Who Said That?: A Simple Question That May Change the Way Courts View Legislative Prayer

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Related Opinions & Briefs:

- Petition for Writ of Certiorari, Town of Greece v. Galloway: http://sblog.s3.amazonaws.com/wp-content/uploads/2013/01/Galloway-Cert-Petition.pdf
- Galloway v. Town of Greece, 681 F.3d 20 (2nd Cir. 2012): http://www.adfmedia.org/files/GreeceOrder.pdf
- Brief of Plaintiff-Appellants, Galloway v. Town of Greece, 681 F.3d 20 (2nd Cir. 2012): https://www.au.org/files/legal_docs/Greece%20opening%20appeal%20brief.pdf

I. Context

Nearly three decades ago, in the case of *Marsh v. Chambers*, the Supreme Court declared that legislative prayers do not constitute an establishment of religion.[1] It is the only time the Supreme Court has directly addressed the constitutionality of legislative prayers. In *Marsh*, the high Court found that it did not violate the Constitution for a state legislature to pay a Presbyterian minister to serve as its chaplain for sixteen years, even where that chaplain delivered daily prayers that were "often explicitly Christian."

Despite the Supreme Court's pronouncement, since 2004 seventeen federal lawsuits have challenged the validity of various legislative prayer practices. These suits have focused on the content of the prayers as well as the government's role in regulating that content. The year 2004 was significant because it marked the first time a legislative prayer practice was struck down. In *Wynne v. Town of Great Falls, SC*, the Fourth Circuit reviewed troubling facts that led the court to find that the Town of Great Falls had impermissibly exploited the prayer opportunity.[2] Most notably, town officials publicly chided a Wiccan who had complained that Christian prayers were offered. And to make matters worse, the town refused to allow her to participate in public town meetings unless she was present for the prayers.[3] The Fourth Circuit's finding that the town's prayer opportunity was exploited is unremarkable, given those facts. But the many federal lawsuits challenging legislative prayer practices that were brought after *Wynne* were spawned by the Fourth Circuit's reliance upon dictum contained in a Supreme Court decision involving public holiday displays, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[4] which led the *Wynne* court to find the content of legislative prayers themselves to be unconstitutional.[5]

The Fourth Circuit's focus on the content of legislative prayers represented a sea change in the constitutional analysis of legislative prayer practices. In *Marsh*, the dissent categorized the content of the prayers as being too Christian and argued that legislative prayers should be evaluated in light of the three prong test set forth in *Lemon v. Kurtzman*.[6] The *Marsh* majority rejected the *Lemon* test for evaluating Establishment Clause challenges to legislative prayers and, instead, relied upon a historical analysis. The Court noted 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 . . . ."[7] After finding the act of legislative prayer constitutional, the *Marsh* Court turned its attention to the claims that legislative prayers should be judged by their content. It set forth the following standard for when a court may analyze the content of prayers:

> 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 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.[8]

In *Allegheny*, the Supreme Court applied the *Lemon* test, via the analytical tool known as the endorsement test, to determine the constitutionality of holiday displays on public property during the Christmas season. The facts and the holding of *Allegheny* had nothing to do with legislative prayer, but in a 5-4 decision the dissent suggested that the Establishment Clause analysis should follow the historical approach used in *Marsh*. In defense of the endorsement test, Justice Blackmon opined that the prayers in *Marsh* did not have the "effect of affiliating the government with any one specific faith or belief" because the chaplain had "removed all references to Christ."[9] Several courts have interpreted this dictum as altering the *Marsh* standard so as to shift the focus of the analysis to the content of the prayers.[10] In doing so, those courts claim to apply the *Marsh* precedent finding the act of having a legislative prayer to be constitutional, but uniformly strike down such practices by applying the *Lemon* endorsement test to the content of the prayers, despite the Supreme Court's rejection of the test in *Marsh*.[11]

Shifting the court's focus from the context to the content of the prayers raises a host of constitutional questions, among which are: Can the government determine what can and cannot

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be said in a prayer without violating the Establishment Clause? Are judges competent to make theological distinctions as to what is acceptable language in a prayer and what is not? What is the proper standard for evaluating the content of prayers? And does the standard change depending on whether prayers are considered private expression or government expression? The focus of this article is on the last question.

II. Current Disputes

The tension between the *Marsh* admonition against evaluating the content of prayers and the *Allegheny* dictum implying that the constitutionality of legislative prayer is contingent upon the content of the prayers has created a three-way divide amongst the circuits as to how the Establishment Clause is to be applied to legislative prayer. The Eleventh Circuit refused to interpret *Allegheny* as altering the *Marsh* standard and upheld a legislative prayer practice despite the prayers' frequent Christian references.[12] But both the Second and Fourth Circuits relied upon *Allegheny* to replace the *Marsh* standard relating to the content of the prayers with the *Lemon* endorsement test and thereby justified striking down legislative prayer practices based on the frequency of Christian references found in the prayers.[13] This focus on the content of prayer has resulted in confusion over whether the government can or should dictate the content of legislative prayers. The Second Circuit holds the Establishment Clause prevents governmental regulation of prayer content.[14] This is at odds with the Fourth Circuit's holding that the Establishment Clause requires the government to censor the content of legislative prayers to prevent Christian references from becoming too frequent.[15]

For courts that apply the analysis used in *Marsh* and heed the Court's admonition against evaluating the content of the prayers, the Establishment Clause yields the same results whether the prayers are delivered by a government actor or a private speaker. *Marsh* found that the Establishment Clause permitted a practice in which a paid government actor, in the performance of his governmental duties, delivered prayers that were often explicitly Christian from 1965-1979.[16] The case should be that much easier when the content is the product of private expression protected by the Free Speech Clause of the First Amendment. But for courts that apply the endorsement test to the content of prayer, the impact of the Establishment Clause may depend upon whether the content of the individual prayers bear the imprimatur of the prayer giver or the state.

Two current cases sharing substantively similar facts illustrate the current legal debate. On November 8, 2012, in *Rubin v. City of Lancaster*, the U.S Court of Appeals for the Ninth Circuit heard oral argument on a challenge to a legislative prayer practice.[17] And on December 6, 2012, a Petition for Certiorari was filed with the U.S. Supreme Court in *Galloway v. Town of Greece*.[18] In both cases, the towns created opportunities for private citizens to voluntarily open town council meetings with invocations. The private citizens could have read an inspirational message or opted to lead a moment of silence, but in most instances a prayer was delivered. In each case the towns informed the citizenry that invocations consistent with the dictates of the speaker's conscience were permitted, including leading a prayer in conformity with the traditions of the speaker's own faith. The record reveals that the towns had invocations delivered from a variety of faith traditions, including meta-physicists, Baha'i, Sikh, Jewish, Muslim, Wiccan, and all denominations of Christianity. Due solely to the demographics of the communities—and not surprisingly—a substantial majority of the invocations contained Christian references, such as closing the prayers in the name of Jesus.

The *Lancaster* court concluded the town's practice did not violate the Establishment Clause.[19] The Second Circuit did the opposite in *Galloway* and concluded the Town of Greece's practice did violate the Establishment Clause because the town permitted repeated Christian references in the prayers without taking sufficient steps to prevent a reasonable observer from perceiving government endorsement of Christianity.[20] In both cases, the courts focused on Establishment Clause claims and the tension created by the *Allegheny* dictum's gloss on *Marsh*.[21] Both courts agree—indeed every court to evaluate a legislative prayer practice since 1983 has agreed—that under *Marsh* the mere act of having legislative prayer does not violate the Establishment Clause. But the courts reached opposite conclusions due to their respective evaluation of the impact of the prayers' content.

On appeal the Ninth Circuit and the Supreme Court are grappling with another fundamental question, namely: Is the content of legislative prayer to be judged in light of the Establishment Clause or the Free Speech Clause? The answer depends upon whether the content of the invocation is deemed private speech or government speech. Determining the nature of the speech only impacts the standards used to define the limits on the government's ability to regulate the content of the prayers. If the prayers are deemed government speech, the "government speech doctrine" gives latitude to the government to control its message within the boundaries set by the Establishment Clause.[22] However, if the prayers are deemed private speech, government regulation of the content, even in the most limited context, must be viewpoint neutral.[23]

Obviously, not every legislative prayer is offered in the context of a public forum that permits private expression. For example, *Marsh* involved a paid government actor carrying out governmental functions, and no court has suggested the *Marsh* prayers were anything but government expression. But deliberative bodies that choose to allow private expression must protect the First Amendment rights of the speakers. Under *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995), "Once [the deliberative body] has opened a limited forum, however, the State must respect the lawful boundaries it itself has set." Therefore, determining whether the content of legislative prayer constitutes private expression or government expression is critical to understanding the constitutional limits of the government to regulate the content of legislative prayer.

Recognizing the limitations of the court to order the Town of Lancaster to regulate the content of private expression, on October 10, 2012 the U.S. Court of Appeals for the Ninth Circuit *sua sponte* requested supplemental briefing on the private/government nature of the legislative prayers offered before the town council.[24] The court posed the following questions:

1. Do the prayers delivered before city council meetings

and authorized under the City of Lancaster's Invocation Policy constitute government speech or private speech for purposes of the Free Speech Clause of the First Amendment of the United States Constitution?

2. Assuming the invocations constitute private speech, is the setting in which the City's council meetings occur a public forum, a limited public forum, or a nonpublic forum?

3. If the invocations constitute private speech, would a policy prohibiting only "sectarian" prayers in general—or prayers explicitly invoking the name of "Jesus" or "Jesus Christ" in particular—amount to a content- or viewpoint-based restriction under the Free Speech Clause?

4. Supposing such a policy would constitute a content- or viewpoint-based restriction, would the City have a sufficient interest in maintaining the policy?

Similarly, the Petition for Certiorari filed in *Galloway* asks the Supreme Court to review the impact of Christian references contained in a public invocation delivered by a private citizen in response to an open governmental invitation in light of the protections of the Free Speech Clause.[25]

III. Development of Free Speech Analysis for Legislative Prayer Practices

Very few legislative prayer cases have analyzed the nature of the speech involved. In 1998 the U.S. Court of Appeals for the Tenth Circuit, in the case of *Snyder v. Murray City Corp*., faced a free speech challenge when a city denied a private citizen the opportunity to offer a political harangue under the guise of a "prayer" that lambasted a city council for opening their meeting with an invocation.[26] While the original panel unanimously agreed that Murray City's refusal to permit the "prayer" did not violate the *Marsh* standard, one dissenting judge opined that the city had opened a limited public forum for the purpose of offering the invocation and that denying the plaintiff access to the forum due to the content of the "prayer" violated his free speech rights.[27] In addition to the free speech analysis, the dissenting judge contended that the prayer practice in question was sufficiently distinct from that in *Marsh* so as to warrant a different Establishment Clause analysis.[28] The Tenth Circuit accepted *en banc* review of the case for the limited purpose of evaluating the proper Establishment Clause standard.[29] While the *en banc* majority reaffirmed *Marsh* as providing the proper Establishment Clause standard for evaluating legislative prayer practices, a dissent was filed by multiple judges raising Free Speech concerns.[30]

Since the *Snyder* opinion, the U.S. Court of Appeals for the Fourth Circuit has addressed a free speech claim in the context of a legislative prayer practice on two occasions. In *Simpson v. Chesterfield County Board of Supervisors* , the court summarily found legislative prayers to constitute government speech, even when given by private citizens, because the purpose of the prayers was to solemnize the occasion rather than exchange views or engage in public discourse.[31] In 2008, the Fourth Circuit again considered a free speech claim in the context of legislative prayer in the case of *Turner v. City Council of the City of Fredericksburg, Va.*[32] The City of Fredericksburg maintained a practice of allowing City Council members to volunteer on a rotational basis to open public meetings with a prayer.[33] The city's policy mandated that the prayers be "nonsectarian," and a member of the city council claimed the "nonsectarian" mandate violated his Free Exercise and Free Speech rights.[34] Retired Justice Sandra Day O'Connor authored the panel opinion. The court concluded that prayers of an elected official acting in his official capacity constituted government speech and consequently found the Free Speech and Free Exercise claims to be inapplicable.[35]

IV. Development of the Government Speech Doctrine

The cases that have thus far considered the nature of the speech involved in legislative prayers have not had the benefit of the Supreme Court's "government speech doctrine" as refined in the 2009 case of *Pleasant Grove City v. Summum*.[36] While the Supreme Court in *Marsh* acknowledged the constitutionality of legislative prayers delivered by a paid government employee, the Court has never limited the ability of deliberative bodies to establish various procedures for instituting other prayer practices. No case, for example, prevents a deliberative body from creating a forum allowing private citizens to choose private messages to solemnize the occasion. Indeed, the Supreme Court has repeatedly recognized that "a government entity may create a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects." [37] And such a limited public forum may be opened in a venue that is not generally considered a forum.[38] Both the Town of Lancaster, California and the Town of Greece, New York assert that their practices have the indicia of a limited public forum.[39]

In *Summum*, the Supreme Court not only recognized the flexibility of the government to open forums for private expression, but it also identified the hallmark of the type of expression falling into the government speech doctrine. According to the Court, in order to be considered government speech the government must exercise significant editorial control over the content of the delivered message.[40] In both *Galloway* (Petition for Certiorari currently pending) and *Lancaster* (oral argument held at the Ninth Circuit on November 8, 2012), the towns exercise no editorial control over the content of the prayer.[41] In both cases the invocation speaker was permitted to deliver a message consistent with the dictates of his or her own conscience—the private citizen retained responsibility for the content of the invocation. The lack of editorial control by the government weighs against a finding that legislative prayers in this context are government speech.[42] Legislative prayers delivered by private citizens with discretion to pray as their conscience dictates have the indicia of private expression.

V. The Impact of the Invocations Being Private Expression

If legislative prayers are offered by private speakers, the government's ability to control the content of the prayer is

limited by the protections of the Free Speech Clause. As the Supreme Court stated in *Bd. of Ed. Of Westside Community Schools v. Mergens*: "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private speech* endorsing religion, which the Free Speech and Free Exercise Clauses protect."[43] The Free Speech Clause protects private expression even when the message is quintessentially religious or decidedly religious in nature.[44] This protection prevents government regulation of the content of a private message expressed in a government forum based on the viewpoint expressed.[45] The government may not reward or permit private expression it finds agreeable, while discouraging or preventing disfavored private expression.

The suits in *Galloway* and *Lancaster* were initiated because the plaintiffs objected to certain types of prayers, specifically those that reference the deity of Christ.[46] The plaintiffs in *Galloway* and *Lancaster* seek to exclude prayers that express the view that Jesus is God, labeling such prayers "sectarian."[47] In fact, the parties in each case concede that other prayers that meet their definition of "nonsectarian" are constitutionally permissible.[48] A court-imposed ban on an otherwise permissible prayer because of the speaker's viewpoint as to God's identity or the speaker's viewpoint as to the elements necessary for an effective prayer[49] runs counter to the Supreme Court's Free Speech jurisprudence. Consequently, if the prayers constitute private expression, the government may not place limits on the faith traditions referenced in the prayer.

Because the act of legislative prayer involves the government permitting or participating in religious expression, an Establishment Clause analysis is required, even when the content is private expression. *Marsh* resolves the Establishment Clause question, especially when the content of the prayer is dictated by private choice. However, even if a court adopts an endorsement analysis to aspects of the legislative prayer practice, finding the content of a prayer to be private expression does limit the government's ability to regulate its content. Additionally it clarifies whether the imprimatur of the state is shaped by the content of the prayers. Permitting a variety of religious perspectives on a nondiscriminatory basis does not place the power of the government behind any particular creed.[50] When a city council provides an avenue for the public to comment on pending deliberations, the government is not responsible for the perspective of the citizenry. For example, a city council is no more responsible for the language used by those citizens arguing in favor of the issuance of public bonds than it is the language of those citizens opposing those bonds. Similarly the deliberative body is not responsible for the language used by private citizens taking advantage of an invocation opportunity provided via a public forum. As the Supreme Court stated: "The proposition that [the government does] not endorse everything they fail to censor is not complicated."[51]

VI. The Impact of the Invocations Being Government Expression

As with public invocations offered as private expression, government regulation of the content of legislative prayer is likewise constrained by constitutional limits. In *Summum*, the Supreme Court noted that the government's discretion to control its message is not without limits.[52] Government speech cannot exceed the bounds of the Establishment Clause.[53] Despite the plainly religious nature of the practice, the Supreme Court in *Marsh* clarified that legislative prayers do not violate the Establishment Clause, even when explicitly Christian and performed by a paid government employee in furtherance of his governmental duties.[54] *Marsh* should be sufficient to conclude the analysis. Because *Marsh* rejected the *Lemon* test, applying the test to specific aspects of legislative prayer seems inconsistent; nevertheless legal challenges are on the rise because some courts use the *Lemon* endorsement test to evaluate impact of the theological content of the prayers.

In evaluating the boundaries of the Establishment Clause, the Supreme Court, in a variety of contexts, has repeatedly warned against the government making legal judgments based on theological distinctions.[55] In *Lee v. Weisman*, the Supreme Court considered a public prayer policy at a high school graduation ceremony wherein the government had advised an invited speaker that prayers should be "nonsectarian."[56] The Court noted that the "nonsectarian" instruction constituted a means by which the government impermissibly directed and controlled the content of prayers.[57] While the factual context of *Lee* is different from that of legislative prayer,[58] lower courts have found the high Court's warnings concerning the dangers of creating a civil orthodoxy by proscribing or prescribing religious expression applicable to legislative prayer practices.[59] The Second Circuit found the language and principles in *Lee* to unequivocally prohibit the government from regulating the content of legislative prayers.[60] Similarly, the Eleventh Circuit found the *Lee* ruling instructive.[61] But the Fourth Circuit has rejected the application of *Lee* in the context of legislative prayer.[62] Consequently, the Fourth Circuit mandated deliberative bodies to be "proactive in discouraging sectarian references."[63] Even when the content of legislative prayers are plainly government expression, significant confusion exists in the lower courts regarding what circumstances the Establishment Clause mandates or prohibits government regulation of the content of the prayers.

The confusion over the Establishment Clause's proscription or prescription of the content of legislative prayer, combined with the confusion surrounding the applicability of the historical analysis used by *Marsh* or the endorsement test, threaten the very existence of the venerable practice of legislative prayer. In *Galloway* the Second Circuit struck the Town's invocation practice because it found that repeated Christian references allowed a reasonable observer to perceive government endorsement, while simultaneously warning that any attempt by the Town of Greece to regulate the content of the prayers would also constitute a violation of the Establishment Clause.[64] Recognizing this challenge, the Second Circuit concluded with this grim warning: "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer."[65]

VII. Conclusion

Tension between the Supreme Court's holding in *Marsh* and the dictum in *Allegheny* has created confusion in the lower

courts regarding the proper standard(s) to use when evaluating legislative prayer practices. Central to the confusion is the government's role in regulating the content of legislative prayers. For courts that apply the endorsement test to the context surrounding a legislative prayer practice, distinguishing between private expression and government expression is critical to the viability of the practice. For courts that apply a historical analysis, as in *Marsh*, the content of the prayer does not define the analysis absent evidence of government exploitation, irrespective of its classification as government or private expression.

The First Amendment is a shield against a government-imposed civil orthodoxy. Legislative prayer is a historic tradition practiced across the country at every level of government. The circuits are irreconcilably conflicted about the application of fundamental, constitutional principles. The current disputes provide the Supreme Court with an opportunity to resolve these conflicts and provide clarity to the law.

Endnotes

1 Marsh v. Chambers, 463 U.S. 783 (1983).

2 Wynne v. Town of Great Falls, SC, 376 F.3d 292 (4th Cir. 2004).

3 *Id.* at 295.

4 County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

5 *See Wynne*, 376 F.3d at 297–301.

6 *See Marsh*, 463 U.S. at 797. To survive a challenge for a violation of the Establishment Clause under the *Lemon* test, government practice must 1) have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971). Later, the "endorsement test" was developed as an analytical tool for applying the *Lemon* test. *See* Lynch v. Donnelly, 465 U.S. 668, 691–92 (1984) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.") (O'Connor, J. concurring).

7 *Marsh*, 463 U.S.at 793.

8 *Id.* at 794–95.

9 *Allegheny*, 492 U.S. at 603.

10 The district court in *Rubin v. City of Lancaster*, 802 F.Supp.2d 1107, 1112 (C.D.Cal. 2011) explains the dichotomy between *Marsh* and *Allegheny*:

> [T]hose who advocate only "nonsectarian" prayer (if prayer is to be permitted at all) interpret *Allegheny's* reference to *Marsh* as a blanket prohibition against "sectarian" prayer. *See, e.g. Wynne v. Town of Great Falls, South Carolina,* 376 F.3d 292 (4th Cir. 2004); *Rubin v. City of Burbank,* 101 Cal.App.4th 1194, 124 Cal.Rptr.2d. 867 (2002). Two other opinions supporting this view, *Doe v. Tangipahoa Parish School Board,* 473 F.3d 188 (5th Cir. 2006), and *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006), were vacated or reversed and remanded with instructions to dismiss for lack of standing.
>
> Those who reject this supposed "bright-line" rule, and advocate for a policy that allows "sectarian" prayer so long as it is not "exploited to proselytize or advance any one, or to disparage any other, faith or belief," rely heavily on *Marsh's* mandate not to "embark on a sensitive evaluation or to parse the content of a particular prayer." *See, e.g.*,Pelphrey v. Cobb Cnty*., Ga.,* 547 F.3d 1263, 1271–72 (11th Cir. 2008); Snyder v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc); Galloway v. Town of Greece, 732 F.Supp.2d 524 (W.D.N.Y.2010); Doe v. Indian River Sch. Dist., 685 F.Supp.2d 524 (D.Del. 2010); Doe v. Tangipahoa Parish Sch. Bd., 631 F.Supp.2d 823 (E.D.La. 2009); *see also* Lee v. Weisman*,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (holding a school could not provide for "nonsectarian" prayer to be given by clergyman selected by the school); Turner v. City Council of Fredericksburg, 534 F.3d 352 (4th Cir. 2008) (upholding policy permitting only nondenominational prayers, expressly declining to hold that *Marsh* requires such a policy, and applying *Marsh's* prohibition against parsing the content of a particular prayer); Simpson v. Chesterfield Cnty. Bd. of Supervisors, 404 F.3d 276, 283-84 (4th Cir. 2005) (noting defendant "has aspired to nonsectarianism and requested that invocations refrain from using Christ's name," but describing terms used by clerics, including "the God of Abraham, of Moses, Jesus, and Mohammad," "King of Kings," and others). These cases have thoroughly analyzed the topic and the Court can add little or nothing to the debate. Having reviewed these cases and others, the Court concludes that *Marsh* does not prohibit sectarian prayer and specifically does not prohibit references to Jesus or any other deity.

(footnotes omitted).

11 *See* Galloway v. Town of Greece, 681 F.3d 20, 26, 33 (2nd Cir. 2012) (acknowledging that "[our analysis must begin with *Marsh v. Chambers*" then proceeding to apply the endorsement test to a legislative prayer practice); Joyner v. Forsyth County, 653 F.3d 341, 346, 355 (4th Cir. 2011) (taking heed of the fact that *Marsh v. Chambers* found legislative prayer constitutional while striking a practice by finding it implied government endorsement);

12 *See* Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2008) (applying *Marsh* and refusing to act as an "ecclesiastical arbiter" of the content of prayers absent evidence of government exploitation or an impermissible motive).

13 *See Galloway*, 681 F.3d 20 (Relying on *Allegheny* to explicitly apply the endorsement test to strike down prayers acknowledged to be consistent with the *Marsh* standard); *Joyner*, 653 F.3d 341 (striking down invocation practice in light of *Allegheny* because frequent Christian invocations imply an endorsement of religion).

14 *See Galloway*, 681 F.3d at 28–29 ("[a] state imposed requirement that all legislative prayers be nondenominational," the court noted "begins to sound like the establishment of 'an official or civic religion'" prohibited by the First Amendment) (citing Lee v. Weisman, 550 U.S.577, 590 (1992)).

15 *See Joyner*, 653 F.3d 353 (requiring deliberative bodies who open meeting with a legislative prayer to be "proactive in discouraging sectarian prayer in public settings").

16 Marsh v. Chambers, 463 U.S. 783, 784–86 (1983).

17 Rubin v. City of Lancaster, 802 F.Supp.2d 1107, 1112 (C.D.Cal. 2011).

18 Petition for Writ of Certiorari, Town of Greece v. Galloway, 681 F.3d 20 (2nd Cir. 2012), *petition for cert. filed*, No. 12-696 (Dec. 6, 2012).

19 *Lancaster*, 802 F.Supp.2d at 1115.

20 *Galloway*, 681 F.3d at 33.

21 *Galloway*, 681 F.3d at 30 n.3; *Lancaster*, 681 F.Supp.2d at 1115.

22 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009) (noting the "government speech must comport with the Establishment Clause").

23 *See* Good News Club v. Milford Central Sch., 533 U.S. 98, 106 (2001) (noting that even in a limited public forum government restrictions "must not discriminate against speech on the basis of viewpoint").

24 Order, Rubin v. City of Lancaster, No. 11-56318, (9th Cir. Oct. 9, 2012), ECF No. 55.

25 Petition for Writ of Certiorari, Town of Greece v. Galloway, 681 F.3d 20 (2nd Cir. 2012), *petition for cert. filed*, No. 12-696 (Dec. 6, 2012).

26 *See* Snyder (II) v. Murray City Corp., 159 F.3d 1227 (10th Cir. 1998) (en banc).

27 Snyder (I) v. Murray City Corp., 124 F.3d 1349, 1359–60 (10th Cir. 1997).

28 *Id*. at 1358.

29 *Snyder II*, 159 F.3d at 1236 (noting "Snyder attempts to incorporate the Free Speech Clause of the First Amendment into his argument in this appeal. Because these contentions fall outside the limitations of our order for

rehearing-confined as it was to the Establishment Clause issues in this case-we will not address them")

30 *Id*. at 1243–48.

31 Simpson v. Chesterfield County Board of Supervisors, 404 F.3d 276, 288 (4th Cir. 2005).

32 Turner v. City Council of the City of Fredericksburg, Va., 534 F.3d 352 (4th Cir. 2008).

33 *Id*. at 353–54.

34 *Id*. at 354.

35 *Id.* at 354–56.

36 Pleasant Grove City v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., Concurring) (refers to the government speech doctrine as "recently minted").

37 *Id.* at 470 (citing to Perry Ed. Assn., v. Perry Local Educators Assn., 460 U.S. 37, 46 n.7 (1983)); *see* Widmar v. Vincent, 454 U.S. 263 (1981) (government opens a forum limited to student groups); *see also* City of Madison Joint Sch. Dist. v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976) (government opens forum limited to discussing school business).

38 Summum, 555 U.S. at 469 ("We have held that a government entity may create 'a designated public forum' if government property that has not traditionally been regarded as a public forum is intentionally opened for that purpose.") (citing to Cornelius v. NAACP Legal Defense & Ed. Fund., Inc., 473 U.S. 788, 804–06 (1985)).

39 Supplemental Brief filed by Appellees, Rubin v. City of Lancaster, No. 11-56318, (9th Cir. Oct. 19, 2012), ECF No. 59.

40 *See id.* at 473 (the government speech doctrine requires the government to "effectively control" the message); *see also* Johanns v. Livestock Marketing Assn., 544 U.S. 550, 562 (2005) (a marketing campaign was deemed government speech when the government set the overall message to be communicated and approved every word disseminated).

41 Galloway v. Town of Greece, 681 F.3d 20, 23 (2nd Cir. 2012) (noting the town "does not review the language of the prayers before they are delivered, and that it would not censor an invocation, no matter how unusual or offensive its content"); Rubin v. City of Lancaster, 802 F.Supp.2d 1107, 1108 (C.D.Cal. 2011) (finding the town policy permits speakers to deliver prayers consistent with the dictates of their own conscience).

42 *See Summum*, 555 U.S. at 473 (in determining the city had "controlled the message" expressed by a monument created by private parties, the court noted the government chose what message would be permanently displayed and the donor had relinquished all rights to the monument); Adler v. Duval County School Board, 250 F.3d 1330, 1341 (11th Cir.2001) ("What turns private speech into state speech in this context is, above all, the additional element of state control over the content of the message.")

43 Bd. of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1991) (emphasis in the original).

44 *See* Good News Club v. Milford Central School, 533 U.S. 98, 111 (2001) (the religious viewpoints offered by a student club on school property was protected free speech).

45 *See* Lambs Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) ("The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of other'") (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984); *see also* Good News Club v. Milford Central Sch., 533 U.S. 98, 107 (2001) ("The restriction [on speech] must not discriminate against speech on the basis of viewpoint").

46 *Galloway*, 732 F.Supp.2d at 203 ("Many of the prayers that were given at Board meetings were explicitly Christian, and referred to Jesus or Jesus Christ. Many of the prayers end with the phrase, 'in Jesus' name,' or similar language. Plaintiffs, who are not Christians, found such prayers offensive and inappropriate."); *Lancaster*, 802 F.Supp2d at 111 (noting "[p]laintiffs were upset and offended because [the invocation speaker] mentioned the name Jesus. Neither plans on attending additional City Council meetings until the Invocation Policy forbids people from referring to "Jesus" or "Jesus Christ").

47 *Galloway*, 732 F.Supp.2d at 203 (noting that Plaintiff "states that a prayer ending with the words 'in Jesus's name,' or which included the names Jesus, Jesus Christ, or Holy Spirit, would be sectarian"); *Lancaster*, 732 F.Supp.2d at 1115 (plaintiff assert that a single reference to Jesus in a prayer violates their proposed standard allowing only nonsectarian prayers)

48 *Galloway*, 732 F.Supp.2d at 209 (noting that Plaintiffs maintain that "only 'non-sectarian, broadly inclusive prayers are constitutionally permissible'"); *Lancaster*, 802 F.Supp.2d 1113–14 (noting that Plaintiffs advocate for a rule that only permits prayers that meet their definition of "nonsectarian").

49 Many Christian traditions consider John 16:23 and other Biblical passages to require and effective prayer to be offered in the name of Jesus. *See* Catechism of the Catholic Church 702 (Doubleday Edition, 1995); Francis Pieper, Christian Dogmatics 3 (Concordia Publishing House, 1953, 1970); Robert Dabney, Systematic Theology 713 (Banner of Truth, 1871, 1995).

50 *See* Bd. of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1991) (noting that permitting student speech on a nondiscriminatory basis is not sufficient to imply the school either endorses or supports the student's expression)

51 *Id*.

52 *See* Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

53 *Id.*

54 Marsh v. Chambers, 463 U.S. 783, 793-95 (1983).

55 *See* Widmar v. Vincent, 454 U.S. 263, 269–70 n.6, 272 n.11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify whether it is "pervasively sectarian" is offensive and contrary to precedent); NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 502 (1979) (finding that "the very process of inquiry leading to findings and conclusions" involving religious beliefs may impinge upon First Amendment rights).

56 Lee v. Weisman, 505 U.S. 577, 592 (1992).

57 *Id*. at 588.

58 *Id.* at 596–97.

59 *See id*. at 589.

60 Galloway v. Town of Greece, 681 F.3d 20, 29 (2nd Cir. 2012).

61 Pelphrey v. Cobb County, 547 F.3d 1263, 1271 (11th Cir. 2008) (noting that *Lee* informs *Marsh* and "controls our review of the constitutionality of legislative prayers").

62 Turner v. City Council of the City of Fredericksburg, Va., 534 F.3d 352, 355 (4th Cir. 2008) ("We do not read *Lee* as holding that a government cannot require legislative prayers to be nonsectarian.").

63 Joyner v. Forsyth County, 653 F.3d 341, 353 (4th Cir. 2011).

64 Galloway v. Town of Greece, 681 F.3d 20, 33 (2nd Cir. 2012).

65 *Id*. at 34.