

## WHAT YOU CAN DO IN YOUR COMMUNITY

Even prayers that fall within the legal legislative prayer exception can be divisive and exclude those of minority religious beliefs or no religious beliefs from participating in and contributing to their government.

To ensure that all community members are included and everyone's religious freedom is protected, encourage your local government bodies to:

- (1) use their personal time before or after meetings to pray as they see fit, so they can focus meeting time on getting government business done; or
- (2) solemnize meetings by starting with a few words from volunteer speakers from a wide variety of faiths and philosophical traditions.

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# Legislative Prayer



## Doesn't legislative prayer violate the separation of church and state?

Not always. In a 1983 case called *Marsh v. Chambers*, the Supreme Court permitted "legislative and other deliberative public bodies" to open their sessions with prayer.<sup>11</sup>

The Supreme Court allowed such legislative prayer because of the United States' "unique history," including over a century of continuous prayer by the Nebraska state legislature, at issue in *Marsh*, and the United States Congress' use of prayer dating back to the adoption of the First Amendment.<sup>12</sup>

Not all legislative prayer is constitutional, however. Legislative prayer *does* violate the separation of church and state when it is used to "proselytize or advance any one, or to disparage any other, faith or belief."<sup>13</sup>

## Which government bodies are allowed to open with a prayer?

"[L]egislative and other deliberative public bodies,"<sup>14</sup> including the United States Congress and Texas legislature, may open with a prayer.

The Supreme Court has not weighed in on what entities count as "deliberative public bodies," but some lower federal courts have included city councils<sup>15</sup> and county and planning commissions.<sup>16</sup>

## Is my local school board allowed to open meetings with a prayer?

Maybe. The Supreme Court has not decided whether school boards are "legislative" or "deliberative public bodies" under *Marsh*, and courts outside of Texas have reached different conclusions.<sup>17</sup>

## What kind of prayer is allowed?

The Supreme Court has permitted a "nonsectarian" legislative prayer "in the Judeo-Christian tradition."<sup>18</sup> A nonsectarian prayer does not invoke a specific deity—like Jesus or Buddha—or reflect the message of a specific religion or sect.

To avoid violating the First Amendment, legislative prayers *must not*: proselytize to others regarding a particular faith;<sup>19</sup> disparage other forms of religious belief;<sup>20</sup> or "have the effect of affiliating the government with any one specific faith or belief."<sup>21</sup>

## Can the prayer specifically mention Jesus?

Maybe. The Supreme Court emphasized that the legislative prayer in *Marsh* was allowed "because the particular chaplain had removed all references to Christ,"<sup>22</sup> but lower federal courts have differed over whether limited references to Jesus are allowed.<sup>23</sup>

At a minimum, references to Jesus violate the First Amendment when they indicate that legislative prayer is being "exploited to advance or disparage a belief, or affiliate[] the government with a specific faith."<sup>24</sup> For example, many courts have struck down legislative prayers that *persistently* invoke Jesus, particularly if they contain few or no references to deities other than Jesus.<sup>25</sup>

## Can a member of the clergy or a chaplain give the prayer?

Yes, courts have approved legislative prayer delivered by rotating clergy and by a long-term chaplain of a specific denomination.<sup>26</sup>

However, legislative bodies *may not* select the prayer-giver based on an impermissible discriminatory motive.<sup>27</sup> For example, one court found legislative prayer delivered by rotating clergy at a county planning commission meeting violated the Establishment Clause because several non-Christian denominations were purposefully excluded from the county's list of potential speakers.<sup>28</sup>

## Can the prayer-giver be paid with public funds?

Yes, if the specific facts indicate that payment does not amount to an endorsement of a particular religion.<sup>29</sup>

## LEGISLATIVE PRAYER

This *Know Your Rights* fact sheet is intended to help community members understand the limits on legislative prayer under the First Amendment. However, this fact sheet does not cover every nuance of the law surrounding legislative prayer and **should not be taken as legal advice**. If you have specific legal questions, consult an attorney or request legal assistance from the ACLU of Texas.

## YOUR RELIGIOUS FREEDOM AND LEGISLATIVE PRAYER

The First Amendment to the United States Constitution protects religious freedom with two complementary rules: individuals have a right to **freely exercise** their religion, and the government may not **establish** or endorse any religion.<sup>1</sup> Many Texans are surprised to learn that, despite the prohibition against establishing religion, the Texas legislature and some local government bodies open their proceedings with a prayer.

The United States Supreme Court has allowed such prayers in limited circumstances, finding the practice “deeply embedded in the history and tradition of this country.”<sup>2</sup> But this exception is a narrow one. When someone prays before the convening of a state or local body, he or she speaks on behalf of the government. This is true whether the person is a member of the state or local body, or a volunteer from the community.<sup>3</sup> Therefore, religious neutrality is required. Any suggestion that the government prefers one religion over others constitutes an endorsement of a particular religion and implies that other religions are somehow inferior. It also sends a message of exclusion to community members whose religious beliefs differ from that of the favored religion.

## RESTRICTIONS ON LEGISLATIVE PRAYER

Prayer opening a legislative session or a session of any other deliberative body must not proselytize<sup>4</sup> or affiliate the government with a particular religion.<sup>5</sup> It must not disparage any faith or belief.<sup>6</sup> Legislative prayer that fails to comply with these restrictions violates the Establishment Clause of the First Amendment of the U.S. Constitution.

In most cases, **nonsectarian** legislative prayer complies with these restrictions and is therefore constitutionally permissible.<sup>7</sup> Nonsectarian prayer is prayer that does not reflect the beliefs or dogma of a specific religion or sect.

## LAWS

Legislative prayer is governed by the U.S. Constitution and the Texas Constitution.

The First Amendment of the United States Constitution says that the government “shall make no law respecting an establishment of religion.”<sup>8</sup> This phrase, called the **Establishment Clause**, means that the “government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions).”<sup>9</sup>

Article 1, Section 6, of the Texas Constitution states that “[n]o man shall be compelled to attend, erect or support any place of worship” and that “[n]o human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship.”<sup>10</sup>

## RESOURCES

[www.au.org/issues/prayer-at-government-events-and-legislative-meetings](http://www.au.org/issues/prayer-at-government-events-and-legislative-meetings)



## CONTACT US

If you believe a local government body is not entitled to the legislative prayer exception, or is using legislative prayer to proselytize, advance a specific religion, or disparage other religions or nonbelievers:

**Write it down** – keep a record of the prayers over time. Include every detail, like when and where the government body met, who gave each prayer, the words used in each prayer, and any deities specifically mentioned; and

**Report it** – let the ACLU of Texas know about it. Visit our website at [www.aclutx.org](http://www.aclutx.org) and click “Request Legal Assistance” to submit a complaint.

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *Marsh v. Chambers*, 463 U.S. 783, 786 (1983).

<sup>3</sup> *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 355 (4th Cir. 2008); *Simpson v. Chesterfield City Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005).

<sup>4</sup> *Marsh*, 463 U.S. at 794-95.

<sup>5</sup> *County of Allegheny v. ACLU*, 492 U.S. 573, 603-04 (1989).

<sup>6</sup> *Marsh*, 463 U.S. at 794-95.

<sup>7</sup> *Marsh*, 463 U.S. at 786, 793 n.14; *Turner*, 534 F.3d at 356.

<sup>8</sup> U.S. CONST. amend. I.

<sup>9</sup> *County of Allegheny*, 492 U.S. at 605.

<sup>10</sup> TEX. CONST. art. 1, § 6.

<sup>11</sup> *Marsh*, 463 U.S. at 786, 795.

<sup>12</sup> *Id.* at 786-792.

<sup>13</sup> *Id.* at 794-95.

<sup>14</sup> *Id.* at 786.

<sup>15</sup> *Turner*, 534 F.3d at 356.

<sup>16</sup> *Pelphrey v. Cobb County*, 547 F.3d 1263, 1275 (11th Cir. 2008).

<sup>17</sup> *Compare Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 280-82 (3rd Cir. 2011) (finding *Marsh*'s legislative prayer exception inapplicable to school board) and *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999) (same) with *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 838 (E.D.La. 2009) (finding school board is a “deliberative public body” under *Marsh*).

<sup>18</sup> *Marsh*, 463 U.S. at 793 n.14; *see also County of Allegheny*, 492 U.S. at 603.

<sup>19</sup> *Marsh*, 463 U.S. at 794-95.

<sup>20</sup> *Id.*

<sup>21</sup> *County of Allegheny*, 492 U.S. at 603.

<sup>22</sup> *Id.* (quoting *Marsh*, 463 U.S. at 793 n.14).

<sup>23</sup> *Compare Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 202 (5th Cir. 2006) (noting that prayers that are “not nonsectarian” fall outside of *Marsh*'s reach), *vacated on other grounds*, 494 F.3d 494 (5th Cir. 2007) (en banc) with *Pelphrey*, 547 F.3d at 1271-74 (rejecting argument that legislative prayer must be nonsectarian).

<sup>24</sup> *See Pelphrey*, 547 F.3d at 1271 (internal quotation marks omitted) (citations omitted).

<sup>25</sup> *See, e.g., Joyner v. Forsyth City*, 653 F.3d 341, 353-55 (4th Cir. 2011) (invalidating prayer policy that permitted sectarian references because 80% of prayers were Christian and no other sectarian references were made); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298-99 (4th Cir. 2004) (prayers that frequently referred to Jesus Christ—and made no reference to any other sect—impermissibly promoted one religion over all others); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 356-57 (9th Cir. 2002) (invalidating prayer that was “always offered” in the name of Jesus”) (internal quotation marks omitted).

<sup>26</sup> *See, e.g., Pelphrey*, 547 F.3d at 1278 (rotating clergy); *Marsh*, 463 U.S. at 793-94 (single chaplain served for 16 years).

<sup>27</sup> *Marsh*, 463 U.S. at 793-94.

<sup>28</sup> *Pelphrey*, 547 F.3d at 1281-82.

<sup>29</sup> *Marsh*, 463 U.S. at 794-95.