NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION

35TH ANNUAL CHARLES W. FROESSEL
INTRAMURAL MOOT COURT COMPETITION

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2011

DOCKET NO. 5201121/11

TOWN OF IMAGINE,

Petitioner,

- against -

IAN WISHNICK

Respondent.

On Writ of Certiorari from the
Court of Appeals for the Thirteenth Circuit

THE FACT PATTERN

(Cite as Wishnick v. Imagine, 825 F. Supp. 3d. 1984 (D. Froes. 2011))
IN THE DISTRICT COURT OF FROESSEL
FEBRUARY 6, 2011

IAN WISHNICK,

Plaintiff,

- against -

TOWN OF IMAGINE,

Defendant.

Judge SILVERMAN:

This matter involves a challenge brought by Ian Wishnick, a citizen of Imagine and a devout member of the Church of Beatle, to 47 ITO § 1954, a local ordinance regulating the practice of legislative prayer for the purpose of instilling a sense of solemnity and unity over local government proceedings.[1] Wishnick filed for injunctive relief under 42 U.S.C. § 1983[2] alleging that the ordinance violates the Free Speech Clause and the Establishment Clause of the First Amendment to the United States Constitution.[3] The Town of Imagine moved for summary judgment on the law dismissing all claims. After considering the claims in a light most favorable to the non-moving party, this Court concludes that as a matter of law, 47 ITO § 1954 passes constitutional muster under both the Free Speech Clause and the Establishment Clause of the First Amendment. Therefore, Defendant's motion for summary judgment is granted.OR WE CAN SAY Plaintiff's motion for injunctive relief is denied.

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[1] Legislative prayer is to be distinguished from other forms of prayer, such as courtroom prayer and school prayer that may be per se unconstitutional. See, e.g., North Carolina Civil Liberties Union Legal Fund v. Constangy, 947 F.2d 1145 (4th Cir. 1991); Lee v. Weisman, 505 U.S. 577 (1992). Such prayers are not at issue in this case.

[2] 42 U.S.C. § 1983 permits suits against any person who, acting under color of statute, ordinance, regulation, custom or usage, of any State subjects, or causes to be subject, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the constitution. The Supreme Court interprets § 1983 to be applicable to municipalities. Local governing bodies can be sued directly under 42 U.S.C. § 1983 for monetary, declaratory, or injunctive relief. To prevail under any 42 U.S.C. § 1983 claim, a plaintiff must demonstrate that defendant(s) deprived him of a right, privilege, or immunity secured by the United States Constitution.

[3] By advancing only Free Speech and Establishment Clause claims, plaintiff has waived any other constitutional claims on the issue of legislative prayer. The parties have stipulated that 47 ITO § 1954 does not violate the constitution of the State of Froessel.

I. Factual Background

The following facts in this case are undisputed:

In the summer of 1969, Mr. John L. Beatle, a billionaire [*1985] musician, co-founded the Church of Beatle[4] (hereinafter "the Church") with his closest friends, Paul, George, and Ringo. Upon the Church's founding, Beatle publicly declared that, "for too long people have been living with the fallacy that we are subordinate to some supreme guy in up the sky. While such a belief may seem innocent enough, people inevitably end up fighting over whose interpretation of "supreme being" is correct, and we are forced into a debate with no end that only leads to hatred and violence." Beatle then called for all those who believe in humanity alone as a method of achieving peace and love to join his congregation.

Unfortunately for the congregants of the Church (the "Beatles"), this message was received with severe hostility from the majority of Lancashire's residents, some of whom resorted to violent tactics to intimidate the Beatles from espousing their message. The Church's location in the heart of downtown Lancashire also proved to be an inviting target for malicious activity and vandalism, as 83% of the surrounding population were devoted followers of the Elders of Gaga.[5] Throughout the summer, the Church was repeatedly vandalized. Words such as "heathen" and "blasphemer" were spray-painted on the walls and the Elders frequently harassed congregants. The tension finally came to a head on August 25, 1969 when Christopher Costello, the leader of the Elders of Gaga, set the Church ablaze, reducing the building to a pile of ash. Upon his arrest, Costello declared, "the God of Gaga called out to me to remove the symbol of blasphemy from within our midst."

True to his non-confrontational nature, John Beatle issued a public response to Costello stating, "these recent events make it clear that Lancashire is not ready for true enlightenment. Rather than continuing to subject our congregation to persecution, we are taking the Church to a place where we can live freely and peacefully." Shortly after, John Beatle purchased a secluded fourteen-acre farm roughly two hours south of Lancashire. The farm was named "Imagine" to challenge outsiders to imagine an enlightened future in the present.

Tragedy struck Imagine in 1971. After serving a one-year prison sentence for arson, Costello, convinced of his mission to bring an end to the Church, shot and killed John Beatle on the steps of Beatle's front porch. Costello also lost his life after a violent

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[4] John Beatle's usage of "Church" was done with a sense of irony, as the major tenet of the congregation is that there is no need for an established religion. Perhaps the only other discernable tenet of this Church came after the death of the founders, when the congregants accepted them as the true gods of enlightenment, and believed that the only way to reach their fullest potential in this lifetime is to invoke their divine wisdom and guidance.

[5] This group is a progressive religious movement incorporating monotheistic Judeo-Christian and Islamic tenets.

shootout with the local sheriff. John Beatle had envisioned a land free of the majoritarian pressures of a capitalist society. To realize this vision, the remaining co-founders purchased several of the surrounding farms, expanding Imagine to nearly twenty square miles. On July 4, 1971, the Town of Imagine was incorporated and recognized by the Froessel State Legislature.

At the time of incorporation, the charter contained the following relevant provision: "Upon [*1986] thoughtful deliberation, the Town of Imagine considers legislative prayer a religious exercise unbecoming of the American tradition. As such, the Council is hereby prohibited from engaging in the recitation of prayer during any legislative or other deliberative function." Following incorporation, the Council did not engage in the practice of legislative prayer for over two decades.

In 1997, War Inc., the nation's third largest defense contractor, completed construction of the world's largest weapons factory. The factory is located an hour south of Lancashire and one hour north of Imagine. The factory employs nearly 5,000 full-time employees; approximately 3,300 of these employees live within Imagine, creating a significant increase in the town's population. This population boom also brought with it a huge shift in social and political points of view.

The council election of 1998 proved to be particularly divisive and resulted in particular enmity and animosity among the various council members. Thereafter, Imagine's legislative process degenerated, and involved frequent personal attacks by council members upon each other throughout the three years preceding the 2001 election. Consequently, the Council was unable to pass much needed legislation during this period.

In 2001, Councilwoman Stephanie Wine, a freshman council-member, ran for reelection on a platform stressing the need for unity and nationalism in a post 9/11 world. While making a statement at the annual fall music festival commemorating the life of John Beatle, Councilwoman Wine attacked the charter provision prohibiting legislative invocations stating, "legislative prayer is a long-standing and deeply rooted tradition in our nation and serves the important purpose of uniting parties and reminding legislators they are engaged in serious business. Imagine has been run by liberal, anti-religious hippies for long enough! This town needs God to guide us." Upon her reelection, Councilwoman Wine immediately proposed a bill amending the charter to provide for legislative prayer. The text of the amendment reads as follows:

> The Council of Imagine has been prevented from properly engaging in its deliberative function due to the growing hostility and animosity among its members. The Charter is hereby amended to allow for invocation on behalf of Imagine's Council and citizens. The Council is hereby authorized to pass any ordinance it shall deem fit to give effect to this amendment.

Subsequently, on March 4, 2003, the Council passed 47 ITO § 1954. The ordinance governs the Council's prayer practice, providing:

> (1) Any Council meeting involving a deliberative function must include an invocation for divine guidance offered on behalf of the Council members and the citizens of Imagine, Froessel.
>
> (2) Any invocation offered on behalf of the Council and citizens of Imagine, Froessel must receive prior approval from the Council Chairperson.

The [*1987] Council did not establish guidelines or requirements governing selection for the offering of an invocation. Thus, invocations were offered by a variety of individuals with a myriad of religious views. The Chairperson would often open the floor to anyone who wished to come forward and offer an invocation. Approval was given as a matter of course. On other occasions, Council members would offer the invocation or invite other parties to offer an invocation on their behalf. The record does not reflect any objections to the prayers offered during this time.[6] However, an incident occurred following the 2009 election resulting in an amendment to ITO § 1954.

On January 5, 2010, as per his usual practice, Chairman Lawrence Thomas opened the first deliberative session of 2010 by inviting anyone who wished to offer an invocation to come forward. With the approval of Chairman Thomas, Ian Wishnick approached the floor and proceeded to offer the following invocation:

> "Citizens of Imagine, join me in offering a prayer not to a divine creator, but to humanity. Imagine there's no heaven. No hell below us, above us, only sky. Imagine all the people, living for today. There will be a time of no religion when we all live in peace. Imagine sharing all the world. We must live as one: a brotherhood of man. You may say I'm a dreamer, but I am not the only one. I hope someday you'll join us so the world may live as one. In beseeching wisdom for this Council, I hereby invoke the divine guidance of the Beatle Gods and their message of peace and love. I pray in the names of John, George, Paul and Ringo. Amen."

Pandemonium ensued. Council members and citizens stormed out in protest. The tension between the two religious groups escalated into violence and vandalism, leaving several congregants hospitalized in critical condition. Subsequently, the Council was inundated with demands that the Council take necessary measures to ensure that polytheistic beliefs do not pervert the purpose of the prayer practice, making clear that such offensive behavior will no longer be tolerated in Imagine.

On September 11, 2010, ITO § 1954 was amended to provide:

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[6] From ITO § 1954's enactment in 2003 to 2010, ninety three invocations were delivered during council meetings: 21 by a church cleric, 7 by a rabbi, 4 by an imam, 25 by members of the council, and 36 by lay citizens. The majority of the invocations offered by the clerics were secular in nature, for example: "Almighty One, we look forward to the day when all people of the earth will have the opportunity to hear the message and music of the Almighty God who has revealed himself in the saving power of Gaga."

> (1) Any party may request to offer an invocation on behalf of the Council and citizens of Imagine; (2) All requests must be submitted in writing at least thirty (30) days prior to the desired council meeting and include the full text of the proposed invocation; (3) A party may not offer an invocation without approval from the chairperson; (4) The invocation may not reference a particular religious tenet or a particular deity; (5) All invocations for divine guidance must be made in the name of "God" in accordance with the American civic tradition; and (6) Any person deviating from the approved invocational prayer guidelines will be subject to a fine of $1,000 and will be prohibited from giving the invocation for a period of five (5) years.

On January 15, 2011, Wishnick submitted the following written invocation for approval [*1988] in accordance with ITO § 1954:

> "I ask that this council receive guidance on behalf of itself and on behalf of the citizens of Imagine so that they may understand the importance of their work and understand that it is only through unity that we as a people can come together. I pray in the names of John, George, Paul and Ringo. Amen."

Wishnick received an official rejection letter from Chairman Thomas dated January 21, 2011 informing him that his proposed invocation violates the terms of ITO § 1954 and, as such, is denied.[7] In the rejection letter, Chairman Thomas explained that, "Imagine's nonsectarian invocations are traditionally made to a divinity consistent with our Nation's monotheistic traditions," noting that "polytheism is not consistent with such tradition."

On April 15, 2011, Wishnick filed suit seeking injunctive relief on the ground that ITO § 1954 violates the Free Speech and Establishment Clauses of the First Amendment to the United States Constitution.

II. Free Speech Clause

A. Applicability of the Free Speech Clause

As with any constitutional challenge, the starting point for analysis must be the relevant text. The First Amendment to the United States Constitution, as applicable to the states through the Fourteenth Amendment, provides, "Congress shall make no law ...

[7] The invocation selected over the prayer offered by Wishnick was similar to the prayer invalidated by the Supreme Court in Engle v. Vitale, 370 U.S. 421 (1962). The prayer offered during the February 2010 council meeting by Daniel Binns in accordance with ITO § 1954 provided: "Almighty God Gaga, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our citizen's, our legislators, and our country, so that we may invoke your divine guidance and have you lead us through the laws of this land. Amen."

abridging the freedom of speech." U.S. const. amend. I.; See Gitlow v. New York, 268 U.S. 652 (1925) (incorporating the Free Speech Clause). In recent years, the Supreme Court has made it clear that the Free Speech Clause applies only when the government is regulating private speech: "it does not restrict government speech." Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005); Pleasant Grove City v. Summum, 555 U.S 460, 129 S.Ct. 1125 (2009). The textual interpretation of [*1989] the Free Speech Clause recognizes that the government is "not constrained by the First Amendment from controlling its own message." Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring). Thus, when the government "engag[es] in [its] own expressive conduct, ... the Free Speech Clause has no application." Summum, 129 S. Ct. at 1131. The same is also true when a government entity "receives assistance from private sources for the purpose of delivering a government-controlled message." Id.; see also Johanns, 544 U.S. at 562; Rust v. Sullivan, 500 U.S. 173 (1991); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995).

The Supreme Court has grounded this reading of the Free Speech Clause in two mutually reinforcing principals. At the basic level, the Court recognized that in order to govern, the sovereign must be able to make its voice heard in the "marketplace of ideas." Keller v. State Bar of Cal., 496 U.S. 1, 12-13 (1990). Indeed, the Court recognized that "if every citizen were to have a right to insist that no one paid by public funds express a view with which he [or she] disagreed debate over issues of great concern to the public would be limited to those in the private sector and the process of government as we know it radically transformed." Id. This leads directly to the second principle the Court has expressed when shielding government speech from free speech scrutiny. The proper redress for those who disagree with a particular government message is not found in the constitution but at the ballot box. Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000). In order to allow "newly elected officials [to] espouse some different or contrary position," the electorate would have to be able to identify the government's message. Keller, 496 U.S. at 12.

However, the Court has also made clear that while these principles shield a government-controlled message from free speech scrutiny, there are other constitutional provisions, such as the Establishment Clause, that may prohibit the government from adopting a particular message. Summum, 192 S. Ct. at 1132. However, the Court's Establishment Clause jurisprudence does not alter the threshold question of whether the government itself is speaking or providing a forum for private expression. Id. Therefore, the Establishment Clause claim is addressed independently in Part III of this opinion.

B. Government Speech.

The constitutionality of ITO § 1954 under the Free Speech Clause turns on whether the invocation offered on behalf of the Council constitutes private speech or government speech, which is exempt from First Amendment scrutiny. Johanns, 544 U.S. at 553. Unfortunately, the Supreme Court has yet to set forth a specific framework for

distinguishing government speech from private speech. However, its analyses in Johanns and Summum, provide guideposts for making this distinction.

In Johanns, the Supreme Court considered the distinction between government and private speech, with respect to whether a federal program that compelled subsidies from beef producers to finance advertisements for the beef industry as a whole violated the First Amendment. Johanns, 544 U.S. at 554. The respondent asserted that this amounted to compelled speech, which "impeded on their ability to market their own superior quality beef." Id. at 556; [*1990] see also West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (First Amendment prevents public officials from compelling a person to utter a message with which he or she does not agree); Keller v. State Bar of Cal., 496 U.S. 1 (1990) (First Amendment prevents compelling those who disagree with political speech of a bar association or union from having to pay for that message).

The respondents in Johanns, like Plaintiff, argued that the role played by the Beef Board and its operating committee precluded a holding that attributed the speech to the government, because the Board consisted of private individuals. Johanns, 544 U.S. at 557-567. To further their argument, the respondents pointed to the advertisements themselves, highlighting the fact that the advertisements made no mention of the government and were paid for by the association. Id. at 577 (Souter, J., dissenting).

Writing for the majority, Justice Scalia explained that because the subsidy funds government speech, it is not susceptible to a First Amendment challenge. Id. at 557-567. When "the government sets the overall message to be communicated and approves every word that is disseminated," the speech is properly attributed to the government. Id. at 562. The fact that private sources assist in the development of a message and that the government does not expressly endorse the message does not preclude reliance on the government-speech doctrine. Id.

In labeling the advertisements government speech, the Court noted, "Congress and the Secretary [of Agriculture] ... set out the overarching message and some of its elements." Id. at 561. While Congress "left the development of the remaining details to an entity whose members are answerable to the Secretary...[T]he Secretary exercise[d] final approval authority over every word used in every promotional campaign." Id. Under this scheme, "[t]he message set out in the beef promotions [was] from beginning to end the message established by the Federal Government" and therefore government speech. Id. at 560.

This Court finds that Johanns is clear on the controlling issue here. Once a government entity asserts effective control over a message and retains the authority to edit and approve every word of that message, it may discriminate against a contradictory message. Id. at 563; see also Rust v. Sullivan, 500 U.S. 173 (1991) (holding the Health and Human Services regulations did not violate the Free Speech rights of private Title X fund recipients, their staffs, or their patients by impermissibly imposing viewpoint-discriminatory conditions on Government subsidies).

As such, Wishnick's Free Speech claim must fail. The Council of Imagine enacted an ordinance that sets out the overall purpose and intent of the invocational prayer program. Additionally, and controlling for the purposes of this case, the Council retains the right to select and approve every request to provide the invocation.

Today's holding is reinforced by the Supreme Court's more recent decision in Pleasant Grove City v. Summum, 555 U.S. 460, 129 S. Ct. 1125 (2009). In Summum, respondents [*1991] challenged the city's refusal to place a permanent monument donated by a religious organization in a public park after accepting a Ten Commandments monument. Id. at 1130. The Court found that "monuments displayed on public property typically represent government speech," noting the government maintained extensive control over the messages sent by the monuments. Id. at 1133. Specifically, the government "exercised *selectivity*" and "editorial *control*" over the monuments and "[took] care in accepting donated monuments." Id. (emphasis added). In light of these characteristics, city park monuments were found to communicate government speech. Furthermore, the Court recognized that the fact that the monument was privately created and financed does not alter the government control analysis. Id. Similarly, the fact that the invocation may originate with a private party does not change the fact that the local government retains final approval and editorial control over the invocation.

While the Court's analysis in Summum arguably revived consideration of a fully informed reasonable person standard, it would be very difficult to reconcile the Court's analysis in Johanns with such an approach. This court interprets the Summum reasonable person standard as dicta. That analysis was simply a means by which the Court was attempting to show the ease by which its conclusion, that the monument at issue was government speech, could be supported. Further, the Court's analysis was clearly in response to the specific relief sought by the petitioners in Summum. The Court explained that mandating every state and municipality to issue a formal endorsement of every monument it wished to display would be a formality with no substance. Id. at 1134. However, the Court's emphasis on Johanns, which expressly disavowed such a consideration, limits if not eliminates, its importance. Additionally, this court need not reconcile this seeming discrepancy because, much like the monument at issue in Summum, the invocation in the Council chambers indicates that the invocation is government, rather than private, speech. When the Summum Court addressed this consideration, it noted that when permanent monuments are displayed on public property, there is "little chance that observers will fail to appreciate the identity of the speaker" as the government. Id. at 1133. Similarly, when a local government, pursuant to an ordinance, invites someone to offer an invocation in the council chambers, it is clear that it is the Council's message that is being conveyed. Additionally, a reasonable observer in this context should be aware that the purpose of the legislative prayer program is to promote a sense of unity among the Council members and citizens. This is clearly a government interest and is not a means of forwarding personal expression.

Because this court concludes that the invocational prayer program at issue is a form of government expression, Wishnick's Free Speech claim must be denied as a matter of law.

III. Establishment Clause

The very first command [*1992] of the Bill of Rights, made applicable to the states through the Fourteenth Amendment, is that the government "shall make no law respecting an establishment of religion." U.S. Const. amend. I.; see, e.g., Everson v. Bd. of Educ., 330 U.S. 1 (1947). A basic tenet of the Establishment Clause is that the government shall be neutral and must not favor one religious view over another. See Larson v. Valente, 456 U.S. 228 (1982); Bd. of Educ. v. Grumet, 512 U.S. 687 (1994); see also Lee v. Weisman, 505 U.S. 577 (1992) (Blackmun, J. concurring). At a minimum, the Establishment Clause guarantees that a government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith." Weisman, 505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S 688 (1984)).

Wishnick asserts that Imagine unconstitutionally discriminated against him based on his religion by providing preferential treatment to more common monotheistic religions in violation of the Establishment Clause. This court does not agree. The requirement that all invocations be nonsectarian does not constitute "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." Marsh v. Chambers, 463 U.S. 783, 792 (1983).

A. The Sui Generis Status of Legislative Prayer

The evolution of Establishment Clause jurisprudence suggests that the constitutionality of legislative prayer is a sui generis legal issue. Snyder v. Murray City, 159 F.3d 1227, 1232 (10th Cir. 1998) (en banc). The practice of opening legislative sessions with an invocational prayer is deeply rooted in this nation's history and tradition and has "coexisted with the principles of disestablishment and religious freedom." Marsh, 463 U.S. at 786. In Marsh, the Supreme Court upheld the Nebraska Legislature's chaplaincy practice under the Establishment Clause based on the history and tradition of the practice. Id. The Court compared Nebraska's prayer practice to that of the United States Congress where, since the first Congress, prayer has been offered every session. The Court stated that:

> On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights…Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress.

Id. at 788.

In Marsh, the Court declined to apply one of the traditional Establishment Clause tests and simply overruled the Eighth Circuit based on the long-standing tradition [*1993] of legislative prayer. See Lemon v. Kurtzman, 403 U.S. 602 (1971). As Justice Brennan noted in his dissent, the legislative prayers at issue in Marsh simply would not have survived the traditional Establishment Clause tests. Marsh, 463 U.S. at 797 (Brennan, J., dissenting); see also Simpson v. Chesterfield, 404 F.3d 276, 280 (4th Cir. 2005), cert. denied, 546 U.S. 937 (2005) ("[T]he Court's failure to apply this well-known test suggests that Lemon was not the proper lens through which to view this particular dispute."). Thus, while the traditional Establishment Clause tests generally guide this court's analysis, they do not extend to the instant controversy involving Imagine's legislative prayer practice. See, e.g., Snyder v. Murray City Corp., 159 F.3d 1227, 1232 (10th Cir. 1998) (The current body of Establishment Clause jurisprudence "provides little guidance for our decision in this case.").

The practice of legislative prayer is a distinct genre. By relying solely on the history and tradition of the practice, the Supreme Court made clear that its traditional Establishment Clause jurisprudence is inapplicable in the context of legislative prayer. Marsh, 463 U.S. at 786. In reaching its determination, the Court identified the sui generis status of legislative prayer stating:

> 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 towards establishment; it is simply a tolerable acknowledgement of beliefs widely held among people of this country.

Id. at 792; See also Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, J., concurring) (These types of "government acknowledgements of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."). The Supreme Court has observed that "it would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers [than legislative prayer]." Lynch, 465 U.S. at 674. Thus, following Supreme Court precedent, we read Marsh as establishing the constitutional principle that, absent a showing of an "impermissible motive," legislative prayer does not violate the Establishment Clause so long as the invocation does not serve to "proselytize or disparage a particular religion or religious faith." Marsh, 463 U.S. at 794-95; see also Snyder, 159 F.3d at 1233.

It is not the role of the judiciary to embark on a sensitive evaluation or to parse the content of a particular prayer. Snyder, 159 F.3d at 1233. In the instant matter, Wishnick argues that ITO § 1954 was fueled by the impermissible motive of favoring one religious sect over another. Wishnick further contends that the ordinance exploits the

prayer opportunity to advance one religious faith over another, namely, any religion that fails to conform to monotheistic values. Marsh, 463 U.S. at 794-95.

B. Nonsectarian Requirement

The Establishment Clause does not automatically bar a state from regulating conduct solely because it harmonizes with majoritarian religious beliefs. Simply having a religious tone or promoting a message consistent [*1994] with religious doctrine does not automatically run afoul of the Establishment Clause. Lynch, 465 U.S. at 687. In the context of legislative prayer, what matters is "whether the prayer to be offered fits within the genre of legislative invocational prayer that has become part of the fabric of our society." Snyder, 159 F.3d at 1233 (quoting Marsh, 463 U.S. at 792) (internal citations omitted).

The Marsh Court focused primarily on the issue of whether legislative prayer was intrinsically constitutional under the Establishment Clause. See Marsh, 463 U.S. 783. In Marsh, the respondent claimed that because the invocations were based on the Judeo-Christian tradition, the prayers were incompatible with atheism and other well-established faiths, such as Buddhism. Id. at 793. The Supreme Court responded by stating, "[t]he 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." Id. at 794-95. Indeed, every prayer arguably advances a particular religion, and "[t]he act of praying to a supreme power assumes the existence of that supreme power." Snyder, 159 F.3d at 1234 n.10. Nevertheless, Marsh is inconsistent with Wishnick's claim that a prayer invoking a particular concept of God may run afoul of the constitution. See Marsh, 463 U.S. at 793 n.14.

The Supreme Court had the opportunity to revisit Marsh sixteen years later in County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1998). In upholding one holiday display while declaring the other unconstitutional, the Court re-examined the constitutional limits imposed on the practice and content of legislative prayer. Id. The crèche at issue in Allegheny was analogized to the legislative prayer at issue in Marsh. The Allegheny Court found that invocations at issue in Marsh did not have the effect of affiliating the government with any one specific faith or belief because the chaplain removed all references to Christ from the invocation after a Jewish legislator complained about the prayer practice. Id. at 603 (quoting Marsh, 463 U.S. at 793 n. 14) (internal citations and quotations omitted).

Likewise in Van Orden v. Perry, 545 U.S. 677 (2005), the Supreme Court recognized the importance of the nonsectarian nature of the invocations at issue in Marsh. The Court implied that it rejected the challenge to Nebraska's legislative prayer practice because the prayers were nonsectarian; observing that "[i]n Marsh, the prayers were often explicitly Christian, but the chaplain removed all references to Christ the year after the suit was filed." Id. at 688 n.8. Justice Breyer, in his controlling concurrence, recognized the role of nonsectarianism in upholding a Ten Commandments display at the Texas Capitol. Id. at 701. The Establishment Clause does not compel the government to purge

from the public sphere all that may partake of the religious. Id. at 699. In fact, such extremism would result in the very sort of intrusion the Establishment Clause seeks to avoid. Id.

This court reads Marsh, as interpreted and refined by Allegheny and Van Orden, as standing for the principle that legislative prayer is required to be scrupulously nonsectarian to pass [*1995] constitutional muster. Section 1954 is simply the codification of this constitutional principal. Moreover, ITO § 1954 not only requires that all invocations be nonsectarian, but there is ample evidence suggesting that the driving force behind its enactment was to advance unity and solidarity during a time of hostility among the Council members and citizens of Imagine.

Legislative prayer has become an important part of Imagine's Council meetings over the past decade. It is apparent from the record that the ordinance was enacted to unify the citizens of Imagine during a time of national conflict and to instill a sense of solemnity and purpose over local government proceedings. The Supreme Court has accepted these secular goals as a legitimate purpose for upholding similar prayer practices. See Marsh, 463 U.S at 792; Lee, 505 U.S. at 646 (Scalia, J., dissenting) (prayer is "an important unifying mechanism" for our citizenry); Turner v. City Council of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008) (O'Connor, J., retired, sitting by designation), cert. denied, 129 S. Ct. 909 (2009) (Legislative prayers "share[] a common characteristic: they recognize[] the rich religious heritage of our country in a fashion that was designed to include members of the community."). Here, the purpose of ITO § 1954 is to ensure that the invocations offered are non-sectarian and non-proselytizing in nature. This court agrees with the following statement made by the Tenth Circuit:

> The genre approved in Marsh is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect a Judeo-Christian ethic, typically involves non-sectarian requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body.

Snyder, 159 F.3d at 1234.

Two recent circuit court decisions follow the Supreme Court's holding in Marsh and shed light on the facts in the instant case. In Simpson v. Chesterfield County. Bd. of Supervisors, 404 F.3d 276 (4th Cir. 2005), cert. denied, 546 U.S. 937 (2005), the Fourth Circuit held that a county board inviting different religious leaders to offer invocational prayers prior to public board sessions could limit participation to representatives of Judeo-Christian religions. Id. at 278. In reaching its determination, the court recognized that nonsectarian legislative prayer generally does not violate the Establishment Clause and commended the county board for "its attempt to foster inclusiveness in invocations" while avoiding "the divisiveness the Establishment Clause seeks rightly to avoid." Id. at 282-84. Here, Wishnick attempts to distinguish Imagine's prayer policy from the policy challenged in Simpson on the grounds that Imagine invites the general public to offer an invocation, while Chesterfield County limited the invitations to religious leaders. This

argument is unpersuasive. This court agrees with the Fourth Circuit that legislative prayer does not run afoul of the Establishment Clause so [*1996] long as the invocations offered are nonsectarian and “describe[] divinity in wide and embracive terms,”[8] tying its legitimacy to common ground. Id. at 284. That is exactly the purpose of ITO § 1954, as it serves to unify and create a common ground among people of varying faiths. Thus, it follows a fortiori that it is constitutionally permissible for ITO § 1954 to limit invocations to those adhering to nonsectarian religious views.

Additionally, in Pelphrey v. Cobb County, 547 F.3d 1263 (11th Cir. 2003), taxpayers brought suit challenging the county’s procedures for selection of local religious leaders to offer an invocational prayer at county commission meetings. The issue in Pelphrey was whether the differing selection practices, which allowed volunteer leaders of different faiths to offer the invocation on a rotating basis, violated the Establishment Clause. Id. at 1267. The Eleventh Circuit held that invocational prayers offered by clergy did not constitute the establishment of religion, even though over 90% of the speakers were Christians, and the invocations often contained references to particular religions. In upholding the county’s sectarian prayer practice, the court noted that the commission did not compose or censor the prayers, despite the fact that the prayers often concluded with references to “our Heavenly Father” or “in Jesus’ name we pray.” Id. The Eleventh Circuit reasoned that because the references to specific deities were often short, usually at the end of the prayers, and reflected the beliefs of diverse faiths, the prayers did not unconstitutionally advance or disparage a particular faith. Id. While this court disagrees with the conclusion reached in Pelphrey, it follows a fortiori that ITO § 1954’s nonsectarian requirement is permissible as it prohibits reference to any deity.

C. Reference to a Supreme Being

Wishnick further contends that ITO § 1954 has the unconstitutional effect of affiliating the government with a specific religious belief by mandating that all invocations for divine guidance be made in the name of God. However, as Justice Douglas acknowledged, “[we] are a religious people whose institutions presuppose a Supreme Being.” Marsh, 463 U.S. at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952)); see also Engle v. Vitale, 370 U.S. 421, 434 (1962) (“the history of man is inseparable from the history of religion.”). The history of our great nation “is replete with official references to the value and invocation of Divine guidance.” Lynch, 465 U.S. at 675. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge of Allegiance: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). Simply having religious content or promoting a message that is consistent with a religious doctrine does not run afoul of the Constitution. Lynch, 465 U.S. at 687. There is nothing unconstitutional in a government favoring religion [*1997] generally, honoring

[8] Some invocations upheld in Simpson include: “"Lord God, our creator," "giver and sustainer of life," "the God of Abraham, Isaac and Jacob," "the God of Abraham, of Moses, Jesus, and Mohammad," "Heavenly Father," "Lord our Governor," "mighty God," "Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator." Simpson, 404 F.3d at 284.

or acknowledging God through public prayer as long as it is done in a non-proselytizing manner. See Van Orden v. Perry, 545 U.S. 677, 692 (2005) (Scalia, J., concurring); McCreary County. v. American Civil Liberties Union, 545 U.S. 844 (2005) (Scalia, J., dissenting).

Reference to God alone does not per se constitute proselytization. The word "God" in ITO § 1954 is used in a manner consistent with the concept of "ceremonial deism."[9] See Elk Grove Unified School Dist. v. Newdow, 542 U.S. 1, 26 (2004) (Rehnquist, C. J., concurring in judgment) ("Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound."); id. at 35-36 (O'Connor, J., concurring) ("It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mottoes, and oaths."); Lynch v. Donnelly, 465 U.S. at 675 ("Our history is replete with official references to the value and invocation of Divine guidance."). Here, ITO § 1954 prohibits invocations from referencing particular religious tenets or deities. 47 ITO § 1954(5). To take the view that the ordinance is espousing a monotheistic religious message would render the ordinance contradictory. Invoking the divine guidance of a general "God" does not advance or disparage a particular religious faith or belief. As Justice O'Connor explained, the term "God" is simply "a tolerable attempt to acknowledge religion [in general] and to invoke its solemnizing power without favoring any individual religious sect or belief system." Elk Grove, 542 U.S. at 42. Here, § 1954 serves to unite the Council and citizens of Imagine while advancing the purely secular goal of ensuring the Council understands the importance of its work.

Wishnick's claim fails under current Supreme Court doctrine. See Lee v. Weisman, 505 U.S. 577 (1992). In Lee both the District and Circuit Courts invalidated the policy on the grounds that the word "God" was used in the prayer at issue. Although the Supreme Court affirmed the lower court decisions, it did so on other grounds. Lee, 505 U.S. at 599. Justice Kennedy expressly stated the Establishment Clause violation occurred at the point in which students might have felt compelled to participate in the prayer because school officials prescribed the prayer. Id. at 599. The compelling nature of the prayer, not the use of the word "God," invalidated the policy. Id. It was for this reason that the Court refused to extend Marsh to the public school setting. Id. The context of a public school setting is clearly distinguishable from the case at hand, which falls squarely in the purview of Marsh, because the audience is comprised of adults who are voluntarily attending the Council meetings.

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[9] The term "ceremonial deism" was coined by former Yale Law School Dean Walter Rostow in 1962. Rostow recognized ceremonial deism as a "class of public activity, which...could be accepted as so conventional and uncontroversial as to be constitutional." See Steven B. Epstein, Rethinking the Constitutionality of Ceremonial Deism, 96 Colum. L. Rev. 2083, 2091-92 (1996). Government practices that fall into the category of ceremonial deism include the post-1954 Pledge of Allegiance ("under God"); the invocation to the deity opening judicial proceedings ("God save the United States and this Honorable Court"); the swearing in of government officials and witnesses ("so help me God"); and the national motto inscribed on our currency ("In God We Trust"). The Supreme Court has explicitly used this phrase in two opinions, the crèche cases of Lynch v. Donnelly, 465 U.S. 668 (1984), and County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

Moreover, Wishnick misconceives the nature of the word "God" and its role in our society. He assumes that by allowing prayers that reference "God", the Council limits all invocations to a monotheistic deity. This is wrong on several grounds. First, "God" by its nature is not [*1998] a definitive term but simply an attempt to identify a concept beyond description.[10] See Elk Grove, 542 U.S. at 35 (O'Connor, J., concurring). Second, the term "God" as used in ITO § 1954 is "protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant religious content." Lynch v. Donnelly, 465 U.S. 668 (1984) (Brennan, J., dissenting); see also Abington School Dist. v. Schempp, 374 U.S. 203, 303 (1963) (Brennan, J., concurring)[11] (The "truth is that we have simply interwoven the ["In God We Trust"] motto so deeply into the fabric of our civil polity that its present use may well not represent the type of involvement which the First Amendment prohibits.").

In effect, the Marsh holding enabled legislative bodies to engage in a form of prayer that acknowledges their own beliefs, so long as they do not advance those beliefs or disparage any others. There is a distinction between allowing legislative prayers that invoke divine guidance generally, and allowing those referencing specific deities. The former "is simply a tolerable acknowledgment of beliefs widely held among people of this country," Marsh, 463 U.S. at 792, while the latter serves to advance a specific religion or religious belief. By requiring that all invocations be nonsectarian and only reference a general concept of a supreme being, ITO § 1954 does not run afoul of the Establishment Clause. Id. Reference to God in an invocational prayer is no different from the founders' reference to "Nature's God" in the Declaration of Independence. Read in conjunction with the concept of "self-evident truths," reference to God represents not an attempt to establish monotheistic principles, but a rejection of legal positivism.

In conclusion, ITO § 1954 does not coerce anyone to support any religion or its exercise thereof. Nor does the ordinance allow for proselytizing prayers that advance one particular faith or belief. Therefore, the ordinance does not violate the Establishment Clause of the First Amendment to the United States Constitution.

III. Conclusion

For the foregoing reasons, plaintiff's prayer for relief is denied and summary judgment for defendant is granted in full.

Dated, February 6, 2011

[10] When Albert Einstein was asked whether he believed in God, he replied, "first tell me what you mean by God and then I will tell you if I believe."

[11] Justice Brennan further stated; "this general principle might also serve to insulate the various patriotic exercises…which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded under God. Thus, reciting the pledge maybe no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." Schempp, 374 U.S. at 303-304.

(Cite as Wishnick v. Imagine, 521 F.3d 409 (13th Cir. 2011)

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

IAN WISHNICK,

Petitioner,

- against -

TOWN OF IMAGINE,

Respondent.

Majority opinion delivered by ROSS, C.J., joined by SCHNEIDERMAN, J.
HAGAN, S., filed a concurring opinion:

This matter is before the court on appeal from a decision of the United States District Court for the District of Froessel denying relief to Plaintiff-Appellant Ian Wishnick with respect to his action seeking declaratory relief to enjoin enforcement of Imagine Town Ordinance § 1954. In denying relief, the District Court held that: (a) ITO § 1954 constituted government speech; and (b) ITO § 1954 adhered to the Supreme Court precedent of Marsh v. Chambers, 436 U.S. 783 (1983). For the reasons set forth in this opinion, we reverse.

I. Free Speech Clause

The First Amendment to the United States Constitution provides, "Congress shall make no law…abridging the freedom of speech. U.S. Const. Amendment I. The Supreme Court has long struggled to attribute a specific meaning and purpose to this text. See Erwin Chemerinsky, Constitutional Law, 922-1176 (3d Ed. 2006). However, in its more recent cases, the Court's holdings have been unambiguous on at least one point: the government may not discriminate against a particular viewpoint based simply on its disagreement with that viewpoint. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). In fact, this principle is so fundamental to the concept of free speech the Court has prohibited viewpoint distinctions in the context of fully proscribable speech. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 391-92 (1992) (holding that a state may not selectively ban fighting words on the basis of viewpoint, even though it may ban fighting words entirely).

The District Court avoided Wishnick's Free Speech claim on the ground that Imagine's invocational prayer practice is a form of government speech and thus not limited by Free Speech principles. For [*410] the reasons articulated below, we reverse the District Court's holding and find that ITO § 1954 is properly analyzed as a government created forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). We further hold that the speech limitations imposed by the ordinance are clearly viewpoint discriminatory in violation of the Free Speech Clause of the First Amendment. Good News Club v. Milford Central School, 533 U.S. 98 (2001) (denying a religious group access to a school's limited public forum due to a religious viewpoint violated the Free Speech Clause). Additionally, even were we to assume that ITO § 1954 is not viewpoint discriminatory, the ordinance would still violate the Free Speech Clause as it provides "unbridled discretion" to the chairperson in approving a request to offer an invocation. City of Lakewood v. Plain Dealer Publ'n Co., 486 U.S. 750 (1988).

A. The Government Speech Doctrine

The District Court and respondents rely on Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005) and Pleasant Grove City v. Summum, 129 S. Ct. 1125 (2009), to assert that ITO § 1954 constitutes government speech. In this context, however, application of the government speech doctrine would clearly be "a subterfuge for favoring certain private speakers over others based on viewpoint." Id. at 1134. Both Johanns and Summum are inapposite on this point and are readily distinguishable.

In Johanns, the petitioners challenged a direct tax on beef producers, which was used by the federal government to fund generic advertising for the beef industry. Johanns, 544 U.S. at 553-554. The beef producers claimed the tax was a form of compelled subsidy for private speech. Id. at 560; see also Abood v. Detroit Bd. of Ed., 431 U.S. 209 (1977) (objecting employees have a constitutional right to withhold payment of any union fees that support political and ideological causes). The Johanns Court held that the control retained by the Secretary of Agriculture over the advertisements, as well as the Beef Board itself, constituted sufficient grounds to consider the beef advertisements as conveying the government's speech. Id. at 562. Moreover, "the Secretary's role [was not] limited to final approval or rejection: [o]fficials of the Department also attend[ed] and participate[d] in the open meetings at which proposals [were] developed." Id. at 561.

In contrast, ITO § 1954(1), which allows "any party" to petition the Council to give any invocation, does not grant any drafting or editing power to any of the council members. The Chairperson is simply permitted by the terms of the ordnance to draft, edit, and submit their own invocation for selection - a right available to all parties regardless of their affiliation with Imagine. Further, unlike the Secretary's extensive role in Johanns, the Council's only role is simply to approve or reject a proposed invocation. ITO § 1954(1). While this certainly offers a measure of control, the Council does not create the invocation. Rather, it is an individual who authors a personal expressive message on behalf on the Council. Clearly, Johanns does not control.

The District Court's reliance on Summum is even more misguided. Summum concerned "permanent monuments displayed [*411] on public grounds." Summum, 129 S. Ct. at 1132. In holding such monuments constitute government speech, the Court relied on three distinct rationales; each of which would be out of context in this case.

First, the Court recognized that historically various governments have used monuments "to remind their subjects of their authority and power." Id. at 1132-1133. The Court reinforced this point by further holding that privately funded and donated monuments, which the government accepts and chooses to display, likewise convey a government message. Id. at 1133.

> It certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated. And because property owners typically do not permit the construction of such monuments on their land, persons who observe donated monuments routinely-and reasonably-interpret them as conveying some message on the property owner's behalf.

Id.

This reasoning does not extend to legislative chambers. There are many instances of a government body allowing individuals to speak within its chambers, including foreign citizens and leaders.[12] It would be nonsensical to consider the speech of foreign citizens and dignitaries as the government's own speech. Undoubtedly, when Congress invites an individual to speak, Congress may be expressing a viewpoint regarding that individual. However, what the individual says certainly remains attributed to the speaker, and not Congress. Similarly, when an individual comes forward to offer an invocation on behalf of a city council, that individual is expressing his or her own belief. To hold otherwise would require this court to ignore the simple fact that offering the invocation requires an affirmative step by an individual. ITO § 1954(1). It would beg reason to consider a self-composed invocation that a private individual affirmatively offers as a form of government speech. Id. at 1141. (Souter, J., concurring). We decline to hold otherwise.

Second, petitioners in Summum argued that in order for the city to invoke the government speech doctrine, the government must formally adopt the message as it own. Id. at 1135. The Court responded that this approach "fundamentally misunderstands the way that monuments convey meaning." Id. Monuments may be interpreted to have several different meanings and are "almost certain to evoke different thoughts and sentiments in the minds of different observers." Id. By choosing to accept and take ownership of the monument, the government is not necessarily adopting the message intended by a particular donor. Id. at 1136. However, the Court in Summum expressly contrasted the futile endeavor of assigning a particular message to a monument to the message conveyed by direct speech. Id. at 1135 [*412] ("The meaning conveyed by a

[12] On December 10, 1824, Marquis de Lafayette became the first foreign citizen to address the House of Representatives in its chambers. More recently, on May 24, 2011, Israel Prime Minister Benjamin Netanyahu addressed a joint session of Congress.

monument is generally not a simple one like Beef. It's What's for Dinner.") (internal quotations omitted).

Third, and perhaps most fatal to respondents in this case, the Summum Court recognized that "public forum analysis would be out of place in the context of th[at] case." Id. at 1137 (internal citations omitted).

> The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program […] By contrast, public parks can accommodate only a limited number of permanent monuments.

Id.

This reasoning was grounded in the recognition that applying Free Speech limitations when the government chooses to accept a monument would leave the government with the option of "either brac[ing] themselves for an influx of clutter or face the pressure to remove longstanding and cherished monuments." Id. at 1138 (internal citations omitted). On this point, the Court expressly contrasted the nature of speech to permanent monuments. Id.

> Speakers, no matter how long-winded, eventually come to the end of their remarks; […] monuments, however, endure. […] A public park, over the years, can provide a soapbox for a very large number of orators - often, for all who want to speak - but it is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression.

Id. at 1137.

We hold these distinctions dispositive on the issue. In dismissing Wishnick's Free Speech claims, the District Court did not consider whether the ordinance created a forum. The court simply applied the government speech doctrine and held ITO § 1954 immune from Free Speech scrutiny. The implications of the "newly minted" government speech doctrine, Id. at 1139 (Stevens, J., concurring), has yet to be worked out and "it would do well for [courts] to go slow in setting its bounds." Id. at 1141 (Souter, J., concurring). There can be little doubt that both Johanns and Summum were inappropriately extended by the District Court, regardless of the Council's attempt to control the invocational prayer program. This case is a clear example of "the government opening its property for the purpose of private expression," and thus, it is subject to a forum analysis. Perry, 460 U.S. at 45.

B. Imagine Town Ordinance §1954 Unconstitutionally Discriminates Based On Viewpoint in a Government Created Forum[13]

The forum doctrine was first laid out the Supreme Court in Perry Educ. Ass'n, 460 U.S. 37 (1983). The [*413] Court explained that "the existence of a right of access to public property and the standard by which limitation upon such a right must be evaluated, differ depending on the character of the property at issue." Id. at 45-47. The Perry Court recognized "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Id. at 46. See Rosenberger, 515 U.S. at 829; see also Greer v. Spock, 424 U.S. 828, 836 (1976). The power to ensure that the property is being used for its intended purposes allows the government to impose any reasonable regulation on speech that is "not an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46.

While the Perry Court laid out varying standards for analyzing different forums, the Court has consistently reinforced the principle that regardless of the nature of the forum, viewpoint discrimination violates the Free Speech Clause. Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 806 (1985); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("It is axiomatic that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."); Rosenberger, 515 U.S. at 829 (1995) (state university's denial of funding for a religious student publication based on religious content, imposed a financial burden on speech and amounted to viewpoint discrimination in violation of the Free Speech Clause); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993) (school district violated the Free Speech Clause by refusing the Chapel's request to show movies on school premises solely because such movies were based on a religious viewpoint).

The terms of ITO § 1954 are clearly discriminatory against polytheistic viewpoints. Imagine cannot meet its burden of demonstrating that the provisions of the ordinance are narrowly tailored to serve a compelling state interest. Therefore, ITO § 1954 cannot be upheld.

Imagine asserts that alleviating the tension and violence in its town constitutes a compelling state interest. Imagine further contends that the speech limitations are narrowly tailored to ensure that the invocations are inclusive. We find this argument flawed because the ordinance is not narrowly tailored to achieve its stated purpose. Further, Imagine failed to demonstrate that sectarian prayers inevitably lead to violence. Even if we were to assume that the statute would survive scrutiny, it would nonetheless be unconstitutional, for the ordinance does not sufficiently govern the Chairperson's authority in approving or rejecting a proposed invocation. This grant of "unbridled discretion," regardless of the need for the speech discrimination inherent in the ordinance,

[13] The Supreme Court has used various forum terms somewhat inconsistently. However, for matters of this case the precise label of the forum is irrelevant because viewpoint discrimination is equally prohibited in all forums. See Perry v. Educ. Ass'n, 460 U.S. 37 (1983).

plainly violates the Free Speech protections afforded by the First Amendment. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 763 (1988).

II. Establishment Clause

We now turn to the issue of whether the Establishment Clause of the First [*414] Amendment to the United States Constitution prevents a city council from denying a request from a private citizen to offer an invocational prayer at the opening of the council's deliberative session when the denial is made on the basis of the proposed invocation's content. In upholding ITO § 1954, the District Court impermissibly extended the Supreme Court precedent established in Marsh v. Chambers, 463 U.S. 783 (1983). Even if the practice of legislative prayer is permissible, the District Court's endorsement of a government practice that, on its face, discriminates against minority religions goes too far. We now reverse and hold that ITO § 1954 violates the Establishment Clause of the First Amendment.

A. Standard of Review

We begin by addressing the District Court's determination that ITO § 1954 fits squarely within the sui generis category of legislative prayer established in Marsh, 463 U.S. 793 (1983). We hold that it does not.

While Marsh may arguably be read to extend to situations involving rotating clergymen or unpaid chaplaincies, the Court's historical treatment of legislative prayer must be limited to established chaplaincy systems.[14] The question presented in Marsh was "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violate[d] the Establishment Clause." Id. at 784 ("We granted certiorari limited to the challenge to the practice of opening sessions with prayer by a state-employed clergyman."). In the instant matter, invocational prayers are not offered by paid clergymen, but by the citizens of Imagine. While the citizen offering the prayer may also be a religious leader in the community, the individual is not offering the prayer as an established chaplain. For this reason, ITO § 1954 falls outside the purview of Marsh and must be subject to the Supreme Court's traditional Establishment Clause jurisprudence, specifically, its prohibition on excessive entanglement. See Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). The process of policing invocations submitted for prior approval will inevitably "call[] for official and continuing surveillance leading to an impermissible degree of entanglement." Waltz v. Tax Comm'n, 397 U.S. 664, 675 (1970); see, e.g., Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981) (public university offering its facilities for student group meetings risks great degree of entanglement by attempting to enforce exclusion of religious groups because of "continuing need to monitor group meetings to ensure compliance with the rule"); Lemon, 403 U.S. at 629

[14] As Justice Brennan stated in his dissent, if the Court were to judge legislative prayer through the lens of the court's well-established doctrine, the Court would have no choice but to strike down Nebraska's legislative prayer practice as a clear violation of the Establishment Clause. Marsh v. Chambers, 463 U.S. 783, 795 (Brennan, J., dissenting) ("I have no doubt that, if any group of law students were asked to apply the principles of Lemon to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.").

(statute's requirement that government examine school records to determine how much of total expenditure is attributable to secular education and how much to religious activity is "fraught with the sort of entanglement that the Constitution forbids.").

Imagine [*415] argues that the traditional Establishment Clause tests[15] are unworkable in the context of legislative prayer and instead urges this court to follow the history-based precedent established by the Supreme Court in Marsh and followed in Van Orden v. Perry, 545 U.S. 677 (2005). However, we find Van Orden readily distinguishable from the instant matter. In Van Orden, the plurality asserted that the Lemon test is not useful in dealing with the passive Ten Commandments display erected by Texas on its Capitol grounds. Instead, according to the plurality, the analysis should be driven by the nature of the monument and the history of the nation. Id. at 686. While the history of legislative prayer in this nation is long-standing, we are not dealing with the same sort of passive monument in the case at hand. Rather, the act of offering an invocation requires an affirmative step by the government in reviewing the proposed prayer for approval, by the speaker in offering the prayer, and by the listener. An individual attending a council meeting cannot turn away from the prayers being offered as they arguably could to a silent monument. The active nature of Imagine's legislative prayer practice requires a higher level of scrutiny in order to ensure that the practice is constitutional. Today, history and tradition will not suffice.

B. The Lemon Test

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Supreme Court established a three-pronged test to determine whether a statute violates the Establishment Clause of the First Amendment: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion." Id. at 612-613. No consideration of the second or third criteria is necessary if the statute fails to satisfy the secular purpose requirement. See Wallace v. Jaffree, 472 U.S. 38 (1984).

1. Secular Purpose of ITO § 1954

The Establishment Clause of the First Amendment prohibits a state legislature from enacting laws for the purpose of advancing or inhibiting religion. See Zelman v. Simmons Harris, 536 U.S. 639, 648-49 (2002). The Constitution requires that a statute must be invalidated if it is motivated by a purpose to advance religion. See Wallace, 473

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[15] See, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971) (statute must have a secular purpose; statute's primary effect must be one that neither inhibits nor advances religion; the statute must not foster an excessive entanglement with religion); Santa Fe Independent Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down a public school policy of permitting student-led prayers before football games under Lemon); Lynch v. Donnelly, 465 U.S. 668, 679 (O'Connor, J., concurring) (upholding a city-owned holiday display placed in a park owned by a non-profit organization under the endorsement test); Lee v. Weisman, 505 U.S. 577 (1992) (finding prayer at high school graduation violates the Establishment Clause under Broad Coercion analysis); Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding Ohio voucher program under the formal neutrality analysis); Wallace v. Jaffree, (Rehnquist, C.J., dissenting) (applying the non-preferentialist analysis); Elk Grove Unified Sch. Dist. V. Newdow, 542 U.S. 1 (2004), (applying the non-incorporation analysis).

U.S. at 56 (holding that a statute authorizing a moment of silence for voluntary prayer in public schools for the purpose of returning prayer to school violated the Establishment Clause).

Under Lemon, we must first ask whether ITO § 1954 was enacted for the purpose of endorsing or disapproving of religion. See Wallace, 472 U.S. at 64 (Powell, J., concurring) (Under the purpose prong, "it is appropriate to ask whether the government's actual purpose is to endorse [*416] or disapprove of religion.") (quoting Lynch v. Donnelly, 465 U.S 668, 690 (1984)). So long as the legislature expresses a plausible secular purpose for a legislative prayer statute in either the text or the legislative history, the court must defer to that stated intent. See Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating Louisiana Creationism Act under the Establishment Clause because it advanced a religious viewpoint and had no secular purpose); Wallace v. Jaffree, 472 U.S. at 75 (O'Connor, J., concurring) (even if the text and history of a statute does not express a secular purpose, the statute should be declared unconstitutional "only if it is beyond purview that endorsement of religion or a religious belief was and is the law's reason for existence.") (quoting Epperson v. Arkansas, 393 U.S. 97, 108 (1968) (internal quotations and citations omitted).

There is little doubt that the Council was motivated to exclude Wishnick from the prayer practice because of his non-mainstream religious beliefs. Further, the record indicates that ITO § 1954 was amended to prevent those who adhere to non-theistic or polytheistic religions from offering an invocational prayer. The true object of the amendment was not to advance Christianity or Judaism, but to exclude those religions that do not conform to traditional monotheistic views. Wishnick v. Imagine, 825 F. Supp. 3d 1983, 1986 (D. Froes. 2011). Although ITO § 1954 cannot be said to have a wholly secular purpose, the first prong of Lemon does not require that a statute have "exclusively secular" objectives. Wallace, 472 U.S. at 64; see, e.g., Waltz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding New York's property tax exception for religious organizations); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (holding that the local government may reimburse parents for transportation costs to parochial schools). Section 1954 was enacted to impose a sense of solemnity and unity over government proceedings, which the Court has held to be a valid secular purpose. Lynch, 465 U.S. at 621. Therefore, we must turn to the second prong of Lemon and determine whether ITO § 1954 has the primary effect of endorsing religion.

2. Primary Effect of ITO § 1954

The second prong of Lemon asks whether, irrespective of the government's actual purpose, the practice under review in effect conveys a message of endorsement or disapproval of religion. Lynch v. Donnelly, 465 U.S. at 690 (O'Connor, J., concurring). Unlike the Free Exercise Clause, the Establishment Clause does not require a showing of direct government compulsion. Rather, the enactment of laws endorsing a particular religion or religious view violates the Establishment Clause regardless of whether the law operates directly to coerce non-observing individuals. See, e.g., Engle, 370 U.S. at 430. When the support of "the government is placed behind a particular religious belief, the

indirect coercive pressure upon religious minorities to conform to the prevailing official approved religion is plain." Id. at 431. Religious liberty protected by the Establishment Clause is infringed upon when the government makes adherence to religion relevant to a person's standing in the political community. Lynch v. Donnelly, 465 U.S. 668, 687-689 (1984). Government endorsement of religion or a particular religious [*417] belief is unconstitutional because it "sends a message to non-adherents that they are outsiders, not full members of the political community," while sending a simultaneous message to adherents "that they are insiders, favored members of the political community." Lynch, at 688; see also Wynne v. Town of Great Falls, 376 F.3d 292 (4th Cir. 2004) (invalidating legislative prayers that were overtly Christian).

As the Supreme Court observed in Engle, when the support of "government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing official approved religion is plain." Id. at 431. This concern is especially prevalent in the legislative prayer context where attendance is mandatory for those making the law. Here, the ordinance has the effect of forcing those who adhere to non-monotheistic religious beliefs to choose between conforming their invocations to the majoritarian belief or not attending these legislative sessions. Imagine argues that the legislative prayer context is distinguishable from the school prayer context where the Court has declared such prayer practices unconstitutional. However, the mere fact that children may be more susceptible than adults to religious indoctrination and peer pressure is not sufficient to uphold the practice. An endorsement, such as a government's intention to favor religion or a religious belief, is not consistent with the established principle that the government must maintain complete neutrality towards religion. If ITO § 1954 is upheld, the inevitable effect will be the symbolic association of government power with religious intolerance.

3. Excessive Entanglement

Finally, under the third prong of Lemon, the statute must not foster an excessive government entanglement with religion. An individual's freedom to choose his or her own creed is the counterpart to the right to refrain from accepting the creed established by the majority: the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. See Wallace v. Jaffree, 472 U.S. 38 (1984). The administration of Imagine's prayer practice results in a level of entanglement far beyond what is sanctioned by the historical practice of legislative prayer. Entanglement occurs even when a local government's legislative prayer practice is not marked by proselyization or disparagement. Simply by controlling the prayer practice, government officials must engage in regulating the content of prayer and deciding which members of the public represent the diverse religious life of the community. Further, the practice of monitoring prayers to ensure that the invocations adhere to ITO § 1954 "inevitably results in excessive entanglement of church and state." See Aguilar v. Felton, 473 U.S. 402 (1985); Agostini v. Felton, 521 U.S. (1997); Lemon v. Kurtzman, 403 U.S. 602 (1971).

III. Conclusion.

For the forgoing reasons, we vacate the judgment of the District Court of Froessel and hold that ITO § 1954 violates both [*418] the Free Speech and Establishment Clauses of the First Amendment to the United States Constitution.

HAGAN, S., Concurring:

The practice of legislative prayer has been upheld based solely on the historical fact that the framers of the First Amendment engaged in this practice themselves. Even if the framers themselves did not consider legislative chaplains to violate the Establishment Clause, this history can no longer be treated as dispositive. While I concur in judgment, I believe the opportunity is ripe for the Supreme Court to re-examine the precedent set in Marsh v. Chambers, 463 U.S. 783 (1984). While the lower courts are struggling to articulate a rule of law pertaining to legislative prayer, no court has been able to demonstrate why a practice that so clearly violates the fundamental principles of the Establishment Clause continues to be upheld in the twenty-first century.

While the citizens of this nation may still be "a religious people whose institutions presuppose a Supreme Being," Marsh, 463 U.S. at 792 (quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952), the "religion" of this nation is unidentifiable. Any reference to God in a government prayer inevitably advances some religions over others, and religion over non-religion. There are over fifty different religious sects in the United States, each with profoundly different interpretations of the nature of a Supreme Being. Robert J. Delahunty, "Varied Carols": Legislative Prayer in a Pluralist Polity, 40 Creighton L. Rev. 517, 522 (2007) ("the purported distinction between sectarian and nonsectarian is illusory."). If government practices that have been long unbroken were inherently constitutional solely because of their historical pedigree, many invidious laws that have been declared unconstitutional would have been upheld.[16] Therefore, legislative prayer should be upheld only if it can be justified under some Establishment Clause principle. No such principle exists.

Dated: July 8, 2011

[16] Such historically-justified practices would include laws prohibiting interracial marriage, segregation in public schools, and most recently, same-sex marriage.

IN THE SUPREME COURT OF THE UNITED STATES

Order Granting Certiorari

Town of Imagine,

Petitioner,

- against -

Ian Wishnick,

Respondent.

Docket No. 5201121/11

October Term, 2011

In response to the appeal by Petitioner of the judgment of the United States Court of Appeals for the Thirteenth Circuit, this Court hereby grants review of the above-entitled matter on the following two issues:

1) Whether invocational prayers offered on behalf of the Council and citizens of Imagine during legislative sessions pursuant to ITO § 1954 constitutes government speech immune from First Amendment scrutiny, or is protected private speech.

2) Whether ITO § 1954's requirement that all invocations be nonsectarian and invoke only the divine guidance of God violates the Establishment Clause of the First Amendment.

APPENDIX

IMAGINE TOWN ORDINANCE

SECTION 1954 INVOCATIONAL PRAYER ACT

47 ITO § 1954

Amended September 11, 2010

Imagine Town Ordinance ("ITO") Section 1954 governs the Town Council's prayer practice, and as amended, provides:

(1) Any party may submit a request to offer an invocation on behalf of the council and citizens of Imagine;

(2) All requests must be submitted in writing at least thirty (30) days prior to the desired council meeting and must include the full text of the proposed invocation;

(3) A party may not offer an invocation without approval from the chairperson;

(4) The invocation may not reference a particular religious tenet or a particular deity;

(5) All invocations for divine guidance must be made in the name of "God" in accordance with the American civic tradition;

(6) Any person deviating from the approved invocation prayer proposal will be subject to a fine of no more than $1,000 and will be prohibited from offering an invocation at subsequent council meetings for five (5) years.