

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

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

Plaintiff,

v.

Civil Action No. 2:18-cv-01198

THE CITY OF PARKERSBURG,

Defendant.

**THE CITY OF PARKERSBURG'S RESPONSE TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Defendant, The City of Parkersburg, submits this response to the *Plaintiffs' Motion for Preliminary Injunction*. Dkt. 5. For the reasons set for the below, the motion for preliminary injunction should be denied.

INTRODUCTION AND STATEMENT OF FACTS

The City of Parkersburg is a municipality located in Wood County, West Virginia. The Parkersburg City Council consists of nine elected members who typically meet twice a month at the City Hall. Dkt. 1, Plaintiffs' Complaint, p.5, ¶¶ 30-31. Since at least 1982, the City Council prayed some form of prayer during City Council meetings until July 2015, when the practice was changed such that the Lord's Prayer was recited prior to the beginning of the meetings in response to a request from the Plaintiff. *See* Affidavit of John Reed at ¶¶ 6-9, attached hereto as **Exhibit A**. Following the Lord's Prayer, the City Council recites the Pledge of Allegiance and then the meeting is called to order. Dkt. 1, Plaintiffs' Complaint, p. 6, ¶¶ 35-38; Reed Aff. at ¶ 5. The Lord's Prayer as recited by the Parkersburg City Council follows the typical format:

Our Father who art in heaven, hallowed be thy name.
Thy kingdom come. Thy will be done, on earth as it is in heaven.
Give us this day our daily bread; and forgive us our trespasses,
as we forgive those who trespass against us;
and lead us not into temptation, but deliver us from evil.
For thine is the kingdom, the power, and the glory forever. Amen.

Despite the fact that the prayer occurs prior to the beginning of the meeting, Plaintiffs contend that these prayers are “treated as an official part of the meeting”. Defendant contends that the prayer takes place solely during the ceremonial prelude to the meeting. Reed Aff. at ¶¶ 5, 11. Aside from one occasion on April 10, 2018 when the Lord’s Prayer and Pledge of Allegiance were recited during a recess due to an oversight, it is undisputed that since at least 2015, all forms of prayer take place prior to the meeting being called to order to perform any governmental functions. *Id.* at ¶¶ 11-12. The purpose of the prayer is for the benefit of the City Council members as a spiritual invocation to assist them in their decision making, to put them in the proper mindset to perform their civic duties. *Id.* at ¶ 10, 13.

On July 1, 2015, the Freedom From Religion Foundation, Inc. send a letter to then-Council President J.R. Carpenter complaining about the City Council’s prayer practice. Dkt. 1, Plaintiffs’ Complaint, p. 9, ¶ 53, Ex. 1. The City Attorney responded and outlined nearly the exact criteria for Legislative Prayer set forth by Justice Kennedy in the 2014 Supreme Court decision in *Greece v. Galloway*. *Id.* ¶54, Ex. 2. While the City Council did not follow all of the suggestions laid out by the City Attorney, they did hold the prayer prior to “calling the meeting to order,” and other than the stray events referenced by the Plaintiffs, the President ceased inviting the public to participate. Reed Aff. at ¶ 14. Mr. Reed admits there are some unintentional incidents where he raised his arms at the beginning of the prayer, but this only occurred in three of the twelve videos immediately available of the Council’s website, and he

believes it is a very rare occurrence overall. *Id.* at ¶ 15. The Freedom From Religion Foundation, Inc., took the position that such efforts and proposed changes were insufficient, and cited pre-*Greece* cases to support this contention. Dkt. 1, Plaintiffs' Complaint, p. 10-11, ¶ 56, 58, Ex. 3.

STANDARD FOR PRELIMINARY INJUNCTION

It is well established that a preliminary injunction may be granted only if a plaintiff satisfies the following elements required for such relief: (1) Plaintiffs are likely to succeed on the merits; (2) Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in Plaintiffs' favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

A preliminary injunction is an extraordinary remedy intended to protect the *status quo* and prevent irreparable harm during the pendency of a lawsuit, and the Plaintiff must make a "clear showing" that he is likely to succeed at trial. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (2017). Indeed, the Fourth Circuit has noted that a preliminary injunction "involve[s] the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.*, 245 F.3d 335, 339 (4th Cir. 2001) (internal quotation marks and citations omitted). As set forth below, the facts and circumstances in this case do not establish any of the necessary elements for a preliminary injunction in this matter.

The City of Parkersburg follows the long tradition of legislative prayer which this Country has permitted for its entire history. Thus, the Plaintiffs are not likely to succeed on the merits of their claim barring a radical departure from 300 years of tradition and jurisprudence. Additionally, Plaintiffs have not demonstrated any actual or particularized harm that a preliminary injunction could remedy. The Plaintiffs are not required to participate in or to even be present for the pre-meeting prayer and yet may still participate in the entirety of the official

meeting. The Plaintiffs are not being subjected to any personal injury, such as harassment or humiliation by the Council, nor are they being treated any differently from any other citizen with regard to participating in Council meetings. Therefore, no irreparable harm will befall the Plaintiffs during the pendency of this litigation. Additionally, the balance of equities and the public interest both favor the City and against issuing a preliminary injunction in this case.

LEGISLATIVE PRAYER UNDER THE ESTABLISHMENT CLAUSE

In 1983 the Supreme Court affirmed the constitutionality of legislature prayer offered by a chaplain before its legislative session – even when the chaplain is paid with public funds for his service. *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh* the Nebraska Legislature had been opening up its sessions with a prayer by a Presbyterian minister who was paid through public funds. *Marsh*, 463 U.S. 783, 784-85. Chief Justice Burger began the majority opinion with a historical overview of legislative prayer in the United States, beginning his analysis with colonial times. *Id.* at 786-87. In early colonial times chaplains frequently opened legislative sessions with prayer, this tradition continued at the First Congress where one of the first initial items of business was to find a chaplain for precisely this purpose. Just three days after a chaplain was found, the language for the Bill of Rights was agreed upon. *Id.* at 787. The *Marsh* Court considered this historical practice, and the fact that those who continued it were the same men who passed the Bill of Rights. Chief Justice Burger wrote, “[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice ... is not something to be lightly cast aside.” *Id.* at 790, citing *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970).

Not only was the legislative prayer upheld, but the Court allowed the prayer to continue in a Christian form paid for with public funds. *Id.* at 791-92. Senator Chambers claimed – as do Plaintiffs herein – that in a pluralistic society an overtly Christian prayer should not be allowed; to bolster this claim, Senator Chambers argued that not all legislators accepted the practice of opening the First Congress with prayer. *Id.* at 791. Chief Justice Burger dismissed this argument and in doing so he appropriately cited to Samuel Adams’ remark on the very matter of the First Congress’ prayer, where he said, “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.” *Id.* at 792.

Courts continued to apply *Marsh* to challenges to legislative prayer for over thirty years until the 2014 decision of *The Town of Greece v. Galloway* in which the Supreme Court considered legislative prayer not offered by chaplains in a solely legislative body, but to a local city board meeting, and determined that it was constitutional.

In 1999, a newly elected town supervisor decided to open sessions by inviting local clergy to give a prayer. *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014). From 1999-2007, the clergymen were all Christians from the local area who served as unpaid volunteers. *Id.* The Town of Greece did not attempt to control the prayers, which often had Christian themes. Some examples of prayers show this recurring Christian theme:

“Lord we ask you to send your spirit of servanthood upon all of us gathered here this evening to do your work for the benefit of all in our community. We ask you to bless our elected and appointed officials so they may deliberate with wisdom and act with courage. Bless the members of our community who come here to speak before the board so they may state their cause with honesty and humility.... Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day into your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen.”

Some prayers very specifically related to Christian Holy Days:

“Lord, God of all creation, we give you thanks and praise for your presence and action in the world. We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn events of next week that we find the very heart and center of our Christian faith. We acknowledge the saving sacrifice of Jesus Christ on the cross. We draw strength, vitality, and confidence from his resurrection at Easter.... We pray for peace in the world, an end to terrorism, violence, conflict, and war. We pray for stability, democracy, and good government in those countries in which our armed forces are now serving, especially in Iraq and Afghanistan.... Praise and glory be yours, O Lord, now and forever more. Amen.”

Town of Greece, 134 S. Ct. 1811, 1816-1817. The Plaintiffs claimed that these Christian prayers were offensive, the town had been excluding other religions, and that it violated the Establishment Clause. *Id.*

Justice Kennedy wrote the majority decision, and – similar to Chief Justice Burger’s analysis in the *Marsh* case – focused on the historical practice of legislative prayer in framing the issue under the Establishment Clause. *Id.* at 1819.

The Court first considered that the prayers were typically sectarian in nature and ruled that legislative prayer need not be generic and that the State should not overly involve itself in the content of the prayers. *Id.* at 1822-23. The Court instead determined that “[i]f the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.” *Id.* at 1823. In *Greece* there were even two circumstances which could be categorized as disparaging non-Christians, but the Court considered these stray remarks and not representative

of the pattern and practice of the prayers. *Id.* at 1824. No such allegation is present in the case at bar.

The Court next determined that the prayers at issue were not coercive in nature. It determined that this analysis is considered from the point-of-view of a reasonable observer and that “[i]t is presumed that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.” *Id.* at 1825. The Court stated that these prayers were primarily for the benefit of the legislatures prior to performing their work, and that there was no evidence that any citizen was treated differently due to their participation. *Id.* at 1825-26. The Court reasoned that the Plaintiffs may have been offended, but that “[o]ffense, however, does not equate to coercion.” *Id.* at 1826.

Although the *Greece* Court notes that the analysis would be different if the legislators “directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity”, none of the foregoing were deemed to be dispositive. *Id.*

In support of their Motion, Plaintiffs cite the recent Fourth Circuit Court of Appeals decision in *Lund v. Rowan City, N.C.*, 863 F.3d 268 (2017). In *Lund*, the Rowan County Board of Commissioners opened each session with a prayer led by one of the five Commissioners on a rotating basis. *Lund*, 863 F. 3d 268, 272-3. The Commissioners often verbally called on the public to stand and pray with them. *Id.* at 273. The prayers were “unmistakably Christian in content,” in various ways “implied that Christianity was superior to other faiths,” and “[o]n occasion, Board members appeared to implore attendees to accept Christianity.” *Id.* After

determining that the legislator-led prayer differed from the traditional historical context of chaplain-led prayer, the Court turned their attention to four topics: “commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting.” *Id.* at 281. The Court was clear to emphasize that “it is the combination of these elements—not any particular feature alone—that threatens to blur the line between church and state to a degree unimaginable in Town of Greece.” *Id.* (internal citations and quotation marks omitted).

First, the Fourth Circuit determined that the prayer-givers in *Lund* were the State itself, and that it was a problem for the Commissioners to compose prayers and maintain complete control over the content thereof. *Id.* at 281.

Next, the Court determined that the prayers served to elevate the Christian faith while disparaging nonbelievers with prayers such as:

‘We have been blessed to be the recipients of your immeasurable grace. We can't be defeated, we can't be destroyed, and we can't be denied because we are going to live forever with you through the salvation of Jesus Christ. . . . And as we pick up the Cross, we will proclaim His name above all names, as the only way to eternal life.’ S.A. 33 (prayer of March 5, 2012).

‘We can't be defeated, we can't be destroyed, and we won't be denied, because of our salvation through the Lord Jesus Christ.’ S.A. 19 (prayer of May 18, 2009).

‘You saved us and you call us with the holy calling. We are the recipients of your immeasurable grace and glory. We are the richest people in the world. . . . [W]e're going to live forever with Him.’ S.A. 15 (prayer of June 2, 2008).

Lund at 285. Other prayers preached conversion:

Father, I pray that all may be one as you, Father, are in Jesus, and He in you. I pray that they may be one in you, that the world may believe that you sent Jesus to save us from our sins. May we

hunger and thirst for righteousness, be made perfect in holiness, and be preserved, whole and entire, spirit, soul, and body, irreproachable at the coming of our Lord Jesus Christ.

Id. The Fourth Circuit determined that “[b]y proclaiming the spiritual and moral supremacy of Christianity, characterizing the political community as a Christian one, and urging adherents of other religions to embrace Christianity as the sole path to salvation, the Board in its prayer practice stepped over the line.” *Id.* at 286. None

Third, the Court found that the Commissioners “pressed religious observances upon their citizens” as the “commissioners told attendees to rise and often invited them to pray.” *Id.* at 286. The Court found it outside of the parameters established in *Greece* for the Commissioners to invite the attendees to participate. *Id.* at 287. It also noted that the *Town of Greece* involved similar requests, but the prayers in *Lund* had a higher degree of proselytization, and thus were more problematic. *Id.*

Finally, the Court considered the setting in which the prayers occurred. The Fourth Circuit found that as this setting was intimate, and involved attendees requesting the Board to exercise its “quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards,” that it presented “the opportunity for abuse” and that it may push attendees to participate. *Id.* at 288.

ARGUMENT

The extraordinary remedy of a preliminary injunction may be granted only if a plaintiff makes a clear showing on each of the following required elements: (1) Plaintiffs are likely to succeed on the merits; (2) Plaintiffs are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in Plaintiffs’ favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, under

Greece and *Lund*, the Plaintiffs are not likely to succeed on the merits, and even if the Plaintiffs were likely to succeed, the balance of equities and the public interest favor the City's ability to continue to participate in the nearly 300-year tradition of legislative prayer in the United States, and better serve the citizen of the City.

I. The Plaintiffs Have Failed to Make a Clear Showing that they are Likely to Succeed on the Merits of their Establishment Clause Challenge.

In *Lund* the Fourth Circuit took portions from the majority and plurality decisions in *Greece* and reasoned that “Courts adjudicating a challenge to legislative prayer inquire ‘into the prayer opportunity as a whole, rather than into the contents of a single prayer.’ *Town of Greece*, 134 S. Ct. at 1824. They must conduct a ‘fact-sensitive’ review of ‘the setting in which the prayer arises and the audience to whom it is directed,’ *id.* at 1825 (plurality opinion), as well as ‘the pattern of prayers over time,’ *id.* at 1827.” *Lund*, 863 F.3d 268, 280-281.

Thus, the stark differences between this matter and *Lund* must be given weight as to conduct a “fact-sensitive” review, and this case must be considered not only in comparison to *Lund* but to the Supreme Court's analysis in *Marsh* and *Greece*.

A. Lund Analysis

In *Lund*, after determining that the legislator-led prayer differed from the traditional historical context of chaplain-led prayer, the Court turned their attention to four topics: “commissioners as the sole prayer-givers; invocations that drew exclusively on Christianity and sometimes served to advance that faith; invitations to attendees to participate; and the local government setting.” *Id.* at 281. The Court was clear to emphasize that “it is the combination of these elements – not any particular feature alone” which made the prayer in that case

unconstitutional. *Id.* Thus, these four factors must be considered together in this case pursuant to *Lund*.

1. The identity of the legislative prayer-giver is not dispositive under *Greece* or *Lund*

Though the Plaintiffs' place great weight in the identity of the prayer-givers in this case, neither *Greece* nor *Lund* state that if the legislator themselves are the prayer-givers, that the prayers are *per se* unconstitutional. Instead, *Lund* concluded that the identity of the prayer-giver is relevant to the constitutional inquiry. *Lund*, 863 F.3d 268, 280. It is true that *Lund* gave this consideration weight, and this factor weighed against the constitutionality of the Board's practices, but the *Lund* Court never stated it was dispositive, and continued to consider the prayers under the fact-sensitive analysis.

2. Though the Lord's Prayer is a Christian prayer, the content of the prayer does not proselytize or advance any one, or disparage any other, faith or belief.

The Lord's Prayer was first spoken by Jesus Christ as recorded in the Gospel of Matthew. Though the Lord's Prayer is a sectarian prayer within the meaning of *Greece*, nothing about the Lord's Prayer runs afoul of *Marsh*, *Greece*, or even *Lund*. Legislative prayer is not required to be generic or non-sectarian. Instead, the Supreme Court made clear in its Syllabus that "[Plaintiff's] insistence on nonsectarian prayer is not consistent with this [legislative prayer] tradition," and "[a]bsent a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose, a challenge based solely on the content of a particular prayer will not likely establish a constitutional violation." *Town of Greece*, 134 S. Ct. 1811, 1813-1814. The case of *Mullin v. Sussex City* cited by the Plaintiffs for the proposition that reciting the

Lord's Prayer at county council meetings took place prior to the clear guidance the Supreme Court issued in *Greece* and should thus be given no regard in this case. 861 F. Supp.2d 411.

Nothing in the Lord's Prayer denigrates, proselytizes, or betrays an impermissible government purpose. This fact stands in stark contrast to *Lund* where the Fourth Circuit expressly found that the prayers composed and offered by the individual Commissioners were problematic because, "the prayer practice at times 'promote[d]' Christianity, the commissioners' 'preferred system of belief.'" *Lund*, 863 F.3d 268, 283 (citing, *Town of Greece*, 134 S. Ct. at 1822). This point is also supported by the Sixth Circuit Court of Appeals decision in *Bormuth v. County of Jackson*. In *Bormuth*, Christian County Commissioners led prayers at Commission meetings with public participation. *Bormuth v. Cty. of Jackson*, 870 F.3d 494, 498 (2017). The Sixth Circuit cited the following as generally illustrative of the prayers in the record:

Bow your heads with me please. Heavenly father we thank you for this day and for this time that we have come together. Lord we ask that you would be with us while we conduct the business of Jackson County. Lord help us to make good decisions that will be best for generations to come. We ask that you would bless our troops that protect us near and far, be with them and their families. Now Lord we wanna give you all the thanks and all the praise for all that you do. Lord I wanna remember bereaved families tonight too, that you would be with them and take them through difficult times. We ask these things in your son Jesus's name. Amen.

Id. at 498. The *Bormuth* Court – writing *en banc* – held that solemn, respectful-in-tone prayers led by Commissioners – even those which espouse the Christian faith – meet First Amendment scrutiny, even when on one occasion a Commissioner asked that God “Bless the Christians worldwide who seem to be targets of killers and extremists”.

The factual distinction between *Bormuth* and *Lund* is clear and telling of how the factor of proselytization drives the analysis. On this point more than any other, this case is

distinguishable from *Lund*. Despite Plaintiffs' claim that somehow the Lord's Prayer is *more coercive* than the circumstances in *Lund*—this holds no water under *Greece*. *Greece* emphasized that it was not concerned with the sectarian nature of the prayers, but rather with whether they sought to denigrate or proselytize; the Lord's Prayers simply cannot be deemed coercive under controlling precedent. *Town of Greece*, 134 S. Ct. 1811, 1821-22.

3. The City Council rarely “invited” the attendees to pray since 2015.

In the two years preceding Plaintiff's lawsuit – indeed since July 22, 2015 – the City Council President only knows of few instances where he gestured to others to rise for the Lord's Prayer and the Pledge of Allegiance. Reed Aff. at ¶ 15. After the July 22, 2015 letter, the City Council President made a point to cease inviting the attendees to prayer per the suggestion of the City Attorney. *Id.* at ¶ 14.

Thus, this case is distinct from *Lund*, which determined that the invitations to pray by the Board members set the case apart from *Greece*. *Lund* at 286-287. To the extent that Plaintiffs attempt to rest their case on these two stray incidents, *Greece* requires the Court to consider the prayer opportunity as a whole, not a single prayer; thus, these few stray events should not control the day. *Greece* at 1824.

Even if this Court does find these few invitations a portion of the analysis, this matter is still distinguishable from *Lund*. In *Lund*, the Court did find it disfavored that the Board members themselves were inviting the attendees to pray, they also noted this was a problem because the prayers offered by the Board in *Lund* involved a greater “degree of proselytization” than the prayers in *Greece*. *Lund* at 287. As noted above, the Lord's Prayer does not proselytize, thus taken as a whole, this case is further distinguishable from the analysis in *Lund*.

4. The setting in which the prayers in the City of Parkersburg take place is proper under *Greece*

The Supreme Court in *Greece* permitted chaplain-led legislative prayer at monthly town board meetings which were attended by the public. *Greece*, 124 S. Ct., at 1816. In *Lund* the Fourth Circuit found that the Rowan County Board's "intimate setting" cut against its constitutionality, even though the overall setting was similar to *Greece*. *Lund* 863 F.3d, at 287-288. It is not clear in the *Lund* decision where precisely it strikes the difference from *Greece* on this issue, however, this factor should still be considered.

In *Lund*, the Court placed significance on the fact that immediately after the prayer, the Board began to hold adjudicatory hearings, in which they exercised "quasi-adjudicatory power over such granular issues as zoning petitions, permit applications, and contract awards." *Lund* at 288. In other words, the Court was concerned that there would be pressure to participate in prayer since individuals would be appealing to the Board for not just legislation which they support or oppose, but adjudication on their personal issues. The Plaintiffs have not alleged here that the Parkersburg City Council performed such functions immediately after the prayer nor do they allege that their interest have been adversely impacted by this practice.

Another issue seems to be that the attendees would feel pressured to stand and participate, one attendee was even booed and jeered by fellow citizens when she spoke out against the prayer. *Id.* at 288. The *Greece* Court expressly held that offense does not equal coercion, and "[i]f circumstances arise in which the pattern and practice of ceremonial, legislative prayer is alleged to be a means to coerce or intimidate others, the objection can be addressed in the regular course." *Greece*, at 1826. While the Plaintiffs allege in detail their

internal feelings about the Council's practice, they have not alleged any facts that could plausibly demonstrate that the prayer is a "means to coerce or intimidate others."

In analyzing this factor in the context of *Greece* and *Lund*, it should not weigh against the City Council as the Plaintiffs have not alleged the same set of facts in *Lund* which appear to differentiate that case from *Greece*.

B. Other Factors from *Greece* and *Marsh*

In addition to the four factors considered in *Lund*, there are other considerations laid out in *Greece* which are relevant to the constitutional considerations at hand, and which should also be considered here.

1. The prayers took place prior to the legislative function of the City Council meetings in accordance with *Greece*.

Plaintiffs cite a pre-*Greece* 2008 Fourth Circuit case, *Turner v. Fredericksburg*, in an effort to claim that it does not matter that the prayers take place prior to the legislative function of the City Council meetings. 534 F.3d 352, 356 (2008). This reliance on *Turner* is misplaced in light of the more recent decision in *Greece*. In *Greece* the prayer took place "[f]ollowing the roll call and recitation of the Pledge of Allegiance." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816. The Supreme Court considered this a factor *favorable* to the permissibility of the prayer, writing "the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions," and, "[t]he inclusion of a brief, ceremonial prayer as part of a larger exercise in civic recognition suggests that its purpose and effect are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers." *Id.* at 1827. Despite one stray occurrence at the April 10, 2018 Council meeting where the Council forgot the prayer and thus

adjourned the meeting to briefly hold it, this was a single stray event and should not be dispositive of this Court's analysis; indeed, the effort to remove the recitation of the Lord's Prayer from the official business of the meeting is evidence of separation between the ceremonial aspect of the meeting and the substantive legislative functions. *Greece* makes clear that the City of Parkersburg's timing of the prayer meets the exact criteria the Supreme Court envisioned as appropriate.

2. The Plaintiffs have not alleged facts sufficient to demonstrate coerciveness of Council's recitation of the Lord's Prayer and therefore have not made a sufficient showing as to the likelihood of success on the merits.

Mr. Cobranchi and Mr. Engel allege they was "conspicuous" because they chose to remain seated while others stood, "felt pressure to participate," and "feel negatively singled out," by not participating in the Lord's Prayer. Dkt. 1, Plaintiffs' Complaint, p. 2-4, ¶¶ 10-12; 21-23. The sole objective fact alleged arises from a September 12, 2017 meeting during which Councilman Eric Barber looked at the Plaintiffs' video camera as they filmed the Lord's Prayer and stated "Amen" into his microphone. Dkt. 1, Plaintiffs' Complaint, p. 9, ¶¶ 51-52. These stray occurrence adds nothing to Plaintiff's case for coercion under *Greece*.

The coercive "feelings" the Plaintiffs point toward are exactly the type of allegations the Supreme Court in *Greece* considered insufficient to reach the level of coercion. In Section II-B of *Greece*, Justice Kennedy was joined by Chief Justice Roberts and Justice Alito in stating, "[i]n their declarations in the trial court, respondents stated that the prayers gave them offense and made them feel excluded and disrespected. Offense, however, does not equate to coercion." *Greece*, 134 S.Ct. 1826. The Supreme Court also confirmed that this analysis is not a subjective analysis, but takes place from the point of view of a reasonable observer, and "[i]t is presumed

that the reasonable observer is acquainted with this tradition and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or force truant constituents into the pews.” *Id.* at 1825.

As noted above, there was no such proselytizing in at these City Council meetings, and there was no coercion on the level required by the Supreme Court. This analysis weighs in favor if the City Council’s prayer practice being constitutional.

II. Plaintiffs Have Not Suffered Harm

The Plaintiffs are suffering no particularized harm which a preliminary injunction should be used to address. The Plaintiffs are not required to participate in the prayers. They do not allege that they have ever been treated different in the realm of a government-function or decision due to their not participating in the prayers. They do not allege they were forced to participate in prayer or that they suffered any actual harm as a result of their refusal to participate. As noted above, Plaintiffs are simply not acting as reasonable observers viewing a historical practice of legislative prayer, particularly in light of the fact that “an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum, . . .” *Id.*

III. The Balance of Equities Favors the City of Parkersburg’s Right to Continue this Country’s Centuries-Old Practice of Legislative Prayer.

Legislative prayer is interwoven into this Country’s history as deeply as any other practice. The Supreme Court in *Greece* and *Marsh* recognized this reality: “[t]hat the First Congress provided for the appointment of chaplains only days after approving language for the First Amendment demonstrates that the Framers considered legislative prayer a benign

acknowledgment of religion’s role in society.” *Greece* at 1819. Though *Lund* recognized differences between chaplain-led prayers and legislator-led prayers, it still analyzed the issue under the case law relating to legislative prayer. The balance of equities favors the City Council’s right to continue in this long line of history through the litigation of this matter. “In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with a prayer has become part of the fabric of our society.” *Marsh* at 792, 103 S. Ct. 3330. An injunction halting this practice would impose undue hardship on the City of Parkersburg which is gravely out of proportion to any speculative benefit that could be obtained by the Plaintiffs.

IV. An Injunction is Against the Public Interest.

The members of the Parkersburg City Council take their duties seriously. There can be no doubt that many people of faith turn to a higher power when they must face serious issues and responsibilities. The Court in *Greece* detailed the value of these prayers:

The principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing. The District Court in *Marsh* described the prayer exercise as “an internal act” directed at the Nebraska Legislature’s “own members,” *Chambers v. Marsh*, 504 F. Supp. 585, 588 (Neb. 1980), rather than an effort to promote religious observance among the public. See also *Lee*, 505 U.S., at 630, n. 8, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (Souter, J., concurring) (describing *Marsh* as a case “in which government officials invoke[d] spiritual inspiration entirely for their own benefit”); *Atheists of Fla., Inc. v. Lakeland*, 713 F. 3d 577, 583 (CA11 2013) (quoting a city resolution providing for prayer “for the benefit and blessing of” elected leaders); Madison’s Detached Memoranda 558 (characterizing prayer in Congress as “religious worship for national representatives”); Brief for U.S. Senator Marco Rubio et al. as Amici Curiae 30-33; Brief for 12 Members of Congress as Amici Curiae 6. To be sure, many members of the public find these prayers meaningful and wish to join them. But

their purpose is largely to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers. For members of town boards and commissions, who often serve part-time and as volunteers, ceremonial prayer may also reflect the values they hold as private citizens. The prayer is an opportunity for them to show who and what they are without denying the right to dissent by those who disagree.

Town of Greece, 134 S. Ct. 1811, 1825-1826. These prayers are for the City Council, and to deprive them of their ability to put themselves in the proper mindset before performing their legislative duties would be a disservice to the public whom they serve.

V. The Plaintiffs Would Not Be Satisfied with Any Form of Legislative Prayer

It is well worth noting that the Plaintiffs have already expressed that legislative prayer, even that in the exact form found in *Greece*, would be unacceptable to them. In the July 2015 letter exchanges between the Freedom From Religion Foundation, Inc. and the City of Parkersburg Attorney, the City Attorney suggested that: “(1) Any prayer should be conducted (and as it already is) prior to calling the meeting to order; (2) The public should not be invited to stand or otherwise participate in the prayer; and (3) No elected official should lead the prayer.” Dkt. 1, Plaintiffs’ Complaint, p. 10, ¶ 54, Ex. 2. Despite the fact that as outlined, which would precisely mirror the circumstances found in *Greece*, the Plaintiffs maintain that “Even if enacted by the City Council, the proposed actions of the City Attorney Santer’s letter do not comply with the Establishment Clause of the First Amendment.” Dkt. 1, Plaintiffs’ Complaint, p. 10, ¶ 56. In short, the Plaintiffs would only be satisfied if this Court were to be hostile to religion, which is forbidden under the Constitution. *Lund*, 863 F.3d 268, 275.

Plaintiffs make no effort to square their allegations with any of the centuries of First Amendment jurisprudence. They do not come to this Court with a case or controversy but rather with an agenda to divorce prayer – any prayer – from the function of government. Were this

Court to award the relief requested in Plaintiffs' Motion, "An injunction preliminarily, and thereafter permanently, enjoining Defendant, . . ., from initiating or delivering sectarian prayers at meetings of the Parkersburg City Council" it would squarely violate *Greece*. Such a *carte blanche* prohibition against sectarian prayer violates established First Amendment jurisprudence and would chill the practice of Legislative prayer both within and without this Court's jurisdiction.

CONCLUSION

For all the reasons stated above, this Court should deny the *Plaintiffs' Motion for Preliminary Injunction* because they are not likely to succeed on the merits, are not suffering irreparable harm, the balance of equities favors the City of Parkersburg, and the public interest would be gravely harmed by the granting of a preliminary injunction.

CITY OF PARKERSBURG,

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Defendant City of Parkersburg, do hereby certify that on **September 10, 2018**, I electronically filed the foregoing ***The City of Parkersburg's Response to Plaintiffs' Motion for Preliminary Injunction*** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following counsel of record:

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