

Supreme Court Likely to Restore Freedom to Pray at Public Events

Those seeking the right to pray at government events consistent with their religious beliefs seem poised for a major victory after Wednesday's oral arguments before the Supreme Court in *Town of Greece v. Galloway*.

The plaintiffs in this lawsuit are asking the **Supreme Court** to declare that faith-specific content in public prayers (which they call "sectarian" prayers) violates the Constitution, and so government bodies must tell pastors, priests, rabbis and anyone else giving prayers that they cannot express any belief with which other people of faith might disagree.

Justice Kennedy did not like that argument, saying, "It seems to me that enforcing [that] standard ... involves the state very heavily in the censorship and the approval or disapproval of prayers." And with that, it's almost certain the plaintiffs lost their case.

Updating our earlier report providing the details of the case and history of this issue of public prayer, *Galloway* is a case involving offering public invocations at the outset of meetings of lawmaking bodies such as a house of Congress, state legislature or city council.

The court had upheld this tradition—called legislative prayer—in its 1983 case *Marsh v. Chambers*, noting that the First Congress—which wrote the Bill of Rights, including the Establishment Clause of the First Amendment at issue here—created congressional chaplains' offices to offer legislative prayers just a few days after they wrote the Establishment Clause. The court also noted that these prayers began with the Continental Congress in 1774 and endured to the

present at the federal, state and local levels.

In *Galloway*, the town of Greece invites all houses of worship to volunteer to pray at town board meetings and further welcomes any residents who belong to faiths that do not have a house of worship or belong to an organized religion by allowing any citizen to volunteer. All volunteers are allowed to pray on a first-come, first-served basis.

While this 90 percent Christian town predictably has a heavy majority of Christian volunteers, prayers have been offered by adherents of other faiths, such as a Jewish man, a Baha'i follower and even a Wiccan priestess who prayed to the pagan Greek deities Apollo and Athena.

The town is represented by the Alliance Defending Freedom (ADF), which recruited top Supreme Court litigator Thomas Hungar to argue the case.

Hungar began by noting how much of an easier case this was compared to the Court's 1983 *Marsh* case from Nebraska. "Nebraska had one chaplain from one [Christian] denomination for 16 years, and yet that was constitutionally permissible, and his prayers were not distinguishable in content from the prayers at issue here," he said.

Hungar also noted that the plaintiff in *Marsh*—an atheist legislator named Ernest Chambers—felt pressured to stand when the prayers were offered because not doing so would be noticed by his colleagues, with whom he had to make legislative deals, but that the court nonetheless reasoned he was an adult and thus expected to deal with things he finds offensive or considers unconstitutional.

Justice Kennedy asked if the court should uphold legislative prayer as an "aberration" based on its 240-year history, later adding, "It seems to me that your argument begins and ends there."

Hungar disagreed, emphasizing the town's broader argument in its legal briefs.

"The principles that undergird the Establishment Clause are equally consistent with the position we're advancing here. ... The core of Establishment Clause concern is coercion, or conduct that is so extreme that it leads to the establishment of religion because it is putting the government squarely behind one faith to the exclusion of others, and that's clearly not what's going on here," he said.

Justice Stephen Breyer asked what was wrong with actively reaching out to non-Christians to make the prayer practice more diverse, including reaching out to those who are not religious.

Justice Antonin Scalia immediately followed up, asking Hungar to explain, "What is the equivalent of **prayer** for somebody who is not religious?" The courtroom erupted in laughter when Breyer cut Hungar's answer off to say, "Perhaps he's asking *me* that question, and I can answer it later."

The **Obama administration** also participated in the argument, represented by Deputy Solicitor General Ian Gershengorn. The administration came down firmly on the side of the town, though—not surprising—with a much narrower argument than Hungar and ADF.

Adopting the argument and statistical facts that I presented in a brief I filed in this case for members of Congress, Gershengorn showed that parties cannot agree on what sort of words are "sectarian," and therefore "whether, for example, 15 percent, 50 percent, [or] 60 percent of the congressional prayers are sectarian. There are debates about whether 'Holy Spirit' is sectarian. A district court has held that 'Allah' is *not* sectarian."

In other words, a nonsectarian rule would embroil federal judges in religious debates, which they are not qualified for

and which the Constitution does not allow.

The plaintiffs in the case were represented by Prof. Doug Laycock, who had a rough time during argument. Laycock argued, "The town should instruct—should have a policy in the first place, which it doesn't—instruct the chaplains: Keep your prayer nonsectarian."

To this, Justice Samuel Alito replied, "Give me an example of a prayer that would be acceptable to Christians, Jews, Muslims, Buddhists [and] Hindus ... Wiccans, Baha'i."

Chief Justice John Roberts interjected, "And **atheists**."

Scalia enthusiastically seconded that thought, causing laughter again throughout the courtroom by insisting, "And atheists! Throw in the atheists, too!"

When Laycock admitted there is no prayer an atheist would agree with (making it odd he would take this approach—since one of his clients here is an atheist), Alito allowed him to exclude atheists for the moment and reiterated, "Give me an example of a prayer that is acceptable to all of the [religious] groups I mentioned."

At this point Laycock made a significant mistake. He asked for one of his team members to hand him a copy of the case record and burned up time looking for such a prayer. He found one to "the Almighty," until Alito pointed out that people who do not believe in one single God would not accept it.

He tripped over himself again by citing another prayer until he realized, "No, I'm sorry. That ends 'in Christ's name.'"

Scalia provided comic relief yet again by asking, "What about devil worshippers?"

Laycock conceded that group also, answering, "Well, if devil worshippers believe that the devil is the Almighty, they might be OK. But they're probably out [too]."

Roberts then asked skeptically, "So, there is an official in the town council that is to instruct clergy about what kind of prayer they can pray?"

"That's right," Laycock answered, and probably guaranteed he lost Roberts' vote. That clearly was not an answer the chief considered acceptable.

Scalia then tried to bring all this into the context of public officials as citizens, each of which has their own personal beliefs.

"These people perhaps invoke the deity at meals," he said. "They should not be able to invoke it before they undertake a serious governmental task such as enacting law or ordinances? There is a serious religious interest on the other side of this thing, that people who have religious beliefs ought to be able to invoke the deity."

When Laycock insisted that certain beliefs cannot be mentioned in prayer at government events, Scalia asked incredulously, "You want to pick the groups we're going to exclude?"

Laycock might have even managed to lose Breyer, which would make this a 6-3 judgment in favor of the prayergivers. After listening to Laycock set forth his elaborate scheme of what prayer-givers are not allowed to say, Breyer responded, "If those [restrictions] are satisfactory to you, then I wonder, are they satisfactory to everyone? ... There will be people who say, 'But I cannot give such a prayer. ... I must refer to God as I know that God by name.' And what do we do with them?"

Laycock's answer was, "I respect that, and they should not be giving government prayers." After that moment, it seemed impossible for the secularists to win this case.

Even Justice Sonia Sotomayor, who is expected to still vote in favor of the challengers, said, "You hear the resistance of some members of the court to sitting as arbiters of what's

sectarian and nonsectarian, and I join some skepticism as to knowing where to join that line.”

Justice Elena Kagan aggressively pressed a line of questioning hostile to Hungar and ADF but nevertheless said to Laycock, “I think it’s hard because the court lays down these rules and everybody thinks that the court is being hostile to religion, and people get unhappy and angry and agitated in various kinds of ways. And every time the court gets involved in things like this, it seems to make the problem worse rather than better.”

This is not necessarily sympathetic to the town, however. It could be Kagan laying the foundation to say that prayer at government events should be banned altogether. And her other questions make it very likely she will side with the challengers.

In his rebuttal, Hungar concluded, “We think that the dangerously overbroad theories advanced by respondents are at odds with our history and traditions, which we reflect [in] this tradition of tolerance for religious views that we don’t agree with in the legislative context. [Their] theories also conflict with the [Constitution’s] Religion Clauses’ mandate, that it’s not the business of government to be regulating the content of prayer and regulating theological orthodoxy.”

The court did not discuss the much broader issues presented in the briefs filed in the case about whether to re-examine the general test that normally applies in Establishment Clause decisions, making it unlikely the court will take this opportunity to end the hostility that expressions and displays of faith routinely encounter in federal court as a result of that deeply flawed framework.

It is still possible that the court could reach that broader issue. But even if decided on narrow grounds, this is likely to be a very significant victory for religious liberty supporters.

A decision will be handed down before the first week of July.

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