

Ruling on prayer divides justices, bar

By: Kimberly Atkins in News Stories May 9, 2014

WASHINGTON — The U.S. Supreme Court ruling allowing prayers to be delivered before public town meetings divided the justices in two ways: over the result and in the standard that applies in determining whether public prayers violate the Establishment Clause.

Attorneys' reaction to the decision in *Town of Greece v. Galloway*, No. 12-696, was also mixed. Some say the ruling gives much needed guidance to government officials seeking to avoid running afoul of the Constitution in municipalities that allow prayers at public meetings.



"The actual holding really just applies to local governments in communities that want to open their public meetings with a prayer, [but] there are principles in the ruling that we can use to determine what is and what is not" permissible in other contexts, said Miles E. Coleman, a lawyer in Columbia, South Carolina, and co-author of an amicus brief filed on behalf of the Chaplain Alliance for Religious Liberty in support of the town.

But others say that the decision sends a confusing message that is at odds with the constitutional prohibition against coercive religious speech by the government.

"It is hard to square a government-led religious practice in a local municipal meeting with the Constitution's guarantee of equal rights of citizenship without regard to religion," said K. Hollyn Hollman, general counsel of the Washington-based Baptist Joint Committee for Religious Liberty, which filed an amicus brief in the case in support of residents challenging the prayer practice.

Fractured ruling

The court ruled 5-4 that a policy allowing local clergy in Town of Greece, New York, to deliver prayers at the start of monthly town board meetings was not unconstitutional.

Although the policy was informal and unwritten, and therefore did not specify or preclude any particular religions, the list of clergy members invited by town officials to deliver the prayers featured only Christians. The prayers that were given were all focused on Christianity, and often referred to "Jesus" or "Jesus Christ."

Two residents challenged the policy, arguing that it violated the First Amendment's Establishment Clause by promoting Christianity.

A federal district court granted summary judgment in favor of the town, finding no First Amendment violation. But the 2nd U.S. Circuit Court of Appeals reversed, holding that the policy "conveys to a reasonable objective observer under the totality of the circumstances an official affiliation" with Christianity.

In a fractured ruling, the Supreme Court reversed. A five-justice majority held that the prayer policy did not violate the Establishment Clause.

Noting the historical precedent for prayers at legislative meetings dating back to the time of the Framers, the majority rejected the plaintiffs' assertion that the town violated the First Amendment by not limiting prayers to generic or nonsectarian invocations.

"To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact," Justice Anthony M. Kennedy wrote.

But the majority disagreed on what standard should be applied to determine whether a prayer policy violates the First Amendment by coercing citizens "to support or participate in any religion or its exercise."

A plurality of Kennedy, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. supported a "fact-sensitive" coercion analysis "that considers both the setting in which the prayer arises and the audience to whom it is directed."

Justice Antonin Scalia, joined by Justice Clarence Thomas, wrote separately that he would require proof of "actual coercion" to find an Establishment Clause violation.

Under either test, Greece's policy passes muster, the majority found.

In dissent, Justice Elena Kagan argued that the town's policy impermissibly embraced Christianity to the exclusion of other faiths.

"[T]he Town of Greece's prayer practices violate that norm of religious equality — the breathtakingly generous constitutional idea that our public institutions belong no less to the Buddhist or Hindu than to the Methodist or Episcopalian," Kagan wrote.

Some breathing room

Jonathan R. Whitehead, a Lee's Summit, Missouri, attorney who filed a brief in the case on behalf of the Southern Baptist Convention's Ethics and Religious Liberty Commission, said the ruling gives "some breathing room" for officials who want to allow prayer at public meetings while guarding against coercion or exclusion based on type of religion.

Attendees at public meetings have historically been able to determine when a prayer giver is "speaking to the government as opposed to speaking from the government," he said.

"Given our history, there is not much concern that Americans will mistake this speech for government speech," Whitehead said. "The much bigger concern is [for] government to start editing the prayers of members of the public. It's not the government's role to get in the middle of it."

Coleman said that the ruling supports longstanding practices, such as the use of military chaplains.

Such chaplains are "the perfect illustration of what the court had found to be permissible," Coleman said, noting that these chaplains represent a variety of faiths and that events where chaplains are used never favor the message of one faith over another.

"There is no proselytizing, no evangelizing, no disparagement of other religions," Coleman said.

But Arthur Eisenberg, legal director of the New York Civil Liberties Union, which submitted an amicus brief in the case in support of the citizens challenging the policy, said the ruling fails to protect the First Amendment rights of citizens to be free of religion when participating in their government.

"The constitutional requirement that church and state must be separated rests in part on the understanding that when government supports one religion over others, people who are not members of the favored religion are made to feel like outsiders by their government," he said.