IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SUSAN GALLOWAY and LINDA STEPHENS, Plaintiffs, v. TOWN OF GREECE and JOHN AUBERGER, in his official capacity as Town of Greece Supervisor, Defendants.	)	Case No. 06:08-cv-06088-CJS

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Defendants' practice of permitting local persons to give a short invocation before its Town Board meetings is consistent with America's long standing history of allowing legislative prayers, and is constitutional. In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court upheld the Nebraska Legislature's hiring of a Presbyterian minister, who for 16 years opened the legislative sessions by giving prayers in the Judeo-Christian tradition. This is an easier case than *Marsh* as here, anyone in the community can give the prayer, and indeed, several different persons from varying denominations and faiths have given the prayer. *Not one person who has ever requested to give the prayer has been denied.* There is no evidence that anyone from the Town ever preferred one religion over another in selecting the prayergivers. Even Plaintiffs were told before this lawsuit was ever filed that an atheist could give the prayer if they so desired.

Lacking any evidence that the Town was exploiting the prayers to proselytize a faith or disparage others, Plaintiffs have resorted to parsing out the content of prayers. But this is exactly what the Supreme Court said in *Marsh* should not happen.

The merits of this case, however, do not need to be reached as Plaintiffs lack standing. Plaintiffs have never been denied the opportunity to give the invocation, nor have they ever requested to be placed on the list of potential prayer-givers. Thus, Plaintiffs have not suffered an injury-in-fact. Simply being exposed to a "sectarian" prayer during a Town Board meeting is not an injury-in-fact. If Plaintiffs claim they were injured because "non-Christian" prayergivers were not given equal opportunity to give a prayer, such argument is disingenuous as Plaintiffs testified that they were not aware of any non-Christian religious organizations or places of

worship in the Town. How could they be offended at their supposed exclusion if they did not know they existed? The only plausible basis for an injury-in-fact is if Plaintiffs were exposed to prayers during Town Board meetings that were exploited to proselytize or disparage other faiths.[1] But none of the prayers given at the meetings Plaintiffs attended, and indeed none of the prayers given at any of the meetings, were exploited for such purpose.

Even if Plaintiffs had suffered an injury-in-fact, such injury would not be redressed by the remedy they seek. Plaintiffs are not seeking to stop all prayers from being given, but only "sectarian" prayers. But not even the Plaintiffs agree what constitutes a *sectarian* prayer as compared to a *nonsectarian* prayer. Making this determination would necessarily require Town employees to become excessively entangled with religion and would cause the Town to violate the Establishment Clause, and thus is not an available remedy to Plaintiffs.

II. STANDARD OF REVIEW

Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering such a motion, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). This case is ripe for summary judgment. There are no disputes of material facts, and Defendants are entitled to judgment as a matter of law.

[1] Even this, however, would not constitute a policy and practice of the Town as a "one-time exploitation" would not constitute a policy and practice of the Town to constitute liability under 42 U.S.C. § 1983.

III. PLAINTIFFS LACK STANDING

A. Standing is a Jurisdictional Requirement

"'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). The Constitution does not vest the federal judiciary with "an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982). Rather, Article III of the Constitution confines the judicial power to the resolution of actual "cases" and "controversies." U.S. Const. art. III, § 2, cl. 1. That limitation is an indispensable "ingredient of [the] separation and equilibration of powers, restraining the courts from acting at certain times," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), and "'confin[ing] federal courts to a role consistent with a system of separated powers.'" *Valley Forge*, 454 U.S. at 472 (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). If a plaintiff lacks standing, the federal court has no subject matter jurisdiction and no business deciding the case or expounding the law. *See DaimlerChrysler Corp.*, 547 U.S. at 341; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

"A federal court's jurisdiction . . . can be invoked only when the plaintiff himself . . . has suffered 'some threatened or actual injury resulting from the putatively illegal action'." *Warth*, 422 U.S. at 499 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973)). "The requisite elements of Article III standing are well established: 'A plaintiff must allege personal injury

fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2562 (2007) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

B. Plaintiffs Have Not Suffered An Injury-In-Fact

Plaintiffs have never been denied the opportunity to give an invocation at Town Board meetings, or to be placed on the list of potential prayer-givers. *See* Defendants' Statement of Facts ("SOF"), ¶ 13. Although Plaintiffs were told before this lawsuit was ever filed that even an atheist would be permitted to give the invocation, they have never asked to do so, and thus, have never been denied. Rather than claiming a direct injury, Plaintiffs claim they were offended by the "sectarian" nature of some prayers made at Town Board meetings. But a plaintiff's assertion of injury to his feelings does not, by itself, establish the kind of "concrete and particularized" injury that Article III requires. *See, e.g.*, *Lujan*, 504 U.S. at 560.

The Supreme Court has held that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485-486 (1982). Article III injury "is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Id.* at 486. In general, when plaintiffs allege as injury something with which they disagree, the courts refuse to allow standing precisely because it turns the courts

into a super-legislature to review generalized grievances with the executive and legislative branches of government.[2]

Even in Establishment Clause cases, courts have consistently held that merely being offended or having hurt feelings alone does not constitute Article III injury. *See, e.g., U.S. Catholic Conference v. Baker*, 885 F.2d 1020, 1024-1025 (2nd Cir. 1989) (pro-choice clergy lacked standing to challenge Catholic Church's tax-exempt status based on alleged stigma arising from "'government favoritism to a different theology"'); *Kurtz v. Baker*, 829 F.2d 1133, 1141 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) (secular humanist lacked standing to challenge exclusion of atheists from Congressional guest speakers program based on suggestion that exclusion stigmatizes secular humanists and atheists); *Americans United for Separation of Church and State v. Reagan*, 786 F. 2d 194, 201 (3rd Cir.) *cert. denied*, 479 U.S. 914 (1986), (religious groups lacked standing to challenge adoption of diplomatic relations with the Vatican based on suggestion that such relations would cast their religious views in an adverse light in the religious market).

(1) Exposure to "Sectarian" Prayers Is Not An Injury-in-Fact.

The target of Plaintiffs' lawsuit is the "sectarian" prayers. *See* Galloway Dep. 53:12-19 ("I'm asking [the Court] to make [the prayers] nonsectarian so that they are inclusive to the

[2] *See, e.g., Allen v. Wright*, 468 U.S. 737, 755-756 (1984) (no Article III injury in fact for mere "abstract stigmatic injury"); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974) (Article III burden not met for "abstract injury in nonobservance of the Constitution" so no standing to challenge military reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution); *U. S. v. Richardson*, 418 U.S. 166 (1974) (no standing to challenge reporting rules governing CIA as violation of requirement under Art. I, § 9, cl. 7 of the Constitution for regular statement of account of public funds).

majority of the people … to different faiths"); Stephens Dep. 21:2-10. But mere exposure to a sectarian prayer, even during Town Board meetings, does not constitute an injury-in-fact. *See Marsh*, 463 U.S. at 794-95 ("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…. [I]t is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer."); *Bacus v. Palo Verde School Board,* unpublished- No. 99-57020, 52 Fed.Appx. 355, 356 (9th Cir. 2002) ("We need not decide whether the prayers 'in the name of Jesus' would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations."); *Snyder v. Murray,* 159 F.3d 1227, 1234, n.10 (10th Cir. 1998) (en banc) ("[T]he mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause" because "[t]he kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that *aggressively advocates* a specific religious creed, or that *derogates another* religious faith or doctrine.") (emphasis added).

Thus, Plaintiffs cannot predicate their standing on the mere exposure to "sectarian" prayers.

(2) Plaintiffs' Complaint About How Prayer-Givers Are Selected Is Disingenuous.

Plaintiffs might claim that they are not only predicating standing on their exposure to "sectarian" prayers, but that the manner in which prayergivers were selected favored Christian prayers, and thus was an "exploitation" of the prayers. While such an argument is wholly contradicted by the record, it is disingenuous and does not support the conclusion that Plaintiffs'

suffered an injury-in-fact. Plaintiffs are trying to allege that the Town clerks who selected the prayergivers on a random basis excluded non-Christian organizations from the list they called from. How could Plaintiffs have been offended by the supposed exclusion of non-Christian organizations *when Plaintiffs were not aware that such organizations existed*? Both Plaintiffs testified that neither one was even aware of non-Christian organizations within the Town of Greece. Ms. Stephens has resided in Greece since 1970, and she said that she was not aware of any Muslim mosques, Jewish synagogues, Wiccan temples, or Hindu places of worship within the Town, nor had she ever seen a Buddhist place of worship within the Town. In fact, outside of Christian churches, Ms. Stephens was not aware of any other religious organization that had a location in Greece. (Stephens Dep. 28:5-30:4). Ms. Galloway as well has resided in Greece for 30 years. And she was not familiar with any Muslim mosques, Jewish synagogues, Wiccan temples, Buddhist places of worship, or Hindu places of worship within the Town. Outside of Christian churches, Ms. Galloway was not aware of any other religious organization that had a place of worship in Greece. (Galloway Dep. 36:6-37:3).

How can Plaintiffs be offended at the exclusion of non-Christian prayergivers when they were not even aware that non-Christian organizations even existed within the Town? Plaintiffs do not have standing to challenge the process of selecting prayergivers as they were not aware of any exclusions. In fact, when Plaintiffs first met with Mr. McCann and Ms. Firkins about this issue, well before this lawsuit was filed, they inquired if an atheist could give a prayer. During the same conversation, they were told "yes, even an atheist could give the invocation at the beginning of Town Board meetings." *See* Stephens Dep. 53:11-19.

Plaintiffs cannot predicate standing on the mere exposure to "sectarian prayers" at a meeting, and they could not have been offended by the alleged preference of Christian

prayergivers as they were not aware that such practice existed. Thus, what Plaintiffs are left with is to parse the content of the prayers to try to claim that references to Jesus during the prayers was offensive. But the Supreme Court stated in *Marsh*, ***"[t]he content of the prayer is not of concern to judges"*** because it is "not for [the courts] to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 795 (emphasis added). Thus, Plaintiffs have not alleged that they were injured in a specific way, and lack standing. *See Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494 (5th Cir., en banc, July 25, 2007).

(3) Plaintiffs Lack Standing To Challenge Town Board Meetings They Did Not Attend.

During the course of this lawsuit, Plaintiffs have challenged every prayer given at a Town Board Meeting since 1999. But Plaintiffs only have alleged specific memory of attending the August 21, 2001, January 16, 2007, September 18, 2007, October 16, 2007, November 2007, and the January 15, 2008, Town Board meetings. The content of the prayers at the other meetings is thus irrelevant, and Plaintiffs lack standing to challenge what was said in those meetings. *See Doe*, 494 F.3d at 497 ("Standing to challenge invocations as violating the Establishment Clause has not previously been based solely on injury arising from mere abstract knowledge that invocations were said."); *see also Valley Forge*, 454 U.S. at 486-87 (plaintiffs lacked standing to challenge a transfer of federal property to a religious organization, despite the intensity of plaintiffs' objection to the transfer and their media exposure to it); *Newdow v. Bush*, unpublished – No. 02-16327, 89 Fed.Appx. 624, 625 (9th Cir. 2004) (plaintiff lacked standing to bring an Establishment Clause challenge to presidential inauguration prayers he saw on television because he did not allege a sufficiently concrete and specific injury).

C. Plaintiff's Alleged Injuries Cannot Be Redressed.

In order to have standing, a plaintiff must not only allege a particularized injury, but also that the injury can be redressed by a favorable court decision. *Valley Forge Christian College*, 454 U.S. at 472. Here, the remedy Plaintiffs seek is an unconstitutional remedy – to require government officials to become excessively entangled in church doctrine in order to determine if a prayer if sectarian or not. This issue was recently addressed by the Eleventh Circuit in *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263 (11th Cir. 2008). In that case, resident taxpayers sued the county, claiming that the practice of offering sectarian invocations at the beginning of county meetings violated the Establishment Clause. In analyzing if this was possible, the court stated, "[w]e would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions, and the taxpayers have been opaque in explaining that standard." *Id*. at 1272. The court then showed how not even the plaintiffs, nor their counsel, could agree on a workable standard:

> Bats, one of the taxpayers, testified that a prohibition of "sectarian" references would preclude the use of "father," "Allah," and "Zoraster" but would allow "God" and "Jehovah." Selman, another taxpayer, testified "[Y]ou can't say Jesus, … Jehovah, … [or] Wicca …." Selman also deemed "lord or father" impermissible.
>
> The taxpayers" counsel fared no better than his clients in providing a consistent and workable definition of sectarian expressions. In the district court, counsel for the taxpayers deemed "Heavenly Father" and "Lord" nonsectarian, even though his clients testified to the contrary. At the hearing for oral arguments before this Court, the taxpayers' counsel asserted two standards to determine when references are impermissibly "sectarian." Counsel for the taxpayers first stated, "It is sectarian when the ... prayer has the effect of affiliating the government with one specific faith or belief," but he later described a reference as "sectarian" when it "invokes the name of a divinity ... in which only one faith believes." Counsel had difficulty applying either standard to various religious expressions. When asked, for example, whether "King of kings" was sectarian, he replied, "King of kings may be a tough one .... It is arguably a reference to one God .... I think it is safe to conclude that it might not be sectarian."

Id.

The Court concluded that "[t]he difficulty experienced by taxpayers' counsel is a glimpse of what county commissions, city councils, legislatures, and courts would encounter if we adopted the taxpayers' indeterminate standard. As the taxpayers' counsel conceded at oral arguments, 'the line is not completely bright between sectarian and nonsectarian.' On that score, we are in complete agreement with the taxpayers' counsel." *Id*.

The plaintiffs in this case fared no better. Susan Galloway at first offered a very vague definition of sectarian and nonsectarian prayers: "Sectarian is generally specific to one religion, and nonsectarian is more inclusive and I'd like to say universal but, you know, I know not everyone even in a nonsectarian prayer … is covered …." (Galloway. Dep. 8:16-21). But when asked how many religions had to be included in a prayer in order for it to be "inclusive", she could not say. When asked if a prayer that was inclusive of four religions would be considered nonsectarian, she could not say. (Galloway Dep. 9:10-12). Ms. Stephens said that a nonsectarian prayer would be "inclusive of all types of religions", but later said that a prayer is nonsectarian if it encompasses three religions. (Stephens Dep. 31:14-22; 39:13-17).

While one of the plaintiffs in *Pelphrey* said that a prayer to "father" was nonsectarian, Ms. Galloway wasn't so sure. She said,

> I guess I would think that – I guess the father, if it's like that – I don't know, father is – I mean, father is okay. I don't know if you – when you emphasize the Father, you know, that connotates [sic] a little difference because then I think – I would take it as the Trinity, but if it was just father, I wouldn't.

(Galloway Dep. 17:14-20).

Later, Ms. Galloway testified that prayers to "Father", "God", "Lord God", and "the Almighty" are acceptable nonsectarian prayers, (Galloway Dep. 52:6-10), but a prayer to "I am the Lord God" would be sectarian. (Galloway Dep. 65:13-14). She did not know about a prayer to "Father of Glory" or ""Everlasting Father." (Galloway Dep. 65:21-66:3).

Prayers to "Mother" did not fare any better. Ms. Galloway at first said that a prayer to "Mother" would be nonsectarian. (Galloway Dep. 15:7-8). She later waffled, saying, "I guess I've never heard a prayer with mother, and I guess I wouldn't even know what to think. It would be very – you know, it would be different. I wouldn't know. I mean, I guess it would be in the context of the prayer." (Galloway Dep. 17:22-18:3). She later testified that a prayer to "Mother" would be sectarian as it would not be inclusive of most religions. (Galloway Dep. 28:9-11).

Ms. Galloway testified that prayers to a polytheistic god should not be allowed as it was not inclusive of most religions, but a prayer to monotheistic God should be permitted. (Galloway Dep. 24:17-25:12).

After reviewing the prayer given in *Snyder v. Murray City Corporation*, 159 F.3d 1227 (10th Cir. 1998), Ms. Galloway concluded it was nonsectarian, (Galloway Dep. 54:19-55:7), while Ms. Stephen said it should not be given because it disparages government leaders. (Stephens Dep. 40:2-11).

Although Jesus is referred to as the "branch" in the Bible, Ms. Galloway would not commit as to whether a prayer in the name of a "branch" was sectarian. She said she had "no idea." (Galloway Dep. 56:11-14).

While the plaintiffs in *Pelphrey* concluded that prayers to Allah were sectarian, Ms. Stephens waffled on that point when asked whether the term Allah was just a term for God, but

in a different language (Arabic). *See* 547 F.3d at 1272; Stephens Dep. 37:8-17. She said it would be helpful to have more knowledge about the different religions before making this determination. (Stephens Dep. 35:3-6).

Needing more knowledge on theological matters was a common theme throughout the Plaintiffs' depositions. Ms. Stephens said that she did not know whether a prayer to "Yahweh" was sectarian or non-sectarian because she did not know enough about "that subject." (Stephens Dep. 35:7-11). Ms. Galloway testified that she would need more information before determining if the following were sectarian: "jealous God", "sanctuary", "I am", "Ancient of Days", "Bright and Morning Star", "I am the Lord thy God that divideth the sea", "Father of Glory", and "Wonderful Counselor". (Galloway Dep. 64:10-66:6). Ms. Galloway summed it up best when she said, "If I had to make the policy, I would have to research it, and that's what I would have to do with some of these that I don't know, because I'm not a – you know, a theologian."[3] (Galloway Dep. 61:6-10).

This thought was echoed by the Eleventh Circuit when it said in *Pelphrey*, "[w]hether invocations of 'Lord of Lords' or 'the God of Abraham, Isaac, and Mohammed' are 'sectarian' is best left to theologians, not courts of law." 547 F.3d at 1267. In the same way, state officials have no business becoming excessively entangled with religious matters in making determinations whether prayers are "sectarian" or not. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). Plaintiffs want the Town to become excessively entangled with religion, and this is a remedy courts should not give.[4]

[3]Yet, this is exactly what Plaintiffs are wanting Town officials to become!

[4]In addition, a policy dictating prayer content would impose a greater restriction than is required by the U.S. Congress or any state legislature. *See, e.g., Newdow v. Bush*, 355 F.Supp.2d 265, 285 n. 23 (D.D.C.2005) (acknowledging that "the legislative prayers at the U.S. Congress are overtly sectarian"); *see also* Steven B. Epstein,

IV. DEFENDANTS' PRAYER PRACTICE IS CONSTITUTIONAL.

A. Offering A Prayer For Public Deliberations Is Consistent With This Nation's History and Traditions.

The issues brought up by Plaintiffs have already been settled by the Supreme Court in *Marsh*, 463 U.S. at 783. In *Marsh*, the Nebraska Legislature had hired the same Presbyterian minister to pray for its deliberations for 16 years. The plaintiffs made the same arguments that the Plaintiffs are making here, and argued that such prayers violated the Establishment Clause. *See id*. at 793. In rejecting this argument, the Court began by looking to this country's history. Indeed, this nation has enjoyed a long history and tradition of seeking Divine guidance. More than a century ago, the Court acknowledged in *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892), that our nation has maintained a "custom of opening sessions of all deliberative bodies and most conventions with prayer …."

The *Marsh* Court noted that agreement was reached on the final language of the Bill of Rights on September 25, 1789, three days *after* those same members of Congress authorized opening prayers by paid chaplains. 463 U.S. at 788. Clearly then, "[t]o invoke divine guidance on a public body… is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. By simply following this tradition, government officials run no risk of violating the Constitution.[5]

Rethinking the Constitutionality of Ceremonial Deism, 96 COLUM. L.REV. 2083, 2104 at n.118 (1996) (noting that, from 1989 to 1996, "over two hundred and fifty opening prayers delivered by congressional chaplains [ ] included supplications to Jesus Christ")). Such a policy would also likely run afoul of the U.S. Supreme Court's admonition in *Lee v. Weisman*,505 U.S. 577, 588-89 (1992) ("The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.").

[5] In *Lynch v. Donnelly*, 465 U.S. 668, 675 (1984), the Court observed "[o]ur history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." Indeed, "[t]hose government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing

Marsh defined the standard and test for public invocations. Writing for the Court, Chief Justice Burger concluded:

> The opening of sessions of legislative and other deliberative public bodies with prayer is 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 and religious freedom.

Id. at 786.

After *Marsh*, in order to prove legislative prayers violate the First Amendment, a plaintiff must show that the public body at issue has "exploited" its prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794. **Absent such an abuse, *"[t]he content of the prayer is not of concern to judges"*** because it is "not for [the courts] to embark on a sensitive evaluation or to parse the content of a particular prayer." *Id.* at 795 (emphasis added). It made no difference in *Marsh* that the challenged prayers were brought "in the Judeo-Christian tradition," because the way in which the prayers were presented – the overall context and prayer practice – was acceptable. *Id.* at 793.

Just as the Nebraska Legislature's practice of having a person open its sessions with prayer did not violate the Establishment Clause, the prayers before the Town Board meetings offered by private individuals of different denominations and faiths are constitutional.

B. Defendants' Prayer Practice Is *More* Inclusive Than The One Approved In *Marsh.*

Defendants' prayer practice has been to have members from the community give an invocation at the beginning of Town Board meetings. As a result, many different denominations and faiths have been represented in the prayer practice. For instance, Baptists, Catholics,

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confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." *Id.* at 693 (O'Connor, J., concurring).

Presbyterians, Jewish persons, Wiccans, Episcopals, United Methodists, Lutherans, and Buddhists have all given an invocation before the meeting. *See* SOF ¶ 25 (Ms. Fiannaca' file attached as exhibit 14). In the ten years in which Defendants have allowed persons to give a prayer before a Town Board meeting, ***no one has been denied this opportunity***! Every single person who has requested to give a prayer has been permitted to do so. Before this lawsuit was ever brought, Plaintiffs themselves approached the Town and asked if an atheist could give a prayer. *See* Stephens' Dep. 53:14-19. The Plaintiffs were told that they could. *Id*. A Wiccan asked to give a prayer, and was told she could. *See* SOF ¶ 11. A Jewish person asked to give a prayer, and was allowed. *Id*. ¶ 10.

Thus, Defendants' prayer practice is *more* inclusive than the practice upheld by the United States Supreme Court in *Marsh.* In *Marsh,* the Nebraska Legislature had hired one Presbyterian minister to serve as its chaplain and he served in this capacity for 16 years, giving prayers only in the "Judeo-Christian tradition." *See* 463 U.S. at 793. The plaintiffs argued that having only one clergyman serve as chaplain for 16 years gave the appearance that the legislature favored his religious views. *See id*. at 793. The Court rejected this argument, stating "We, no more than the Members of the Congresses of this century, can perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id*. Thus, the Court concluded, "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive, … long tenure does not in itself conflict with the Establishment Clause." *Id*. at 793-94; *see also Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263, 1277 (11th Cir. 2008) (upholding town board's prayer practice of permitting local persons to give prayers, noting that it was more inclusive than the practice upheld in *Marsh*).

Under *Marsh*, Defendants would be permitted to have only one clergy person from one denomination give the invocation every week in the Judeo-Christian tradition. It would turn the First Amendment on its head if a practice that was more inclusive and that allowed many different clergy to give such invocations was then not permitted under the Constitution.

C. The Town Has Not Purposefully Endorsed Or Preferred Any Faith Or Religious Belief Over Any Other.

`Plaintiffs ask this Court to do precisely what the Supreme Court advised against in *Marsh* and its progeny, *i.e.,* to parse the content of selected prayers to determine if they were too "sectarian". The approach is flawed because Plaintiffs have presented no evidence that the Board's invocation opportunity has been exploited for an impermissible purpose. Defendants have been allowing persons to give prayers at the beginning of Town Board meetings for over 10 years.[6] During that time, the practice has not been exploited to proselytize for any one faith, or to disparage any one faith. Rather, these prayers have been used to say a prayer to solemnize the proceedings.

In addition, Plaintiffs have presented no evidence of viewpoint discrimination or hostility to non-Christian religions; no evidence that any person desiring to offer an invocation has ever been denied the opportunity; and no evidence whatsoever that the Defendants ever arranged for, or requested any sectarian references in the invocations offered before it. Accordingly, Plaintiffs have made no showing that the Town has purposefully endorsed or preferred any faith or religious belief over any others. Thus, there is no more proof of an impermissible motive here than there was in *Marsh*. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) (courts should be "reluctan[t] to attribute unconstitutional motives" to government decision makers,

[6]As was explained above, however, Plaintiffs only have standing to challenge the meetings they actually attended.

particularly where a "plausible secular purpose" for government action exists); *Pelphrey v. Cobb County, Georgia*, 547 F.3d 1263 (11th Cir. 2008) (upholding County's practice of opening its meetings with prayer by volunteer clergy invited by the County on a rotating basis).

Pelphrey is directly on point. In *Pelphrey*, taxpayers sued the county claiming that its practice of offering invocations at the beginning of county meetings violated the Establishment Clause. Like the present case, the county had "a long tradition of opening their meetings with prayer by volunteer clergy invited by County personnel on a rotating basis." 547 F.3d at 1267. The county neither composed nor censored the prayers, nor did they compensate those who prayed. *Id.* Like the present case, the employees of the county had autonomy in the selection of speakers, and used "a master list to select randomly a speaker to offer the prayer at the meeting." *Id*. at 1267-68. And similar to our facts, the majority of speakers were Christian. *Id*. at 1267. In fact, according to the taxpayers, 96.6 percent of the clergy who gave the invocations were Christian. *See id*.

The court rejected the taxpayers' argument and upheld the invocations. In response to the taxpayers' argument that *Marsh* only permits nonsectarian prayers, the court said, "their reading [of *Marsh*] is contrary to the command of *Marsh* that courts are not to evaluate the content of the prayers absent evidence of exploitation." *Id*. at 1271. The court stated that if it were to only permit nonsectarian prayers, it would not even "know where to begin to demarcate the boundary between sectarian and nonsectarian" prayers. *Id*. at 1272. The taxpayers argued that county commissions are not legislative bodies as in *Marsh*, but the court rejected that, saying the county commission is "a public body entrusted with making the laws." *Id*. at 1275.

The taxpayers then argued that the prayers violated *Marsh* as they were exploited to advance a particular faith. In support, the taxpayers cited three factors: (1) the identity of the invocational speakers, (2) the selection procedures employed, and (3) the nature of the prayers. *See id*. at 1277. The court rejected all three. The court noted that although the identities of the speakers were predominately Christian, this did not violate *Marsh*, where the Nebraska Legislature hired one chaplain of one denomination for 16 years. *See id*. "The diversity of the religious expressions, in contrast with the prayers in the Judeo-Christian tradition allowed in *Marsh*, supports the finding that the prayers, taken as a whole, did not advance any particular faith." *Id*. at 1278. Like the prayers in *Pelhprey*, the prayers in our case are more diverse than the prayers upheld in *Marsh*. Prayers have been given by many different denominations and faiths, including Baptists, Catholics, Presbyterians, Jewish, Wiccans, Episcopals, United Methodists, Lutherans and Buddhists. *See* SOF ¶ 25.

Secondly, the court found that the procedures for selecting prayer-givers did not violate the Establishment Clause. Like in our case, the list of potential speakers was compiled from various sources and included diverse religious institutions. *See id*. The person who selected the prayer givers testified that she never excluded anyone based on their beliefs. In short, the court held that "[n]othing in the record suggests any improper motive on the part of the commissioners …." *Id.* In the same way, there is nothing in the record in this case to suggest any improper motive.

The court then ruled that absent evidence that the prayer practice was being exploited, which there was none, then it "need not evaluate the content of the prayers." *Id*. The court said, "The federal judiciary has no business in 'compos[ing] official prayers for any group of the American people to recite as a part of a religious program carried on by government …'" *Id*.

(quoting *Lee v. Weisman*, 505 U.S. at 577, 588 (1992)). In the same way, this Court should not engage in parsing out the contents of prayers.[7]

In *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2004), *cert. denied*, 126 S.Ct. 426 (2005), the Fourth Circuit affirmed that "*Marsh*, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines." In *Simpson,* the court upheld a prayer policy in which religious leaders of only monotheistic congregations were invited to present invocations during meetings of a county board, where the county "made plain that that it was not affiliated with any one specific faith by opening its doors to a wide pool of clergy." *Id.* at 286. The court noted that "[a] party challenging a legislative invocation practice cannot, therefore, rely on the mere fact that the selecting authority chose a representative of a particular faith, because some adherent or representative of some faith will invariably give the invocation." *Id.* at 285.[8]

"Sectarian" references in public invocations are not constitutionally problematic. Exploitative governmental conduct that proselytizes one faith to the *insistent exclusion* of others *is.* That is a reviewing court's only concern – as the Supreme Court specified in *Marsh* – and the Plaintiffs here have not, and cannot, make any such showing. *See also Bacus v. Palo Verde School Board,* unpublished- No. 99-57020, 52 Fed.Appx. 355 (9th Cir. 2002); *Snyder v. Murray*, 159 F.3d 1227, 1234, n.10 (10th Cir. 1998) (en banc) ("The kind of legislative prayer that will run afoul of the Constitution is one that *proselytizes* a particular religious tenet or belief, or that

[7]But even if the Court did look to the content of the prayers, these prayers are consistent with the prayers upheld in *Marsh.*

[8]The court did not invoke the language of its earlier pronouncement in *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004), *cert. denied* 545 U.S. 1152 (2005), that any reference to a particular deity is constitutionally impermissible. The reason the *Wynne* case was easily distinguishable from *Simpson* (*see Simpson*, 404 F.3d at 283), and from most other situations, is the *town council* in *Wynne* exclusively invoked Jesus' name and also *publicly chided* the plaintiff for failing to stand and participate in the prayers. *Wynne* presented a genuinely exploitative situation where a town council "insisted upon invoking the name 'Jesus Christ' to the *exclusion of other deities* associated with any other particular religious faith." *Wynne* at 295, 301.

aggressively advocates a specific religious creed, or that *derogates another* religious faith or doctrine.") (emphasis added). But simply praying in the name of a Deity is not an unconstitutional advancement of religion. Specifically addressing what it means to "advance" a particular faith under *Marsh*, the court said, "[a]ll prayers 'advance' a particular faith or belief in one way or another. . . By using the term 'proselytize,' the [*Marsh*] Court indicated that the real danger in this area is effort by the government *to convert* citizens to particular sectarian views." *Id.* 1234, n.10 (Emphasis added).

More recently, federal district courts have specifically upheld sectarian county commission meeting prayers brought in the name of "Jesus" and "Christ" (*Pelphrey v. Cobb County*, 410 F. Supp. 2d 1324, 1325 (N.D. Ga. 2006); *aff'd* 547 F.3d at 1263), and sectarian school board prayers (*Dobrich v. Walls*, 380 F.Supp. 2d 366 (D. Del., Aug. 2, 2005)). Like the Fourth Circuit, the *Dobrich* court found it persuasive that in *Marsh*, "[t]he Court went on to find no violation of the Establishment Clause based on the fact that the clergyman offering the prayers was from one denomination, used Judeo-Christian prayers, and was paid at the public expense." *Dobrich*, 380 F.Supp. 2d at 376.

As these courts have recognized, the Supreme Court gave no indication in *Marsh* that the mere mention of a sectarian deity or belief would violate the Establishment Clause. The *Marsh* Court itself reviewed and relied upon overtly sectarian prayers as examples of permissible public invocations. *Marsh*, 463 U.S. at 794–95, and *McCreary County v. ACLU of Ky.*, 125 S.Ct. 2722, 2733, n. 10 (2005). The Court referenced the prayers delivered at the Continental Congress and the Constitutional Convention as examples of what would and should be historically and traditionally permitted. *Id.* at 791-92. Included in those example prayers were invocations brought in the name of Jesus, by invited guests. For example, the prayer at the first session of

Congress, September, 7, 1774, in Carpenter's Hall, Philadelphia, was delivered by Rev. Jacob Duché. He included these words (emphasis added):

> Be Thou present; O God of Wisdom, and direct the councils of this Honorable Assembly: enable them to settle all things on the best and [surest] of foundations: that the scene of blood may be speedily closed: that Order, Harmony and Peace may be effectually restored, and Truth, and Justice, Religion, and Piety prevail and flourish among the people. Preserve the health of their bodies and the vigor of their minds, shower down on them, and the millions they here represent, such temporal Blessings as Thou seest expedient for them in this world, and crown them with everlasting Glory in the world to come. *All this we ask in the name and through the merits of Jesus Christ, Thy Son and Our Savior, Amen.*[9]

The substance of Rev. Duché's prayer is virtually indistinguishable from that of the invocations made the subject of the case at bar. In essence, Plaintiffs are asking this Court to now declare unconstitutional the very invocation that was reviewed with approval and referenced by the Supreme Court in *Marsh.* Plaintiffs' legal theory is not cognizable as a matter of law, and the Court must deny their request for relief.

V. ALL CLAIMS AGAINST THE TOWN SUPERVISOR SHOULD BE DISMISSED.

Plaintiffs' claims against the Town Supervisor in his official capacity should be dismissed as redundant. A suit against an individual municipal official in his "official" or "professional" capacity is functionally equivalent to a claim brought against the governmental entity itself. *See Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official capacity suit is, in all respects other than name, to be treated as a suit against the entity."); *Petruso v. Schlaefer*, 474 F.Supp.2d 430, 441 (E.D.N.Y.2007) (citing *Orange v. County of Suffolk*, 830 F.Supp. 701, 706-07

[9] *See,* September 7, 1774, *First Prayer in Congress: Beautiful Reminiscene* (Washington, D.C. Library of Congress); John S.C. Abbott, *George Washington* (New York, NY Dodd, Mead & Co., 1875, 1917), p.187; Reynolds, *The Maine Scholars Manual* (Portland, ME Dresser, McLellan & Co., 1880) (emphasis added).

(E.D.N.Y.1993) (noting that "any damage award may be satisfied by looking only to the entity itself, not the official")). On this basis, the court in *Petruso* dismissed the official capacity claims against the individuals named in the suit, on the grounds that "it is redundant to allow the lawsuit to continue against individuals in their official capacities." *Id*. (citing *Orange v. County of Suffolk*, 830 F.Supp. at 707). In the same way, the claims against the Supervisor in his official capacity are redundant of the claims against the Town and should be dismissed.

CONCLUSION

Plaintiffs do not have standing as they have not suffered an injury-in-fact that is redressible by a favorable court decision. Simply being exposed to a "sectarian" prayer at a Town Board meeting is not a constitutional injury, as evidenced by holdings of the Supreme Court and all other courts to consider the issue. Plaintiffs cannot predicate their injury on the supposed exclusion of non-Christian organizations as they were not even aware that such organizations existed. Even if they had suffered an injury-in-fact, the remedy they seek would cause Defendants to become excessively entangled with religion and violate the Establishment Clause. As Plaintiff Galloway herself said, she cannot make all of the determinations of what constitutes a "sectarian" prayer because she is not a "theologian."

Moreover, the practice of opening up a meeting with prayer is consistent with this Nation's long standing history and traditions. Plaintiffs have offered no evidence that this practice has ever been exploited by the Town to advance any one faith or to disparage another. In fact, the clerical staff that selects the prayergivers has never even attended a Town Board meeting or heard a prayer given at such meetings! *See* SOF ¶ 23. As the Supreme Court said in *Marsh*, "[t]he content of the prayer is not of concern to judges" because it is "not for [the courts]

to embark on a sensitive evaluation or to parse the content of a particular prayer." 463 U.S. at 795.

Currently, Defendants select prayer-givers from a list organized in October of 2008 and that is comprised of all churches and places of worship within the Town, and anyone who asks to be placed on the list. In order to clean up a cluttered file, Michele Fiannaca organized her lists into this one list. *See* SOF ¶ 28. She did not intentionally leave anyone out. In fact, she told Plaintiffs that if they were aware of anyone not on the list who should be, to let her know and their names would be added. *Id*. ¶ 30. Plaintiffs have no basis for prospective injunctive relief as Defendants' policy goes well above and beyond what is required by law.

Executed this 20th day of January, 2009.

Respectfully submitted,

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