

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

DARYL COBRANCHI, ERIC ENGLE, and
FREEDOM FROM RELIGION
FOUNDATION, INC.,

Plaintiffs,

vs.

THE CITY OF PARKERSBURG,

Defendant.

CIVIL ACTION NO.: 2:18-cv-01198

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Introduction

The City of Parkersburg's summary judgment motion is fundamentally flawed because it is based upon the false premise that its legislator-led prayer practice is part of the "legislative prayer" tradition recognized by the Supreme Court in *Marsh v. Chambers* and *Town of Greece v. Galloway*. It is not. The history of legislative prayer recognized by those cases does not involve lawmaker-led prayer. Nor does it feature practices at all similar to the repeated communal recitation of widely-known, doctrinal Christian prayer, in the local government setting. The City's practice runs afoul of the long-held Establishment Clause truth that the government may not adopt official prayers, and it clashes in significant ways with the practices upheld in *Marsh* and *Greece*.

Lund v. Rowan County recognized these critical points of distinction in striking down the prayer practice it considered. Yet Defendant all but ignores *Lund* in favor of the Supreme Court's

legislative prayer cases. In doing so, it presupposes that its practice is a similar instance of legislative prayer without engaging in any analysis identifying a longstanding tradition that would include anything like its decades-long practice of lawmakers leading citizens in recitation of the Lord’s Prayer. While Defendant may prefer *Lund* not exist, it cannot prevail on a motion for summary judgment that ignores the Fourth Circuit case directly on point. Given its similarities to this case, *Lund* controls the outcome here.

Defendant’s attempts to align its practice with the one upheld in *Greece*—and indirect attempts to distinguish the facts of this case from those in *Lund*—are unsuccessful. The practice is not saved by the content of the Lord’s Prayer, the timing of its recitation, and bald assertions that it has solemnizing value. Defendant’s “piece by piece by piece” dissection of the practice misses the forest for the trees. *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 289 (4th Cir. 2017). The City of Parkersburg practices exclusively lawmaker-led recitation of a single Christian prayer at every meeting. These are the fundamental features that take the practice outside the legislative prayer tradition, place the case on all fours with *Lund*, and cause the impermissible advancement of a single faith in violation of the Establishment Clause. As such, Defendant’s Motion for Summary Judgment must be denied, and Plaintiffs’ motion should be granted.

Argument

I. The City of Parkersburg prayer practice is not part of the “legislative prayer tradition.”

As *Lund* observed, lawmaker-led prayer reserved only for local lawmakers is a “conceptual world apart” from the legislative prayer tradition identified in *Marsh* and *Greece*. *Lund v. Rowan Cty., N.C.*, 863 F.3d 268, 277 (4th Cir. 2017). In so holding, the court found that legislative prayer cases typically involved outside prayer givers participating by invitation and that courts have “not once described” a constitutional prayer practice featuring legislator-led

prayer. *Id.* at 277-78. In addition, the court found broad support for its conclusion that *Greece* took for granted the use of outside clergy in describing the historical legislative prayer tradition. *Id.* at 278. The differences between the legislative prayer tradition and lawmaker-led prayer were critical to *Lund*'s decision to conduct its own "fact-sensitive" review of the constitutionality of the Rowan County prayer practice. *Id.* at 276-81.

Lund's approach was not at odds with *Marsh* and *Greece*. It specifically and correctly distinguished prayer practices like the one before this Court from those previously upheld by the Supreme Court. *Id.* at 275-80. In so doing, *Lund* found that the "historical principles" discussed in *Greece* cannot control prayer practices so different from those within the legislative prayer tradition. *Id.* Neither *Greece* nor *Marsh* sought to settle the constitutionality of all prayer practices—within and outside the legislative prayer tradition; the Establishment Clause itself makes clear that "elected representatives [may not] invite their constituents to participate in prayers invoking a single faith for meeting upon meeting, year after year." *Lund* at 271-72. And both cases recognized limits where, as here, a practice "advance[s] a particular faith" over time. *Id.* at 276 (internal symbols omitted) (quoting *Marsh*, 463 U.S. 783, 794-95 (1989)).

Not only does Defendant fail to address *Lund*'s controlling distinction of *Marsh* and *Greece*, it also fails to provide its own argument as to how its practice fits within any longstanding tradition. When *Lund* searched for instances of lawmaker-led prayer within the "tradition of legislative prayer elaborated in *Marsh* and [] *Greece*," it found legislator-led prayer practices to be "the exception to the rule." *Id.* at 279. The City has offered no contrary historical analysis. Instead, it simply presumes that *Greece*'s "analytical framework for evaluating whether a legislative prayer practice violates the Establishment Clause" applies to this case. Def. Memo.

in Supp. (ECF No. 25), 9-10. Defendant has given the Court no reason to ignore the historical findings and sound reasoning of *Lund* in favor of *Greece*.

In light of this failure and because *Lund* is binding on this Court, Defendant's blindered "legislative prayer" argument fails to support its motion for summary judgment. The key features that drove the outcome in *Lund* are present here, and they distinguish strikingly the Parkersburg prayer practice from those considered in *Marsh* and *Greece*. Given the critical differences, these cases serve only as the "doctrinal starting point" for this Court's analysis. And when the features of this practice are considered "through the lens of the prayer-giver's identity," as called for by *Lund*, the result is clear: Plaintiffs are entitled to summary judgment. *Id.* at 281.

II. The City of Parkersburg prayer practice violates the Establishment Clause because it advances Christianity.

A. The Lord's Prayer does not ask for legislative guidance and instead advances Christianity.

The Court should reject Defendant's argument that it may look past the content of the Lord's Prayer under the auspices that "a challenge based solely on the content of a *particular prayer* will not likely establish a constitutional violation." Def. Memo. in Supp. 10 (quoting *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1813-14, 572 U.S. 565, 565-67 (2014)) (emphasis added). *Greece*'s reasoning that the content of a *particular prayer* will not spoil an otherwise constitutional legislative prayer practice was designed to prevent courts from being asked to parse specific prayers given in the context of a broader, inclusive prayer practice. *Greece*, 572 U.S. at 567. This reasoning presupposed (1) that the "particular prayer" was part of an otherwise permitted practice that falls within the legislative prayer tradition and (2) that the "particular prayer" would be but a single prayer among a larger group of varied prayers presented without

the effect of advancing one religion over time. Thus, it is only applicable in cases involving the same circumstances.

In this case, the Lord's Prayer is not a "particular prayer" in a practice falling within the country's "legislative prayer tradition"; it is *the prayer* of Parkersburg recited by its lawmakers meeting after meeting, year after year. Bedrock Establishment Clause principles existing long before *Marsh* and *Greece* prohibit Parkersburg from adopting an official prayer. *Lund*, at 281 (*Id.* at 281 ("[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers....'" (citing *Lee v. Weisman*, 505 U.S. 577, 588 (1992), *Engel v. Vitale*, 370 U.S. 421, 425 (1962))). In addition, the fact that lawmakers lead the prayer makes the content more important. Given the unique features of the Parkersburg practice, the Court must look closely at the content of the Lord's Prayer.

A review of the prayer shows it to be a doctrinal Christian prayer that does not serve the aims of the legislative prayer tradition described in *Marsh* and *Greece*.¹ The Lord's Prayer is unmistakably Christian, comes directly from the New Testament, has long been held to be a singularly Christian prayer, and features prominently in Christian worship. *See, e.g., Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 267, 284 n.61 (1963) (Brennan, J., concurring) (referring to The Lord's Prayer as "an essentially Christian supplication" and stating that recitation of The Lord's Prayer is "clearly sectarian"); *Skarin v. Woodbine Cmty. Sch. Dist.*, 204

¹ As discussed in Plaintiffs' Motion for Summary Judgment, *Lund* distinguished between doctrinal and ecumenical aspects of religion. In so doing *Lund* concluded that doctrinal aspects are more coercive because they are "most often expressed in religious services" and "signify the ideas of rituals that make religions distinctive." *Lund*, 863 F.3d at 285-86. While prayers within the legislative tradition may "give[] voice to the ecumenical dimensions of religious faith," doctrinal distinctions "risk the divisiveness the Establishment Clause seeks rightly to avoid." *Id.* at 286 (internal quotations and citations omitted).

F.Supp.2d 1195, 1197 (S.D. Iowa 2002) (citing expert testimony to support conclusion “that the words of ‘The Lord’s Prayer’ and its ritual unison recitation or singing are central to the Christian faith and liturgy”). The version of the prayer recited by City Council’s prayer incorporates a biblical translation of Matthew 6:9–13 as well as a concluding Christian doxology. These words land far from the sorts of ecumenical request for guidance in the performance of legislative function typically found in the legislative prayer tradition. In light of these features the prayer does far more to advance Christianity than it does to solemnize Parkersburg’s meetings.

B. Parkersburg’s lawmaker-led practice is far more coercive than previously-upheld legislative prayer practices.

The circumstances and practices under which Parkersburg has carried out its prayer practice further separates the practice presented here from the “legislative prayer” practices considered in *Marsh* and *Greece*. Defendant’s suggestion that the sectarian content of the Lord’s Prayer is the only support for Plaintiffs’ argument that the practice creates an unconstitutionally coercive environment is incorrect. Plaintiffs need only show that the prayer practice advances one faith over time, not that it is coercive. Even so, the history of invitations to participate, the communal recitation of the prayer, and the setting in which the prayer is delivered support the perception of the prayer as a statement of the government’s Christianity directed outwardly towards those in attendance.

These features, viewed through the lens of the Councilmembers as the prayer-givers, reveal an improperly coercive prayer practice. For years, the City Council invited citizens in attendance to participate in the prayer and recognized the recitation of the prayer in its minutes as part of each meeting. JSF ¶24; Def. Memo. in Support 4. While verbal and non-verbal invitations to participate have lessened, community members continue—likely in part because of the

practice's history—to participate communally in the recitation of the prayer. Moreover, the City Council continues to direct its unified recitation of the Lord's Prayer in the direction of their audience as they rise and stand above those seated below. As such, the practice appears to be an announcement of the City's and its Council's preference for Christianity

Prayer practices in line with the legislative prayer tradition show the opposite. As Defendant's own review of *Greece* shows, the principal audience for traditional legislative prayer practices is the lawmakers themselves. Def. Memo. in Supp. 14 (quoting *Greece*, 134 S. Ct. at 1825-26). This is signaled not just by the fact that legislative prayer invocations are directed towards—not by—lawmakers but also because the messages of these prayers tend to call for guidance in performing the lawmaking function. *Id.* Again, the lack of any such message in the Lord's Prayer and the fact that Councilmembers in this case deliver the “invocation” place this case in stark contrast and support the conclusion of unconstitutional advancement of religion.

The Supreme Court's “reasonable observer” in *Greece* would conclude the same. Defendant attempts to rely upon this reasonable observer as an ally in its Memorandum in Support. But the reasonable observer employed in *Greece*, which was integral to the Court's decision, was aware of the legislative prayer tradition, and the features of the Town of Greece's practice rendered it more like prayers within that tradition than not. *Greece*, 134 S. Ct. at 1825-26. Because the prayer practice in this case is so different from the practices that make up the legislative prayer tradition described in *Greece*, neither that tradition nor a reasonable observer

aware of it help save the practice. In fact, because the practice here differs from those historical practices so significantly, such awareness cuts against a finding of constitutionality.

C. The timing of the lawmaker-led recitation of the Lord’s Prayer does not alter the impermissible effect of the practice.

Government-led prayers constitute government speech regardless of whether they occur before or during government meetings. *See Turner v. Fredericksburg*, 534 F.3d 352, 353 (4th Cir. 2008) (holding pre-meeting prayers to be government speech), *cert. denied*, 129 S. Ct. 909 (2009); *Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 288 (4th Cir. 2005); *Joyner v. Forsyth County*, 1:07CV243, 2009 WL 3787754, at *5 (M.D.N.C. 2009) *aff’d*, 653 F.3d 341 (4th Cir. 2011). In *Turner*, the Fourth Circuit Court of Appeals applied its four-factor test to conclude that the Council of the City of Fredericksburg’s legislative prayers were government speech. 534 F.3d 352, 354. The test considers: (1) the central “purpose” of the program in which the speech in question occurs; (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal speaker”; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech. *Id.* at 354–55.

Under this test, the legislative prayers delivered by the Parkersburg City Council are government speech. First, the purpose of the prayer “suggests that the speech is governmental in nature.” *Id.* at 354. The prayer is an official part of every City Council meeting “and is delivered as part of the opening, along with the Pledge of Allegiance.” *Id.* As to the second and third factors, the City Council “exercises substantial editorial control over the speech in question,” as it delivers the same Christian prayer at each meeting without deviation. *Id.* at 354–55. The City Council members are “allowed to speak only by virtue of [their] role as . . . Council member[s].” *Id.* at 355. Finally, the City Council members recite the prayer as a collective, leaving no

question that the government “bears the ultimate responsibility for its content.” *Id.* No private entity has been given the opportunity to dictate the content of the speech occurring at the outset of every meeting. Thus, the City Council’s in-unison recitation of the Lord’s Prayer constitutes government speech such that it is subject to the restrictions placed on that speech by the Establishment Clause.

Greece does not change this. While these cases were decided before *Greece*, nothing in *Greece* purports to change their analysis of when speech will be attributed to the government. In addition, *Greece*’s consideration of the timing of the Town of Greece prayer practice is inapplicable to this Court’s consideration of the Parkersburg practice. Again, the prayer practice considered in *Greece* involved prayer that fell within the legislative prayer tradition *Greece* described. The ceremonial portion of the town meetings in *Greece*, during which guest ministers delivered prayers, featured other secular aspects of community celebration. *Greece*, 572 U.S. at 591. This characteristic of the practice provided *further support* for the constitutionality of the practice. Here, the prominent features of the Parkersburg practice demonstrate an unconstitutional practice that has advanced Christianity over time. The timing of the delivery of the performance of this practice does not outweigh the conclusion compelled by these other aspects of the practice.

III. Plaintiff’s requested relief is narrowly tailored to the Parkersburg prayer practice and does not support Defendant’s Motion for Summary Judgment.

There are three flaws with Defendant’s argument that the claim for relief in Plaintiffs’ Verified Complaint somehow supports Defendant’s offensive motion for summary judgment. First, Plaintiffs request relief beyond the injunctive relief cited by Defendant, to which they would be entitled if they prevail. Compl. (ECF No. 1), 12. Second, the relief in their Complaint is not part of Plaintiffs’ claim (and associated burdens) such that it would support Defendants’

argument that it should prevail as a matter of law. Third, and most importantly, Defendant's concern over the relief requested in Plaintiffs' Complaint is moot because Plaintiffs have requested specific relief in their own Motion for Summary Judgment that does not ask the Court to end all legislative prayer. Thus, Plaintiffs' requested relief—as specifically outlined in their Proposed Order submitted with their own Motion for Summary Judgment—provides no support for Defendant's summary judgment motion.

The declaratory judgment and nominal damages requested by Plaintiffs are proper forms of relief in light of Plaintiffs' injuries. In addition to their claim for injunctive relief (with which Defendants take issue), Plaintiffs have also sought a declaratory judgment declaring Parkersburg's prayer practice unconstitutional and nominal damages in the amount of \$1.00 per Plaintiff. *Id.* Nominal damages are an appropriate form of damages for Establishment Clause plaintiffs, and declaratory relief is an appropriate form of prospective relief. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003). Thus, even if the Court determines Plaintiffs are not entitled to the injunctive relief requested in their Complaint, Plaintiffs can recover these other forms of relief.

The specific prayer for injunctive relief in Plaintiffs' Complaint does not affect the evidentiary burdens necessary for Plaintiff to prevail on its substantive claims. “A demand for relief is not part of a plaintiff's statement of [a] claim.” *Charles v. Front Royal Volunteer Fire and Rescue Dept., Inc.*, 21 F.Supp.3d 620, 629 (W.D. Va. May 13, 2014) (quotations and citations omitted) (so holding in the context of a defendant's motion to dismiss under Rule 12(b); *Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002). While these decisions occurred in the context of motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure, the rationale underlying them extends to summary judgment as well. In particular, these cases have

looked to Rule 54(c) of the Federal Rules of Civil procedure to determine that a flawed prayer for relief does not provide a basis to dismiss a party's claim in its entirety. *Bontkowski*, 305 F.3d at 762. Rule 54(c) provides that a party entitled to relief—i.e., a party who prevails on the merits of its case—should receive relief to which it is entitled, even if the relief has not been demanded in its complaint. Fed. R. Civ. P. 54(c). Given that the Court will ultimately determine the relief to which Plaintiffs are entitled, regardless of the prayer for relief contained in Plaintiffs' Complaint, the specific relief requested therein does not provide Defendants a basis to seek summary judgment against Plaintiffs.

In any event, Plaintiffs have provided a specific and narrowly-tailored claim for relief in their Proposed Order provided with their own Motion for Summary Judgment. ECF No. 26-1. In that Proposed Order, Plaintiffs seek an injunction to permanently enjoin Defendant (and its officers and agents) from “delivering, scheduling, or initiating *the recitation of the Lord's Prayer* at meetings of the Parkersburg City Council.” *Id.* (emphasis added). In addition, and in light of Fourth Circuit case law addressing the issue of what constitutes government speech, Plaintiffs have also requested an injunction enjoining the inclusion of the Lord's Prayer in any ceremonial prelude to Parkersburg's bi-monthly meetings. These requests relate only to Parkersburg's longstanding practice of Lord's Prayer recitation and certainly do not seek to end all forms of legislative prayer in this case.

Conclusion

Lund controls the outcome of this case and dictates that the Parkersburg prayer practice must be struck down. Parkersburg's lawmaker-led recitation of the Lord's Prayer strays far from the legislative prayer tradition described in *Greece*, and it aligns in all material respects with the prayer practice addressed in *Lund*. Under *Lund*'s analysis, the features of the longstanding prayer

practice reveal the practice to be an improper advancement of Christianity by the City of Parkersburg.

Even if the Court finds that the result in *Lund* does not directly control the outcome here, the Court must reach the same conclusion. *Marsh* and *Greece* do not direct the result of the Court's constitutional analysis. The prayer practice at issue in this case does not fall within the historic tradition of legislative prayer that was recognized in *Marsh* and controlled the outcome in *Greece*. Therefore, the Court must undertake its own constitutional analysis of the Parkersburg practice in light of other well-established Establishment Clause principles and the broader principles embodied in *Marsh* and *Greece*. This is precisely the analysis announced and undertaken by *Lund*, and the Court's own analysis of the Parkersburg prayer practice under these principles will lead to the conclusion that the practice is unconstitutional.

Respectfully Submitted,

/s/ Marcus B. Schneider
Marcus B. Schneider
W.V. I.D. No. 12814
STEELE SCHNEIDER
420 Fort Duquesne Blvd, Suite 500
Pittsburgh, PA 15222
412-235-7682
marcschneider@steeleschneider.com

Kristina Thomas Whiteaker
W.V. I.D. No. 9434
The Grubb Law Group
1114 Kanawha Boulevard East
Charleston, WV 25301
304-345-3356
kwhiteaker@grubblawgroup.com

Patrick C. Elliott
Christopher Line
Freedom From Religion Foundation, Inc.
10 N. Henry St.
Madison, WI 53703
608-256-8900
patrick@ffrf.org
chris@ffrf.org

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, the foregoing **Response in Opposition to Defendants' Motion for Summary Judgment** was filed electronically on the Court's ECF System. Notice of this filing will be sent to all parties by operation of the Court's electronic case filing system and constitutes service of this filing under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure. Parties may access this filing through the Court's ECF system.

/s/ Marcus B. Schneider

Marcus B. Schneider, Esq.