

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: August 12, 2009
TO: Mayor and City Councilmembers
FROM: City Attorney
SUBJECT: Recitation of the Pledge of Allegiance at City Council Meetings

INTRODUCTION

The Permanent Rules of the Council provide that City Council [Council] meetings begin with the roll call followed by an invocation and a recitation of the Pledge of Allegiance [Pledge]. Our Office has been asked whether reciting the words “under God” at Council meetings violates laws requiring separation of church and state.

QUESTION PRESENTED

May the Council allow the Pledge to be recited in its entirety at Council meetings, or must it omit the words “under God”?

SHORT ANSWER

The Pledge may be recited in its entirety, including the words “under God,” at Council meetings without violating laws requiring separation of church and state.

DISCUSSION

The Establishment Clause of the First Amendment of the United States Constitution guarantees, at a minimum, that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way that “establishes a [state] religion or religious faith, or tends to do so.” *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). The question, therefore, is whether the City’s practice of allowing the Pledge to be recited in its entirety before a City

Council meeting impermissibly coerces attendees to participate in a religious exercise or otherwise establishes a state religion or religious faith.

Although it involved a school board and not a legislative meeting, a Ninth Circuit case supports our opinion that the City may allow the Pledge in its entirety at Council meetings without violating the First Amendment. In *Newdow v. The Congress of the United States of America*, 383 F. Supp. 2d 1229, 1243 (E.D. Cal. 2005), the Court held that recitation of the words “under God” during the Pledge at school board meetings does not violate the Establishment Clause because meeting attendees are free to enter and leave the meeting with or without reason. The *Newdow* Court largely relied on analysis provided in *Marsh v. Chambers*, 463 U.S. 783 (1983), which condoned a prayer exercise at legislative meetings, and *Lee v. Weisman*, 505 U.S. 577 (1992), which found that prayers at school graduation ceremonies violate the First Amendment.

Marsh considered the Nebraska Legislature’s practice of beginning sessions with a prayer by a chaplain paid by the State with the legislature’s approval. A member of the legislature sued, claiming the legislature’s chaplaincy practice violated the Establishment Clause of the First Amendment. The Supreme Court noted the historical significance of an opening prayer. Although not a determinant of whether a violation occurred, the Court said, “the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an establishment of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country.” *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

The Supreme Court then established a test that provides guidance in evaluating the constitutionality of prayer recited during a legislative meeting. The constitutionality depends on whether the “prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983). The Court found that neither the chaplain’s long tenure nor his publicly-funded compensation was reason to invalidate the practice because there was no indication the prayer opportunity had been exploited or advanced any particular religion. Rather, the prayer was of historical significance with no religious agenda.

In *Lee*, on the other hand, the Supreme Court noted “[i]nherent differences between the public school system and a session of a state legislature.” See *Lee v. Weisman*, 505 U.S. 577, 596 (1992). The Court found that the Establishment Clause is violated if clergy offer official prayers as part of an official public school graduation ceremony because “the school district’s supervision and control of a high school graduation ceremony places subtle and indirect public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation or benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion” and therefore violates the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

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Here, there is no indication that the Council has exploited the words “under God” to proselytize or advance any one religion, or to disparage any other, faith or belief. *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983). The words “under God” are recited at open government meetings without any pressure on meeting attendees to participate in the recitation. A meeting attendee who objects to the language may remain silent or leave the meeting during the pledge without any ramification.

CONCLUSION

The Establishment Clause does not forbid recitation of the Pledge at legislative meetings if an attendee may leave on his or her own accord without explanation or ramification. Accordingly, the City Council may continue to allow the Pledge to be recited in its entirety at its meetings without violating the laws requiring separation of church and state.

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cc: Elizabeth Maland, City Clerk