

# HUNT V. KENAI PENINSULA BOROUGH: THE SEARCH FOR CLARITY IN LEGISLATIVE PRAYER SPEAKER SELECTION

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## ABSTRACT

*In 2016, three residents of the Kenai Peninsula Borough were prevented from delivering an invocation at a Borough Assembly meeting because they were neither borough chaplains nor members of a qualifying religious association. These three residents sued the borough, claiming that the Borough Assembly's speaker selection policy violated the Alaska Constitution's Establishment Clause. The superior court ruled for the plaintiffs, holding that the selection policy constituted a step towards the establishment of a state religion. Applying Supreme Court precedent, the superior court reached the correct result. However, the limited amount of federal precedent on the principles guiding speaker selection policies has led to significant variance of application in different jurisdictions. Important questions remain regarding the scope of legislative prayer doctrine in Alaska, which still need to be addressed.*

## I. INTRODUCTION

In 2016, the Kenai Peninsula Borough Assembly (the Assembly) instituted a policy partially restricting who could deliver the Assembly's invocation.<sup>1</sup> Three plaintiffs who were prevented from delivering an invocation sued, arguing that the policy violated Alaska's religious establishment clause.<sup>2</sup> The superior court ruled for the plaintiffs, finding the Assembly's policy "stemmed from intolerance for the controversial

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1. *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 3 (Alaska Super. Ct. Oct. 9, 2018) (on file with author). The case was decided by Judge Andrew Peterson, who was appointed to the Third Judicial District in 2018. *Alaska Judges*, Alaska Court System, <http://courts.alaska.gov/judges/> (last visited Mar. 25, 2019).

2. *Hunt*, No. 3AN-16-10652 CI at 4.

views expressed during two particular invocations.”<sup>3</sup> Interpreting *Bonjour v. Bonjour*,<sup>4</sup> and subsequent Supreme Court cases, the superior court concluded that Alaska’s Establishment Clause need not be interpreted more broadly than the federal Establishment Clause.<sup>5</sup> Therefore, the court applied the only two cases the Supreme Court has decided on the issue of legislative prayer:<sup>6</sup> *Marsh v. Chambers*<sup>7</sup> and *Town of Greece v. Galloway*.<sup>8</sup> The *Hunt* court was largely successful in doing so but failed to fully clarify important points regarding religious affiliation, the scope of discrimination, and first amendment principles.

This Comment provides a brief survey of notable interpretative approaches to *Marsh* and *Greece* in order to critique the approach in *Hunt*. Part II describes the important facts and holdings of the *Hunt* case. Part III discusses the legal background of *Marsh*, *Greece*, and other important legislative prayer cases. Finally, Part IV contrasts the approach in *Hunt* to that of other legislative prayer cases discussed in Part III. We conclude by reiterating the importance of further clarification on the issue of legislative prayer in Alaska.

## II. HUNT V. KENAI BOROUGH PENINSULA

In 2016, the Assembly adopted a “first come, first served” practice, in order to expand the pool of invocation speakers.<sup>9</sup> This resulted in two controversial invocations, one of which ended with the phrase “Hail Satan,” which in turn created further complaints.<sup>10</sup>

To address the complaints, the Assembly introduced a speaker selection policy which became the subject of the *Hunt* case:<sup>11</sup>

To ensure that [] (the “invocation speaker”) is selected from among a wide pool of representatives . . . :

The Clerk shall post a notice on the borough internet home page that all religious associations with an established presence in the Kenai Peninsula Borough that regularly meet for the primary purpose of sharing a religious perspective, or chaplains who may serve one of [sic] more of the fire departments, law enforcement agencies, hospitals, or other similar organizations

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3. *Id.* at 18.

4. *Bonjour v. Bonjour*, 592 P.2d 1233, 1236 n.3 (Alaska 1979).

5. *Hunt*, No. 3AN-16-10652 CI at 9.

6. *Id.*

7. 463 U.S. 783 (1983).

8. 572 U.S. 565 (2014).

9. *Hunt*, No. 3AN-16-10652 CI at 3.

10. *Id.*

11. *Id.* at 4.

in the borough, are eligible to provide invocations to the assembly, and that the authorized leader of any such association or chaplain can submit a written request to provide an invocation to the borough clerk.<sup>12</sup>

After the adoption of the resolution, three borough residents sought to provide an invocation, but their requests were rejected as they were not members of a qualifying religious association or borough chaplains.<sup>13</sup> Lance Hunt was an atheist, Iris Fontana was a twenty-seven year old Kenai Peninsula College student and member of the Satanic Temple,<sup>14</sup> and Elise Boyer was Jewish.<sup>15</sup>

In response to their rejection, the three sued the Assembly, alleging, amongst other claims, that the Assembly's policy violated the Alaska Constitution's establishment clause.<sup>16</sup> Alaska's establishment clause provides that "[n]o law shall be made respecting an establishment of religion."<sup>17</sup> Noting that the Alaska Supreme Court has not addressed the issue of legislative prayer under Alaska's establishment clause, the superior court relied exclusively on federal law and limited its inquiry to the narrow issue of whether the requirements in the Assembly's policy constitute an impermissible establishment of religion.<sup>18</sup>

The court explained that the establishment clause "not only prohibit[s] the establishment of a state religion, it prohibits laws that act as a step towards the establishment of a state religion."<sup>19</sup> The *Hunt* court determined that the Assembly's policy "excludes minority faiths from participating in the invocation practice."<sup>20</sup> The court further reasoned that "[t]he goal behind legislative invocations . . . is the idea that people of many faiths may be united in a community of tolerance and

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12. *Id.*

13. *Id.* All three members were denied for not belonging to a "qualifying religious association" as defined under the policy. *Id.* No further definition for "established presence" or "regularly meet" is established in *Hunt*.

14. Daysya Eaton, *Kenai Assembly Considers Moment of Silence After Satanic Prayer, Protest, Counter-Protest*, ALASKA PUBLIC MEDIA (Aug. 23, 2016), <https://www.alaskapublic.org/2016/08/23/kenai-assembly-considers-moment-of-silence-after-satanic-prayer-protest-counter-protest/>.

15. *Hunt*, No. 3AN-16-10652 CI at 4.

16. *Hunt*, No. 3AN-16-10652 CI at 5-6.

17. ALASKA CONST. art. I, § 4. The relevant portion of the federal Establishment Clause is identical. U.S. CONST. amend. I.

18. *See Hunt*, No. 3AN-16-10652 CI at 7-8.

19. *Id.* at 7.

20. *Id.* at 17.

devotion.”<sup>21</sup> The court found the Assembly’s policy was contrary to this goal, as it stemmed from intolerance of certain controversial views.<sup>22</sup>

Finally, the court impliedly provided a rule outlining what future behavior assemblies may engage in. The court stated that after “opening the invocation opportunity to all residents, [the assembly] cannot then put in place requirements that in effect exclude minority faiths or beliefs.”<sup>23</sup> The court stated that the Assembly “has made clear that the resolution stemmed from intolerance for the controversial views expressed during two particular invocations.”<sup>24</sup> Furthermore, the court held that the establishment clause only allows the prevention of an invocation speaker “where [the speaker has] exploited the invocation opportunity to proselytize, advance, or disparage any faith or belief.”<sup>25</sup>

Ruling for the Plaintiffs, the court concluded that the invocation policy adopted by the Assembly was not inclusive enough under *Greece*, where “no faith was excluded by law, nor any favored.”<sup>26</sup>

### III. LEGISLATIVE PRAYER IN ALASKA: MARSH, GREECE AND THEIR PROGENY

#### A. Alaska’s Legislative Prayer Tradition

Legislative prayer has been a routine practice of Alaskan legislatures since the first session of the Alaska Constitutional Convention which opened with an invocation by Reverend Roy Ahmogak.<sup>27</sup> He prayed, “[e]nlighten [the delegates] with wisdom from above and especially in establishing our Constitution.”<sup>28</sup> Today, both houses of the Alaska Legislature open their sessions with prayer.<sup>29</sup> However, local practices differ across the state,<sup>30</sup> and these practices have occasionally prompted controversy. An invocation was officially adopted as a standing item on

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21. *Id.* (citing *Town of Greece v. Galloway*, 572 U.S. 565, 134 S. Ct. 1811 (2014)).

22. *Id.* at 18.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 16.

27. Proceedings of the Alaska Constitutional Convention [hereinafter PACC], at 594, available at <http://www.akleg.gov/pdf/billfiles/ConstitutionalConvention/Proceedings/Proceedings%20-%20Complete.pdf>.

28. *Id.*

29. See, e.g., H.R. 29-2015-01-20, 1st Sess., at 2 (Alaska 2015).

30. For instance, the Anchorage Assembly does not typically begin their meetings with prayer. See, e.g., MUNICIPALITY OF ANCHORAGE, ASSEMBLY AGENDA (Jan. 29, 2019), [http://anchorageak.granicus.com/DocumentViewer.php?file=anchorageak\\_8c975b90c15359e11fc4eebcfcb6e32.pdf&view=1](http://anchorageak.granicus.com/DocumentViewer.php?file=anchorageak_8c975b90c15359e11fc4eebcfcb6e32.pdf&view=1).

the Fairbanks North Star Borough Assembly agenda in 2001.<sup>31</sup> Before that, invocations were traditionally offered, but not officially a part of the agenda.<sup>32</sup> In 2017, a proposal to remove the invocation from the Assembly's agenda failed by one vote after hours of testimony and debate over the role of religion in civic life and the freedom of individuals to express their religion publicly.<sup>33</sup> It is worth bearing in mind that while legislative prayer has a long history in Alaska, it has prompted discord at times.

## **B. Supreme Court Jurisprudence: Legislative Prayer & the Establishment Clause**

The Supreme Court has addressed the issue of legislative prayer twice. First, in *Marsh*, the court held Nebraska's legislative prayer practice to be constitutional.<sup>34</sup> Nebraska's legislature opened their sessions with a prayer by a state employed chaplain, chosen with legislative approval.<sup>35</sup> Chief Justice Burger observed that over time "the practice of opening legislative sessions with prayer has become a part of the fabric of our society."<sup>36</sup> Thirty years later, the court tackled the question of prayer at local government meetings in *Greece*, finding that the town of Greece's practice of opening its council meetings with invocations by local clergy was consistent with the Establishment Clause.<sup>37</sup> *Marsh* and *Greece* have collectively established that sectarian legislative prayer is constitutional at all levels of government. However, these cases leave important practical matters unresolved.

One key open question is: *who* is required to have the opportunity to deliver an invocation? The issue of speaker selection took a backseat in both *Marsh* and *Greece* to other pressing issues like whether legislative prayer is constitutional at all and whether it is required to be nonsectarian. The Nebraska Legislature employed the same Presbyterian minister to

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31. Amanda Bohman, *Local Issue Breakdown: Should the Borough Nix its Invocation?*, FAIRBANKS NEWS-MINER (Apr. 6, 2017), [http://www.newsminer.com/news/local\\_news/local-issue-breakdown-should-the-borough-assembly-nix-its-invocation/article\\_f5d8e848-1aa2-11e7-b2e7-af395b5bf773.html](http://www.newsminer.com/news/local_news/local-issue-breakdown-should-the-borough-assembly-nix-its-invocation/article_f5d8e848-1aa2-11e7-b2e7-af395b5bf773.html) (citing local history research performed by Borough Clerk Nanci Ashford-Bingham).

32. *Id.*

33. Amanda Bohman, *Borough Assembly Votes to Keep Prayer at Meetings*, FAIRBANKS NEWS-MINER (Apr. 14, 2017), [http://www.newsminer.com/news/local\\_news/borough-assembly-votes-to-keep-prayer-at-meetings/article\\_f60a5e36-20ed-11e7-86a8-4b32b8f52fc0.html](http://www.newsminer.com/news/local_news/borough-assembly-votes-to-keep-prayer-at-meetings/article_f60a5e36-20ed-11e7-86a8-4b32b8f52fc0.html).

34. *Marsh*, 463 U.S. at 795.

35. *Id.* at 784.

36. *Id.* at 792.

37. *Town of Greece*, 572 U.S. at 570.

deliver invocations for sixteen years.<sup>38</sup> In *Marsh*, the Court accepted this practice because in their estimation, the chaplain's long tenure reflected his "performance and personal qualities" rather than "an impermissible motive."<sup>39</sup> While that phrase is not defined specifically, the Court suggested that the advancement of one religion would be an "impermissible motive."<sup>40</sup>

In *Greece*, the Court faced a more complicated issue of speaker selection. The town had traditionally solicited volunteers to give the invocation by calling local congregations (almost all of which were Christian) listed in the phone book.<sup>41</sup> When this practice prompted complaints from non-Christian citizens, the town allowed a Jewish layman, the chairman of the local Baha'i temple, and a Wiccan priestess to deliver invocations after they requested the council's permission.<sup>42</sup> The Court found this speaker selection regime acceptable, summarizing its holding as follows:

The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one . . . So long as the town maintains a policy of *nondiscrimination*, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.<sup>43</sup>

This is the clearest statement from the Supreme Court directly addressing the selection of speakers in legislative prayer. The standard the Court chose places enormous weight on whether a speaker selection policy is discriminatory, without much guidance as to where that line should be drawn. However, First Amendment jurisprudence from other contexts sheds light on how the nondiscrimination principle should be applied.

### 1. *The Distinct Doctrines of Legislative Prayer*

The Supreme Court has emphasized that because of the long history and tradition of legislative prayer, it merits different treatment from other Establishment Clause contexts.<sup>44</sup> It is true that the *Marsh* court declined

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38. *Marsh*, 463 U.S. at 793.

39. *Id.*

40. *Id.*

41. *Town of Greece*, 572 U.S. at 571.

42. *Id.* at 572.

43. *Id.* at 585–86 (emphasis added).

44. See *Marsh*, 463 U.S. at 790 ("In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but

to apply long standing Establishment Clause precedent, including *Lemon v. Kurtzman*.<sup>45</sup> But the Court has not squarely held that this history entirely severs the legislative prayer context from traditional Establishment Clause doctrine.<sup>46</sup>

It is impractical to hermetically seal legislative prayer, isolating it from the broader context of First Amendment jurisprudence, for several reasons. First, *Marsh* and *Greece* explicitly call on courts to make a fact specific inquiry into each prayer opportunity.<sup>47</sup> More importantly, the standards set forth in those two cases are insufficiently precise to workably govern the broad range of issues raised by fact specific analyses of the many varied legislative practices. Addressing these issues by creating special, separate doctrines for the legislative prayer arena would be inconsistent and possibly confusing. Further, treating legislative prayer like an island cut off from the rest of the First Amendment is counterproductive because it deprives this specific context of insights gained over decades spent interpreting the contours of the Establishment Clause. Rather than creating new standards from whole cloth, it is appropriate to seek guidance from other religious clause precedents to illuminate the impermissible motive and nondiscrimination standards of *Marsh* and *Greece*. Two doctrines that would be especially helpful to incorporate are: the prevention of religious gerrymanders, and the prohibition on discriminating between denominations.

## 2. *Facially Neutral Discrimination*

Over the years, the Supreme Court has developed religious clause principles that could be useful in fortifying *Greece's* “nondiscrimination” requirement. Legislative prayer jurisprudence should acknowledge the problem of religious gerrymandering, whereby facially neutral policies are crafted to exclude disfavored religious views.<sup>48</sup> Otherwise, local governments will be able to skirt the requirements of *Marsh* and *Greece* by enacting ostensibly neutral policies that exclude controversial invocation speakers. The Supreme Court has already addressed this problem in other Establishment Clause contexts.

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also on how they thought that Clause applied to the practice authorized by the First Congress – their actions reveal their intent.”).

45. 403 U.S. 602 (1971).

46. See *Greece*, 572 U.S. at 576 (“Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.”).

47. *Id.* at 587 (“The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”).

48. See *Walz v. Tax Commission*, 397 U.S. 664, 695 (1970) (identifying the problem of religious gerrymandering).

In *Gillette v. United States*,<sup>49</sup> Justice Marshall clearly rejected a facial neutrality standard: “The question of governmental neutrality is not concluded by the observation that [the statute] on its face makes no discrimination between religions, for the Establishment Clause forbids subtle departures from neutrality, ‘religious gerrymanders,’ as well as obvious abuses.”<sup>50</sup>

The Supreme Court addressed facial neutrality again in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.<sup>51</sup> There, the city had drafted vastly underinclusive ordinances to prevent practitioners of Santeria from performing animal sacrifices, relying on a pretextual public health justification.<sup>52</sup> Justice Kennedy pointed out that the law applied to essentially no other form of animal slaughter besides Santeria because exceptions to the rule were tailored to allow other practices and slaughterhouse businesses.<sup>53</sup> He found the city’s actions preceding its passage of the ordinances evidenced its hostility toward Santeria.<sup>54</sup> Justice Kennedy pulled away the veil of facial neutrality, finding that the anti-slaughter laws were not neutral with respect to religion because they were motivated by distaste for Santeria.<sup>55</sup> In striking them down, he wrote, “the Free Exercise Clause protects against government hostility which is masked, as well as overt.”<sup>56</sup>

The Supreme Court has also condemned discrimination between religious denominations. In *Larson v. Valente*,<sup>57</sup> the Supreme Court declared “[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”<sup>58</sup> There, the state exempted religious organizations from certain registration requirements if they got more than half of their funding through charitable donations.<sup>59</sup> The law did not specify religions or denominations to which it would apply, for instance by differentiating between Protestants and Catholics; instead, the law set a standard that the legislature thought would provide consumer protection from fraudulent charitable solicitations.<sup>60</sup> Nevertheless, the Court struck down the

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49. 401 U.S. 437 (1971).

50. *Id.* at 452 (quoting *Walz*, 397 U.S. at 696).

51. 508 U.S. 520 (1993).

52. *Id.* at 547.

53. *Id.* at 545.

54. *Id.* at 541.

55. *Id.* at 542.

56. *Id.* at 534.

57. 456 U.S. 228 (1982).

58. *Id.* at 244.

59. *Id.* at 230.

60. *Id.* at 231–32.

distinction because it had the effect of imposing requirements on some religious denominations, but not others.<sup>61</sup>

The *Marsh* Court did not apply *Larson* to Nebraska's choice of clergy.<sup>62</sup> Justice Brennan pointed out that *Larson*, decided shortly before *Marsh*, would have been an apt precedent saying, "I have little doubt that the Nebraska practice, at least, would fail the *Larson* test."<sup>63</sup> However, in *Greece*, the Court expanded on *Marsh* by incorporating a requirement of nondiscrimination in speaker selection.<sup>64</sup> This new doctrine implicates *Larson* because discrimination between denominations is a concrete example of unconstitutional religious discrimination. Though Brennan was dissenting in *Marsh*, his observation could offer insight into how courts should apply the *Greece* nondiscrimination principle. "Nondiscrimination" calls out for a workable definition, so precedents like *Larson* and *Lukumi Babalu Aye* that apply nondiscrimination principles in the religious context seem to be the most logical place to look for clarity. The Fourth Circuit, at least, saw value in this approach when citing *Larson* in a recent legislative prayer decision.<sup>65</sup>

### 3. Lower Court Decisions Post-Greece

Federal courts have interpreted *Greece's* mandates in myriad and at times directly contradictory ways. The inconsistency of these lower court decisions reflects the need for clarification of *Greece's* standards through the application of existing Establishment Clause principles. In *Bormuth v. County of Jackson*, the Sixth Circuit upheld a county commissioner's practice of having the commissioners themselves offer invocations on a rotating basis.<sup>66</sup> They relied heavily on facial neutrality:

The Board's invocation practice is facially neutral regarding religion. On a rotating basis, each elected Jackson County Commissioner, regardless of his religion (or lack thereof), is afforded an opportunity to open a session with a short invocation based on the dictates of his own conscience. Neither other Commissioners, nor the Board as a whole, review or approve the content of the invocations. There is no evidence that the Board adopted this practice with any discriminatory intent.<sup>67</sup>

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61. *Id.* at 255.

62. *Marsh*, 463 U.S. at 795.

63. *Id.* at 801 n.11 (Brennan, J., dissenting).

64. *Town of Greece*, 572 U.S. at 585-86.

65. *Lund v. Rowan County*, 863 F.3d 268, 280 (4th Cir. 2017).

66. *Bormuth v. County of Jackson*, 870 F.3d 494, 498 (6th Cir. 2017).

67. *Id.* at 498.

The court interpreted the nondiscrimination mandate to bar discriminatory intent and censorship, but expressly held that the county was not required to seek out prayers from individuals of other faiths.<sup>68</sup> That someone of a different faith could be elected to the county commission and offer an invocation satisfied the *Bormuth* court's standard of nondiscrimination. This reasoning is in tension with *Greece's* nondiscrimination policy and seems to stop at facial neutrality when *Larson* and *Lukumi Babalu Aye* appear to require more.

The Fourth Circuit reviewed a strikingly similar case, where county commissioners offered prayers to begin meetings.<sup>69</sup> Contrary to the Sixth Circuit's approach, the court found that limiting the class of prayer givers to commissioners was inconsistent with *Greece*.<sup>70</sup> Though the court's opinion focused heavily on the risk of politicizing religious faith, it also observed that, "instead of embracing religious pluralism and the possibility of a correspondingly diverse invocation practice, Rowan County's commissioners created a 'closed-universe' of prayer-givers dependent solely on election outcomes."<sup>71</sup> The court also found that "a tapestry of many faiths" represented in the invocation practice would lessen the appearance that the county has aligned itself with any one religion.<sup>72</sup> These completely opposing approaches to speaker selection demonstrate the need for a cleaner definition of nondiscrimination.

Federal district courts have also taken on speaker selection issues. For instance, the Middle District of Florida struck down Brevard County's practice of barring nontheists from giving invocations.<sup>73</sup> The Middle District of Pennsylvania reached the same conclusion when it examined the state House of Representatives' invocation practice, saying: "[t]he House's selection process invites members of the public to serve as guest chaplains but draws a qualifying line of demarcation between theistic and nontheistic belief systems. This is a horse of a different color from prayer practices previously found to be consistent with history and tradition."<sup>74</sup> These courts took a broad view of *Greece's* nondiscrimination mandate, suggesting that the prayer opportunity must be offered to citizens with a wide range of beliefs.

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68. See *id.* at 514 ("*Marsh* and *Town of Greece* do not require Jackson County to provide opportunities for persons of other faiths to offer invocations.").

69. *Lund*, 863 F.3d at 272.

70. *Id.*

71. *Id.* at 282 (quoting *Lund v. Rowan Cty.*, 103 F. Supp. 3d 712, 723 (M.D.N.C. 2015)).

72. *Id.* at 284.

73. *Williamson v. Brevard County*, 276 F. Supp. 3d 1260, 1283–84 (M.D. Fla. 2017).

74. *Fields v. Speaker of Pennsylvania House of Representatives*, 327 F. Supp. 3d 748, 757 (M.D. Pa. 2018).

By contrast, the Eastern District of Tennessee found no constitutional problem with a county commission's regime limiting the opportunity to give an invocation to "eligible member[s] of the clergy."<sup>75</sup> In support of its holding that religion may be favored over non-religion, the court emphasized that the legislative prayer context is distinct from the main line of Establishment Clause jurisprudence because of its unique history.<sup>76</sup> Flowing from this premise the court found that "while legislative bodies cannot intentionally discriminate against particular faith systems, they can require that invocation givers have some religious credentials."<sup>77</sup> These wildly disparate interpretations of *Marsh* and *Greece* suggest that the standards set forth in those cases are vague enough to act as Rorschach tests for lower courts.

#### IV. THE *HUNT* COURT'S STRENGTHS AND POINTS FOR IMPROVEMENT

This analysis begins by highlighting the strengths of the *Hunt* opinion. We then examine some of the important similarities and differences between *Hunt* and other lower court opinions. Finally, we conclude by examining some of the important remaining challenges left for Alaska courts to examine.

The *Hunt* court was largely successful in applying the limited Supreme Court precedent, to create a set of boundaries to assess the Assembly's policy. The *Hunt* court accurately tracked the language and spirit of *Greece* by citing the purpose of legislative prayer to be one of uniting people of many faiths in "a community of tolerance and devotion."<sup>78</sup> And it emphasized the importance that *Marsh* and *Greece* placed on invocations being before "adults not readily susceptible to religious indoctrination."<sup>79</sup> Perhaps most importantly, in striking down the Assembly's policy, the court applied the holding established in *Greece* that sectarian invocations are constitutional only if "a policy of nondiscrimination is maintained."<sup>80</sup> Indeed, the Assembly's requirement that interested candidates be a member of a "religious association[] with an established presence" that "regularly meet[s]" seems to be precisely tailored to discriminate against atheism and minority faiths.<sup>81</sup>

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75. *Coleman v. Hamilton County*, 104 F. Supp. 3d 877, 880 (E.D. Tenn. 2015).

76. *Id.* at 889-90.

77. *Id.* at 890.

78. *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 17 (Alaska Super. Ct. Oct. 9, 2018) (on file with author) (quoting *Town of Greece*, 572 U.S. at 566).

79. *Id.* at 13.

80. *Id.* at 3.

81. *Id.* at 5.

The *Hunt* court's reasoning is in some ways consistent with at least one federal case involving strikingly similar facts. In *Coleman*, the Eastern District of Tennessee found Hamilton County's prayer policy to be within the confines of *Marsh* and *Greece* despite the County's requirement that members be a part of a "religious congregation[]" with an established presence in Hamilton County."<sup>82</sup> The court upheld the policy because the plaintiff failed to provide any evidence of intentional or unintentional discrimination against "particular faith systems."<sup>83</sup> In both *Coleman* and *Hunt*, great emphasis was placed on the importance of discrimination against certain faiths, which explains the different results between the two cases. The *Hunt* court held that the purpose of the Assembly's policy was to exclude controversial minority faiths without one of the valid *Greece* purposes.<sup>84</sup> This decision is consistent with *Greece*, which favors the inclusion of various faiths provided that their members not take the invocation opportunity to advance their own, or disparage another's, belief system.<sup>85</sup>

However, *Coleman* identifies an important gap in the *Hunt* court's reasoning. In *Coleman*, the plaintiff claimed not to represent any particular faith, and the court held that the Establishment Clause does not prohibit requiring that an individual "have some religious credentials."<sup>86</sup> In *Hunt*, one of the plaintiffs, Lance Hunt, identified as an atheist.<sup>87</sup> While the *Hunt* court acknowledged that the Assembly's policy discriminated against disfavored religious groups,<sup>88</sup> it neglected to address whether the exclusion of an atheist violates this principle. The reasoning in *Coleman*, and even *Hunt*'s own reasoning, seem to interpret *Greece* as requiring the inclusion of diverse *faiths*.<sup>89</sup> Neither decision interprets *Greece* as requiring the inclusion of any person who wishes to provide an invocation.

Another point which lacks clarification in *Hunt* was exemplified in *Bormuth*. There, the Sixth Circuit was satisfied that the standards of *Marsh* and *Greece* were met because the policy at issue was not discriminatory on its face.<sup>90</sup> In contrast, though the *Hunt* court did not explicitly address the issue of implicit or facial discrimination, the court's reasoning implies

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82. *Coleman v. Hamilton County*, 104 F. Supp. 3d 877, 880, 890 (E.D. Tenn. 2015).

83. *Id.* at 890.

84. *Hunt*, No. 3AN-16-10652 CI, at 17-18.

85. *Id.* at 16-17.

86. 104 F. Supp. 3d, at 881, 890.

87. *Hunt*, No. 3AN-16-10652 CI, at 5 n.4.

88. *Id.* at 16-17.

89. *See, e.g., Coleman*, 104 F. Supp. 3d at 890; *Hunt*, No. 3AN-16-10652 CI, at 16-17.

90. *Bormuth*, 870 F.3d at 514.

that either would be sufficient to violate Alaska's Establishment Clause.<sup>91</sup> The Assembly's policy was not discriminatory on its face, but the *Hunt* court pointed to extrinsic evidence, such as the Assembly's own statements, which demonstrated the discriminatory nature of the Assembly's policy. Establishing this outright would provide helpful guidance for future decisions.

*Hunt* also usefully demonstrates that the intensely fact specific nature of a legislative prayer inquiry requires tailoring the non-discrimination principle's application to the nature of the locale. Legislative prayer inquiries involve an examination of the way a legislative body's speaker selection policy interacts with the local community's demographic makeup, geography, and culture. The *Greece* court was clear that local governments do not have to look outside their borders to create religious balancing, but must maintain a policy of nondiscrimination within their borders.<sup>92</sup> Because every locality is different, a policy that fosters nondiscrimination in one place might result in discrimination if it were applied elsewhere. A comparison of the speaker selection policies examined in *Hunt* and *Coleman* vividly illustrates this phenomenon. They both required affiliation with a faith group that had an established presence in the community. However, Hamilton County has a population of about 361,500 people distributed over around 542 square miles (roughly 620 people per square mile).<sup>93</sup> And Kenai Peninsula Borough has a population of about 58,600 people and a land area of about 16,075 square miles (roughly 3.5 people per square mile).<sup>94</sup> This drastic difference in density is significant when considering a speaker selection policy that requires an established presence in the community. Where people are more concentrated, it is easier for them to create established presences. Where people are more dispersed, a policy that requires an institutional presence creates a greater risk of discrimination against minority faiths.

The superior court's decision in *Hunt* also implicitly acknowledges important First Amendment principles from outside *Marsh* and *Greece*: avoidance of religious gerrymanders and facially neutral discrimination between denominations. The superior court in *Hunt* struck down the speaker selection policy because it found from the record that 1) some

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91. See *Hunt*, No. 3AN-16-10652 CI at 17-18.

92. 572 U.S. at 585-86.

93. *QuickFacts Hamilton County, Tennessee*, U.S. CENSUS BUREAU (Jul. 1, 2017), <https://www.census.gov/quickfacts/fact/table/hamiltoncountytennessee,US/PST045217> (last visited Mar. 7, 2019).

94. *QuickFacts Kenai Peninsula Borough, Alaska*, U.S. CENSUS BUREAU (Jul. 1, 2017), <https://www.census.gov/quickfacts/fact/table/kenaipeninsulaboroughalaska/PST045217> (last visited Mar. 7, 2019).

prior invocations had been controversial, 2) that the speaker selection policy was created in response to this controversy, and 3) the purpose of the policy was to prevent future invocations of a similar nature.<sup>95</sup> This describes exactly the kind of reasoning the U.S. Supreme Court applied to bar a facially neutral religious gerrymander in *Church of the Lukumi Babalu Aye*. In the future, courts should flesh out this implicit acknowledgement to create a workable doctrine regarding speaker selection. Importing the prohibitions on religious gerrymanders and discrimination between denominations to the island of legislative prayer jurisprudence would clarify the doctrine of speaker selection. These independently established principles could mitigate the scattershot interpretations lower courts have placed on the mandates of *Marsh* and *Greece*.

## V. CONCLUSION

In *Hunt* the superior court interpreted *Marsh* and *Greece* to strike down an invocation speaker selection policy that was tailored to exclude disfavored beliefs. The case and its circumstances offer a demonstration of how murky the directives of *Marsh* and *Greece* can be in practice. Trial courts are called upon to interpret broad questions of intent and decide what kinds of policies are discriminatory without much direction. For this reason, it is important for courts to consult other cornerstone establishment clause nondiscrimination principles to clarify legislative prayer doctrine. Though each case will remain highly fact specific, consistently applicable principles should be developed.

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95. *Hunt*, No. 3AN-16-10652 CI at 17-18.