
NO. 04-1052

IN THE

SUPREME COURT OF THE UNITED STATES

TOWN OF GREAT FALLS, *et. al.*,

Petitioners,

vs.

DARLA KAYE WYNNE,

Respondent,

**On Petition for Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

**Brief of Respondent in Opposition to Petition for
Writ of Certiorari**

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QUESTIONS PRESENTED

1. Whether the lower courtís properly held that Town Councilís persistent and systematic use of a sectarian Christian prayer invoking the name of iJesus Christî to the exclusion of deities associated with any other particular religious faith, at each Town Council meeting in its public prayers, and in which town citizens participated, violated the Establishment Clause under *Marsh v. Chambers*, 463 U.S. 783 (1983), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

2. Whether this Court, absent a very obvious and exceptional showing of error, should review the concurrent findings of fact by two courts below that the Town Council advanced one religion over others in violation of the Establishment Clause of the First Amendment.

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MISCELLANEOUS

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**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

Respondent, Darla Kaye Wynne, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's opinion in this case.

STATEMENT OF FACTS

The facts in this case as found by the district court and fully concurred in by the Court of Appeals are not in dispute.¹

Respondent, Darla Kaye Wynne, is a citizen and resident of Great Falls, South Carolina. She is a follower of the Wiccan faith² and the Assistant National Director of Witches Against Religious Discrimination, Inc. (W.A.R.D.) since 1998.

Petitioners admit that the meetings of the Great Falls Town Council have been opened, and continue to be opened with prayer... Prayer is also the first item of official business listed on each agenda published by Town Council. (App. 37)

The Town Council conceded at the trial that Ms. Wynne had legitimate purposes for attending Town Council meetings unrelated to her religion. (App. 4) Ms. Wynne regularly attended Town Council meetings, and testified that a prayer or invocation was given at each Town Council meeting, which invoked the name of "Jesus Christ," "Christ," or "in the name of Jesus Christ, Savior," or "in Christ's Name." Initially, Ms. Wynne stood up and bowed her head as the prayer was delivered at the Council meetings. (App. 23) Prior to one Council meeting, Ms. Wynne was questioned about her Wiccan beliefs by several Council members. (App. 24) After the Council members questioned Ms. Wynne about her faith in Wicca, the prayers became more extensive, and more Christian in nature, and referred to our "Savior Jesus Christ," or "Jesus Christ." During the prayers citizens attending the meetings stood each time, bowed their heads, and concluded the prayers with "Amen." (App. 24) The prayers usually ranged from one (1) minute to four and one half (4 ½) minutes depending on current events within the Town.

Ms. Wynne stopped standing during the prayers as the references to Savior, Christ, Jesus, or Jesus Christ continued to increase, Wynne explained that it was "a very church environment," and that she became most uncomfortable since she believed that a prayer that invoked the name of Jesus Christ was a promotion of the Christian religion in which she did not believe. (App. 4-5) Ms. Wynne attended approximately forty (40) Town Council meetings, or approximately eight (8) per year since moving to Great Falls in 1998. (App. 23) Council member J.C. Broome, led the prayer or invocation at almost every meeting and commenced or ended the prayer with an invocation to "Christ," "Jesus Christ" or "Christ our Savior," on each occasion. (App. 23) At one meeting, Ms. Wynne requested that Council change its prayer policy. Councilmember Hilton thereafter posted this request for alternative prayers on the town website and asked for public comments. (App. 5)

The court found that the Town Council meeting of February 19, 2001 commenced with the typical prayer with references to Jesus Christ. Ms. Wynne presented her request to Council for an alternate prayer at the Town Council meetings. Ms. Wynne requested that Council utilize a generic prayer that was non-sectarian, one that did not pray to a specific deity of the Christian religion, or in the alternative, to invite members of different faith groups to come to Council meetings and give the prayer. (App. 24) This meeting was attended by over 100 citizens who all stood during the opening prayer, bowed their heads, and concluded the prayer with "Hallelujahs and Amens." Representatives of several churches and several ministers presented resolutions from their churches in

favor of Town Council maintaining its practice of having a Christian prayer to open every meeting, and petitions were presented signed by members of the public supporting council's Christian prayer. At this same meeting, Mayor Starnes announced that the Town was not going to change its prayer. (App. 24)

The court found that Ms. Wynne continued to attend council meetings, but was treated differently from other members of the public at Town Council meetings. She was ostracized for not standing during the prayers. She was not allowed to speak while others were allowed to do so. She was not recognized by the Mayor or Council in open session, and she was not allowed to speak at public session even after she had properly signed up to speak and had been placed on the agenda. (App. 24)

On one occasion, Ms. Wynne waited outside of the Town Council meeting in order to avoid having to be present during the invocation, and when she entered the meeting at 7:02 p.m., she was not allowed to speak at the public session. Mayor Starnes refused to recognize her, or allow her to speak even though she had properly signed up to be allowed to address Council at public session. (App. 24)

Ms. Wynne thereafter requested on several occasions that Council conduct a generic prayer with reference to a generic deity such as "God," and without reference to a specific deity associated with the Christian faith, so that members of her faith and those of other religions did not have to betray their own faith in order to attend Council meetings and to participate as citizens in Town affairs. (App. 7)

The court found that the Resolution adopted by Town Council on June 23, 2003, did not resolve the unconstitutional practices challenged by Wynne. (App. 7, N. 2) (App. 27, N. 3) The Resolution still allowed Council to invoke a Christian deity; it provided for a prayer with a Judeo-Christian format; and provided that the prayer opportunity could be given only by a councilmember, thus ensuring that members of other faith groups would be proscribed from leading prayer. The Resolution imposed no restriction on the content of the prayer whatsoever, and included a provision for persons to leave the Council chambers in order to avoid Council's Christian prayer activities. Citizens were thus forced to get up and leave the Council meeting in order to avoid participation in a Christian prayer, further calling attention to persons of other religious faiths or persons of non-religion, and further ostracizing them from the community. In addition, Ms. Wynne testified that she had a conversation with Council member Stevenson after Council adopted the Resolution, and was informed by him that the prayers were not going to change, that everything would stay the same and that the prayer would continue as it had in the past. (App. 7, N. 2), (App. 26, N. 19)

Mayor Starnes admitted that the Resolution did not address the content of the invocation, or prayer, or place any guidelines on the prayer. Mayor Starnes also admitted that it had been customary to open Town Council meetings with a prayer or invocation, and that "Jesus Christ," "Jesus Our Savior," and "In Christ's Name" have been mentioned in the prayers. (App. 23)

J.C. Broome, Mayor Pro Tem., had been the Council member who normally led the prayer, or invocation in the past, and had been designated by Council to lead the prayer, or invocation pursuant to Town Council's Resolution of June 23, 2003. Council has not directed whether J.C., Broome can or cannot invoke the name of "Jesus Christ" in the prayers, and the decision to invoke the name of "Jesus Christ" or other references to Christ is left totally to his discretion. (App. 26) (App. 36)

The court found that the Mayor and all Council Members are Christian. (App. 23) Mayor Starnes admitted that Jesus Christ is a Christian God and that only if a Muslim were elected as a Council Member, would there ever be a reference to Allah. As Mayor Starnes admitted, the only way that the prayer will change is if someone of another faith is elected to Council. (App. 27)

Mayor Starnes testified that Town Council passed the Resolution on June 23, 2003 and they wanted

a prayer that would meet the needs of our Council having their prayer. It would also make people feel comfortable to come in, and take part in the proceedings other than the prayer... The Mayor asserted that someone else would have to be elected to Council before the prayer would be changed. Mayor Starnes volunteered that 99 percent of the people in Town are Christian. That unless we had someone to come in from outside, they would probably follow a Judeo Christian format. (App. 27) Mayor Starnes made it clear that Council considers that there is no restriction on the content of any prayer or invocation in the Resolution, and he admitted that even with the Resolution in place, Council was free to continue to refer to Jesus Christ in any prayer or invocation, and would continue to do so. (App. 26)

Mayor Starnes admitted that even with the provisions of the Resolution in place, that members of the public at the meeting on June 30, 2003 rose, bowed their heads, and prayed with Town Council.

The June 23, 2003 Resolution paragraph 2(c) provides the invocation may request divine guidance for the Town of Great Falls, and its officials, and citizens in the conduct of the business of the Town. The court found that the Resolution was directed at public participation in the prayer and invocation, and it was not merely a legislative prayer. (App. 26)

Nothing changed after Town Council enacted the June 23, 2003 Resolution. Town Council meetings still began with a prayer or invocation and still contained references to, and invoked the name of, Jesus Christ, Jesus Our Savior, and/or Christ, until properly enjoined by the district court. (App. 40)

REASONS FOR DENYING THE PETITION

1. Petitioners Explicitly Christian and Sectarian Prayers Violate the Establishment Clause, as the Court of Appeals Correctly Concluded, the Town Councils' Prayer Improperly "Exploited" a "Prayer Opportunity" to "Advance" One Religion over Others in Violation of *Marsh v. Chambers*, 463 U.S. 783 (1983)

The question presented by Petitioners has in fact already been answered by this Court, contrary to the Petitioners' suggestion that it is an open question under *Marsh v. Chambers*, 463 U.S. 783 (1983). Petitioners claim that *Marsh* frees legislative prayer from all the restrictions of the Establishment Clause, including the fundamental ban on religious preferences acknowledged in *Larson v. Valente*, 456 U.S. 228 (1982). [Petition at 14.] In *County of Allegheny v. ACLU*, 462 U.S. 573 (1983), a majority of the Court rejected that precise claim.

The Court in *Marsh* found that the Establishment Clause was not violated when a legislative session was opened with a prayer offered by a chaplain. It is clear that the Court in *Marsh* was dealing with a prayer that made no reference to Jesus Christ. See *Marsh*, 463 U.S. at 793, Footnote 14. The Chaplain in *Marsh* had specifically removed any references to Jesus Christ from the prayer when he had received a complaint from a Jewish member of the Nebraska legislature. In *Marsh*, the non-sectarian prayer was not advancing one religion over another religion or non-religion. In these circumstances, legislative prayer is not an establishment of religion or a step toward establishment, but is simply a tolerable acknowledgment of beliefs widely held among the people of this country. 463 U.S. at 792.

As *Marsh* stated: "Not even the unique history of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief." 463 U.S. at 793, Footnote 14. (Emphasis added) In numerous cases since *Marsh*, prayer, invoking the name of Jesus Christ has been identified as sectarian, and prayer that does not invoke the name of Jesus Christ has been identified as acceptably non-sectarian. *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989); *Lee v. Weisman*, 505 U.S. 577, 589 (1992); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S. Ct. 2266 (2000).

The Court, in *County of Allegheny v. ACLU*, determined that the placing of a Christian creche in the County Courthouse was an unconstitutional violation of the Establishment Clause as it had the unconstitutional effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ.

As the Court stated in explaining *Marsh*:

Indeed, in *Marsh* itself, the Court recognized that not even the unique history of legislative prayer, 463 U.S. at 791, 103 S. Ct. at 3336, can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. *Id.* at 794-795, 103 S. Ct. at 3337-3338. The legislative prayers in *Marsh* did not violate the principle because the particular chaplain had removed all references to Christ. 492 U.S. at 603... Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, e.g., *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions.) "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982). 492 U.S. at 603.

The Court explained further that government cannot appear to take a position on questions of religious belief or make adherence to a religion relevant in any way to a person's standing in the political community. *Id.* at 594. Accord, *Everson v. Board of Education*, 330 U.S. 1 (1947); *Board of Education of Kiryas Joel Vill.*

School District v. Grumet, 512 U.S. 687 (1994).

Petitioners bury this discussion of *Marsh* at page 16 of this Petition, dismiss it as dicta, and explain that the holding of *Marsh* should not be so drastically altered in dicta in the subsequent opinion by those who disagreed previously with the majority opinion. *Id.* at 17. It acknowledged that the Fourth Circuit placed great weight on these words - how could it not in a hierarchical judicial system? - but complain that the court's submission to this holding in *County of Allegheny* is itself reason for granting the writ.

This argument is based on a fundamental distortion of this Court's rule. Rule 10 of this Court's rules provides that a decision that *conflicts* with relevant decisions of this Court (*emphasis added*) is grounds for granting certiorari. *Following* those decisions is not. Such compliance is an obligation of the lower courts, not the usurpation Petitioners suggest requires correction by this Court.

Justice O'Connor's comprehensive review of permissible government uses of religious references, *Elk Grove U.S.D. v. Newdow*, 124 S.Ct. 2301 (2004), likewise assumes that while general acknowledgments of religion need not be viewed by reasonable observers as denigrating the non-religious, the same cannot be said of instances where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent omnipotent Creator...are known to differ, [*Lee v. Weisman* at 641 (Scalia, J., dissenting)]. As a result, no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another. The Pledge [under God] complies with this requirement. It does not refer to a nation "under Jesus" ... 124 S.Ct. at 2326-2327.

The prayers offered by the Great Falls Town Council are explicitly Christian prayers. They clearly invoke the name of Jesus Christ, and are therefore sectarian and impermissible under the Establishment Clause. They impermissibly favor the Christian religion over all others.

2. The Concurrent Findings of Fact by the District Court and Fourth Circuit Court of Appeals Were Not Very Obvious and Exceptional Error.

The Petitioners conceded in the Circuit Court below that the findings of fact made by the district court were not erroneous. (App. 3. N 1) This Court has held that it cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank and Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *Accord, Exxon Co., U.S.A. v. Sofee, Inc.*, 517 U.S. 830, 841 (1996). Given the concessions of the petitioners, there can be no very obvious and exceptional showing of error. Under the circumstances, the Petition for Writ of Certiorari should be denied.

The Town of Great Falls, South Carolina, commences each and every Town Council meeting with a prayer which invokes exclusively the Christian deity: "Jesus," "Jesus Christ," or "Christ." (App. 23) There has never been a prayer which invoked any other deity associated with any specific faith other than Christianity. (App. 15). Contrary to the misleading phrasing of the Question Presented in the Petition, this case does not present the question of whether an isolated reference to Jesus in a single legislative prayer is unconstitutional. The question in fact presented by this case - as Respondent has rephrased it - is whether legislative prayers may reflect a persistent and systematic sectarian preference, specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ.

The question in fact considered by the District Court was whether Petitioner's practice of "invok[ing] the name of Jesus Christ in prayers to open or close Town Council meetings" (*emphasis added*) violated the First Amendment. It noted that the councilperson who *often* leads the prayer and *frequently* refers to Jesus, Jesus

Christ, or Christ our Savior in the opening or closing portion of the prayer. (App. 23) The single prayer cited in the Petition was only itypicalî of the prayers offered at Council meetings, (App. 23) not the sole subject of the Complaint, as Petitioners would have it, but merely an example of the Christian prayers which typified legislative prayer in Great Falls.

The Court of Appeals accepted these factual findings - made after a bench trial - and noted that Wynneís objection was ito the Town Councilís *practice* of referring to ëJesus,í ëChristí or ëJesus Christí in its prayers.î (App. 3 at L 4.) (*Emphasis added.*) It noted that citizen support was for îChristianî prayer (App. 24) It noted further that the Council rejected a proposal by Ms. Wynne calling for non sectarian prayers, or opening prayers to be recited by citizens professing a variety of faiths - a proposal which would not have barred an occasional reference to Jesus. (App. 24)

All of Ms. Wynneís requests were steadfastly rejected. Ms. Wynneís refusal to accept the Christian prayer practice adversely affected her right to participate in community affairs. Councilmember Hilton urged citizens and members of Christian churches to present petitions and letters in support of Council continuing its Christian prayers. The Mayor testified that all members of council were Christian, and ninety nine percent (99%) of the citizens of Great Falls were Christian, and that Council would not change its prayer unless or until, someone of another faith was elected to Town Council.

On June 23, 2003 - two (2) years after the commencement of this litigation, Town Council passed a Resolution to give written guidance to its prayer opportunity. The Resolution made it clear that only councilmembers would have a prayer opportunity as the Resolution restricts the prayer opportunity to councilmembers, and it provided that representatives of other faith groups would not ever be allowed to participate, or lead prayer at council meetings. Furthermore, the resolution did not limit in any way the Councilís use of prayer invoking îJesus Christí, and Mayor Starnes admitted that the use of Jesus Christ in the prayer would be acceptable to all members of the Town Council. The Resolution was directed at the Town of Great Falls, its officials and citizens. Prayer continues to be listed on the agenda as the first item of official business each month, and members of the public continue to be invited to participate. Petitioner, Councilman Stevenson, admitted to Ms. Wynne that the passage of the Resolution would not change anything, and that the prayers invoking the name of Jesus Christ would remain the same and continue as they had in the past. (App. 7, N. 2) (App., No. 19)

Petitionersí have maintained a persistent, deliberate and exclusionary prayer practice and policy at virtually every Town Council meeting. This is not a case of happenstance, mistake, or the case of a single or even an occasional sectarian prayer. This is a deliberate and pervasive practice of Town Council ignoring the Establishment Clause of the First Amendment to the United States Constitution in order to maintain its practice of giving a Christian prayer as part of the public business of the Town.

Despite Petitionersí labored efforts to obfuscate and confuse the matter, it is clear that Town Councilís persistent and systematic practice of invoking the name of Jesus Christ in its prayers at the commencement of every public meeting is a violation of the Establishment Clause and that the lower courts were correct in their findings.

3. The Petitioners Have Not Cited to a Single Case Which Holds That Legislative Prayers Which Invoke the Name of Jesus Christ Are Acceptable Non-sectarian Prayers.

In *Lee v. Weisman*, the Court recognized that acceptable non-sectarian prayer would not include explicit references îto the God of Israel, or to Jesus Christ, or to a patron Saintî 505 U.S. at 589. In *Santa Fe Independent School District v. Doe*, the Court held that the school district policies permitting student led, student initiated, pre-game prayers violated the Establishment Clause. The Court struck down the use of Christian invocations,

benedictions, and overtly Christian prayers which invoked the name of Jesus Christ. See 530 U.S. 295, N 2.

In *City of Burbank v. Rubin*, 124 Cal Rptr 2d 867(Cal Ct App., 2002), *cert. denied* 538 U.S. 1034 (2003) the California Appellate Court found that the City of Burbank violated the Establishment Clause by commencing City Council meetings with prayer invoking the name of Jesus Christ.

The Court concluded:

It cannot be reasonably argued that the prayer here with a specific reference to Jesus Christ, is on the same constitutional footing as the prayer in *Marsh* from which all references to a specific religion had been excised! 124 Cal. Rept. 2d at 872

Similarly, the Great Falls Town Council prayers with their invocation of, and references to, Jesus Christ, and to the Christian faith, fail the *Marsh* and *Alleghenny* standards.

Petitioners cite a district court case, *Newdow v. Bush*, ____ F. Supp. ____, 2005 W.L. 81120 (D.D.C. 2005) for the proposition that an invocation to Jesus Christ at the 2005 Inauguration somehow makes the invocation at issue here constitutional. The facts and circumstances of *Newdow* are clearly distinguishable. The district court denied Newdow's request for a preliminary injunction since the case presented substantial issues of standing, issue preclusion, redressability, state action, and the balancing standards for a preliminary injunction, as well as, the fact that at the time the court denied Newdow's request for a preliminary injunction the content of the 2005 and future prayers was unknown, and the content of most of the earlier prayers was absent from the record.

4. There Is No Conflict among the Circuits.

Petitioners assert that a conflict among the circuits has evolved, however, it is clear that no such conflict exists. The Sixth Circuit in *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), held that ceremonial invocations and benedictions could be delivered at high school commencement ceremonies without violating the Establishment Clause provided they preserved substance of principle of equal liberty of conscience. The Court held that the invocations and benedictions in question, however, violated the First Amendment in that they symbolically placed the government seal of approval on the Christian view of religion. The Court determined that the invocations and benedictions were framed and phrased so that they:

ì...symbolically place the government's seal of approval on one religious view—the Christian view. They employ the language of Christian theology and prayer. Some expressly invoke the name of Jesus as the Savior. They are not the civil invocations or benedictions used in public legislative and judicial sessions as described in *Marsh*. 822 F.2d at 1409.

Accord: *Coles v. Cleveland Board of Education*, 171 F.2d 369 (6th Cir. 1999) (School boards practice of opening its meetings with prayers with specific references to Jesus violated the Establishment Clause.)

See also: *Bacas v. Palo Verde Unified School Dist. Bd of Ed.*, No. 99-57020, 2002 WL 31724273 (9th Cir. Dec. 3, 2002) (unpub.) finding that school board prayers in the name of Jesus violated the Establishment Clause as interpreted by *Marsh* and *Lemon*.

Petitioners try to find conflict among the circuit courts by pointing to the juxtaposition of the terms "proselytize" and "advance" as used in *Marsh*.

Marsh, stated that legislative prayer may not "proselytize or advance any one...or disparage any other

faith or belief. 463 U.S. at 794-95. It is clear that sectarian prayers advance one religious belief to the exclusion of others, and thus run afoul of the dictates of *Marsh*.

Petitioners cite *dicta*, and passages taken out of context in *Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) *cert. den.* 526 U.S. 1039 (1999) in an attempt to establish a conflict between the circuits. In *Snyder*, the Tenth Circuit held that a city council did not violate the Establishment Clause by denying a citizen permission to deliver, during the time set aside for prayer, a proselytizing, disparaging message which advocated the view that government should not be involved in religion. 159 F.3d at 1228. The Court found that the prayer fell well outside the genre of acceptable legislative prayers since it attacked the idea of legislative prayer, and disparaged anyone who believed legislative prayer was appropriate, proselytized his religious views, and disparaged others' religious views.

The Court in *Snyder* contrasted a sole reference to "God" with prayer advancing particular sectarian views and concluded that sectarian legislative prayer is a more aggressive form of governmental advancement of religion and would not be allowed.

Petitioners argue that only legislative prayer which proselytizes a particular religious tenet, or belief, or *aggressively* advocates a specific religious creed or derogates another religious faith or doctrine runs afoul of the Constitution.

However, *Snyder* concluded:

"The genre approved in *Marsh* is a kind of ecumenical activity that seeks to bind peoples of varying faiths together in a common purpose. That genre, although often taking the form of invocations that reflect a Judeo-Christian ethic, typically involves *nonsectarian* requests for wisdom and solemnity, as well as calls for divine blessing on the work of the legislative body." 159 F.3d at 1234 (*emphasis added*).

The Fourth Circuit thoroughly considered Petitioners' "proselytize-advance" arguments below and rejected them (App. 15-16). The Fourth Circuit concluded:

In sum, we must reject the Town Council's arguments that *Marsh* renders the challenged prayers constitutional. *Marsh* does not permit legislators to do what the district court, after a full trial, found the Town Council of Great Falls did here – that is, to engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather they embody the precise kind of "advance[ment]" of one particular religion that *Marsh* cautioned against. Accordingly, we hold the district court did not err in finding the challenged prayers violated the Establishment Clause and enjoining the Town Council "from invoking the name of a specific deity associated with any one specific faith or belief in prayers given at Town Council meetings." (App. 18)

The Fourth Circuit found that the Town Council's insistence upon an invocation in the name "Jesus Christ" to the exclusion of deities associated with any other particular religious faith at Town Council meetings in public prayers in which the Town's citizens participated clearly "advanced" one faith, Christianity, in preference to others in a manner decidedly inconsistent with *Marsh*.

The Fourth Circuit specifically noted the *dicta* in *Snyder* (App. 16, N 6) and found it unpersuasive, and determined that the holding and discussion in *Snyder* was entirely in accord with its own reasoning:

Snyder distinguishes, as we do, the "Judeo-Christian, non-sectarian" invocations, approved in *Marsh* from sec-

tarian prayers like those at issue here, *Id.* at 234 n. 10, and quotes, as we do, the Supreme Court's conclusion that nonsectarian prayers, unlike sectarian prayers, do not have the effect of affiliating the government with any one specific faith or belief. *Id.* at 1234 (quoting *Allegheny*, 492 at 603). (App. 16, N. 6)

Marsh and the cases interpreting *Marsh* have consistently held that sectarian prayer that invokes the name of a specific deity associated with one particular religion is not acceptable legislative prayer.

As is apparent, the Town Council's claim of conflict in the circuits, is not a conflict at all, and can have no meaningful impact upon the current litigation. *Snyder* and the Fourth Circuit have reached the same conclusion: Sectarian legislative prayer is unconstitutional and a violation of the Establishment Clause. Where the resolution of even a clear conflict among the circuits is irrelevant to the ultimate outcome of a case, certiorari is properly denied. See *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959) (The Court decides questions *in the context of meaningful litigation.*); *Sommerville v. United States*, 376 U.S. 909 (1964).

CONCLUSION

Contrary to Petitioners' suggestion nothing about *Marsh* and its progeny is ambiguous, and nothing in the decision below is inconsistent with the decision of the Court or any other court of appeals. On the contrary, it is fully consistent with all of those results. There is, accordingly, no occasion for review in this Court and Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully Submitted,

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