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OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

December 3, 2002

Greg Nelson, General Manager
Department of Neighborhood Empowerment
305 East First Street
Los Angeles, CA 90012

Re: *Rubin v. City of Burbank* and Moments of Inspiration

Dear Mr. Nelson:

This letter is to apprise you of a recent decision by the California Court of Appeal, *Rubin v. City of Burbank* (2002) 101 Cal. App. 4th 1194, which involved an invocation given at a Burbank City Council meeting. This office has already alerted the City Council to the issues raised in that case by Report No. R02-0373 dated September 20, 2002, which Report is attached hereto.

In the *Rubin* case, a challenge was made to the Burbank City Council beginning one of its meetings with an invocation that invoked the name of "Jesus Christ." The court held that the Burbank prayer was sectarian in nature and thus violated the Establishment Clause of the First Amendment of the United States Constitution. As noted in the office's Report to Council, the City of Burbank was permanently enjoined from " 'knowingly and intentionally allowing sectarian prayer at City Council meetings.' "

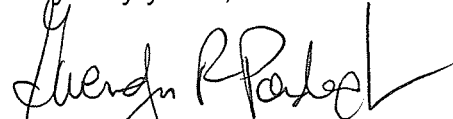
In accordance with the court of appeal decision, this office has advised the City Council that any invocation, prayer or "Moment of Inspiration" which is offered to begin its Council meetings, may not be sectarian. As City agencies, neighborhood councils will also have to abide by the parameters in that decision; accordingly, the advice in Report No. R02-0373 is equally applicable to the neighborhood councils in their conduct of public meetings. The Department should notify all neighborhood councils of this recent court decision and our Report to Council to ensure that neighborhood councils comport with this ruling. Neighborhood Council board members, should be advised that if they wish to begin their public meetings with any invocation, prayer, "Moment of Inspiration" or the like, that sectarian prayers are *not* permitted. Your department staff should also be made aware of this decision and the advice provide by our office in Report No. R02-0373.



Greg Nelson, General Manager
Department of Neighborhood Empowerment
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I have also attached a copy of the court of appeal decision for your information. My division will be happy to assist you in developing the language to communicate this issue to the neighborhood council board members. If you have any questions about this matter please feel free to contact me at (213) 978-2236.

Very truly yours,



Gwendolyn R. Poindexter
Managing Assistant
Neighborhood Council Advice Division

GRP:mg

Attachments

cc: Claudia Dunn
Assistant General Manager

84383



REPORT NO. R02-0373
September 20, 2002

OFFICE OF THE CITY ATTORNEY
ROCKARD J. DELGADILLO
CITY ATTORNEY

Honorable Alex Padilla
President, Los Angeles City Council
200 North Spring Street
Room 465, City Hall
Los Angeles, California 90012

Re: Moment of Inspiration

Honorable Council President Padilla:

Last week a case was decided by the California Court of Appeal which may affect the Los Angeles City Council. The case, *Irv Rubin v. City of Burbank*, 2002 DJDAR 10353, involves an invocation given at a Burbank City Council meeting.

The Burbank City Council begins each of its meetings with an invocation. The invocation is usually given by a member of a non-denominational organization of clergy or a representative of another organization, such as the YMCA. A list is provided to the City Clerk with names of volunteers. Neither the City Council nor the City Clerk has anything to do with who gives the invocation. On the occasion involved in this case, the invocation was given by a minister of the Church of Jesus Christ of the Latter Day Saints. At the end of his short invocation, the minister said: "We are grateful heavenly Father for all thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

The City of Burbank was sued for allowing sectarian prayer in a City Council meeting. The trial court found that the prayer was sectarian and, as such, violated the Establishment Clause of the First Amendment of the United States Constitution. The City was permanently enjoined from "knowingly and intentionally allowing sectarian prayer at City Council meetings." The Court ordered Burbank to "advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted."

The City of Burbank appealed the case. However, the Court of Appeal in its decision last week upheld the trial court's determination. In its opinion, the Court of Appeal found that "the interest in protecting and safeguarding the fundamental right to maintain a separation between church and state and to demand neutrality when the interests of religion and government intersect is increasingly more important as our nation becomes more pluralistic."



Honorable Alex Padilla
September 20, 2002
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Each week, the Los Angeles City Council begins its Tuesday Council meeting with a "Moment of Inspiration." Since it is often a member of the clergy who gives this "Moment of Inspiration," the Burbank case will have an impact.

The City of Burbank is still deciding whether it will appeal this case. However, at this time, the Burbank case is the current state of the law in California. Therefore, it is the advice of this office that the City Council notify all persons who are to give the "Moment of Inspiration" that any prayer or invocation not be sectarian.

For your convenience, we are attaching a copy of the Daily Journal report on the Burbank case. This office will keep you apprised of any changes which may occur if Burbank decides to appeal. Please contact Gail Weingart at (213) 485-5478 if you any questions.

Sincerely,



Rockard J. Delgadillo
City Attorney

RJD:GCW:lee
Enclosure

cc: City Clerk
Chief Legislative Analyst

#82055

LEXSEE 2002 Cal. App. LEXIS 4619

**IRV RUBIN et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant
and Appellant.**

B148288

**COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT,
DIVISION TWO**

*101 Cal. App. 4th 1194; 124 Cal. Rptr. 2d 867; 2002 Cal. App. LEXIS 4619; 2002
Cal. Daily Op. Service 8272; 2002 Daily Journal DAR 10353*

September 9, 2002, Filed

NOTICE:

[**1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

SUBSEQUENT HISTORY:

Order Modifying Opinion and Denying Rehearing No Change in Judgment September 9, 2002.

PRIOR HISTORY:

APPEAL from a judgment of the Superior Court of Los Angeles County. Los Angeles County Super. Ct. No. BC 221942. Alexander H. Williams III, Judge.

DISPOSITION:

Affirmed.

COUNSEL:

Dennis A. Barlow, City Attorney and Juli C. Scott, Chief Assistant City Attorney for Defendant and Appellant.

John L. Gordon, Stuart J. Roth, David A. Cortman, Gregory N. Bryl and American Center for Law and Justice for Mayor Margaret Clark, Zane Han, Gary Clark, Joe Velasquez and Ricardo Quevedo as Amici Curiae on behalf of Defendant and Appellant.

Richards, Watson & Gershon, T. Peter Pierce, Amy Greyson and Carrie H. Ahn for Thirty-Four California Cities as Amici Curiae on behalf of Defendant and Appellant.

Roger Jon Diamond for Plaintiffs and Respondents.

Edward Tabash for Council for Secular Humanism as Amicus Curiae on behalf of Plaintiffs and Respondents.

JUDGES:

DOI TODD, J. We concur: NOTT, Acting P.J., ASHMANN-GERST, J.

OPINIONBY:

DOI TODD

OPINION:

[**868] [*1197] Objecting to an invocation given at a Burbank City Council meeting which ended with an expression of gratitude and love "in the name of Jesus Christ," plaintiffs [**2] sought and were granted injunctive and declaratory relief against the City. The trial court ruled that the inclusion of "sectarian prayer" in city council meetings violated the Establishment Clause of the United States Constitution, and it enjoined the City from allowing sectarian prayer at city council meetings. The trial court also ordered the City to "advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted." The City has appealed and contends the judgment is "contrary to a firmly established body of constitutional jurisprudence that holds that the practice of legislative invocations which do not proselytize, promote or disparage any single religion" do not violate the Establishment Clause of the First Amendment. The City further contends that the court order amounts to unconstitutional censorship and viewpoint discrimination.

Because we conclude the invocation violated the Establishment Clause of the First Amendment of the United States Constitution under *Marsh v. Chambers*

(1983) 463 U.S. 783, 77 L. Ed. 2d 1019, 103 S. Ct. 3330, and the court's order did not constitute censorship or viewpoint discrimination [***3] under the Free Speech and Exercise Clauses, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

The facts are not disputed. Since 1953 the City of Burbank has had a practice of beginning each city council meeting with an invocation. The invocation is usually given by a member of the Burbank Ministerial Association (BMA), a non-denominational [**869] organization of clergy and representatives of other organizations, such as the YMCA, whose members meet for [*1198] the purpose of fellowship among the religious leaders of the community. BMA is not entirely Christian, but there are, for example, no Moslem, Buddhist, Hindu or Bahai members in the group.

It was the practice of the BMA to circulate a sign-up sheet among its members for volunteers to give the council invocation. The list of volunteers was provided to the city clerk who placed the name of a volunteer on the agenda. Neither the city council nor the city clerk had any input in determining the subject matter or content of the invocation. Although the members of the BMA agreed among themselves that they would be respectful of their members' various and diverse beliefs, they imposed no restrictions on the content of the invocation. [***4]

Plaintiff Irv Rubin, who is of the Jewish faith, was present at the city council meeting on November 23, 1999 to give his opinion on a proposed plan for expansion of the Burbank Airport. A member of BMA, who was a minister of the Church of Jesus Christ of Latter Day Saints, gave the invocation which opened the meeting. The invocation concluded as follows: "We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen." n1

n1 The entire text of the invocation was as follows: "Our Father in Heaven, we are grateful to assemble this evening in the capacity of the City Council meeting. We wish to thank thee and express our gratitude for the blessings that we receive each day. We especially are mindful of this week and the Thanksgiving Day to come on which people all over our nation will be expressing gratitude and love unto thee for thy bounteous blessings. [P] We feel privileged to be part of this community. We are grateful for those who have stepped forward and have been elected to lead this community. Will thou bless them and

give them insight and wisdom and those of the city staff who assist and direct the affairs of the city. [P] Heavenly Father we are grateful for the youth of this community for they are the future and we ask a blessing upon those who teach and lead the youth that they may inspire them to be their best. [P] We are grateful heavenly Father for all that thou has poured out on us and we express our gratitude and our love in the name of Jesus Christ. Amen."

[***5]

Plaintiff Roberto Alejandro Gandara, who was raised as a Catholic, was present at an earlier city council meeting at which an invocation was given in which Jesus Christ had not been mentioned.

Rubin and Gandara filed suit for declaratory and injunctive relief, challenging the practice of the City to begin the city council meetings with religious prayers invoking the name of Jesus Christ. After trial, the court found the prayer recited on November 23, 1999 was "sectarian" and violated the Establishment Clause of the First Amendment to the United States Constitution. The court permanently enjoined the City from "knowingly and intentionally allowing sectarian prayer at City Council meetings." The City was ordered to "advise anyone conducting a prayer as part of the City Council meeting that sectarian prayers are not permitted."

The City timely appealed the judgment.

[*1199] CONTENTIONS ON APPEAL

The City contends that the trial court erred, asserting (1) pursuant to *Marsh v. Chambers, supra*, 463 U.S. 783, legislative invocations do not violate the Establishment Clause, and the content of legislative prayer is not to be scrutinized where it is not used to proselytize, [***6] advance or disparage any one religion; (2) the rule of *Marsh* has not been diluted or abrogated by other [**870] Establishment Clause cases; and (3) the regulation of the content of prayer is impermissible viewpoint discrimination.

Three amici curiae briefs have been filed. Margaret Clark et al., representing a mayor, clergy, and other private citizens who reside in cities within the jurisdiction of this court, and Thirty-Four California Cities have filed amici briefs in support of the City of Burbank. n2 The Council for Secular Humanism, a non-profit organization promoting the rights of atheists, has filed an amici brief in support of respondents Rubin and Gandara. n3

101 Cal. App. 4th 1194, *; 124 Cal. Rptr. 2d 867, **;
2002 Cal. App. LEXIS 4619, ***; 2002 Cal. Daily Op. Service 8272

n2 Amici in support of the City express concern about the effect the trial court's decision will have on their own cities' practice of prayers at council meetings, and that they too will be forced to end the practice of allowing "sectarian" prayers at their council meetings.

n3 The Council for Secular Humanism takes the position that no branch of government should favor religion over non-belief.

[***7]

DISCUSSION

Standard of Appellate Review

[HN1] We are presented with constitutional issues, which we review de novo. (*Berry v. City of Santa Barbara* (1995) 40 Cal. App. 4th 1075, 1082, 47 Cal. Rptr. 2d 661.) We must decide whether the orders of the trial court violate the First Amendment to the United States Constitution, independent of the trial court's ruling or reasoning. (*Redevelopment Agency v. County of Los Angeles* (1999) 75 Cal. App. 4th 68, 74, 89 Cal. Rptr. 2d 10.)

Legislative invocations do not violate per se the Establishment Clause.

Both sides agree that this case is governed by *Marsh v. Chambers*, *supra*, 463 U.S. 783, the only United States Supreme Court case that has decided the issue of legislative prayer. City urges that the judgment of the trial court is an unconstitutional extension of *Marsh*. Respondents argue that the trial court correctly found the invocation unconstitutional. n4

n4 Respondents, while otherwise taking the position that *Marsh* should be overruled, concede that for the purposes of this case *Marsh* is controlling.

[***8]

The issue presented in *Marsh*, as stated by Chief Justice Burger writing on behalf of the majority, was "whether the Nebraska Legislature's practice of [*1200] opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment." (*Marsh, supra*, 463 U.S. at p. 784.) In *Marsh*, a member of the Nebraska Legislature sought to enjoin this practice claiming that it violated the Establishment Clause. The District Court "held that the Establishment Clause was not breached by the prayers,

but was violated by paying the chaplain from public funds." (*Id. at p. 785.*) On appeal, the Eighth Circuit applied the three-part test established by the court in *Lemon v. Kurtzman* (1971) 403 U.S. 602, 29 L. Ed. 2d 745, 91 S. Ct. 2105. The *Lemon* test set forth a standard for evaluating statutory violations of the Establishment Clause finding no violation if the following were proven: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government [***9] entanglement with religion.'" (*Id. at pp. 612-613*, citations omitted.) n5 The Eighth Circuit [***871] held that the Nebraska policy violated all three elements of the test, and prohibited the state from continuing its established practice. Certiorari was granted by the Supreme Court.

n5 For application of this standard, see, e.g., *Committee for Public Education v. Regan* (1980) 444 U.S. 646, 653, 63 L. Ed. 2d 94, 100 S. Ct. 840; *Committee for Public Education v. Nyquist* (1973) 413 U.S. 756, 772-773, 37 L. Ed. 2d 948, 93 S. Ct. 2955; *Hunt v. McNair* (1973) 413 U.S. 734, 741, 37 L. Ed. 2d 923, 93 S. Ct. 2868.

After a review of the historical precedent of prayer in the public legislative context, the Supreme Court found that such prayer was "deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment [***10] and religious freedom." (*Marsh, supra*, 463 U.S. at p. 786.) The court noted, "On September 25, 1789, three days after congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." (*Marsh*, 463 U.S. at p. 788.)

The majority in *Marsh* did not evaluate Nebraska's prayer tradition under the *Lemon* test. Instead, as Justice Brennan noted in dissent, the court "carved out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer." (*Marsh, supra*, 463 U.S. at p. 796 (dis. opn. of [*1201] Brennan, J.)) The majority concluded that [HN2] the unique history of legislative prayer, which had been established by the

members of the First Congress and practiced over two centuries, evidenced the lack of threat to the Establishment Clause from legislative prayer: "We conclude [***11] that legislative prayer presents no more potential for establishment than the provision of school transportation [citation], beneficial grants for higher education [citation], or tax exemptions for religious organizations [citation]." (*Marsh, supra*, 463 U.S. at pp. 790-791.)

In reviewing the specific prayer in question, the court in *Marsh* found that its characteristics, that a Presbyterian clergyman had been selected to give the invocation for 16 years, that the chaplain was paid at public expense, and that the prayers were in the Judeo-Christian tradition, did not invalidate the practice. (*Marsh, supra*, 463 U.S. at p. 793.) But the court specifically noted in the margin that "although some of [the] earlier prayers were often explicitly Christian, [the minister] removed all references to Christ after a 1980 complaint from a Jewish legislator ." (*Marsh*, 463 U.S. at p. 793), *fn. 14*.

Finally, the court set forth what has since been characterized as the *Marsh* test: [HN3] "The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage [***12] any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer." (*Marsh, supra*, 463 U.S. at pp. 794-795.)

The trial court's review was not an unconstitutional extension of Marsh.

The City, in defending its practice of opening the city council meetings with prayer, contends the trial court misapplied the *Marsh* test and created its own legal standard "which has no precedential base" and is "contrary to established law." The [*872] City asserts the invocations did not serve the purpose of proselytizing, advancing or disparaging any one religion and therefore did not violate the Establishment Clause. Based on that view, the City argues the trial court violated the explicit holding in *Marsh* when it evaluated and parsed the content of the prayer given as the council's invocation on November 23, 1999, improperly focusing on the content of the very last sentence of the prayer that referred to "Jesus Christ" and basing its determination that the prayer was sectarian on that reference alone.

The City and amici in support of the City's position contend that under *Marsh* the appropriate [***13] test involves an examination of the proselytizing or disparaging content of the prayer, rather than a determination of the [*1202] "sectarian" nature of an

individual prayer. They argue that the *Marsh* court's mention in footnote 14 of the removal of all references to Christ in the Nebraska prayer is merely dicta in an anecdotal footnote, and this factor is never substantively addressed in the opinion. Thus, the City argues that the trial court's apparent reliance on footnote 14 was misplaced and that the trial court "created its own legal standard which has no precedential support and is in fact contrary to the law."

Respondents contend that the prayer in *Marsh* survived constitutional scrutiny because any reference to Jesus Christ had been removed and that *Marsh* supports the decision of the trial court here.

Amici Margaret Clark et al. argue that as long as the invocation was not used to advance the Christian faith or disparage other faiths, the prayer passed constitutional muster under *Marsh*.

It 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*, [***14] from which all reference to a specific religion had been excised. It was therefore incumbent upon the trial court to determine whether "the prayer opportunity had been exploited to proselytize or advance any one, or to disparage any other, faith or belief." (*Marsh, supra*, 463 U.S. at pp. 794-795.)

In *Allegheny County v. Greater Pittsburgh ACLU* (1989) 492 U.S. 573, 106 L. Ed. 2d 472, 109 S. Ct. 3086, the court considered whether a December holiday display of a creche in a county courthouse and a menorah outside a city and county building violated the Establishment Clause. In deciding that question the majority stated that [HN4] "whatever else the Establishment Clause may mean ..., it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' [Citation.]" (*Id. at p. 605*.) Nor can government appear "to take a position on questions of religious belief or from 'making adherence to a religion relevant [***15] in any way to a person's standing in the political community.'" (*Id. at p. 594*, quoting from *Lynch v. Donnelly* (1984) 465 U.S. 668, 687, 79 L. Ed. 2d 604, 104 S. Ct. 1355.)

In response to Justice Kennedy's concern about the court's "latent hostility" or "callous indifference" towards religion, Justice Blackmun writing for the majority stated: "On the contrary, [HN5] the Constitution mandates that the [*1203] government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discrimination

among citizens on the basis of their religious faiths. [P] A secular state, it must be remembered, is not the same as an atheistic or [**873] antireligious state. A secular state establishes neither atheism nor religion as its official creed." (*Allegheny, supra*, 492 U.S. at p. 610, 109 S. Ct. at p. 3110.)

The court in *Allegheny*, differentiating between the secular and religious aspects of the celebration of Christmas, stated: "Celebrating Christmas as a religious, as opposed to a secular, holiday, necessarily entails professing, proclaiming, or believing that Jesus of Nazareth, born in a manger in Bethlehem, is the Christ, the [***16] Messiah. If the government celebrates Christmas as a religious holiday (for example, by issuing an official proclamation saying: 'We rejoice in the glory of Christ's birth!'), it means that the government really is declaring Jesus to be the Messiah, a specifically Christian belief. In contrast, confining the government's own celebration of Christmas to the holiday's secular aspects does *not* favor the religious beliefs of non-Christians over those of Christians. Rather, it simply permits the government to acknowledge the holiday without expressing an allegiance to Christian beliefs, an allegiance that would truly favor Christians over non-Christians." (*Allegheny, supra*, 492 U.S. at pp. 611-612.)

The court's discussion of *Marsh* in *Allegheny* reflects that it considered the removal of references to Christ to have been essential to the *Marsh* ruling: "Indeed, in *Marsh* itself, the Court recognized that not even the 'unique' history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this [***17] principle because the particular chaplain had 'removed all references to Christ.'" (*Allegheny, supra*, 492 U.S. at p. 603.)

It is clear that the factual predicate upon which the Supreme Court ruled in *Marsh* was a legislative invocation from which all references to a particular religion have been purposely excised. We therefore agree with respondents that the trial court's decision was correct under *Marsh*.

The reference to "Jesus Christ" in the invocation violated the Establishment Clause.

We review the invocation at issue in light of the foregoing considerations. The expression of gratitude and love "in the name of Jesus Christ" was an [*1204] explicit invocation of a particular religious belief. By directing the prayer to "Our Father in Heaven ... in the name of Jesus Christ" the invocation conveyed the message that the Burbank City Council was a Christian

body, and from this it could be inferred that the council was advancing a religious belief.

The City argues that because only about 20 percent of the volunteers providing the legislative prayer mentioned Jesus Christ in the invocation, it is clear that the prayer opportunity was not being exploited to advance [***18] or disparage any one faith or belief. This argument promotes a test that unless a certain incidence of unconstitutional prayer is proven, it cannot be established that one religious belief or faith is being proselytized or advanced over another. We disagree. Rather, we interpret *Marsh* to mean that [HN6] *any* legislative prayer that proselytizes or advances one religious belief or faith, or disparages any other, violates the Establishment Clause.

We therefore conclude that, [HN7] in accordance with the holding in *Marsh*, the invocation offered to Jesus Christ violated the Establishment Clause because it conveyed the message that Christianity was being advanced over other religions. The trial court was correct in its finding.

[874] *The prohibition against "sectarian prayer" is within the mandate of Marsh.***

City contends that imposing a standard prohibiting "sectarian prayer" is beyond the mandate of *Marsh*, and, indeed, that sectarian prayer in the context of a legislative invocation is constitutionally permitted. City argues that the trial court's review exceeded the only criteria imposed by *Marsh* to assess whether the "prayer opportunity has been exploited" for the [***19] purposes of proselytizing, advancing, or disparaging any one belief or faith. (*Marsh, supra*, 463 U.S. at p. 795.) We disagree.

As we have discussed, in light of the specific references to the Christian faith in the invocation, as distinguished from the invocation in *Marsh* from which any such reference had been excluded by design, the trial court properly considered whether the prayer opportunity had been exploited for the purpose of proselytizing, advancing or disparaging any one belief or faith. In deciding that it had, the court found the reference to Jesus Christ rendered the prayer "sectarian."

[*1205] [HN8] "Sectarian" is defined as relating to or characteristic of a sect. n6 A "sect" is defined as an organized ecclesiastical body, or a religious denomination. n7 The trial court's characterization of the invocation as "sectarian" was merely a definitional determination that the invocation unconstitutionally communicated a preference for one religious faith (or sect) over another. Returning again to the *Marsh* test, in concluding that the prayer was sectarian, the trial court determined that the prayer opportunity had been

exploited to advance one faith, Christianity, [***20]
over another. n8

n6 Webster's 10th Collegiate Dictionary
(2001) page 1053.

n7 Webster's 10th Collegiate Dictionary,
supra, page 1053.

n8 We interpret "exploit" here to mean to
make productive use of for one's own advantage.
(Webster's 10th Collegiate Dict., *supra*, p. 409.)

Requiring the council to advise prayer participants
that sectarian prayers are not permitted does not amount
to unconstitutional censorship or viewpoint
discrimination.

City contends that by ordering the City to advise
those who volunteer to give the council invocation that
sectarian prayers are not permitted, the City is placed in
the position of censoring the speech of those who seek to
address the city council. City further contends that by
"restricting those whose prayer traditions and beliefs
require them to pray in the name of Jesus Christ, while
allowing others to pray in a manner consistent with their
beliefs" the trial court engaged in discrimination based
on viewpoint or ideology, in violation of the speaker's
[***21] right to freedom of speech under the First
Amendment. City relies on *Perry Ed. Assn. v. Perry
Local Educators' Assn.* (1983) 460 U.S. 37, n9, 74 L. Ed.
2d 794, 103 S. Ct. 948 *Cornelius v. NAACP Legal
Defense & Ed. Fund* (1985) 473 U.S. 788, 87 L. Ed. 2d
567, 105 S. Ct. 3439, and *Rosenberger v. Rector and
Visitors of VA.* (1995) [**875] 515 U.S. 819 n10, 132 L.
Ed. 2d 700, 115 S. Ct. 2510 to support its contention.

n9 In *Perry*, a divided Supreme Court held
that permitting access to teachers' mailboxes and
interschool mail to an incumbent teachers' union
and denying access to a rival union did not
amount to viewpoint discrimination, because
government can impose reasonable regulations on
speech, as long as the limitations are necessary to
serve a compelling state interest, are narrowly
drawn to achieve that end, and are not an effort to
suppress expression merely because public
officials oppose the speaker's view. (*Perry*,
supra, 460 U.S. at pp. 45-46.)

n10 In *Rosenberger*, a divided Supreme
Court held that denial of funding to a student
newspaper with a Christian viewpoint from a
university fund created to pay printing costs of

student publications was unconstitutional
viewpoint discrimination, in that any benefit to
religion would be incidental to the government's
provision of services on a religion-neutral basis,
and denial of funding would be based on the
message being communicated. (*Rosenberger*,
supra, 515 U.S. at pp. 829, 843-844.)

[***22]

City correctly points out that "the government must
abstain from regulating speech when the specific
motivating ideology or the opinion or [*1206]
perspective of the speaker is the rationale for the
restriction." (*Rosenberger, supra*, 515 U.S. at p. 829.)
But this does not create *carte blanche* for the speaker.

[HN9] Whether the trial court's order amounted to
unconstitutional censorship or viewpoint discrimination
depends on the nature of the speech involved and the
manner of restriction imposed. The question of whether
prayer in the context of student-led, student-initiated
invocations before football games at a public school was
"private speech" protected by the Free Speech and Free
Exercise Clauses of the First Amendment was answered
by the Supreme Court in *Santa Fe Independent School
Dist. v. Doe* (2000) 530 U.S. 290, 147 L. Ed. 2d 295, 120
S. Ct. 2266. In concluding that such speech was not
"private speech," the court noted that "these invocations
are authorized by a government policy and take place on
government property at government-sponsored school-
related events." (*Id.* at p. 302.) "We recognize the
important role that public worship plays in many [***23]
communities, as well as the sincere desire to include
public prayer as a part of various occasions so as to mark
those occasions' significance. But such religious activity
in public schools, as elsewhere, must comport with the
First Amendment." (*Santa Fe Independent School*, 530
U.S. at p. 307.)

As to whether such speech would be perceived as
public or private speech, the *Santa Fe* court said: "In
cases involving state participation in a religious activity,
one of the relevant questions is 'whether an objective
observer, acquainted with the text, legislative history,
and implementation of the statute, would perceive it as a
state endorsement of prayer in public schools.' [Citation.]
Regardless of the listener's support for, or objection to,
the message, an objective [participant] will
unquestionably perceive the inevitable pregame prayer as
stamped with her school's seal of approval." (*Santa Fe*,
supra, 530 U.S. at p. 308.) The court held that the
invocation delivered over the school's public address
system, supervised by school faculty, and in accordance
with the school policy that explicitly encourages public
prayer was not "private speech." (*Id.* at p. 310.)

The Ninth [***24] Circuit in *Cole v. Oroville Union High School Dist.* (9th Cir. 2000) 228 F.3d 1092, followed *Santa Fe* and concluded that a public school district's refusal to allow students to deliver sectarian and proselytizing valedictory speeches as part of a graduation ceremony was necessary to avoid violating the Establishment clause, and therefore did not violate the speaker's free speech rights. (*Cole*, 228 F.3d at p. 1102.) "The invocation would not have been private speech, because the District authorized an invocation as part of the graduation ceremony held on District property. ..." (*Ibid.*)

[*1207] In light of the fact that the legislative invocation given at the Burbank City Council meeting took place on government property, was authorized by the long [**876] standing policy of the city council, was part of the official agenda of the council meeting, and was for the purpose of calling for spiritual assistance in the work of the legislative body, we are satisfied that it was not "private speech." As in *Santa Fe* and *Cole*, an objective observer familiar with the City's policy and implementation would likely perceive that the invocation carried the City's seal of approval. As [***25] such [HN10] those who provide legislative invocations at the Burbank City Council meetings are subject to the requirement that the prayers should comport with the First Amendment.

[HN11] "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." (*Perry, supra*, 460 U.S. at p. 45.) "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.* at p. 46.)

We can think of no more compelling interest than safeguarding the Establishment Clause of the First Amendment to support the restriction ordered here. As stated in *Lynch v. Donnelly* (1984) 465 U.S. 668, 79 L. Ed. 2d 604, 104 S. Ct. 1355, [HN12] "The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is [***26] excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by non adherents

of the religion, and foster the creation of political constituencies defined along religions lines. ... The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." (*Id.* at pp. 668, 687-688 (conc. opn. of O'Connor, J.).)

The interest in protecting and safeguarding the fundamental constitutional right to maintain a separation between church and state and to demand neutrality when the interests of religion and government intersect is increasingly more important as our nation becomes more pluralistic. In [*1208] ordering that the City not permit sectarian prayer at city council meetings and requiring the City to advise those who participate in conducting prayer at city council [***27] meetings of this limitation, the trial court drew the regulation as narrowly as possible. The only restriction being imposed on the prayer is that it not be sectarian, that is, that the invocation not be used to advance one faith or belief over another. n11

n11 Amicus Thirty-Four California Cities presents an argument in their brief that the terms of the trial court's injunction are ambiguous and therefore unenforceable. This issue was not raised by the appellant in its opening brief. While we recognize that this court may consider new issues raised by an amicus on appeal (see *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 709-713, 209 Cal. Rptr. 682, 693 P.2d 261), we decline to do so here.

[**877] DISPOSITION

The judgment of the trial court fully comports with *Marsh v. Chambers, supra*, 463 U.S. 783, and is affirmed. Respondents are awarded costs of appeal.

DOI TODD, J. [***28]

We concur:

NOTT, Acting P.J.

ASHMANN-GERST, J.