
[10] *See id.* at 15.
[11] *See id.*
[12] *See id.* at 17.
[13] *See id.* at 19 (quoting dissent in *Joyner v. Forsyth Cnty* (4th Cir. 2011) 653 F.3d 341, 362).

Framers lack of concern that an adult will be overly persuaded by the effect of legislative prayer.

The Ninth Circuit also distinguished invocations or legislative prayer, where people have the freedom to walk in or out of a meeting, from school prayer, where you have a trapped audience. The Ninth Circuit noted that if the traditional Establishment Clause test was used, the result may be different, as that test looks at the effect on a reasonable observer's perception of whether the government is endorsing a particular religion.[14] Instead under *Marsh*, the Supreme Court upheld legislative invocation based on original intent, tradition and the absence of evidence suggesting a state-led effort to proselytize, advance, or disparage any one religion.[15]

The Ninth Circuit ruled that the test for whether Lancaster's policy violated the Establishment Clause was not whether, given the frequency of Lancaster's city-council meetings someone would infer favoritism toward Christianity. Rather, it is whether the City itself has taken steps to affiliate itself with Christianity.[16] Based on this test, the Ninth Circuit upheld Lancaster's policy because they found that Lancaster had "taken every feasible precaution" to ensure evenhandedness.

The Ninth Circuit found that just because most of the speakers have been Christian was not a function of an illegal policy but was a result of demographics. That is, Lancaster did not make a choice of what religion to present, the choice was being made by the citizens who chose to reside in Lancaster and the people who volunteered to give the invocation.

The Ninth Circuit noted that the Supreme Court has repeatedly upheld government actions against Establishment Clause challenges when a neutral government policy "merely allows or enables private religious acts."[17] Examples of these were school voucher programs, a state-tax deduction program for educational expenses for religious private schools, and a vocational-scholarship program that resulted in monies going to religious schools.[18]

Finally, the Ninth Circuit rejected the Plaintiffs argument that Lancaster should require invocation speakers to remove all references to Jesus. The Ninth Circuit found such a practice to place the government and the courts in the untenable position of coauthoring prayers, and providing the near impossible task of

---

[14] *See id.* at 21.
[15] *See id.* at 22.
[16] *See id.* at 22.
[17] *See id.* at 25.
[18] *See id.* at 26.

deciding, as a matter of law, who counts as a religious figure or what amounts to a sectarian reference.[19]

Clearly, *City of Lancaster* is binding law in federal district courts and if someone challenged a California city's invocation practices in federal court, the court would be required to follow the decision in *City of Lancaster.* On the other hand, if a lawsuit was brought in a California state court, the court may follow the California Court of Appeal decision in *Rubin v. City of Burbank,* which came to a different result under very similar facts.[20]

The court in *City of Burbank* was asked to consider whether invocation practices at City of Burbank council meetings violated the Establishment Clause. In that case, the court found the invocation practices did violate the Establishment Clause under an analysis that was analogous to the analysis used by the plaintiffs in the *City of Lancaster* decision. Specifically, the court found that any reference to Jesus in an invocation amounted to proselytizing or advancing one religious belief or faith.

The *City of Burbank* court looking at *Marsh* and *Alleghany* found that any reference to Jesus in an invocation violated the Establishment Clause relying on the footnote in *Marsh* that noted that the Chaplain had removed all references to Christ in his later invocations.[21] The court stated, "[i]t cannot reasonably be argued that the prayer here, with a specific reference to Jesus Christ, is on the same constitutional footing as the prayer before the court in *Marsh*, from which all reference to a specific religion had been excised."[22] And again later, in discussing *Alleghany*, the court stated, "The court's discussion of *Marsh* in *Alleghany* reflects that it considered removal of references to Christ to have been essential to the *Marsh* ruling . . . ."[23]

Further, the court found that *Marsh* prohibited all sectarian prayer.[24] The court ordered that the City of Burbank Council not permit sectarian prayer and required the City to advise invocation speakers that sectarian prayers are not permitted.[25] The court rejected an argument that the Burbank Council advising speakers not to provide a sectarian invocation was not a violation of the First Amendment on the basis that it was arguable that the speech would be considered government speech

---

[19] *See id.* at 27-28.
[20] 101 Cal.App.4th 1194 (2d DCA 2002).
[21] *See id.* at 1201.
[22] *See id.* at 1202.
[23] *See id.* at 1203.
[24] *See id.* at 1204.
[25] *See id.* at 1205.

rather than private speech and that honoring the Establishment Clause met the heightened scrutiny of government limitations on speech.[26]

In comparing *City of Lancaster* to *City of Burbank*, it seems the two courts could not have decided the same issues looking at the same sources of law so differently. *City of Burbank* found all sectarian invocations to be unlawful. *City of Lancaster* found that only sectarian invocations that had some other evidence of government endorsement of a particular religion to be unlawful.

The *City of Burbank* court ordered the city council to notify invocation speakers to not use sectarian references—e.g., the name of Jesus. The *City of Lancaster* court held that it was completely improper for a city council or a court to determine the content of an invocation (and potentially a First Amendment violation) and for all practical purposes impossible for a city council and a court to determine which references are sectarian in nature.

Under law, California trial courts are bound to follow Court of Appeal decisions.[27] All California courts are bound by the U.S. Supreme Court on federal question, but are not bound by federal appellate courts, even on questions of federal law. State courts, including state appellate courts, generally give great weight to federal court appellate decisions.[28] Additionally, a State Court of Appeal may be willing to revisit its decision, especially where there has been a new development or later development. It is not clear from these rules where this would leave a city that followed the holding in *City of Lancaster* if they were sued in a state court.

As the Ninth Circuit in *City of Lancaster* was interpreting the very same U.S. Supreme Court decisions as the *City of Burbank* court in interpreting the Establishment Clause of the Federal Constitution, it is possible that the Second District Court of Appeal would change its interpretation of *Marsh* in light of the new Ninth Circuit decision. Additionally, a lower court may be emboldened to attempt and find a different result from the court in *City of Burbank* by trying to distinguish *City of Burbank* from their case at issue based on the Ninth Circuit's decision.

Ultimately, we think that although it is possible a city would lose in a trial court if it followed the holding in *City of Lancaster* to implement a new invocation policy, ultimately the City would prevail if the matter were to reach a State appellate court.

Based on the following, we are of the opinion that:

---

[26] *See id.* at 1206-07.
[27] *See* Cal. Prac. Guide: Civ. App. & Writs, Ch. 14-D, sec. 14:193.
[28] *See Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97-98.

1. The City may allow legislative invocations that include sectarian references—those that mention the name of Jesus or otherwise explicitly make references to a particular religion or faith—provided those selected to give the invocation are chosen under a neutral policy and practice that makes no distinctions regarding the particular faith of the speaker.

2. The City's invocation policy should be adopted by Council in writing.

3. Although the City should request those giving invocations to avoid using the invocation as an opportunity to advance a particular religion, proselytize, or disparage any other faith, the City should avoid demanding invocation speakers to remove all sectarian references from the invocation and/or in any way attempt to edit the content of invocations.

4. City Officials and City Staff in an adopted policy should be prohibited from taking any actions to interfere with a neutral policy or practice to select invocation speakers, and/or attempting to influence who is selected to give an invocation and/or the content of the invocation.

V. FISCAL IMPACT

Unknown as of the preparation of this staff report.

VI. EXHIBITS

None.

Prepared by: William W. Wynder, City Attorney

Reviewed by:

City Clerk	City Treasurer
Administrative Services	Development Services
Economic Development	Public Services

Action taken by City Council

Date_____ Action_____

_____