

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: November 8, 2016
TO: Elizabeth Maland, City Clerk
FROM: City Attorney
SUBJECT: Invocation Advisory for Outside Invocators

INTRODUCTION

The Office of the San Diego City Attorney was asked to review the City's current "Invocation Advisory" (attached). This memo provides an update on applicable law and suggests clarifying edits to the Invocation Advisory. Most cities have implemented invocation policies, and the law requires certain procedures to be in place when selecting outside invocators. This Office can review the procedures being used to select the outside invocator for the inauguration at your request. The Advisory refers to a bright line rule against sectarian language in *Rubin v. City of Burbank*, 101 Cal. App. 4th 1194 (2002), which is no longer the most recent law. The Ninth Circuit Court of Appeals held in *Rubin v. Lancaster*, 710 F. 3d 1087 (2013) that the use of sectarian references in legislative prayer is not categorically forbidden.

BACKGROUND

The First Amendment to the United States Constitution, provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion . . ." This is known as the Establishment Clause. The United States Supreme Court held in *Marsh v. Chambers*, 463 U.S. 783 (1983), that the opening of sessions of state legislatures with prayer is deeply embedded in the history and tradition of this country and does not violate the Establishment Clause. *Marsh*, 463 U.S. at 792. The Court in *Marsh* reasoned 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 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

acknowledgment of beliefs widely held among people of this country.

Id. at 792. The California State Constitution has a similar provision. In *Rubin v. Lancaster*, the Ninth Circuit found that the California establishment clause is co-extensive with the Establishment Clause set forth in the United States Constitution. The Ninth Circuit quoted an earlier California Supreme Court decision and stated:

The ‘protection against the establishment of religion embedded in the California Constitution [does not] create broader protections than those of the First Amendment,’ given that ‘the California concept of a “law respecting an establishment of religion” coincides with the intent and purpose of the First Amendment establishment clause.’ citing *E. Bay Asian Local Dev. Corp. v. California* 24 Cal. 4th at 698 (2000).

Based on this analysis under Federal Establishment Clause jurisprudence, the Ninth Circuit rejected all of the challenges to the City of Lancaster’s invocation policy based on the California Constitution.

ANALYSIS

I. SECTARIAN LANGUAGE IN INVOCATIONS

In *Town of Greece, N.Y. v. Galloway*, the U.S. Supreme Court issued a decision on the question of whether sectarian prayers preceding town council meetings violated the establishment clause of the United States Constitution. *Town of Greece, N.Y. v. Galloway*, - U.S. -, -, 134 S. Ct. 1811 (2014). The U.S. Supreme Court held that such prayer practices were constitutionally permissible. The Court in *Greece* did not address the requirements of the California Constitution, as they impact legislative invocations, nor has the California Supreme Court taken up with issue. Therefore, a binding decision regarding constitutionality of legislative invocations under the California Constitution remains to be rendered. However, the holding in *Rubin v. Lancaster* is consistent with the Court’s holding in *Greece*.

In *Rubin v. Lancaster*, the Ninth Circuit held that a city council's facially neutral practice of opening its meetings with privately led prayers did not effect an unconstitutional establishment of religion in violation of First Amendment and California Constitution. The court found that notwithstanding that the majority of the city council’s invocations had been Christian, the city council's practice of opening its meetings with privately led prayers was facially neutral. The case noted the city had taken proactive measures to deliver on its promise of inclusivity, stressed, both to the public and to invited prayer-givers, and the policy's nonsectarian aims. The fact that most invocations had been Christian was merely a function of local demographics and the choices of the religious leaders who responded out of their own initiative to the city's invitation. The court further held that the use of sectarian references in an invocation is not categorically forbidden by case law. *Id.* at 1094.

This is a shift from the holding in *Rubin v. City of Burbank*, cited in the current advisory, in which the court ruled in favor of a bright line rule against sectarian references. The court in *Rubin v. Lancaster* stated that although a bright line rule may (arguably) be easier to enforce, it did not find the analysis persuasive. *Id.* at 1094.

II. UPDATE TO INVOCATION ADVISORY

The City's Invocation Advisory should be updated to remove the citation to *Rubin v. City of Burbank* and replace it with *Rubin v. City of Lancaster*. The current Invocation Advisory phrasing that merely suggests a non-sectarian invocation be used and balances it with the First Amendment rights of the invocators can remain under the holding in *Rubin v. Lancaster*.

However, the court in *Lancaster* stressed that it was important to indicate the historical importance and held that the use of sectarian references is not categorically forbidden. We have provided for your consideration a suggested edit (attached) to the current advisory, which reflects the court's ruling.

This suggested change to the language is borrowed in part from the League of California Cities and updates the Advisory to meet the most recent case law. It also makes clear that the purpose of the invocation is not to promote any individual religion, but to lend gravity to the public business about to take place.

CONCLUSION

The removal of the citation to *Rubin v. City of Burbank* and replacing it with the Ninth Circuit Court of Appeals case, *Rubin v. City of Lancaster*, provides the most up-to-date case law controlling invocations under the California Constitution. We recommend updating the Invocation Advisory as indicated in the attached, to reflect more recent court rulings. In addition, we note there have been changes in case law addressing broader aspects of invocations, including how invocators are selected. Should a further analysis be desired, a request can be made to our Office.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Monica Willian

Monica Willian
Deputy City Attorney

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MS-2016-31
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Attachments (2)

CITY OF SAN DIEGO
City Attorney

INVOCATION ADVISORY

The Permanent Rules of the San Diego City Council provide that the order of business for Council meetings begin with an Invocation and the Pledge of Allegiance. The City of San Diego desires to consider the rights of all person, beliefs, and faiths that make up the constituents of the City of San Diego. The city also desires to recognize the First Amendment rights of all speakers at Council meetings. By permitting an Invocation, the City does not intend to prefer one religion over another. Accordingly, to recognize these interests and to comply with case law established by *Rubin v. City of Burbank*, 101 Cal.App.4th 1194 (2002), invocators are advised that a non-sectarian invocation is permissible as part of the agenda of a Council meeting. The First Amendment rights, however, of all invocators, will be honored and respected.

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The historical purpose of legislative prayer is to lend gravity to the public business and to remind lawmakers to pursue a higher purpose in their decision making. The prayer giver should face the City Council, and not the public when the prayer is given as the prayer is being directed at the City Council and its conduct.