

Plaintiff has filed an action in lieu of prerogative writ, R. 4:69-1, alleging that the Borough of Point Pleasant Beach has adopted a policy that allows it to open its council meetings with sectarian prayers.

Plaintiff asks the Court to declare that the policy violates the New Jersey Constitution's requirement that government not prefer one religion to another religion. N.J. Const. (1947) Art. 1, Par. 4. While the parties litigate the matter, plaintiff seeks preliminary restraints to prevent the defendant from implementing its new policy that permits sectarian prayers at its meetings.

Cadalzo is entitled to restraints if she can establish 1) a reasonable probability of success on the merits of her claim; 2) immediate, irreparable harm; and 3) a favorable balance of the equities. Crowe v. DiGioia, 90 N.J. 126, 132-34 (1982). Plaintiff satisfies this standard.

First, defendant's prayer policy violates the state constitution's prohibition on preferring one religion to another because it allows, and even encourages, sectarian prayers at municipal council meetings.

Second, injury to religious freedom, a fundamental right, constitutes irreparable injury. Moreover, since the policy will be implemented on Tuesday, November 9, and be followed for the foreseeable future, the injury is immediate.

Third, the equities favor an injunction. The rights at stake outweigh any interest in instituting a prayer policy. Plaintiff and other members of the public should not be required to hear a government-sponsored sectarian prayer before obtaining relief. Defendants cannot demonstrate any harm delaying implementation of the policy while the Court adjudicates its constitutionality. Finally, a preliminary injunction serves the public interest in ensuring that the borough respects and welcomes all faiths and beliefs.

STATEMENT OF FACTS

The defendant, Borough of Point Pleasant Beach holds its municipal council meetings approximately twice per month. The borough has a history and tradition of starting its municipal council meetings with a sectarian prayer. Ex. A (“Policy Regarding Opening Invocations Before Meetings of the Borough of Point Pleasant Beach Council”); Ex. B, Cadalzo Cert. ¶3.

At its last meeting, the council adopted a “Policy Regarding Opening Invocations Before Meetings of the Borough of Point Pleasant Beach Council” that allows for sectarian prayers to be offered at the start of its meetings. Ex. A (hereinafter “policy” or “prayer policy”).

The operative terms of the policy¹ provide for the council to “solemnize proceedings” by “allow[ing] for an invocation or prayer to be offered before its meetings for the benefit of the Council. Ex. A, page 4. While suggesting that the opening proceeding be an invocation or prayer, many of the operative paragraphs refer solely to prayers. *Id.* (see ¶¶ 2, 3, 4, 8, 9).

The policy provides “[t]he prayer shall be voluntarily delivered by a single Council member, scheduled on a rotating basis among all Council members who voluntarily choose to participate in the rotational list.” *Id.* ¶ 4. The policy then purports to permit the “designated Council member” to speak as a “private citizen.” *Id.* ¶ 5. As such, the policy provides for the “designated Council member” to “deliver the prayer or invocation... according to the dictates of his or her own conscience,” without guidelines or limitations as to the content of the prayer nor

¹ The policy also contains 24 “Whereas” clauses that purport to set forth the relevant law, but that omit important cases and misdescribe or omit important facts and analysis from the cases cited.

prior inquiry or review. Id. ¶¶ 5, 6, 9. The “designated Council member” is to be introduced by the Chairperson of the Council.²

Though, as described above, the policy is to provide for the invocation or prayer to be for the benefit of the council, led by a council member, and introduced by a council chairperson, it directs that the prayer not be listed on the council meeting agenda. Id. ¶ 2. It further purports to limit the effects of the policy by stating that the policy “is not intended ... to affiliate the Council with, nor express the Council’s preference for, any faith or religious denomination.” Id. ¶ 11.

The prayer policy was adopted after the defendant abandoned its longstanding practice of reciting the Lord’s Prayer, a well known Christian prayer, at each of its meetings in response to a previous lawsuit filed by the plaintiff in this case. Ex. B, Cadalzo Cert. ¶¶ 3-5. Cadalzo is a resident of Point Pleasant Beach and an adherent of Judaism. She has attended nearly 50 council meetings, and plans to attend future meetings. Id. ¶¶ 2, 7.

At each council meeting that Cadalzo has attended, the meeting had included a recitation of the Lord’s Prayer. Id. ¶ 3. Up until September 2010, the Lord’s Prayer was recited by the Borough Clerk or her deputy, followed by her making the sign of the cross. Id. When the Borough’s practice was for the Clerk to recite the prayer, Cadalzo was uncomfortable and decided to sit immediately after the Pledge of Allegiance while the prayer is recited. Id. ¶ 4. She received strange looks from some people who stood during the prayer. Id. She also had some acquaintances who attended the meetings tease her by referring to her as a “heathen.” Id.

² Though referenced in the policy, counsel for plaintiff could find no reference in the municipal code that refers to the existence of such a position. Presumably, the council president or the mayor would serve as such.

On September 29, 2010, following the filing of the previous lawsuit, the council meeting included a moment of silence after the Pledge of Allegiance. Id. ¶ 5. As soon as the moment of silence began, a group of protesters began reciting the Lord's Prayer. Id. The group was led by Father Varga from St. Peter's Roman Catholic Church, located in the borough. Id. He was wearing a brown friar's robe. Id. The protesters recited the prayer very slowly. They were allowed to continue the prayer, and no one from the Borough took any action to stop the protest. Id. The moment of silence was concluded immediately after the protesters finished reciting the Lord's Prayer. Id.

On October 19, 2010, the council meeting included a moment of silence after the Pledge of Allegiance. Id. ¶ 6. As soon as the moment of silence began, it was breached almost immediately when a group of eight protesters began reciting the Lord's Prayer. Id. The group was led by a resident of the borough who is a sibling of a council member. Id. The protesters were allowed to continue the prayer, and no one from the Borough took any action to stop the protest. Id. The moment of silence was concluded immediately after the protesters finished reciting the Lord's Prayer. Id.

Cadalzo remains distressed by the continued sectarian prayers that the Borough has sponsored or permitted, as well as by the new policy that permits same. Id. ¶ 7. She considers it an endorsement of a particular religion and an improper attempt by government to prefer one religion over another. Id. She also finds it alienating and divisive because it sends a message that the Borough prefers Christianity over other faiths and religions, including her own beliefs in Judaism. Id.

LEGAL ARGUMENT

As noted above, to obtain restraints, Cadalzo must demonstrate a likelihood of success on the merits, immediate irreparable harm, and a favorable balance of the equities. She has made that showing here.

A. Defendants' Policy Likely Violates the New Jersey Constitution's Prohibition Against Government Preferring One Religion Over Another.

Sectarian prayer at municipal council meetings violates the fundamental state constitutional principle that "the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another," Tudor v. Board of Ed. of Rutherford, 14 N.J. 31, 45 (1953). Article 1, Paragraph 4 of the New Jersey Constitution specifically provides that "[t]here shall be no establishment of one religious sect in preference to another." When a government allows for officials to show a preference for a particular religious sect, Article I, Paragraph 4 provides individuals with at least as much protection as does the federal Establishment Clause. South Jersey Catholic School Teachers Organization v. St. Theresa of the Infant Jesus Church Elementary School, 150 N.J. 575, 586 (1997); Marsa v. Wernik, 86 N.J. 232, 239 n.2 (1981); Tudor, 14 N.J. at 44. Indeed, the New Jersey Supreme Court has suggested that, in such circumstances, the New Jersey Constitution likely provides more exacting scrutiny, and greater protection, than the federal constitution. Marsa, 86 N.J. at 239 n.2.

Whether the Court analyzes plaintiff's state constitutional challenge to defendant's prayer policy using federal principles³ or ones that offer greater protection from sectarianism, defendant's prayer policy fails.

1. Defendant's Prayer Policy is Government-Sponsored Speech.

As an initial matter, the defendant's prayer policy provides for government-sponsored speech because the prayer is undertaken directly by government and is intended to "solemnize" governmental activity. Marsa, 86 N.J. at 242-43. "[T]he opening exercises of public municipal meetings by municipal officials" is direct government speech. Id. at 243. The policy, by its terms, indicates that the prayers are authorized by the council itself for a purpose directly related to the council's own meetings ("it is the policy of the Council to allow for an invocation or prayer to be offered before its meetings for the benefit of the Council"); the prayers' content is directed and determined by council members ("according to the dictates of his or her own conscience" and with "no guidelines or limitations... [on] an invocation's content"); and they are introduced and delivered by council members. Ex. A, pp. 4-5. See Turner v. City Council of City of Fredericksburg, 534 F.3d 352, 355 (4th Cir. 2008) (O'Connor, J., sitting by designation), cert. denied, 129 S. Ct. 909 (2009) (noting that there is not "a single case in which legislative prayer was treated as individual or private speech").

2. Under Marsa's "Establishment Clause" Analysis and Recent Federal Jurisprudence, Defendant's Policy Permitting Sectarian Prayer Is Facially Unconstitutional.

The federal Establishment Clause prohibits a state from acting in a way that "prefer[s] one religion over another." Everson v. Bd. of Education, 330 U.S. 1, 15 (1947). The New Jersey

³ The Marsa Court analyzed the prayer practice at issue using the tripartite test articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971). Marsh v. Chambers, 463 U.S. 783 (1983), decided two years after Marsa, did not employ a Lemon analysis, but instead sustained a legislative nonsectarian prayer practice after analyzing its "unique history."

Supreme Court considered the constitutionality of a prayer at the opening of a municipal council meeting in Marsa v. Wernik, setting forth three criteria that the policy must meet: “[t]o pass muster under the ...[c]lause, the law ... must reflect a clearly secular legislative purpose,... have a primary effect that neither advances nor inhibits religion, and ... must avoid excessive entanglement with religion.” 86 N.J. at 241. If the state Constitution is held to embody that standard, then defendant’s policy is unconstitutional.⁴

In Marsa, the Borough of Metuchen implemented a prayer policy in which council members, on a rotating basis, offered a nondenominational invocation or silent meditation. 86 N.J. at 237, 239. The Court held that on the facts before it, the practice did not violate the constitution. Id. at 253. When evaluating the legislative prayer, the Court drew a bright line:

the primary effect of a questioned practice must not only avoid religion in general, it must be totally nonsectarian. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. The government posture towards religion should be a benevolent neutrality. [T]he conduct must not favor in the slightest religion over nonreligion or one sect over another.

Marsa, 86 N.J. at 249.

The only thing that defendant’s prayer policy has in common with the one at issue in Marsa is that the invocation is offered on a rotating basis. In contrast to the nonsectarian invocations or meditations examined by the Supreme Court, defendant’s policy provides that a council member “deliver the prayer or invocation... according to the dictates of his or her own conscience” with “[n]o guidelines or limitations” on its content. Ex. A, p. 4. These terms

⁴ For the purposes of this motion only, which is made without the benefit of discovery, plaintiff does not argue that defendant has also failed to demonstrate a secular legislative purpose for the prayer. Because defendant’s policy did not emerge in a vacuum, plaintiff reserves her right to challenge the purpose of defendant’s policy and request the Court to make a “constitutional assessment” that takes account “the purpose, setting, history, and circumstances” related to adoption of the policy at an appropriate juncture in the litigation. Marsa, 86 N.J. at 246.

empower council members to offer sectarian prayers. Because sectarian prayer is explicitly prohibited by the New Jersey Constitution, the Court should issue a preliminary injunction to ensure that unconstitutional prayers are not offered at municipal council meetings.

Even if the Court examined the defendant's prayer practices using more recent federal jurisprudence on legislative prayers, the policy would fail. In Marsh v. Chambers, the United States Supreme Court examined the history of legislative prayer and held that a legislative body could invoke divine guidance before engaging in public business. 463 U.S. at 792. Subsequently, the Court clarified and explained its holding in Marsh. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 604-05 (1989) (noting that "Marsh plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today."). Allegheny explained that the prayers in Marsh did not "have the effect of affiliating the government with any one specific faith or belief . . . because the particular chaplain 'removed all references to Christ.'" Id. at 603 n.52. The Court also held that the Establishment Clause 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)." Id. at 605.

Point Pleasant Beach's policy does not meet this standard of sectarian neutrality. When council members are authorized to offer a prayer in accordance with their own conscience, they are invited, and are free, to offer up their own sectarian beliefs about the divine. This inevitably results in government-sponsored preference for a particular sect and does not withstand even the most minimal constitutional scrutiny.

3. Using a More Exacting Analysis to Ensure that No Religious Sect Dominates Nor is Disfavored, Defendants' Prayer Policy Also Fails.

The New Jersey Constitution's "No Preference" clause requires "more exacting judicial scrutiny... to ensure that no religious sect dominates and that no sect is disfavored." Marsa v. Wernik, 86 N.J. at 240 n.2. This type of scrutiny differs from that accorded under the federal constitution because the text of Article 1, Paragraph 4 "invite[s] an equal protection analysis, rather than a traditional establishment analysis." Id.

In an equal protection analysis under the state constitution, courts weigh three factors: the nature of the right at stake, the extent to which the challenged action restricts that right, and the public need for the restriction. Lewis v. Harris, 188 N.J. 415, 443 (2006). "The test is a flexible one, measuring the importance of the right against the need for the governmental restriction." Id.

Here, the nature of the right at stake is one of fundamental religious liberty in that the constitution protects the religious freedom of New Jerseyans by prohibiting government from preferring one religion to another. The defendant's policy would allow for repeated violations of that protected right by permitting government officials to advance their own religious beliefs at the opening of a public meeting.

No legitimate basis exists for the defendant to provide for, or allow, sectarian rather than non-sectarian prayers. The only purpose for allowing such prayers is an illegitimate one --to advance religious beliefs.

B. Absent Interim Relief, Plaintiff and the Public will be Irreparably Harmed Because the Only Sufficient Remedy is an Injunction.

Courts consider harm irreparable if it cannot be redressed adequately by monetary damages. Crowe, 90 N.J. at 132-33. Here, Cadalzo seeks to halt the implementation of the

defendant's unconstitutional policy that allows for sectarian prayer, and the harm alleged can never be redressed with monetary damages.

In the context of a federal religious freedom claim, the Third Circuit recognized that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” Tenafly Eruv Ass’n v. Borough of Tenafly, 309 F.3d 144, 178 (3d Cir. 2002) (citing and quoting Elrod v Burns, 427 U.S. 347, 373 (1976)). That principle applies equally to the state constitution’s analogous guarantee of religious freedom.

In addition, the harm here is immediate. The prayer policy will be implemented shortly, allowing for a sectarian invocation. The council will meet in a matter of days, and meets approximately twice each month. Absent interim restraints, the constitutional injury will recur repeatedly while the lawsuit proceeds.

Finally, as the Seventh Circuit explained in an Establishment Clause case, “in considering whether the plaintiff ... has shown irreparable harm, and how much, the court is not confined to the particular harm on which the plaintiff's standing to sue is based; it can consider the effect of the defendant's conduct on the interests protected by the clause if the injunction is not granted.” American Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 275 (7th Cir. 1986).

Because defendant’s policy affects significant constitutional interests, the harm at stake is not only that to the plaintiff, but that to foundational principles of our society. “The systematic and overwhelming expression of Christian faith in official prayers sends a message of official endorsement of one faith and exclusion of others. That message runs counter to that same American tradition of freedom of worship and conscience. ... ” Hinrichs V. Bosma, 410

F.Supp. 2d 745, 751 (S.D. Ind. 2006), aff'd 440 F.3d 393 (7th Cir. 2006) (denying motion for stay on appeal). Indeed, the United States Supreme Court has explained that

religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission.

Lee v. Weisman, 505 U.S. 577, 589 (1992). The Court further noted that the harm is not limited to those who object to the prayer: “It must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference.” Id.

Accordingly, absent preliminary relief, immediate irreparable harm exists here. The Court should so find.

C. The Balance of Equities, Including the Public Interest, Favors the Issuance of an Injunction.

The balance of equities clearly favors plaintiff here. Absent an injunction, the defendant’s policy ostensibly authorizes and allows government-sponsored sectarian prayers at its meetings. Plaintiff will suffer injury to her constitutional rights. Plaintiff should not be required to hear a government-sponsored sectarian prayer before obtaining relief. The borough has no countervailing equitable interest in implementing a policy that likely will cause a constitutional injury. Defendant cannot show that putting its policy on hold will cause them harm.

Moreover, as noted above, a preliminary injunction also serves the public interest. When the public interest is at stake, courts may provide more equitable relief than they would in

matters involving only private matters. Waste Mgmt. v. Union County Utils. 399 N.J. Super 508, 521 (App. Div. 2008) citing Yakus v. United States, 321 U.S. 414, 440 (1944).

In this matter, Plaintiff has alleged that the Defendant has a history and tradition of offering sectarian prayers, and has now adopted a policy that allows for such. Plaintiff seeks an injunction not merely to remedy the harm it has caused her, but to ensure that the defendant's practices are in accord with the constitution and that the borough provides a place of welcome for residents of all faiths and belief systems. Indeed, "[r]eligious liberty for all is more secure when the believers of one faith cannot systematically appropriate the power and prestige of the government to advance their faith." Hinrichs, 410 F.Supp. at 751. This factor weighs heavily in favor of an injunction.

CONCLUSION

Respectfully submitted,



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