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IN THE SUPREME COURT OF THE UNITED STATES

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TOWN OF GREECE, NEW YORK, :

Petitioner : No. 12-696

v. :

SUSAN GALLOWAY, ET AL. :

- - - - - x

Washington, D.C.

Wednesday, November 6, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

THOMAS G. HUNGAR, ESQ., Washington, D.C.; on behalf of Petitioner.

IAN H. GERSHENGORN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

DOUGLAS LAYCOCK, ESQ., Charlottesville, Virginia; on behalf of Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in case 12-696, the Town of Greece v. Galloway.

Mr. Hungar.

ORAL ARGUMENT OF THOMAS G. HUNGAR

ON BEHALF OF THE PETITIONER

MR. HUNGAR: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals correctly held that the legislative prayers at issue in this case were not offensive in the way identified as problematic in Marsh, but the court then committed legal error by engrafting the endorsement test onto Marsh as a new barrier to the practice of legislative prayer.

JUSTICE KAGAN: Mr. Hungar, I'm wondering what you would think of the following: Suppose that as we began this session of the Court, the Chief Justice had called a minister up to the front of the courtroom, facing the lawyers, maybe the parties, maybe the spectators. And the minister had asked everyone to stand and to bow their heads in prayer and the minister said the following: He said, we acknowledge the saving sacrifice of Jesus Christ on the cross. We draw

1 strength from His resurrection. Blessed are you who has
2 raised up the Lord Jesus. You who will raise us in our
3 turn and put us by His side. The members of the Court
4 who had stood responded amen, made the sign of the
5 cross, and the Chief Justice then called your case.

6 Would that be permissible?

7 MR. HUNGAR: I don't think so, Your Honor.
8 And, obviously, this case doesn't present that question
9 because what we have here is a case of legislative
10 prayer in the Marsh doctrine, which recognizes that the
11 history of this country from its very foundations and
12 founding, recognize the propriety of legislative prayer
13 of the type that was conducted here.

14 JUSTICE GINSBURG: Well, the question --

15 JUSTICE KAGAN: The extension just between
16 the legislature and any other official proceeding; is
17 that correct?

18 MR. HUNGAR: Well, clearly, Marsh involves
19 legislative prayer, the tradition that we rely on
20 involves legislative prayer, and this case involves
21 legislative prayer. Whether -- what rule might apply in
22 other contexts would depend on the context.

23 JUSTICE KAGAN: Suppose I ask the exact same
24 question, same kinds of statements, same sort of
25 context, except it's not in a courtroom. Instead, it's

1 in a congressional hearing room. Maybe it's a
2 confirmation hearing, maybe it's an investigatory
3 hearing of some kind, and that a person is sitting at a
4 table in front of the members of a committee, ready to
5 testify, ready to give his testimony in support of his
6 nomination. The minister says the exact same thing.

7 MR. HUNGAR: I think that's a -- that's a
8 closer question because of the congressional history,
9 but, of course, at least as far as I'm aware, they have
10 this history as it applies to the legislative body as a
11 whole, not to committees, but it would be a different
12 question. One, obviously, important distinguishing
13 factor there, in addition to the fact that it's not the
14 legislative body as a whole --

15 JUSTICE SCALIA: We should -- we should --

16 MR. HUNGAR: -- is that people are compelled
17 to attend and testify under oath, which is a different
18 situation from the one here.

19 JUSTICE KAGAN: Well, why --

20 JUSTICE SCALIA: We should assume -- to, to
21 make it parallel to what occurred here that the next day
22 before the same committee a Muslim would lead the
23 invocation and the day after that an orthodox Jew. I
24 mean --

25 MR. HUNGAR: Yes, Your Honor.

1 JUSTICE SCALIA: -- it makes a difference
2 whether it's just one -- one denomination that is being
3 used as -- as chaplain or open to various denominations.

4 MR. HUNGAR: That's correct, Your Honor.
5 That's why we believe this case is actually an easier
6 case than Marsh because in Marsh, there was a paid
7 chaplain from the same denomination for 16 years.

8 JUSTICE GINSBURG: But the question,
9 Mr. Hungar --

10 JUSTICE KAGAN: Suppose you are correct, Mr.
11 Hungar, for 11 years the prayers sounded almost
12 exclusively like the ones that I read, and one year on
13 four occasions, there was some attempts to vary it up,
14 to have a Baha'i minister or a -- a Wiccan, but for the
15 most part, not out of any malice or anything like that,
16 but because this is what the people in this community
17 knew and were familiar with and what most of the
18 ministers were, most of the prayers sounded like this.

19 MR. HUNGAR: Well, no. I mean, it's clearly
20 not correct that most of the prayers sounded like the
21 one you just read.

22 JUSTICE GINSBURG: But your position is that
23 wouldn't matter, as I understand, because you have --
24 you have -- you have two limitations, proselytizing and
25 disparaging. And -- but I think Justice Kagan's

1 question just set place -- place limitations. One could
2 read your brief and say, well, it doesn't matter; it
3 could be an executive body, it could be a court, it
4 could be a town meeting, a school board, a zoning board,
5 a utilities board. That's -- is this case about prayer
6 at the beginning of a legislative session or is it about
7 prayer in all three branches of government?

8 MR. HUNGAR: This case is about prayer at
9 the beginning of a legislative session. That's exactly
10 what the meetings at issue here are -- are about.
11 That's what the board of the Town of Greece is. In
12 fact, Respondents try to argue that this is somehow what
13 they call coercive because there are public hearings
14 that are held. But the public hearings are held at
15 least 30 minutes after the prayer and anyone coming for
16 the purpose of the public hearing can easily show up
17 after the prayer if they don't want to be there.

18 JUSTICE KENNEDY: Why -- why was it that you
19 so promptly answered Justice Kagan's question to the
20 effect that this would be a violation? What/why would
21 there be a violation in the instance she put?

22 MR. HUNGAR: I'm sorry. Which instance,
23 Your Honor?

24 JUSTICE KENNEDY: The first question Justice
25 Kagan asked you, the hypothetical about the prayer in

1 this Court. You seemed readily to agree that that would
2 be a First Amendment violation. Why?

3 MR. HUNGAR: Well, perhaps I conceded too
4 much, but I think the important distinction is between
5 the -- both the judicial context and the legislative
6 context on the one hand and the -- the absence of a --
7 of a comparable history that shows that it did not --

8 JUSTICE KENNEDY: Well, is it -- is it
9 simply history that makes -- there's no rational
10 explanation? It's just a historical aberration?

11 MR. HUNGAR: No, it's not -- it's not a
12 question of historical aberration. It's a question
13 of --

14 JUSTICE KENNEDY: Well, what's -- what's the
15 justification for the distinction?

16 MR. HUNGAR: It's a question of what the
17 Establishment Clause has understood, both at the time
18 and throughout history, to forbid and not to forbid.
19 The judiciary is different than a legislature.
20 Legislatures can be partisan, the judiciary should not
21 be. People are compelled to testify under oath.

22 JUSTICE SCALIA: But you -- but you -- you
23 had no problem, Mr. Hungar, with the marshal's
24 announcement at the -- at the beginning of this session.
25 God save the United States and this Honorable Court.

1 There -- there are many people who don't believe in God.

2 MR. HUNGAR: That's correct, Your Honor.

3 And clearly --

4 JUSTICE SCALIA: So that's okay?

5 MR. HUNGAR: Yes.

6 JUSTICE SCALIA: Why -- why is that okay?

7 MR. HUNGAR: Whether -- if -- perhaps I
8 misunderstood the hypothetical. If the hypothetical is
9 as you described with a different minister, with -- with
10 an open process, a nondiscriminatory process like the
11 one we have here, I think it would be a much closer case
12 than this one, but it might be constitutional. But
13 whether that case is constitutional or not, this case is
14 far from the constitutional line, further from the
15 constitutional line than the State legislature's
16 practice in Marsh. Because there, Nebraska had one
17 chaplain from one denomination for 16 years and yet,
18 that was constitutionally permissible, and his prayers
19 were not distinguishable in content from the prayers at
20 issue here during the time that was relevant to the
21 case.

22 CHIEF JUSTICE ROBERTS: Would it make a
23 difference in your analysis if instead of, as I
24 understand the hypothetical, there was a point of
25 saying, all rise or something of that sort? Would it

1 make a difference if the hypothetical Justice Kagan
2 posed were the same except people weren't told to rise
3 or invited to rise or, in fact, were told to stay
4 seated, something like that, so there would be no
5 indication of who was participating in the prayer? Is
6 that a -- is that a ground of distinction that you're
7 willing to accept or not?

8 MR. HUNGAR: I don't think that is
9 constitutionally significant, unless -- I mean, it might
10 be different if people are compelled to stand, but
11 whether they are or not -- I mean, in the Marsh case
12 itself, Senator Chambers testified that the practice in
13 the Nebraska legislature was for people to stand and he
14 felt coerced to stand. Because when he was there -- he
15 tried to avoid it -- but when he was there, he felt he
16 needed to stand because everybody else was doing it and
17 he needed to have dealings with these people as a fellow
18 legislator.

19 The Court, nonetheless, held that he's an
20 adult and he -- he is expected to be able to disagree
21 with things that he disagrees with and that is not a
22 constitutional violation.

23 CHIEF JUSTICE ROBERTS: I wonder how far you
24 can carry the -- your historical argument and whether
25 some of these things are properly regarded as more

1 historical artifacts, right? I mean, our motto is "In
2 God we trust," right? That's the motto. It's been that
3 for a long time, right?

4 MR. HUNGAR: Yes, sir.

5 CHIEF JUSTICE ROBERTS: But wouldn't we look
6 at it differently if there were -- suddenly if there
7 were a proposal today for the first time, to say let's
8 adopt a motto "In God we trust"? Would we view that the
9 same way simply because it's -- in other words, the
10 history doesn't make it clear that a particular practice
11 is okay going on in the future. It means, well, this is
12 what they've done -- they have done, so we're not going
13 to go back and revisit it. Just like we're not going to
14 go back and take the cross out of every city seal that's
15 been there since, you know, 1800. But it doesn't mean
16 that it would be okay to adopt a seal today that would
17 have a cross in it, does it?

18 MR. HUNGAR: Not necessarily. But -- but I
19 think history is clearly important to the Establishment
20 Clause analysis under this Court's precedence in two
21 significant respects, both of which apply here, one of
22 which might not apply in your -- with respect to your
23 hypothetical.

24 The first being the history shows us that
25 the practice of legislative prayer, just like the motto,

1 has not, in fact, led to an establishment and,
2 therefore, we can be confident it is not in danger of
3 doing so. And secondly, the history of legislative
4 prayer, unlike your hypothetical, goes back to the very
5 framing of the First Amendment. The fact that -- then
6 this is what the Court said in Marsh -- the fact that at
7 the very time the First Congress was writing and sending
8 the -- the First Amendment out to the States to be
9 ratified, they adopted the practice of having a
10 congressional chaplain. And the congressional
11 chaplain -- the record -- the historical record is
12 clear -- gave prayers that were almost exclusively
13 sectarian, as Respondents define that word.

14 JUSTICE SCALIA: I don't really understand
15 your -- your answer. How can it be that if the practice
16 existed in the past, it was constitutional? Was it
17 constitutional in the past?

18 MR. HUNGAR: Yes, Your Honor.

19 JUSTICE SCALIA: If it was constitutional in
20 the past, why -- why would it be unconstitutional if the
21 same thing is done today, even without any past parallel
22 practice. That's a nice alliteration. Is past parallel
23 practice essential?

24 MR. HUNGAR: I think this Court's precedents
25 have also indicated, at least in some cases, that if --

1 if a practice is constitutional, as we know it to be the
2 case because of the fact that it has been understood to
3 be constitutional and consistent with our religion
4 clauses from the founding, other practices that have no
5 greater impact, no greater tendency to establish
6 religion, are equally constitutional. And we believe
7 that is an appropriate doctrine.

8 JUSTICE GINSBURG: Is there -- is there any
9 constitutional historical practice with respect to this
10 hybrid body? It's not simply a legislature. It has a
11 number of administrative functions. Sometimes it
12 convenes as a town meeting. Sometimes it entertains
13 zoning applications. Is there a history for that kind
14 of hybrid body, as there is for the kind of legislature
15 we had in Nebraska or our Congress?

16 MR. HUNGAR: Yes, Your Honor, in two
17 respects. First of all, the Becket Fund amicus brief
18 identifies various examples of -- of municipal
19 government prayer over the course of our founding, which
20 is -- over the course of our history, which is not
21 surprising given this -- the legislative practice at the
22 State and Federal level as well.

23 And secondly, Congress for much of its -- of
24 much of our history entertained private bills, which
25 would be the equivalent in terms of legislative or

1 non-purely legislative functions you're talking about,
2 with what the Town of Greece does here.

3 JUSTICE KENNEDY: Well, if we had a -- if we
4 had a series of cases, what -- what is a -- a utility
5 rate-making board would come to the Supreme Court. We
6 say, well, it's enough like a legislative that it's like
7 Marsh. But I don't think the public would understand
8 that.

9 MR. HUNGAR: Well, Your Honor, whatever --
10 whatever line might be drawn between non-legislative
11 bodies and legislative bodies, what we are talking about
12 here is a legislative meeting of a legislative body, and
13 it would be -- it would be incongruous, as this Court
14 said in Marsh, if Congress could have legislative
15 prayers and the States couldn't. It would be equally
16 incongruous --

17 JUSTICE KENNEDY: Well, the essence of the
18 argument is we've always done it this way, which has
19 some -- some force to it. But it seems to me that your
20 argument begins and ends there.

21 MR. HUNGAR: No, Your Honor. I mean, as
22 we -- as we said in our brief, the principles that
23 undergird the Establishment Clause are equally
24 consistent with the position we're advancing here. As
25 the -- as your opinion in the County of Allegheny case

1 indicates, the fundamental -- the core of Establishment
2 Clause concern is coercion or conduct that is so extreme
3 that it leads to the establishment of a religion because
4 it is putting the government squarely behind one faith
5 to the exclusion of others, and that's clearly not --
6 not what's going on here.

7 JUSTICE ALITO: May I ask you about the
8 individual plaintiffs here. And what do we know about
9 them? They obviously have appeared at proceedings and
10 they object to the proceedings. Does the record show
11 that they had matters before the town council during the
12 hearings part of the proceeding?

13 MR. HUNGAR: No, Your Honor. There is --
14 there's no evidence of that. There's no -- the
15 Respondents have no standing to assert the interests of
16 children or police officers or award recipients or -- or
17 permit applicants. They don't even claim to be in -- in
18 any of those categories.

19 JUSTICE ALITO: Well, what about the public
20 forum part? They did speak occasionally then; isn't
21 that right?

22 MR. HUNGAR: Yes, Your Honor.

23 JUSTICE ALITO: Do we know what they spoke
24 about?

25 MR. HUNGAR: Well, on at least one occasion

1 one of them spoke about the prayer -- or on one or two
2 occasions; and then on multiple occasions spoke about a
3 cable access channel issue.

4 JUSTICE ALITO: And what did they -- what
5 was the issue there?

6 MR. HUNGAR: Something about -- she was
7 expressing vehement disagreement with the town's
8 decision to award a cable access channel to one entity
9 as opposed to another.

10 JUSTICE BREYER: Do you have any objection
11 to -- to doing one thing that was suggested in the
12 circuit court opinion, which is to publicize rather
13 thoroughly in -- in the area that those who were not
14 Christians, and perhaps not even religious, are also
15 welcome to appear and to have either a prayer or the
16 equivalent if they're not religious? Do you have an
17 objection to that?

18 MR. HUNGAR: Certainly not. There'd be --

19 JUSTICE BREYER: Well, then -- then there --
20 is there a disagreement on that point, because
21 certainly, that was one of the concerns. It wasn't on
22 anyone's website. There are -- Greece is a small town
23 very near Rochester, and there are, at least in
24 Rochester, lots of people of different religions,
25 including quite a few of no religion.

1 So -- so could you work that out, do you
2 think, if that were the only objecting point?

3 MR. HUNGAR: I -- I don't know what the
4 town's position would be on that, but it -- certainly,
5 there would be no constitutional problem with doing
6 that. I mean, here as a practical matter, since --

7 JUSTICE BREYER: No, no. I'm not saying
8 it's a constitutional problem I got from the opinion of
9 doing the opposite, of -- of not making an effort to
10 make people who are not Christian feel, although they
11 live near in or near the town or are affected thereby,
12 participants over time.

13 MR. HUNGAR: But, Your Honor, it's a
14 perfectly rational approach when -- when any legislative
15 body is going to have a practice of legislative prayer,
16 to go to the houses of worship in the community.

17 JUSTICE BREYER: I'm not saying it's not. I
18 want to know if you have any objection. I --

19 MR. HUNGAR: Well, I certainly don't think
20 it is constitutionally required, although I would note
21 that as a practical matter that has happened here in
22 2007.

23 JUSTICE BREYER: Do you -- would you have --
24 if all that were left in the case were the question of
25 you're making a good faith effort to try to include

1 others, would you object to doing it?

2 MR. HUNGAR: I don't know what the town's
3 position is on that. As I said, as a practical matter,
4 that has already happened here. The town deputy
5 supervisor was quoted in the newspaper saying anyone can
6 come in prayer, anyone can --

7 JUSTICE BREYER: Yes. That's different from
8 putting it on a website. That's different from making
9 an organized effort to see that people get the word.

10 MR. HUNGAR: As I say --

11 JUSTICE SCALIA: Mr. Hungar, what -- what is
12 the equivalent of prayer for somebody who is not
13 religious?

14 MR. HUNGAR: I would --

15 JUSTICE SCALIA: What would somebody who is
16 not religious --

17 MR. HUNGAR: In the Rubin --

18 JUSTICE SCALIA: -- what is the equivalent
19 of prayer?

20 MR. HUNGAR: It would be some invocation of
21 guidance and wisdom from --

22 JUSTICE SCALIA: From what?

23 MR. HUNGAR: I don't know. In -- in the
24 Rubin case --

25 (Laughter.)

1 MR. HUNGAR: In the Rubin case, a
2 nonreligious person delivered invocations on multiple
3 occasions.

4 JUSTICE SCALIA: I suppose a moment --

5 JUSTICE BREYER: Perhaps he's asking me that
6 question and I can answer it later.

7 (Laughter.)

8 MR. HUNGAR: I'd like to reserve the
9 remainder of my time.

10 CHIEF JUSTICE ROBERTS: Yes. Thank you,
11 counsel.

12 Mr. Gershengorn.

13 ARGUMENT OF IAN H. GERSHENGORN,
14 FOR UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONER

16 MR. GERSHENGORN: Mr. Chief Justice, and may
17 it please the Court:

18 The Second Circuit's decision here requires
19 courts to determine when a legislature has permitted too
20 many sectarian references in its prayers or has invited
21 too many Christian prayer-givers. That approach is
22 flawed for two reasons.

23 First, it cannot be squared with our
24 nation's long history of opening legislative sessions
25 not only with a prayer, but a prayer given in the

1 prayer-giver's own religion idiom. And second, it
2 invites exactly the sort of parsing of prayer that Marsh
3 sought to avoid and that Federal courts are ill-equipped
4 to handle.

5 JUSTICE SOTOMAYOR: And what was the purpose
6 of Marsh saying that proselytizing or damning another
7 religion would be a constitutional violation?

8 MR. GERSHENGORN: So we agree with --

9 JUSTICE SOTOMAYOR: So unless you parse the
10 prayers, you can't determine whether there's
11 proselytizing or damnation. That is Judge Wilkinson's
12 point when he was faced with this question, which is,
13 you have to, to do some parsing.

14 MR. GERSHENGORN: So, Your Honor, you have
15 to look at -- at the prayer to determine proselytizing.
16 But it's a very different series of judgments, we
17 submit, than determining whether something is sectarian.
18 The kinds of debates we're having, I think, are
19 reflected in the differences --

20 JUSTICE SOTOMAYOR: Now, seriously,
21 counselor. You can't argue that the quote that Justice
22 Kagan read is not sectarian. It invokes Jesus Christ as
23 the savior of the world. There are many religions who
24 don't believe that. Let's get past that.

25 MR. GERSHENGORN: So, Your Honor --

1 JUSTICE SOTOMAYOR: This is sectarian.

2 MR. GERSHENGORN: We agree that these are
3 sectarian. But the kinds of debates that you're seeing
4 among the parties, whether, for example, 15 percent, 50
5 percent, 60 percent of the congressional prayers are
6 sectarian. Those are debates about whether "Holy
7 Spirit" is sectarian. A court -- a district court has
8 held that "Allah" is not sectarian.

9 JUSTICE SOTOMAYOR: So let's talk about the
10 context instead of prayer. If the Chief Justice got up
11 at the beginning of this session and said "All rise for
12 a prayer," would you sit down?

13 MR. GERSHENGORN: Your Honor, whether I
14 would sit or not, we don't think that that would be
15 constitutional.

16 JUSTICE SOTOMAYOR: Do you think -- how many
17 people in this room do you think would sit, talking
18 truthfully?

19 MR. GERSHENGORN: I don't think -- I don't
20 think many would sit, Your Honor.

21 JUSTICE SOTOMAYOR: All right.

22 M R. GERSHENGORN: But we don't think that
23 that --

24 JUSTICE SOTOMAYOR: So why do you think that
25 someone who is sitting in a small room where hearings of

1 this nature are being held, when the guy who's about,
2 the chairman of this legislative body, is about to rule
3 on an application you're bringing to him or her, why do
4 you think any of those people wouldn't feel coerced to
5 stand?

6 MR. GERSHENGORN: So, Your Honor, I'd like
7 to address the coercion point this way: With respect to
8 town councils, it's our view that as a general matter
9 that the municipal legislatures can invoke the same
10 tradition of solemnizing and invoking divine guidance as
11 Federal and State legislatures. We recognize there are
12 differences, however, and Your Honor has pointed to one
13 and that's the -- what was called the public forum here.
14 And we think it's very -- because those are the ones
15 where the -- is adjudicated license applications, liquor
16 applications. And we do think it is important on this
17 record that those are separated in time. It's at the
18 court of appeals Appendix 929 and 1120. So that the
19 meeting starts at 6:00, which is in the prayer -- when
20 the prayer is, but the board meetings to adjudicate
21 those types of issues are at 6:30 or 6:32.

22 And so the type of concern that Your Honor
23 has raised is not presented on this record and we think
24 that's significant. We think some of the other
25 factors --

1 JUSTICE KAGAN: Mr. Gershengorn, do you
2 think that if the legislature -- excuse me -- if the
3 town board here just, you know, started it off with a
4 prayer and then kept on going, do you think that that
5 would be a significantly different case and you would
6 switch sides?

7 MR. GERSHENGORN: I don't know that we would
8 switch sides, Your Honor. But I do think it mitigates
9 the coercion that the -- that the Respondents have
10 identified. And we think it -- that that is one of the
11 significant differences between the town, the -- the
12 town legislature and a -- and the legislature --

13 JUSTICE SCALIA: You agree that coercion is
14 the test, however?

15 MR. GERSHENGORN: We don't agree that
16 coercion is the test, Your Honor.

17 JUSTICE SCALIA: If it is the test --

18 MR. GERSHENGORN: We think it's the
19 history -- we think the history is the -- the principal
20 guidance of Marsh is -- we think there are three pillars
21 in Marsh: First of all, that the history is what the
22 Court looks to first. And here there was a long history
23 of legislative prayer. Second, that the Court should be
24 very wary of parsing prayer to make sectarian judgments.
25 And third, what Marsh said is that adults are less

1 susceptible to religious doctrine -- indoctrination and
2 peer pressure.

3 JUSTICE KAGAN: Mr. Gershengorn, could you
4 respond to this? Here's what our -- our country
5 promises, our Constitution promises. It's that, however
6 we worship, we're all equal and full citizens. And I
7 think we can all agree on that.

8 And that means that when we approach the
9 government, when we petition the government, we do so
10 not as a Christian, not as a Jew, not as a Muslim, not
11 as a nonbeliever, only as an American. And what
12 troubles me about this case is that here a citizen is
13 going to a local community board, supposed to be the
14 closest, the most responsive institution of government
15 that exists, and is immediately being asked, being
16 forced to identify whether she believes in the things
17 that most of the people in the room believe in, whether
18 she belongs to the same religious idiom as most of the
19 people in the room do.

20 And it strikes me that that might be
21 inconsistent with this understanding that when we relate
22 to our government, we all do so as Americans, and not as
23 Jews and not as Christians and not as nonbelievers.

24 MR. GERSHENGORN: So, Justice Kagan, I think
25 we agree with much of what you say. But -- but with the

1 difference here is that this approaching of the
2 government body occurs against the backdrop of 240 years
3 of history, which makes this different.

4 From the very beginning of our legislature,
5 from the First Continental Congress, and then from
6 the -- from the first Congress, there have been
7 legislative prayers given in the religious idiom of
8 either the official chaplain or a guest chaplain, that
9 have regularly invoked the -- the deity and the -- the
10 language of the prayer-giver. And that --

11 JUSTICE GINSBURG: Mr. Gershengorn, your --
12 your brief is the one who brought up -- and you were
13 quite candid about it -- the hybrid nature of that body.
14 I think it's on pages 22 to 24 of your brief. And you
15 say it would be proper to have certain checks in that
16 setting. So for one, make sure that the entrance and
17 the exit is easy. For another, inform the people in
18 town of the tradition so they won't be confused.

19 But you recognize on the one hand that this isn't
20 like Congress or the Nebraska legislature, and then you
21 say these would be nice things to do. Are you saying
22 just that it would be good and proper or are you saying
23 it would be necessary given the hybrid nature of this
24 body?

25 MR. GERSHENGORN: So, Your Honor, with

1 respect to some of the things we identify which are
2 similar to the ones that Justice Breyer recommended, I
3 think our view is they're more akin to safe harbors,
4 that there are undoubtedly advancement challenges that
5 could be brought. And to the extent that the town can
6 point to things such as -- such as public criteria and
7 things like that, that is helpful.

8 With respect to the -- the public forum
9 aspect, I don't think we have a position as to whether
10 it is required, but we do think that that makes this
11 case the much easier case, because of that separation of
12 the one part that is the strongest argument for the
13 other side, that there is an element of coercion, that
14 your application is -- is being ruled on, that the
15 separation the town has adopted makes that much less
16 persuasive.

17 We think the other elements that the
18 Respondents have pointed to for coercion are ones that
19 trouble us because they are things that have analogs in
20 our history. So, for example, they point to the
21 presence of children. But, of course, on the Senate
22 floor are the Senate pages, who are all high school
23 juniors. And as the reply brief points out, there are
24 often children in the galleries at State legislatures
25 being acknowledged. And so some of those -- those

1 elements that the Respondents have pointed to for
2 coercion we think are not ones that the Court should --
3 should adopt.

4 JUSTICE KENNEDY: Of course, your -- your
5 test is whether or not -- part of your test -- is
6 whether or not it advances religion. If you ask a
7 chaplain for the State assembly in Sacramento,
8 California, who's going to go to the assembly to deliver
9 a prayer, are you going to advance your religion today,
10 would he say oh, no?

11 MR. GERSHENGORN: So, Your Honor, I think
12 it's a much narrower test. What this Court said in
13 Marsh was that the limit on legislative prayers is
14 prosle -- does it proselytize, advance, or denigrate any
15 one religion. We think with respect to the content of
16 the prayer, that the Second Circuit got it just about
17 right, that the question is does it preach conversion,
18 does it threaten damnation to nonbelievers, does it
19 belittle a particular --

20 JUSTICE KENNEDY: So -- so you -- you use
21 the word "advance" only as modified by "proselytize"?

22 MR. GERSHENGORN: What Marsh said was
23 "proselytize, advance, or denigrate."

24 JUSTICE KENNEDY: Because that's -- that's
25 not what your -- your brief says "does not proselytize

1 or advance."

2 MR. GERSHENGORN: That -- that's the
3 language from Marsh, Your Honor, is to proselytize or --
4 "proselytize, advance, or denigrate."

5 JUSTICE KENNEDY: But that's that the test
6 you want us to adopt and --

7 MR. GERSHENGORN: It is, Your Honor.

8 JUSTICE KENNEDY: -- I'm asking whether or
9 not it is, in fact, honest and candid and fair to ask
10 the minister or -- or the priest or the chaplain or the
11 rabbi if by appearing there, he or she seeks to advance
12 their religion?

13 MR. GERSHENGORN: So, Your Honor, I don't
14 think that's what Marsh meant by advance.

15 JUSTICE KENNEDY: If not, I'm not quite sure
16 why they're there.

17 MR. GERSHENGORN: You're not quite sure why
18 "advance" is there, or why the rabbi is there. We don't
19 think that the mere presence of the rabbi -- that's what
20 Marsh held, that Marsh -- what Marsh says is "advance"
21 does not mean having a single -- a single chaplain -- a
22 chaplain of a single denomination or looking at the
23 content of the sectarian prayer in light of that
24 history.

25 Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.
2 Mr. Laycock.

3 ORAL ARGUMENT OF DOUGLAS LAYCOCK
4 ON BEHALF OF THE RESPONDENTS

5 MR. LAYCOCK: Mr. Chief Justice, and may it
6 please the Court:

7 Petitioner's answer to Justice Kagan's
8 opening question is entirely formalistic. There is no
9 separation in time between the public hearing and the
10 invocation. People appear before this town board to ask
11 for personal and specific things. Our clients put shows
12 on the cable channel. They were concerned the cable
13 channel was about to be abolished or made much less
14 usable. People appear to ask for a group home, parents
15 of a Down syndrome child. There are many personal
16 petitions presented at this -- in the immediate wake of
17 the prayer.

18 JUSTICE ALITO: But that's during the public
19 -- that's during the public forum part.

20 MR. LAYCOCK: That's in the public forum.

21 JUSTICE ALITO: Which is not really -- it's
22 not the same thing as the hearing.

23 MR. LAYCOCK: It's not the same thing as the
24 hearing and that's the point, Your Honor.

25 JUSTICE ALITO: There's another -- there's

1 another part of the proceeding that is the hearing.

2 MR. LAYCOCK: Yes.

3 JUSTICE ALITO: And that's when somebody has
4 a specific proposal. They want to -- something
5 specifically before the board and they want relief.
6 They want a variance.

7 MR. LAYCOCK: The -- the hearing is a
8 particular kind of proposal.

9 JUSTICE ALITO: And that is separated in
10 time.

11 MR. LAYCOCK: That is -- that is somewhat
12 separated in time. The forum is not. And people make
13 quite personal proposals there. They ask for board
14 action. They often get board action.

15 JUSTICE ALITO: But that is a legislative
16 body at that point. It's clearly a legislative body, is
17 it not? The only -- the difference is it's a town
18 rather than -- than Congress or a State legislature
19 where you have more formalized procedures. This is --
20 this is more direct democracy. Or it's like a -- it's a
21 town meeting.

22 MR. LAYCOCK: It is -- it is direct
23 democracy. When a citizen appears and says, solve the
24 traffic problem at my corner, solve this nuisance family
25 that commits a lot of crimes in my block, that's not

1 asking for legislation or policymaking. That's asking
2 for administrative action. This board has legislative,
3 administrative, and executive functions.

4 JUSTICE ALITO: Well, if that is your
5 argument, then you are really saying you can never have
6 prayer at a town meeting.

7 MR. LAYCOCK: That's -- that's not what
8 we're saying. We're saying --

9 JUSTICE ALITO: How could you do it?
10 Because that's the kind of thing that always comes up at
11 town meetings.

12 MR. LAYCOCK: We're saying you cannot have
13 sectarian prayer. The town should instruct -- should
14 have a policy in the first place, which it doesn't,
15 instruct the chaplains keep your prayer nonsectarian, do
16 not address points of --

17 JUSTICE ALITO: All right. Give me an
18 example. Give me an example of a prayer that would be
19 acceptable to Christians, Jews, Muslims, Buddhists,
20 Hindus. Give me an example of a prayer. Wiccans,
21 Baha'i.

22 CHIEF JUSTICE ROBERTS: And atheists.

23 JUSTICE SCALIA: And atheists. Throw in
24 atheists, too.

25 (Laughter.)

1 MR. LAYCOCK: We -- we take Marsh to -- to
2 imply that atheists cannot get full relief in this
3 context, and the McCreary dissenters said that
4 explicitly. So points on which believers are known to
5 disagree is a -- is a set that's in the American
6 context, the American civil religion, the
7 Judeo-Christian tradition --

8 JUSTICE ALITO: Give me an example then. I
9 think the point about atheists is a good point. But
10 exclude them for present purposes and give me an example
11 of a prayer that is acceptable to all of the groups that
12 I mentioned.

13 MR. LAYCOCK: About a third of the prayers
14 in this record, Your Honor, are acceptable.

15 JUSTICE ALITO: Give me an example.

16 MR. LAYCOCK: Can I have the joint appendix?
17 The prayers to the almighty, prayers to the
18 creator.

19 JUSTICE ALITO: To "the almighty."

20 MR. LAYCOCK: Yes.

21 JUSTICE ALITO: So if -- if a particular
22 religion believes in more than one god, that's
23 acceptable to them?

24 MR. LAYCOCK: Well, some religions that
25 believe in more than one god believe that all their many

1 gods are manifestations of the one god. But the true
2 polytheists I think are also excluded from the McCreary
3 dissent.

4 JUSTICE SCALIA: What about devil
5 worshippers?

6 (Laughter.)

7 MR. LAYCOCK: Well, if devil worshippers
8 believe the devil is the almighty, they might be okay.
9 But they're probably out --

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Who is going to make
12 this determination? Is it -- is it an ex ante
13 determination? You have to review the proposed prayer?

14 MR. LAYCOCK: I'm just flipping through.
15 There are a number of examples, but if you look at page
16 74a of the joint appendix, the prayer from August 13,
17 2003 -- no I'm sorry. That ends "in Christ's name."

18 But there are -- the count was about, about
19 two-thirds, one-third. So there are plenty of them in
20 here.

21 JUSTICE ALITO: 74a, "Heavenly father,"
22 that's acceptable to all religions?

23 MR. LAYCOCK: "Heavenly Father" is very
24 broadly acceptable. And you know, the test cannot be
25 unanimity, because that's impossible, right? That's why

1 the atheists are -- that's why the atheists are
2 excluded.

3 I'm sorry, Justice Scalia; would you repeat
4 your question?

5 CHIEF JUSTICE ROBERTS: Well, I'll repeat
6 mine. It was: Who was supposed to make these
7 determinations? Is there supposed to be an officer of
8 the town council that will review? Do prayers have to
9 be reviewed for his approval in advance?

10 MR. LAYCOCK: No. Principally the clergy
11 make this determination. There is a 200-year tradition
12 of this kind of civic prayer. The clergy know how to do
13 it. If the city has a policy, then an occasional
14 violation by one clergy is not the city's
15 responsibility.

16 So -- so this is left principally to the
17 clergy by simply giving them instructions. They receive
18 no instruction of any kind about the purpose of this
19 prayer or --

20 CHIEF JUSTICE ROBERTS: So there is an
21 official in the town council that is to instruct clergy
22 about what kind of prayer they can say?

23 MR. LAYCOCK: That's right. 37 State
24 legislative bodies, the House of Representatives have
25 these kinds of guidelines. They issue them to the guest

1 clergy before they appear.

2 JUSTICE KENNEDY: And if I'm -- if I'm that
3 official and I think a prayer was over the top for being
4 proselytizing and particularly sectarian, I would say I
5 rather not -- you not come back next week; I am going to
6 look for somebody else?

7 MR. LAYCOCK: Well, you might have a
8 conversation with him first and --

9 JUSTICE KENNEDY: Well, so in other words
10 the government is now editing the content of prayers?

11 MR. LAYCOCK: Editing the content of
12 government-sponsored prayers. Of course these clergy
13 can pray any way they want on their own time with their
14 own audience. But this is an official government event.
15 And it's part of the board's meeting. It's sponsored by
16 the government. And they delegate the task to these
17 clergy and they can define the scope of that --

18 JUSTICE SCALIA: Your point is that it
19 coerces, it's bad because it coerces?

20 MR. LAYCOCK: It coerces the people who are
21 about to stand up and ask for things from the board
22 and --

23 JUSTICE SCALIA: If there is -- if coercion
24 is the test of the Free Exercise Clause, why do we need
25 a Free Exercise Clause? If there's coercion -- I'm

1 sorry -- of the Establishment Clause, why do we need the
2 Establishment Clause? If there's coercion, I assume it
3 would violate the Free Exercise Clause, wouldn't it?

4 MR. LAYCOCK: Well, I think that's right.
5 And that's why --

6 JUSTICE SCALIA: So it seems to me very
7 unlikely that the test for the Establishment Clause is
8 identical to the test for the Free Exercise Clause.

9 MR. LAYCOCK: Well, it seems to me unlikely
10 as well. Coercion is one test for the Establishment
11 Clause, but there is also broad agreement on the Court,
12 and there has been, that sectarian endorsements are
13 prohibited by the Establishment Clause.

14 CHIEF JUSTICE ROBERTS: What exactly --
15 since you are adopting the coercion test, what exactly
16 is coercive in this environment? Having to sit and
17 listen to the prayer?

18 MR. LAYCOCK: There are many coercive
19 aspects here of varying degrees of importance. Citizens
20 are asked to participate, to join in the prayer.
21 They're often asked to --

22 CHIEF JUSTICE ROBERTS: They are asked to
23 participate, and -- but not in any tangible way. They
24 say: Well, I'm not going to participate, and
25 everybody's just sitting there.

1 MR. LAYCOCK: They are often asked to
2 physically participate, to stand or to bow their heads.
3 The testimony is most of the citizens bow -- most of the
4 citizens bow their heads whether they are asked to or
5 not. So people who are not participating are
6 immediately visible. The pastors typically say:
7 "Please join me in prayer." They offer the prayer on
8 behalf of everyone there. They talk about "our
9 Christian faith."

10 JUSTICE SCALIA: This is coercion? He says,
11 you know -- he says, "May we pray," and somebody doesn't
12 want to pray, so he stays seated.

13 MR. LAYCOCK: What's coercive about it is it
14 is impossible not to participate without attracting
15 attention to yourself, and moments later you stand up to
16 ask for a group home for your Down syndrome child or for
17 continued use of the public access channel or whatever
18 your petition is, having just, so far as you can tell,
19 irritated the people that you were trying to persuade.

20 JUSTICE ALITO: Let me give you an example
21 of a practice that's a little bit different. Maybe
22 you'll say it's a lot different from what the Town of
23 Greece does. First of all, this town starts out by
24 making -- by proceeding in a more systematic and
25 comprehensive way in recruiting chaplains for the month

1 or whatever it is. So instead of just looking to all
2 the houses of worship within the town, it identifies
3 places of worship that may be outside the town
4 boundaries that people within the town who adhere to a
5 minority religion may attend.

6 And it makes it clear that it's open to
7 chaplains of any religious -- of any religion on a
8 rotating basis. And then they have -- they structure
9 their proceedings so that you have the prayer, and then
10 the legislative part of the town meeting.

11 And then there's a clear separation in time
12 and access between that part of the proceeding and the
13 hearing where variances and things of that nature are
14 held.

15 Now, you would still say that's
16 unconstitutional because you have to add on that a
17 prayer that is acceptable to everybody; is that it? Is
18 there any other problem with what I've just outlined?

19 MR. LAYCOCK: Well, if the separation in
20 time really works, that's part of the remedy that we've
21 suggested that is possible here. We still believe that
22 prayers should be nonsectarian.

23 JUSTICE GINSBURG: On the remedy, this case
24 was remanded by the Second Circuit for the parties
25 together with the court to work out appropriate relief.

1 And if you could tell us what you think that relief
2 would be, because then that is a measure of the
3 constitutional infraction.

4 So what would -- you put yourself before the
5 district judge and propose the changes that you think
6 would be necessary to bring this practice within the
7 constitutional boundary.

8 MR. LAYCOCK: Well, we think the town has to
9 have a policy.

10 CHIEF JUSTICE ROBERTS: Well, just to be
11 clear, are you talking about what would be satisfactory
12 to the Second Circuit or satisfactory to you? Because
13 you don't accept the Second Circuit's approach.

14 MR. LAYCOCK: Well, we've tried to sort out
15 the totality of the circumstances to make it clearer.

16 JUSTICE GINSBURG: What my question was --

17 MR. LAYCOCK: I'm talking about what would
18 be --

19 JUSTICE GINSBURG: -- your theory, and you
20 say existing situation violates the Constitution. So
21 what changes do you think would need to be made --

22 MR. LAYCOCK: We think --

23 JUSTICE GINSBURG: -- that would bring this
24 within the constitutional boundary?

25 MR. LAYCOCK: We think the town needs a

1 policy. The policy should give guidelines to chaplains
2 that say: Stay away from points in which believers are
3 known to disagree. And we think the town should do what
4 it can to ameliorate coercion. It should tell the
5 clergy: Don't ask people to physically participate.
6 That's the most important thing.

7 The government suggests disclaimers might help.
8 We think that's right. The government suggests
9 separating the prayer a bit more in time. Some States
10 put their prayer before the call to order. The prayer
11 could even be five minutes before the beginning of the
12 meeting.

13 The coercion can't be entirely eliminated,
14 but the gratuitous coercion, the things that are done
15 that don't have to be done in order to have a prayer
16 could be eliminated. And we think those two pieces are
17 the components of a remedy.

18 JUSTICE SCALIA: Mr. Laycock, it seems to me
19 that you're missing here is -- and this is what
20 distinguishes legislative prayer from other kinds -- the
21 people who are on the town board or the representatives
22 who are in Congress, they're citizens. They are there
23 as citizens. The judges here are not -- we're not here
24 as citizens. And as citizens, they bring, they bring to
25 their job all of -- all of the predispositions that

1 citizens have.

2 And these people perhaps invoke the deity at
3 meals. They should not be able to invoke it before they
4 undertake a serious governmental task such as enacting
5 laws or ordinances?

6 There is a serious religious interest on the
7 other side of this thing that -- that -- that people who
8 have religious beliefs ought to be able to invoke the
9 deity when they are acting as citizens, and not -- not
10 as judges or as experts in -- in the executive branch.
11 And it seems to me that when they do that, so long as
12 all groups are allowed to be in, there seems to me -- it
13 seems to me an imposition upon them to -- to stifle the
14 manner in which they -- they invoke their deity.

15 MR. LAYCOCK: We haven't said they can't
16 invoke the deity or have a prayer, and they can
17 certainly pray any way they want silently or just before
18 the meeting. We've said they cannot impose sectarian
19 prayer on the citizenry, and that is very different from
20 what Congress does, it is very different from what this
21 Court does. Maybe the closest analogy is legislative
22 committee hearings where the citizens interact. We
23 don't have a tradition of prayer there.

24 What -- what -- what the town board is doing
25 here is very different from anything in the tradition

1 that they appeal to.

2 JUSTICE BREYER: Are you -- I would like you
3 to take into account an aspect of this. I mean, in my
4 own opinion, I don't know of anyone else's, I'm not
5 talking for others. But one -- a major purpose of the
6 religion clauses is to allow people in this country of
7 different religion, including those of no religion, to
8 live harmoniously together.

9 Now, given that basic purpose, what do we do
10 about the problem of prayer in these kinds of
11 legislative sessions? One possibility is say, you just
12 can't do it, it's secular. But that is not our
13 tradition.

14 MR. LAYCOCK: That's correct.

15 JUSTICE BREYER: All right. The second
16 possibility is the one that you are advocating. And it
17 has much to recommend it, try to keep
18 non-denominational, try to keep it as inoffensive to the
19 others as possible. That's the upside.

20 The downside is seeing supervised by a judge
21 dozens of groups, and today, there are 60 or 70 groups
22 of different religions coming in and saying, no, that
23 doesn't work for us, this doesn't work for us, and
24 that's the nightmare that they are afraid of.

25 I mean, even in this town or in the area,

1 there are significant numbers, as well as Christians, of
2 Jews, of Muslims, of Baha'is, of Hindus, and others.

3 All right. So there's a third approach, and
4 that is say, well, you can't have them if there's any
5 aspect of coercion. But we just saw people walking into
6 this room, "God save the United States" and you want to
7 win your case. I didn't see people sitting down.

8 All right. Then the fourth approach, which
9 is the other that has -- makes its appearance here, is
10 to say let's try to be inclusive. Now, was enough -- in
11 other words, so you didn't get the right prayer today,
12 but you -- and even with the nonreligious, you know many
13 believe in the better angels of our nature and the
14 spiritual side of humankind; it's not impossible to
15 appeal to them. So you say, you'll have your chance.

16 And that's the thing I -- I would like you
17 to explore. I mean, is there a way of doing that or is
18 that preferable to the other ways or do we get into
19 trouble?

20 MR. LAYCOCK: We think that rotation does
21 not work. First of all, because -- for several reasons,
22 but most citizens come for a single issue to one or two
23 meetings. They get the prayer they get that night.
24 They don't benefit from the rotation scheme. Any
25 rotation scheme will be dominated by the local majority,

1 maybe even disproportionate to its numbers. Religious
2 minorities -- unfamiliar minorities give the prayer.
3 There are often political protests; there are often
4 threats and hate mail. They don't want to give the
5 prayer. And many city councils won't stand up to the
6 political pressure and enable those people to give the
7 prayer.

8 So there are multiple reasons why rotation
9 does not solve the problem here.

10 We think nonsectarianism has a very long
11 tradition. The government is not a competent judge of
12 religious truth, Madison said, that was not a
13 controversial proposition in the founding. And even in
14 the first Congress, in the prayers they point to, there
15 were no prayers there that violate our principle,
16 invoking details in which believers disagree. Because
17 then, 98-1/2 percent of the population was Protestant,
18 Christ was not yet a point that disbelievers disagreed.

19 JUSTICE ALITO: Well, that gets exactly to
20 the -- that gets exactly to the problem with your
21 argument about nonsectarian prayer. Yes, when -- at the
22 beginning of the country, the population was
23 98 percent-plus Protestant. Then it became
24 predominantly Christian. Then it became predominant --
25 almost exclusively Christian and Jewish.

1 And it -- but now, it's not that -- it's --
2 it's gone much further than that. So we have a very
3 religiously diverse country. There are a lot of
4 Muslims, there are a lot of Hindus, there are Buddhists,
5 there are Baha'is, there are all sorts of other
6 adherents to all sorts of other religions. And they all
7 should be treated equally, and -- but I don't -- I just
8 don't see how it is possible to compose anything that
9 you could call a prayer that is acceptable to all of
10 these groups.

11 MR. LAYCOCK: We --

12 JUSTICE ALITO: And you haven't given me an
13 example.

14 MR. LAYCOCK: We -- we cannot treat -- I'm
15 not a pastor -- we cannot treat everybody, literally
16 everybody equally without eliminating prayer altogether.
17 We can treat the great majority of the people equally
18 with the tradition of prayer to the almighty, the
19 governor of the universe, the creator of the world --

20 JUSTICE SCALIA: You want to pick the groups
21 we're going to exclude?

22 MR. LAYCOCK: I think you picked them, Your
23 Honor.

24 JUSTICE SCALIA: The Baha'i, who else?
25 These -- these groups are too small to --

1 CHIEF JUSTICE ROBERTS: We've already
2 excluded the atheists, right?

3 JUSTICE SCALIA: Yeah, the atheists are out
4 already.

5 MR. LAYCOCK: We've excluded the atheists.
6 I don't think the Baha'i are excluded, but I'm not
7 certain.

8 JUSTICE SCALIA: Okay. So who else? I
9 mean, you suggest -- you say just the vast majority is
10 all that we have to cater to.

11 MR. LAYCOCK: Well, I -- I think the -- the
12 atheists are inevitably excluded. We can't help --

13 JUSTICE SCALIA: Okay. Good. Got that.
14 Number 1, atheists. Who else?

15 MR. LAYCOCK: True poly -- true polytheists
16 who don't understand their gods as manifestations of the
17 one god are probably excluded. I'm not sure many others
18 are.

19 And you have all these lawyerly
20 hypotheticals, but the fact is we've done this kind of
21 prayer in this country for 200 years. There's a long
22 tradition of civic prayer and the clergy know how to do
23 it. When in Greece, no one has told them that's what we
24 want you to do. And -- and I would say the one time the
25 country in a major way got involved in

1 government-sponsored, sectarian prayers that people
2 disagreed about was when we imposed Protestant religious
3 exercises on Catholic children in the 19th century. And
4 that produced mob violence, church burnings, and people
5 dead in the streets.

6 JUSTICE KAGAN: Mr. --

7 CHIEF JUSTICE ROBERTS: We've already
8 separated out, I thought, in our jurisprudence, children
9 and adults.

10 MR. LAYCOCK: Well, Lee v. Weisman twice
11 reserves the question of whether adults might be subject
12 to similar pressures.

13 CHIEF JUSTICE ROBERTS: Well, you do accept
14 the fact that children may be subject to subtle coercion
15 in a way that adults are not, right?

16 MR. LAYCOCK: In some ways that adults are
17 not. But there's -- there's no doubt that before you
18 stand up to ask for relief from a governing body, you
19 don't want to offend that body. Adults are subject to
20 coercion here. And -- and no competent attorney would
21 tell his client, it doesn't matter whether you visibly
22 dissent from the prayer or not. You try to have your
23 client make a good impression.

24 JUSTICE KENNEDY: Well, I just want to make
25 sure what your position -- your position is that town

1 councils like Greece can have prayers if they are
2 non-provocative, modest, decent, quiet,
3 non-proselytizing. That's your position?

4 MR. LAYCOCK: I wouldn't use all those
5 adjectives, but yes. And we don't think that's
6 difficult to do.

7 JUSTICE KAGAN: Mr. --

8 JUSTICE BREYER: Congress has a set of
9 guidelines which you've read and are here in the papers
10 and so forth. Are those satisfactory to you?

11 MR. LAYCOCK: We'd like to be a little more
12 explicit, but those are vastly better than --

13 JUSTICE BREYER: If those are satisfactory
14 to you, then I wonder, are they satisfactory to
15 everyone. And -- and you will find all kinds of
16 different beliefs and thoughts in this country, and
17 there will be people who say, but I cannot give such a
18 prayer if I am a priest in that particular -- or a
19 minister or whatever in that particular religion. I
20 must refer to the God -- to God as I know that God by
21 name. And what do we do with them?

22 That's what -- I mean, we can recommend it,
23 but can we say that the Constitution of the United
24 States requires it?

25 MR. LAYCOCK: You know, there are such

1 people and I respect that and they should not be giving
2 government prayers. They're taking on a government
3 function when they agree to give the invocation for the
4 town board.

5 JUSTICE KAGAN: Mr. Laycock --

6 JUSTICE SCALIA: Well, that's -- that's --
7 that's really part of the issue, whether they're
8 undertaking a government function or whether they're
9 acting as citizens in a legislative body, representative
10 of the people who bring -- who bring to that their --
11 their own personal beliefs.

12 I think the average person who -- who -- who
13 participates in a legislative prayer does not think that
14 this is a governmental function. It's a personal
15 function. And -- and that's why we separate out the
16 legislative prayer from other kinds of prayers.

17 MR. LAYCOCK: They're -- they're not praying
18 for their congregation. They are -- they are invited by
19 the board, the prayer-giver is selected by the board,
20 the board decides to have the prayer, the board gives
21 this one person and only one person time on the agenda
22 to pray. This is clearly governmental as you held in
23 Santa Fe --

24 JUSTICE SCALIA: If you had an atheist
25 board, you would not have any prayer.

1 MR. LAYCOCK: Precisely.

2 JUSTICE SCALIA: I guarantee you, because it
3 is a personal prayer that the members of the legislature
4 desire to make.

5 JUSTICE SOTOMAYOR: Counsel, assuming that
6 we don't --

7 JUSTICE KAGAN: Mr. Laycock, would you --

8 CHIEF JUSTICE ROBERTS: Justice Sotomayor.

9 JUSTICE SOTOMAYOR: Assuming -- you hear the
10 resistance of some members of the Court to sitting as
11 arbiters of what's sectarian and nonsectarian, and I
12 join some skepticism as to knowing exactly where to join
13 that line. Assuming you accept that, what would be the
14 test that you would proffer, taking out your preferred
15 announcement that this prayer has to be nonsectarian?

16 MR. LAYCOCK: Well, the test that we have
17 proffered is the test from the McCreary dissent, points
18 on which believers are known to disagree. So you don't
19 have to be a theologian. Points on which people are
20 commonly known to disagree, and the Fourth Circuit has
21 had no difficulty administering this rule. The cases
22 that come to it are clearly sectarian or clearly
23 nonsectarian.

24 JUSTICE KENNEDY: It just seems to me that
25 enforcing that standard and the standard I suggested

1 involves the State very heavily in the censorship and --
2 and the approval or disapproval of prayers.

3 MR. LAYCOCK: But it's not censorship when
4 it's the governmental --

5 JUSTICE KENNEDY: That may play ultimately
6 in your position if we say that that's why there
7 shouldn't be any prayer at all. But then you have the
8 problem mentioned by Justice Scalia that we are
9 misrepresenting who we really are.

10 MR. LAYCOCK: If you really believe
11 government can't draw lines here, then your alternatives
12 are either prohibit the prayer entirely or permit
13 absolutely anything, including the prayer at the end of
14 our brief, where they ask for a show of hands, how many
15 of you believe in prayer? How many of you feel
16 personally in need of prayer? If there are no limits,
17 you can't draw lines.

18 JUSTICE SCALIA: That's not a prayer.
19 That's not a prayer.

20 MR. LAYCOCK: Well, it was how --

21 JUSTICE SCALIA: "How many of you have been
22 saved?" That's not a prayer.

23 MR. LAYCOCK: It was how he introduced his
24 prayer, and if you can't draw lines I don't know why he
25 can't say that.

1 JUSTICE KAGAN: Mr. Laycock, sort of, all
2 hypotheticals aside, isn't the question mostly here in
3 most communities whether the kind of language that I
4 began with, which refers repeatedly to Jesus Christ,
5 which is language that is accepted and admired and
6 incredibly important to the majority members of a
7 community, but is not accepted by a minority, whether
8 that language will be allowed in a public town session
9 like this one. That's really the question, isn't it?

10 MR. LAYCOCK: That's the issue that actually
11 arises in the case.

12 JUSTICE KAGAN: That's the issue that
13 actually arises. Here's what -- I don't think that this
14 is an easy question. I think it's hard, because of
15 this. I think it's hard because the Court lays down
16 these rules and everybody thinks that the Court is being
17 hostile to religion and people get unhappy and angry and
18 agitated in various kinds of ways. This goes back to
19 what Justice Breyer suggested.

20 Part of what we are trying to do here is to
21 maintain a multi-religious society in a peaceful and
22 harmonious way. And every time the Court gets involved
23 in things like this, it seems to make the problem worse
24 rather than better. What do you think?

25 MR. LAYCOCK: Well, I don't -- I don't think

1 that's true. There are people who distort your
2 decisions. There are people who misunderstand your
3 decisions honestly and -- and innocently. But keeping
4 government neutral as between religions has not been a
5 controversial proposition in this Court. And I don't
6 think the Fourth Circuit has made it worse. They've got
7 a workable rule and the prayers are no longer
8 exclusively Christian prayers in the Fourth Circuit and
9 they have been able to mostly enforce that and there
10 hasn't been litigation at the margins because all the
11 prayers were clearly --

12 JUSTICE BREYER: Suppose you did this. You
13 combined your two approaches. The town has to -- it
14 cannot -- it must make a good faith effort to appeal to
15 other religions who are in that area. And then you have
16 these words from the House: "The chaplain should keep
17 in mind that the House of Representatives, or you would
18 say whatever relative group, "is comprised of members of
19 many different faith traditions," period, end of matter.
20 Is that sufficient, those two things?

21 MR. LAYCOCK: That would help immensely. We
22 think some of the clergy need more detailed explanation
23 of what that means, but yes, that would help immensely.

24 JUSTICE KENNEDY: Should we write that in a
25 concurring opinion?

1 (Laughter.)

2 JUSTICE KENNEDY: I mean, I'm serious about
3 this. This involves government very heavily in
4 religion.

5 MR. LAYCOCK: Well, government became very
6 heavily involved in religion when we decided there could
7 be prayers to open legislative sessions. Marsh is the
8 source of government involvement in religion. And now
9 the question is how to manage the problems that arise
10 from that.

11 JUSTICE ALITO: Well, Marsh is not the
12 source of government involvement religion in this
13 respect. The First Congress is the source.

14 MR. LAYCOCK: Fair enough. The tradition to
15 which Marsh points.

16 JUSTICE ALITO: The First Congress that also
17 adopted the First Amendment.

18 MR. LAYCOCK: That -- that's correct, and
19 that had prayers that did not address predestination or
20 having to accept Jesus as your savior or any point on
21 which listeners disagree.

22 JUSTICE ALITO: Many of them were very
23 explicitly Christian, were they not?

24 MR. LAYCOCK: They were very explicitly
25 Christian, but that was not a point of disagreement at

1 the time. They stayed away from any issue that
2 Protestants disagreed on.

3 JUSTICE KENNEDY: In a way it sounds quite
4 elitist to say, well, now, we can do this in Washington
5 and Sacramento and Austin, Texas, but you people up
6 there in Greece can't do that.

7 MR. LAYCOCK: Well, it's not that the people
8 in Greece can't do it. It's just that this board is
9 functioning in a fundamentally different way from what
10 Congress or the State legislature functions. And
11 also --

12 JUSTICE ALITO: My understanding is that the
13 first chaplain of the Senate was the Episcopal bishop of
14 New York; isn't that correct? And he used to read -- he
15 took his prayers from the Book of Common Prayer. That
16 was acceptable to Baptists at the time, Quakers?

17 MR. LAYCOCK: Well, it wouldn't have been
18 their choice. But did he talk about the choice between
19 bishops and presbyters and congregations as a way of
20 governing the church? They have not offered a single
21 example of a prayer in the founding era that addressed
22 points on which Protestants were known to disagree. And
23 I don't think there is one. The founding generation
24 kept government out of religious disagreements. And
25 what has changed is not the principle. What has changed

1 is that we have a wider range of religious disagreements
2 today.

3 If there are no further questions, we ask
4 you to affirm.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Mr. Laycock.

7 Mr. Hungar, you have 3 minutes remaining.

8 REBUTTAL ARGUMENT OF THOMAS G. HUNGAR

9 ON BEHALF OF THE PETITIONER

10 MR. HUNGAR: Thank you, Mr. Chief Justice.

11 First I would like to correct one factual
12 misimpression, the assertion that only non-Christian
13 prayer-givers delivered the prayer after 2008. It's not
14 in the record, but the official web site of the Town of
15 Greece shows that at least four non-Christian
16 prayer-givers delivered prayers thereafter in 2009, '10,
17 '11 and '13.

18 On the sectarian points, clearly the line --

19 JUSTICE SOTOMAYOR: Counsel.

20 MR. HUNGAR: I'm sorry?

21 JUSTICE SOTOMAYOR: One a year.

22 MR. HUNGAR: I'm sorry, Your Honor?

23 JUSTICE SOTOMAYOR: Four additional people
24 after the suit was filed.

25 MR. HUNGAR: Yes, Your Honor.

1 JUSTICE SOTOMAYOR: One a year.

2 MR. HUNGAR: Approximately.

3 JUSTICE SOTOMAYOR: How often does the
4 legislature meet?

5 MR. HUNGAR: Once a month.

6 And on the sectarian line, I just like to
7 point the Court to the Senate brief, the amicus brief
8 filed by Senators, pages 8 to 17 which shows the
9 extensive history from the beginning of the Republic
10 until today of prayer in Congress. That would be
11 sectarian and unconstitutional under Respondent's
12 position.

13 With respect to coercion, it's
14 unquestionably true that there is less basis for
15 claiming coercion here than there was in Marsh. In
16 Marsh, Senator Chambers was required to be on the Senate
17 floor by rule, he had to be there to do his job and the
18 practice was to stand every single time, which he did
19 because he felt coerced to do it; whereas, here, the
20 record suggests that there were three times when
21 somebody requested people to stand out of 121 occasions.
22 The idea that this is more coercive than Marsh is
23 absurd.

24 In Marsh the Court expressly rejected a
25 coercion argument saying, "We expect adults to be able

1 to deal with this."

2 With respect to the history, as well, I
3 think the debate in the Continental Congress, when this
4 issue was first raised, shows what the American
5 tradition has been. That is Americans are not bigots
6 and we can stand to hear a prayer delivered in a
7 legislative forum by someone whose views we do not agree
8 with. That is the tradition in this country, and that's
9 why it doesn't violate the Establishment Clause.

10 And finally, with respect to the fact that
11 this is a municipality rather than a state or local --
12 Federal government. That can't possibly make a
13 difference as an Establishment Clause matter. It makes
14 no sense to suggest that a prayer at the local level is
15 more dangerous for Establishment Clause purposes than
16 what Congress is doing. Only Congress could establish a
17 religion for the entire nation, which is the core
18 preventive purpose of the Establishment Clause. To
19 suggest that there are greater restrictions on
20 municipalities makes no sense at all.

21 We think that the dangerously overbroad
22 theories advanced by respondents are at odds with our
23 history and traditions, which we reflect this tradition
24 of tolerance for religious views that we don't agree
25 with in the legislative context.

1 Respondent's theories also conflict with the
2 religion clauses mandate, that it's not the business of
3 government to be regulating the content of prayer and
4 regulating theological orthodoxy.

5 Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 The case is submitted.

8 (Whereupon, at 11:04 a.m., the case in the
9 above-entitled matter was submitted.)

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