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No. 12-696

IN THE

Supreme Court of the United States

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Second Circuit**

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Establishment Clause prohibits the presentation of sectarian prayers at local-government meetings in circumstances where both adults and children face pressure to attend the meetings and participate in the prayers.

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INTRODUCTION

This case is not about the ability of legislators to acknowledge God or seek divine guidance. It is about the right of citizens to participate in local government without being required to participate in sectarian prayers.

Petitioner and the United States insist that this case is controlled by *Marsh v. Chambers*, 463 U.S. 783 (1983). But the prayers before the Greece Town Board differ in fundamental ways from the prayers before a state legislature. The prayers in Greece are directed at citizens who have little choice but to attend Board meetings—to seek zoning changes, business permits, or Board action on local issues; to take the oath of office; or to receive public honors. The prayers, moreover, are not inclusive: the vast majority have been explicitly Christian; they are sectarian, in that they specify details on which believers in God are known to disagree. Citizens face undeniable pressure to participate in these prayers, presenting religious minorities with the untenable choice of betraying their conscience or visibly dissenting from majoritarian religious norms.

It is fundamental that government may not press citizens to participate in religious exercises. And whether or not Congress may sponsor sectarian prayers for those of its members who choose to participate—a question that *Marsh* did not decide—government may not direct explicitly sectarian or proselytizing messages at the broader citizenry. The practice in Greece violates both of these principles.

STATEMENT

A. Board Meetings

The Greece Town Board is the "most important part of Town government." Town Board, http://greeceny.gov/planning/townboard.[1] It exercises legislative, executive, and administrative powers. *See* State of N.Y., Dep't of State, *Local Government Handbook* 61-62, 66 (6th ed. 2009), *available at* http://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf.

At its monthly public meetings, Board members, the Town Clerk, the Chief of Police, and Directors of seven other departments sit on a dais. *See* Exhs. 701-807, 811-29; C.A. App. A863.[2] Hardly anyone remains anonymous. Average attendance is modest: one witness guessed ten; another, less than ten. C.A. App. A777, A929. One official testified that in her seven years of regular attendance (C.A. App. A926-27), only one or two meetings drew more than fifty people (C.A. App. A930). Board members routinely engage citizens in

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[1] All websites cited in this brief were last visited on September 15, 2013.

[2] Exhibits 701-807 and 811-29—DVDs of Board meetings from January 1999 through June 2010—accompanied plaintiffs' summary-judgment briefing before the district court. *See* Dist. Ct. Dkt. Nos. 32 (Exhs. 701-807); 34 (Exhs. 811-14); 38 (Exhs. 815-17); 5/27/09 unnumbered docket entry (Exh. 818); 46 (Exhs. 819-21); 9/10/09 unnumbered docket entry (Exh. 822); 51 (Exh. 823); 53 (Exh. 824); and 55 (Exhs. 825-29); *see also* Dkt. Nos. 31, 39 (accepting manual filing of DVDs containing these exhibits).

conversation. *See, e.g.*, http://tinyurl.com/public-forums; http://tinyurl.com/civics-students.[3]

Both adults and children attend meetings, not just as observers, but as participants—often at the Board's invitation or direction. At each meeting, the Board conducts a public forum in which citizens raise concerns and complaints. At almost all meetings, the Board also conducts public hearings at which applicants request zoning changes or special-use permits that the Board has discretion to grant, modify, or deny.[4] Citizens also attend to receive awards for civic accomplishments, to be sworn in as municipal employees, and to fulfill a high-school civics requirement.

1. Award ceremonies

Approximately 40% of Board meetings include an award ceremony. *See* note 4, *supra*. These ceremonies occur immediately after the prayer. *See, e.g.*, C.A. App. A345, A351, A401. Board members and department heads join the honorees at the front of the room. Supervisor Auberger makes remarks and reads a proclamation; the honorees may make a statement or

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[3] This link, and the other video links in this brief, are compilations taken from DVDs of Town Board meetings that were included as exhibits to Plaintiffs' summary-judgment briefing below. *See* note 2, *supra*. To see unedited video of any single item within a compilation, *see* http://www.greecevgalloway.net. To see any meeting in full, view the corresponding DVD.

[4] *See* Minutes & Agendas, C.A. App. A312-A446, A448-A570, A1058-60, A1082, A1092-94, A1102, A1108, A1118, A1120-25.

presentation; and the ceremony concludes with applause. *See* http://tinyurl.com/adults-rec.

For example, a man was honored for maintaining a home that received the Town's first local-landmark designation (Exh. 706); a women's choir was honored for its achievements and sang for the audience (Exh. 716); and eight individuals were honored for founding the local little league (Exh. 721).

2. Oaths of office

Many Board meetings include oath ceremonies for new police officers or other new Town employees. *E.g.*, C.A. App. A345; Exhs. 722 (Fire Marshal's ceremony), 774, 829 (police officers' ceremonies). Oath ceremonies follow award ceremonies (*see, e.g.*, C.A. App. A345, A351, A365); if there is no award ceremony, the oath ceremony immediately follows the prayer (*see, e.g.*, C.A. App. A375, A382, A385, A413, A418). Board meetings are the only venue for these ceremonies. C.A. App. A780-81.

New police officers are typically joined by police officials, other officers, and family members, including children. *See, e.g.*, Exhs. 706, 709, 722, 751, 811, 827, 829; *see also* http://tinyurl.com/oaths-office. The Chief of Police explained the ceremonies' importance:

> You know we make a big deal out of swearing the police officers in and making a big public display, but it's very important to us. These are the officers that citizens are going to see out there every day—risk their lives, do the job.

Exh. 759.

3. Petitioning the Board

Citizens address the Board in two parts of its meetings: the public forum and public hearings. Citizens request official Board action; they petition for redress of grievances. The meetings are a citizen's only opportunity to address the Board as a body. C.A. App. A779.

a. Public Forum. In the public forum, citizens address the Board on a wide range of municipal issues over which the Board has authority. They must state their name and address. *See* Exhs. 701-807, 811-29. They ask the Board to act on matters that directly affect their lives. The parents of a child with Down syndrome argued in support of a proposed group home (Exh. 705); a wheelchair-bound man asked for better accommodations for the disabled (Exh. 718); a citizen opposed the construction of a Wal-Mart (Exh. 794); and citizens asked the Board to address criminal activity in their neighborhoods (Exh. 732) and to ameliorate traffic congestion (Exh. 755). Sometimes these comments yield immediate results, with Supervisor Auberger promising to address the problem. *See, e.g.*, Exhs. 718, 732, 755; http://tinyurl.com/public-forums.

When there is no award or oath ceremony, the public forum immediately follows the prayer; if no one steps to the microphone, the forum closes in under a minute. *See, e.g.*, Exhs. 731, 748, 757, 758, 773, 815, 823.

b. Public Hearings. Approximately 90% of Board meetings include at least one public hearing. *See* note 4, *supra*. A citizen seeking to rezone property or to obtain a special-use permit to open a small business

must appear before the Board for a hearing. *See* Town of Greece, *Instructions for Special-Use Permits*, http://greeceny.gov/planning/townboard; C.A. App. A788. All owners of property within 500 feet of the applicant's property are notified of the hearing. Town of Greece Code § 211-61(B)(2), *available at* http://tinyurl.com/greece-code. The Board may approve, modify, or deny applications in its broad discretion. *Id.*; *id.* § 211-60(A)(2). Many kinds of businesses are subject to these rules. *See, e.g.*, *id.* § 211-11(C)(1), 13(C), 17(A)(3)(a).

At the hearing, the applicant presents a summary of his request; the Board takes comments from supporters and opponents; and Board members question the applicant about the proposed business and about concerns that other citizens have raised. *See* Exhs. 702, 733, 779; http://tinyurl.com/public-hrg.

Hearings typically begin thirty minutes after the meeting starts. *E.g.*, C.A. App. A1118, A1120-25. If the Board has not completed its other agenda items, it interrupts the meeting for the hearing. *See, e.g.*, Exhs. 706, 735, 742, 816.

4. Children's participation

High-school students attend Board meetings to receive up to three hours' credit toward a participation-in-government requirement. C.A. App. A282-A304, A779, A929. They must obtain an official's signature verifying their attendance and write a summary of the meeting for their teacher. C.A. App. A294, A779. Supervisor Auberger and others on the dais regularly instruct these students about the proceedings. *See, e.g.*, Exhs. 739, 812, 827; http://tinyurl.com/civics-students.

The Board routinely gives awards to groups of schoolchildren, who are joined by coaches, teachers, or other authority figures. The Board honored a squad of middle-school cheerleaders, who performed a routine for the audience. Exh. 726. It recognized a successful girls' soccer team, bringing its coach to tears. Exh. 778. A boys' baseball team was honored for representing Greece in a tournament. Exh. 711; *see also, e.g.*, C.A. App. A445 ("students from Greece Athena High School"), A345 (soccer team), A517 (tennis team); http://tinyurl.com/child-grp.

Individual children have been honored for, among other things, academic achievement (Exhs. 721, 724), volunteerism (Exh. 734), and saving people's lives (Exhs. 704, 706, 709, 737). *See also, e.g.*, Exh. 702 (boy honored for calling attention to a traffic hazard); C.A. App. A355 (children inducted into "Greece Youth Hall of Fame"); http://tinyurl.com/student-rec.

The Board has also honored youths from an Explorer Post sponsored by the Greece Police Department; a police-department official described their accomplishments. *See* Exhs. 741, 744; http://tinyurl.com/explorer-rec.[5]

Children also petition the Board in the public forum. A 14-year-old argued against a proposed athletic complex (Exh. 740); and a group of

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[5] Explorer Posts comprise individuals aged 14-20 who participate in work-site career-learning opportunities; they are often sponsored by government agencies. *See Real-World Career Experiences Exploring*, http://exploring.learningforlife.org; *see also What Is Exploring*, http://exploring.learningforlife.org/about-us/what-is.

students—accompanied by teachers and school administrators—thanked the Board for addressing traffic-safety issues at their school (Exh. 702).

Children are regularly invited to lead the Pledge of Allegiance. *See, e.g.*, Exhs. 712, 741, 796. Sometimes, the same children lead the Pledge immediately before the prayer and are honored immediately after. *See* http://tinyurl.com/before-after-prayer. At one of these meetings, a children's group led the Pledge from the front row; as they took their seats, the guest chaplain was summoned to lead the prayer; and as the chaplain walked away from the podium, Supervisor Auberger addressed the children. Exh. 796. All of this happened in a matter of minutes, with a row of police officers at the back of the room awaiting an oath ceremony. *Id.*

B. Petitioner's Sectarian Prayers

Historically, the Town opened its Board meetings with a moment of silence. Pet. App. 3a. When Supervisor Auberger was elected in 1999, he began opening meetings with a prayer instead. *Id.*; C.A. App. A792. Initially, Auberger himself delivered the prayers. C.A. App. A596-98. After a few months, the Board started inviting a "chaplain of the month" to do so. Pet. App. 3a-4a.

Supervisor Auberger summons the guest chaplain to deliver "our prayer" (or "our moment of prayer") from a podium that bears the Town seal and sits just below the dais. *See generally* J.A. 27a-143a. When delivering the prayer, the chaplain faces the assembled

citizens, his back to the Board. *See* Exhs. 701-807, 811-29.[6]

Petitioner gives its guest chaplains no guidelines to discourage sectarian, proselytizing, or disparaging prayers. *See* Pet. App. 4a, 22a. When asked at his deposition whether the Town would permit, for example, prayers lamenting "the evils of homosexuality" or imploring "our white Lord Jesus, to grant peace to the white residents of Greece but not the blacks or Jews or homosexuals or other perverts," Supervisor Auberger said over and over that "We do not control the content of the prayer." C.A. App. A819-21.

Approximately two-thirds of petitioner's prayers have referenced "Jesus," "Christ," "Your Son," or the "Holy Spirit." *See* Pet. App. 7a; J.A. 27a-143a. In the eighteen months before the record closed, 85% contained such references. J.A. 129a-43a. Even in 2008—the year this lawsuit was filed, and the only year to include non-Christian chaplains (Pet. App. 4a-5a)—a majority of prayers were explicitly Christian. *See* J.A. 109a-15a, 117a, 124a-28a.

Many prayers have included extended statements of Christian doctrine. For example, one guest chaplain stated:

> We look with anticipation to the celebration of Holy Week and Easter. It is in the solemn

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[6] An employee later turns the podium around, so that public-forum speakers—unlike the guest chaplains—address the Board rather than the audience. *See, e.g.*, Exhs. 770, 773, 774; http://tinyurl.com/public-forums.

> 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. Jesus Christ, who took away the sins of the world, destroyed our death, through his dying and in his rising, he has restored our life. Blessed are you, who has raised up the Lord Jesus, you who will raise us, in our turn, and put us by His side.

J.A. 88a-89a, http://tinyurl.com/exh773. On another occasion, this chaplain spoke of Spring as "an expressive symbol of the new life of the risen Christ," and said that the "Holy Spirit continues to be the inspiration and the source of strength and virtue, which we all need in the world of today." J.A. 134a, http://tinyurl.com/exh819. Another chaplain spoke of "the plan of redemption that is fulfilled in Jesus Christ" (J.A. 99a, http://tinyurl.com/exh785), and on another occasion,"the life and death, resurrection and ascension of the Savior Jesus Christ" (J.A. 129a, http://tinyurl.com/exh815). Other guest chaplains read and explained biblical passages, and extolled God's having sent his son Jesus Christ into the world. J.A. 94a, http://tinyurl.com/exh780; J.A. 113a-14a, http://tinyurl.com/exh802; J.A. 97a, http://tinyurl.com/exh783.

Guest chaplains regularly assume that everyone present is Christian. They speak of "our Christian faith" (J.A. 88a), "us as Christian people" (J.A. 59a), and "the role of the Holy Spirit in our lives" (J.A. 56a, 61a, 89a). They speak for the group: "We ask it all in

the name of Jesus Christ, our savior" (J.A. 69a), and "We look with anticipation to the celebration of Christmas and the birth of Jesus Christ" (J.A. 117a, 122a). They pray for "the members of our community who come here to speak before the board" (J.A. 45a), and "everybody that will partake in this gathering" (J.A. 143a). Sometimes they pray by name for citizens scheduled to participate in the meeting. *See* J.A. 40a, C.A. App. A464; J.A. 45a, C.A. App. A469; J.A. 108a, C.A. App. A542.

Many chaplains request that all present "join" in the prayer. Pet. App. 6a, 23a; *e.g.*, J.A. 36a ("Let's join our hearts together right now, and ask the Lord's blessing on our time together here tonight. Father, in Jesus' name we just invite you * * *."); *see also* J.A. 60a, 63a, 73a, 78a, 135a. One chaplain called on everyone to recite the "Our Father" together. J.A. 56a, http://tinyurl.com/exh734. Others call for citizen participation in ways that highlight nonparticipants, asking citizens to stand or "bow our heads out of respect to God." J.A. 72a; *see also* Pet. App. 23a. Board members have made similar requests. *See* J.A. 57a, 66a-67a. Board members routinely bow their heads, stand, respond "Amen," or make the sign of the cross. Pet. App. 6a, 23a. The audience does the same. Pet. App. 6a.

Chaplains have disparaged those who question petitioner's prayer practice, or who are not "God-fearing." *E.g.*, J.A. 79a. One said, "despite the objections of some, they are in the minority and they are ignorant of the history of our country." J.A. 108a. Another chaplain thanked the Board for opening with prayer "[o]n behalf of all God-fearing people in this

town." J.A. 137a. Still another impugned towns that lack "God-fearing" leaders. J.A. 79a.

In addition to thanking guests for serving as the Town's "chaplain of the month," Auberger has thanked them for serving as the chaplain for the Greece Police Department. J.A. 32a; *see also* J.A. 35a (describing functions of police-department chaplain); *see generally* J.A. 29a-78a. Auberger's gratitude has been extended on behalf of both the Board and Town residents. *See, e.g.*, J.A. 36a-37a, 40a, 51a, 73a. And he has at times presented guest chaplains with a plaque to commemorate their service. Pet. App. 4a.

C. The Town's Haphazard Selection Process

1. Before the threat of litigation

For nine years, from the beginning of petitioner's prayer practice until just before this lawsuit was filed in February 2008 (J.A. 10a (Dkt. No. 1)), every guest chaplain, and every person on petitioner's lists of potential chaplains, was a Christian clergyman. Pet. App. 4a-5a.

Employees assigned to schedule chaplains were told to "call a pastor" (C.A. App. A177), but received no other guidance (C.A. App. A903-04). They compiled multiple, overlapping, and disorganized lists of clergy. C.A. App. A142-77; Pet. App. 31a-41a. They called pastors off these lists "in no particular order, in no particular fashion" (C.A. App. A991), with no "rhyme or reason" (C.A. App. A972). *See also* C.A. App. A904, A906. When the scheduler had trouble finding someone or when someone canceled, she turned to a handful of reliable "standby" pastors who would "come in a

heartbeat"; this happened "a lot." C.A. App. A905; *see also* Pet. App. 37a-38a. Some pastors appeared eight, nine, or fourteen times; others, only once. Pet. App. 33a, 35a, 41a.

2. After the threat of litigation

In 2007, respondents' counsel wrote to question petitioner's prayer practice. J.A. 21a-25a. As litigation approached and then ensued, petitioner found three non-Christians, who delivered a total of four prayers. Pet. App. 4a-5a.

A Jewish layman, who was a Board member's friend (*see* J.A. 114a-15a), was asked to deliver the prayer in January 2008. Pet. App. 4a-5a; J.A. 109a-10a; C.A. App. A844-45. After the lawsuit was filed in February, a Wiccan Priestess read press reports and asked to deliver a prayer (C.A. App. A166, A855-58); she did so in April (J.A. 112a). In July, the Jewish layman delivered a second prayer. J.A. 114a-15a. The Town added the local Baha'i Temple to its list on its own initiative, but only after the lawsuit was filed. Pet. App. 5a. The Temple's leader gave the prayer in December. J.A. 127a-28a. These three individuals are the only non-Christians ever to deliver a prayer—and they all did so in 2008, the year that the litigation began. Pet. App. 4a-5a.

After discovery closed in October 2008 (J.A. 11a (Dkt. No. 26)), the prayer scheduler promised in a January 2009 summary-judgment filing that she would start a rotation system: "I will start from the top, and work my way down to the bottom of the list. Where I stop one month, I will start the following month * * *." C.A. App. A829. Of the fifty-four names on the list

accompanying her filing, the only non-Christians were the three who prayed in 2008. C.A. App. A831-32.

Still later, petitioner filed a chaplain list with almost forty new entries, including a local Buddhist Temple and over a dozen Jewish groups—several of which appear to be cemeteries. *Compare* C.A. App. A831-32, *with* C.A. App. A1053-55. Many of the new entries shared the same address, and almost all lacked phone numbers. C.A. App. A1053-55.

These alleged reforms led to nothing. From January 2009 until the record closed in June 2010, no non-Christian gave the prayer. Pet. App. 5a. Nor did the Town call chaplains in rotation. Two Christian pastors made repeat appearances (J.A. 137a, 139a, 142a, 143a), and chaplains did not appear in anything resembling the order in which they appeared on the Town's lists. *Compare* J.A. 129a-43a, *with* C.A. App. A831-32 *and* A1053-55.

Petitioner says that "any citizen" can volunteer to deliver a prayer. Pet. Br. 7. But petitioner never publicized any such opportunity. Pet. App. 30a. Even when litigation was imminent, Supervisor Auberger and the Town Attorney said that the practice was to have a prayer by "a member of the local clergy" (J.A. 22a) and "our invited clergy" (J.A. 24a).

D. The Plaintiffs

Respondents are a Jew and an atheist who have regularly attended Board meetings. Pet. App. 7a-8a, 29a. They have done so to address specific local issues—such as the public-access cable channel and the use of local parks—and have spoken during the public-forum period about these issues and about the

prayer practice. C.A. App. A189-90, A195-96, A574-76, A746, A764, A1063, A1067-69, A1076, A1085.

They have felt coerced by guest chaplains' requests to participate in the prayers, and they have felt isolated, embarrassed, and humiliated when they have declined to participate while those around them stared. C.A. App. A1067-69, A1085-86. When respondents complained to Town officials in September 2007, they were told either to leave the room or to ignore the prayers. C.A. App. A190, A196. The following month, the guest chaplain said that they were "in the minority and they [we]re ignorant of the history of our country." J.A. 108a.

E. Proceedings Below

The district court held, on cross-motions for summary judgment, that respondents had standing (Pet. App. 66a-68a); that respondents had not proven intentional discrimination against non-Christians in selecting chaplains (Pet. App. 69a-78a); and that petitioner's prayer practice did not violate the Establishment Clause (Pet. App. 126a-29a). Respondents appealed the last ruling (Pet. App. 10a), arguing that the prayers and chaplains were overwhelmingly Christian (Appellants' C.A. Br. 2, 5-11, 18, 25-37), and that adults and children were pressured to participate in the prayers (*id.* at 2, 11-15, 18-19, 39-43).

After considering the "totality of the circumstances" (Pet. App. 19a), a unanimous panel of the Second Circuit held that petitioner had affiliated itself with a single religion, in violation of *Marsh*. Pet. App. 1a-27a.

The court observed that "[w]e need not 'embark on a sensitive evaluation' or 'parse the content of a particular prayer,' * * * to recognize that most of the prayers at issue here contained uniquely Christian references." Pet. App. 20a (quoting *Marsh*, 463 U.S. at 795). "[T]he town did not explain that it intended the prayers to solemnize Board meetings, rather than to affiliate the town with any particular creed," and did not request that chaplains avoid proselytizing or disparaging remarks. Pet. App. 22a. Petitioner's litigating position—that it would accept volunteers of any faith—was undercut by its failure ever to announce such a policy and by its reliance on "a cadre of recurrent volunteers." Pet. App. 20a & n.5. Its process "virtually ensured a Christian viewpoint." Pet. App. 19a. Under those circumstances, "the rare handful of cases, over the course of a decade, in which individuals from other faiths delivered the invocation cannot overcome the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

The court also considered the context of the prayers, noting Board members' participation, the chaplains' delivery of prayers on everyone's behalf, and the requests for audience participation—all of which "placed audience members who are nonreligious or adherents of non-Christian religion in the awkward position of either participating in prayers invoking beliefs they did not share or appearing to show disrespect for the invocation." Pet. App. 23a. The court concluded that petitioner "conveys the impression that town officials themselves identify with the sectarian

prayers and that residents in attendance are expected to participate in them." Pet. App. 26a.

The court remanded to allow the district court, "with the assistance of the parties, to craft appropriate relief." Pet. App. 27a.

SUMMARY OF ARGUMENT

I. Petitioner's prayer practice is unconstitutional for two independent but mutually reinforcing reasons. It puts coercive pressure on citizens to participate in the prayers, and those prayers are sectarian rather than inclusive.

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee v. Weisman*, 505 U.S. 577, 587 (1992). Petitioner's practice violates this basic guarantee. Citizens attend meetings not as observers, but as participants. Some must attend to request special-use or rezoning permits or Board action on other issues; others attend to be sworn in to office, to be publicly honored, or to fulfill an educational requirement. Citizens' attendance is not voluntary in any meaningful sense.

The Town asks clergy to deliver prayers on its behalf, but it does so without attending to any of its Establishment Clause responsibilities. It does not ask its guest chaplains to refrain from asking citizens to join in the prayers, and it takes no steps to ameliorate the coercion faced by those in attendance. Religious minorities are pressed either to feign participation in an act of worship that violates their own beliefs, or to

publicly display their dissent from majoritarian religious norms.

Petitioner does not ask its guest chaplains to avoid proselytizing or disparaging remarks, let alone to pray in an inclusive manner. With no instruction to do otherwise, petitioner's guest chaplains routinely offer prayers acceptable only to Christians.

Petitioner's practice cannot find refuge in a tradition of governmental religious acknowledgments. "[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, * * * down to the present day," "rule[s] out of order government-sponsored endorsement of religion * * * where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ)." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

Pairing coercion with sectarian prayers makes the Town's practice doubly unconstitutional. Government "may not thrust any sect on any person." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Forcing religious minorities either to participate in Christian prayer or to visibly withdraw "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Marsh did not approve prayers in a coercive environment; no coercion was alleged or apparent. Legislators were free to come and go with little comment; citizens were mere observers, confined to the

gallery. Even then, the only prayers that *Marsh* considered and approved were nonsectarian and not "explicitly Christian." 463 U.S. at 793 n.14. Petitioner and its amici seek to extend *Marsh* far beyond what it actually decided.

II. Requiring petitioner to avoid obviously sectarian prayers would not require difficult religious judgments, impermissible "parsing" of prayers, or censorship of private speech. Pet. Br. 41-42. Any possible difficulty categorizing "King of Kings" (Pet. Br. 42) does not make it difficult to categorize "Jesus Christ"; the prayers in this record are unambiguous. And government does not engage in censorship when it delegates the task of delivering a governmental prayer according to its own specifications.

III. The cumulative effect of petitioner's positions is astounding. Petitioner claims that government may endorse not just religion in general, but tenets of particular religions. Pet. Br. 41. Any limitation on the content of prayers would be unconstitutional. Pet. Br. 53. Only "legal sanctions" count as coercive (Pet. Br. 36), leaving government officials and guest chaplains free to admonish and harangue citizens to participate in sectarian prayers—even those that promise eternal hellfire to religious minorities.

This license would extend to all three branches of government. Pet. Br. 30-35. It would apply not only to the Greece Town Board, but to agency hearings and criminal trials. Indeed, under petitioner's proposed test, a parole officer could urge a parolee to accept Jesus Christ as his Savior and a caseworker could browbeat a welfare recipient for not attending church.

Petitioner is no longer arguing that prayer is permitted in legislatures; it is arguing that government is free to impose religious exercises of any kind in any context, provided that it does not fine or jail people or withhold benefits for resisting. Its position is irreconcilable with this Court's decisions and with any reasonable conception of religious liberty or freedom of conscience.

ARGUMENT

I. PETITIONER'S PRACTICE UNCONSTITUTIONALLY COERCES CITIZENS TO PARTICIPATE IN SECTARIAN PRAYERS.

"[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. Petitioner's practice cannot be reconciled with this prohibition.

Nor can it be reconciled with the prohibition against governmental promotion of a particular faith. The great majority of petitioner's prayers use overtly Christian terms, and many invoke specifics of Christian theology. Such prayers cannot be thrust upon citizens assembled to participate in their local government.

Marsh upheld the delivery of nonsectarian prayers to state legislators before state legislative sessions; it does not authorize petitioner's practices here. It is one thing for a state legislature to sponsor prayers for those of its members who choose to participate, as in *Marsh* or in Congress. It is quite another for a town to press those prayers on a captive audience of the broader citizenry, as in Greece.

A. Citizens Are Coerced To Participate In Prayer.

Governmental "institutions must not press religious observances upon their citizens." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005) (Rehnquist, C.J., plurality opinion). Even "subtle and indirect" pressures are impermissible. *Lee*, 505 U.S. at 593. The government can neither "persuade [n]or compel" people to join in prayer. *Id.* at 599. Government cannot bring to bear public pressure, nor lend its support to peer pressure, to join in prayer. *Id.* at 593. Petitioner's practice cannot be squared with these principles.

1. At Town Board meetings, citizens are active participants whose attendance is all but obligatory.

Citizens who attend meetings of the Greece Town Board are not observers; they are active participants, often at the Board's invitation or direction. Although few citizens attend any given meeting, those few have little choice but to be there—to request Board action, take the oath of office, or receive commendations. They will reasonably believe that they must participate in the prayers to get what they want from the Board.

Indeed, many are *petitioners* to the Board. Those seeking a zoning change or a small-business permit are legally required to attend and make their case in a public hearing. *See* pages 5-6, *supra*. Others come to ask the Board to take action on municipal issues of personal concern; they have no other opportunity to address the Board as a body. C.A. App. A779.

New police officers and some other new employees attend to be sworn in, and family members attend to participate in the ceremony. *See* page 4, *supra*. There is a long history of conducting these ceremonies at Board meetings (C.A. App. A780-81), and a newly hired officer is in no position to disregard the tradition. For these officers and their families, attendance is not optional in any real sense.

Other citizens come, at the Board's invitation, to be recognized for civic accomplishments. *See* pages 3-4, *supra*. For these people, too, attending meetings is not really voluntary; the alternative is to forgo public recognition.

Children regularly attend and actively participate in the meetings. Athletic teams are honored; children are recognized for heroic acts and inducted into the Greece Youth Hall of Fame. Children attend to see their parents sworn in, and they speak in the public forum. *See* pages 4, 7-8, *supra*.

Children also attend as students, earning academic credit to satisfy a civics requirement. C.A. App. A294, A929. Supervisor Auberger explains the proceedings to them and engages them in dialogue. *See* page 6, *supra*.

It would be "formalistic in the extreme" to say that either adults or children have a real choice to forgo these occasions. *See Lee*, 505 U.S. at 595. Both the municipal issues raised by citizens and the more ceremonial events are important to those affected. The meetings are grass-roots democracy in action, and participation is a universal right of citizenship. "[T]he State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting

conformance to state-sponsored religious practice." *Id.* at 596.

The point is not that Greece has less freedom of action than Congress or state legislatures. Rather, its Board functions in fundamentally different ways than those bodies. If this case is to be decided by analogy to federal practices, the relevant benchmark is not the floor of Congress, but court proceedings, agency hearings, and naturalization ceremonies, where citizens actively participate.

2. Citizens experience substantial pressure to participate in the prayers.

The reasons that citizens attend, the physical setting of the meetings, the authority behind the prayers, the chaplains' requests, the lack of anonymity, and the fear of offending Board members converge to place substantial pressure on everyone present to join in the prayers. In these circumstances, few would have the fortitude to disregard a chaplain's instruction, much less to leave the room.

a. Board members, the Clerk, and eight heads of departments sit on a dais, facing the citizens. C.A. App. A863. The Town Supervisor addresses the citizens as he introduces the guest chaplain to give "our moment of prayer." *E.g.,* J.A. 37a-40a, 136a, 138a-39a.

The chaplain faces the assembled citizens; he does not face the Board. The prayer is offered to God, but it is also directed at the citizens. Often, the chaplain explicitly asks audience members to participate—to join in prayer, stand, or bow their heads. *See* pages 8-11, *supra.*

Citizens are seated directly before the chaplain and the Board, and are generally few in number. *See* page 2, *supra*. It is virtually impossible for anyone to step outside, or to decline to stand, without attracting notice.

Those who speak in the public forum or request permits in the public hearing are necessarily eager to make a good impression. On petitioner's five-member Board, it takes only three votes to deny a request; applicants cannot afford to offend anyone. *Perhaps* no Board member would think less of a citizen who refused to participate in the prayer. But the citizen has no way to know.

Newly hired police officers are necessarily mindful of their supervisor, the Chief of Police, who usually administers the oath. C.A. App. A780. Rookie officers cannot risk offending their new boss. And citizen honorees would be hard-pressed to breach decorum by resisting the protocol of the Board that is honoring them.

In addition to the pressure from authority figures at the front of the room, citizens who visibly decline to participate draw reactions from other citizens that embarrass and humiliate. Plaintiffs in their affidavits described the intense pressure they felt to join in the prayer. C.A. App. A1067-69, A1085. Understandably, few citizens decline.

b. Even though the court of appeals acknowledged the pressure on religious minorities (Pet. App. 23a, 26a), it dismissed our coercion argument on the ground that "the plaintiffs are adults." Pet. App. 23a n.8. But "the Constitution guarantees that government may not

coerce *anyone* to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587 (emphasis added). The question, for both adults and children, is whether a person "has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow." *Id.* at 593.

Social-science literature confirms that adults are readily susceptible to pressure to conform their outward behavior to what is expected of them. *Cf. Lee*, 505 U.S. at 593-94 (consulting psychology literature). Many adults will give obviously false answers to simple questions if everyone else does so.[7] They will misrepresent their moral convictions in the face of competing views.[8] Most adults will follow instructions, even deeply offensive or immoral ones, when they come from authority figures.[9] Compliance is further

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[7] Solomon E. Asch, *Effects of Group Pressure on the Modification and Distortion of Judgments*, in *Readings in Social Psychology* 2 (G.E. Swanson et al. eds., 2d ed. 1952) (judging length of lines); *see also* Rod Bond & Peter B. Smith, *Culture and Conformity: A Meta-Analysis of Studies Using Asch's (1952b, 1956) Line Judgment Task*, 119 Psychol. Bull. 111, 132-37 (1996) (collecting replications of Asch experiments).

[8] Richard Crutchfield, *Conformity and Character*, 10 Am. Psychologist 191, 193 (1955) (people willing to "violate[ ] their own inner convictions" when confronted with unanimous views on subjective values questions); *see also* Vernon Allen & Richard Crutchfield, *Generalization of Experimentally Reinforced Conformity*, 67 J. Abnormal & Soc. Psychol. 326 (1963) (conformity enhanced when authority figure affirms unanimous response of others).

[9] *See* Leonard Bickman, *The Social Power of a Uniform*, 4 J. Applied Soc. Psychol. 47, 51 (1974) (experimental subjects twice

enhanced when that authority figure is physically present.[10] Modern science thus validates Charles Carroll's observation in the First Congress: "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand." 1 Annals of Cong. 730 (757 in some printings) (Aug. 15, 1789) (J. Gales ed., 1834).

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as likely to follow instructions from person in uniform); Charles K. Hofling et al., *An Experimental Study of Nurse-Physician Relationships*, 143 J. Nervous & Mental Disease 171 (1966) (21 of 22 nurses would administer dangerous doses of fictional drug on doctor's telephonic instruction); Wim H.J. Meeus & Quinten A.W. Raaijmakers, *Obedience in Modern Societies: The Utrecht Studies*, 51 J. Soc. Issues 155, 161-64 (1995) (91% of subjects would follow instructions to harass unemployed job applicant during employment exam, and collecting similar experiments); Stanley Milgram, *Obedience to Authority: An Experimental View* 33-36 (1974) (nearly all experimental subjects inflict electric shocks, to various degrees, on innocent victim, when instructed to do so); *id.* at 93-97 (compliance fell when instructions came from person with no apparent authority); *see also* Piero Bocchiaro & Philip G. Zimbardo, *Defying Unjust Authority: An Exploratory Study*, 29 Current Psychol. 155 (2010) (replicating Milgram using insults instead of electric shocks); Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 Am. Psychologist 1 (2009) (replicating Milgram).

[10] Milgram, note 9, *supra*, at 59-62 (compliance declined when authority figure out of room); *see also* Bocchiaro & Zimbardo, note 9, *supra* (replicating Milgram's results on compliance when authority figure absent, using insults instead of electric shock); C. Bram Cadsby et al., *Tax Compliance and Obedience to Authority at Home and in the Lab: A New Experimental Approach*, 9 Experimental Econ. 343, 357 (2006) (compliance fell from baseline of 95.5-99.5% to 81.6% when authority figure absent and subjects' response time increased).

Citizens at Board meetings in Greece face both the pressure to comply with the instructions and expectations of the authority figures at the front of the room, who will soon be passing on citizens' requests, *and* the pressure to follow the lead of everyone around them. Social-science literature reinforces the common sense of the situation: brand-new employees, citizens accepting honors, and citizens seeking favorable action from the Board would be hard-pressed to resist. It ignores reality to say that there is no coercion here merely because the victims are adults.

c. The court of appeals assumed that children are no more present at Board meetings than at sessions of the Nebraska legislature. Pet. App. 23a n.8. In fact, children regularly attend meetings in Greece; and unlike children observing a state legislature, Greece's children actively participate. *See* pages 6-8, *supra*.

Children invited by the Board to receive awards as part of a group would need to resist the chaplain's request, the Board's watchful eye, the potentially negative reaction from strangers, and the pressure from teachers, coaches, and peers. It is unrealistic to expect a nine-year-old soccer player or an eleven-year-old cheerleader to remain seated while those around her stand, or to exit the room and leave her friends and teammates behind.

Civics students have even less freedom to excuse themselves. Their attendance must be verified in writing by a Town official and they must summarize the meeting to receive credit. C.A. App. A294, A779.

These children face pressure to religious conformity far exceeding that held unconstitutional in *Santa Fe*

Independent School District v. Doe, 530 U.S. 290 (2000). *Santa Fe* involved the boisterous atmosphere of a football game. Fans wanting to avoid the prayer could arrive late, or make a well-timed trip to the restrooms or concession stand, far more easily than children can avoid the prayers here. At Board meetings, there is "no real alternative which would * * * [allow them] to avoid the fact or appearance of participation." *Lee*, 505 U.S. at 588. So month after month, petitioner presses the Town's children to join in prayer.

d. The rare citizen willing to step outside could not do so without the risk of missing the very occasion for attending. Avoiding the prayer would require either exquisite timing and good luck, or a confederate inside the meeting who would leave at the appropriate time to summon the conscientious objector waiting outside.

Events proceed seamlessly and in rapid succession: the call to order, Pledge of Allegiance, prayer, awards, swearing in of new employees, public forum. More than 40% percent of the time, there is no one to be sworn in and no award, so the public forum immediately follows the prayer. *See* note 4, *supra*. If no one rises to speak, the forum closes in under a minute. *See* page 5, *supra*.

Citizens who attend a single meeting—to receive an award, be sworn in, apply for a permit, or address a pressing issue—would not know the Board's rhythms and procedures well enough to avoid the prayer. For those who attend regularly, consistent tardiness would soon become apparent to the Board and other regulars.

e. Nor should citizens be required to avoid part of the meeting, even if that were feasible. They are

entitled to attend the whole meeting—and those petitioning the Board are well advised to do so, to show respect, to get a better sense of Board members before speaking, and to hear comments on any related issues. No citizen should be required "to choose between compliance or forfeiture" or to "take unilateral and private action to avoid compromising religious scruples." *Lee*, 505 U.S. at 595-96.

If this Court were to open with "Our Lord and Savior Jesus Christ save the United States and this Honorable Court," no one would suggest that Jewish or Muslim lawyers could or should come dashing in after the cry to argue their cases. Arriving late is not a just or workable solution—not in this Court, and not in Greece either.

f. Staying put and remaining silent are no less problematic. Often, the chaplain requests or assumes everyone's participation. He asks those assembled to stand or bow their heads. *See* pages 10-11, *supra*. He speaks in the name of the group: "*we* ask these things," "*our* Christian faith." *E.g.*, J.A. 33a-36a, 88a, 98a-105a (emphasis added). All persons present become participants in the prayer—voluntarily or not—unless they visibly dissent.

Prayer is a religious *act*, not a passive symbol or display. *Cf. Lynch v. Donnelly*, 465 U.S. 668, 686 (1984) (describing créche as "passive symbol"); *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1992) (Kennedy, J., concurring in judgment in part and dissenting in part) (contrasting "purely passive symbols," which are easily ignored, with compulsion "to observe or participate in any

religious ceremony or activity"). Here, citizens face pressures to observe *and* participate.

In *Lee*, "the act of standing or remaining silent was an expression of participation in the rabbi's prayer." 505 U.S. at 593. The Court initially attributed this understanding to what "many" or "most" students would believe. *Id.* In *Santa Fe*, the Court drew the conclusion itself, holding without qualification that "delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship." 530 U.S. at 312. This holding was correct: in the religious and social conventions of our people, one manifests participation in a group prayer by posture, and by silence except when asked to speak or respond. To all but the mind-reader, participation and respectful silence are indistinguishable.

3. Petitioner's coercion test offers no meaningful protection.

a. Petitioner's definition of coercion strips the term of all meaning. Petitioner says that it need avoid only "coerc[ing] *adherence* to a particular faith," or "coerc[ing] anyone to *adopt* a particular tenet or belief." Pet. Br. 35, 39 (emphasis added). But plaintiffs need not show that they were compelled to *believe* in prayers, much less that they were pressed to change their religious affiliation. As even petitioner recognizes elsewhere, it is enough that plaintiffs were pressed to "*participate* in any religion or its exercise." Pet. Br. 14, 38 (quoting *Allegheny*, 492 U.S. at 659 (Kennedy, J., concurring in judgment in part and dissenting in part)) (emphasis added); *accord Lee*, 505 U.S. at 587.

The Court's focus on religious participation follows from first principles. It is impossible to compel belief; visible behavior is all that government can hope to compel. This Court long ago recognized "the folly of attempting * * * to control the mental operations of persons, and enforce an outward conformity to a prescribed standard." *Davis v. Beason*, 133 U.S. 333, 342 (1890). No one would claim that government may require citizens to attend religious services as long as they are free to disbelieve what is preached there. It is no more reasonable to claim that government may press its citizens to join in prayers as long as they are free to disbelieve them.

b. Petitioner also suggests that only taxes and legal sanctions count as coercion. Pet. Br. 36. On that standard, government officials are free to admonish, harangue, and intimidate citizens to participate in prayers, as long as they do not formally penalize those who resist. But government can neither "force *nor influence*" a person in religious matters. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (emphasis added).

Petitioner later suggests that "condition[ing] any governmental benefits on participation" in the prayer might qualify. Pet. Br. 40. But petitioner does just that: it conditions the right to attend Board meetings, obtain official recognition, and petition the government for redress of grievances on observing the prayer and, for all but the most determined dissenters, participating in that prayer.

Perhaps petitioner means to require proof that citizens' requests are denied if they do not participate in the prayer. But nearly all actions that citizens seek

are discretionary, so it would be nearly impossible to prove that any one action was withheld *because* the requester declined to pray. And because the pressures to participate are so pronounced that few citizens refuse, proving a statistical pattern would also be impossible.

B. Petitioner's Prayers Are Unconstitutionally Sectarian.

Petitioner's practice violates the Constitution for a second and independent reason: petitioner directs sectarian prayers at its citizens. Government may not "lend[ ] its power to one or the other side in controversies over religious authority or dogma." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 707 (2012) (internal quotation marks omitted). "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 (1982).

Some Justices have suggested that government may promote monotheism, but none have departed from the settled principle that government may not direct explicitly sectarian messages at the public, coercively or otherwise:

> [O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington, * * * down to the present day, has, with a few aberrations, ruled out of order government-sponsored endorsement of religion * * * where the endorsement is sectarian, in the sense of specifying details upon which men and women

> who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ).

Lee, 505 U.S. at 641 (Scalia, J., dissenting) (citation omitted).

Perhaps some in the founding generation thought that the Constitution "permitted government invocation of Christianity," but "those narrower views of the Establishment Clause were as clearly rejected as the more expansive ones." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 897 (2005) (Scalia, J., dissenting). "*All* of the actions of Washington and the First Congress * * *, virtually all Thanksgiving Proclamations throughout our history, and *all* the other examples of our Government's favoring religion * * *, have invoked God, *but not Jesus Christ*." *Id.* (third emphasis added).

Indeed, "[t]he critically important aspect of the framing generation's compromise was that only the most general, nonsectarian reference to God was deemed appropriate" in addressing the public. Michael Meyerson, *Endowed by Our Creator: The Birth of Religious Freedom in America* 11-12 (2012). The Founders maintained this approach at a time when the non-Christian population was tiny. In an era with more religious diversity, their caution carries even greater wisdom.

1. Petitioner's prayers advance and proselytize Christianity.

Month after month, petitioner invited Christian pastors to offer prayers, without ever requesting or

suggesting that the prayers be inclusive. The predictable result was Christian prayers: two-thirds contained uniquely Christian language. *See* pages 9-10, *supra*. In the eighteen months before the record closed, twelve of the fourteen prayers in the record contained such references. J.A. 129a-43a.

The Board did not ask its chaplains to refrain from proselytizing, advancing, or disparaging any particular faith. Consequently, many chaplains elaborated on exclusively Christian beliefs, referring to "the saving sacrifice of Jesus Christ on the cross" (J.A. 88a), "the plan of redemption that is fulfilled in Jesus Christ" (J.A. 99a), "the life and death, resurrection and ascension of the Savior Jesus Christ" (J.A. 129a), or "the new life of the risen Christ" (J.A. 134a). They discussed the workings of the Holy Spirit (*e.g.*, J.A. 56a, 89a, 123a), the events of Pentecost (J.A. 134a), and the belief that God "has raised up the Lord Jesus" and "will raise us, in our turn, and put us by His side" (J.A. 89a).

The Board did not suggest that chaplains refrain from asking citizens to recite prayers in unison (J.A. 56a), inviting citizens to church events (J.A. 45a-46a, 64a-65a), or denouncing the "ignorant" minority who oppose government-sponsored prayers (J.A. 108a). Indeed, Supervisor Auberger indicated that he would take no corrective measures even if guest chaplains presented racist, anti-Catholic, anti-Semitic, or homophobic rants. C.A. App. A819-21.

Paraphrasing the court of appeals, petitioner assumes that proselytizing prayers necessarily "preach conversion, denigrate other religious traditions, or

threaten nonadherents." Pet. Br. 12-13; *cf.* Pet. App. 21a. That definition captures only the most extreme forms of proselytizing. Even a passive display may proselytize if prominently and persistently displayed. "[P]ermanent erection of a large Latin cross on the roof of city hall * * * would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part); *see also id.* at 664 n.3 (passive displays recognizing "every significant Christian holiday while ignoring the holidays of all other faiths" might "apply[ ] pressure to obtain adherents").

Petitioner's prayers promote a single faith. Repeatedly praying in explicitly Christian terms, invoking the Christian theology of salvation through Jesus, all with the imprimatur of the Town, in an environment that pressures all present to participate, advances and proselytizes Christianity.

2. Petitioner's alleged equal-access policy and its lack of discriminatory intent do not justify either coercion or sectarianism.

Petitioner does not dispute that the overwhelming majority of prayers were explicitly Christian. Rather, it contends that this resulted from a neutral equal-access policy and not from a discriminatory intent. Pet. Br. 19, 21-22, 44. But there was no equal-access policy, and it would not matter if there were.

a. Under petitioner's stylized version of the facts, its prayers have been offered by "volunteers * * * from a multitude of faith traditions" (Pet. Br. 13), "according

to a facially neutral policy" (Pet. Br. 52) that allows "any citizen," including "atheists" (Pet. Br. 7), an "opportunity" to deliver "an opening statement" (Pet. Br. 53).

The reality is that petitioner never adopted *any* policy, let alone one made known to the public. Pet. App. 4a, 20a, 29a-30a. Petitioner gave its prayer practice little thought, and gave the consciences of religious minorities no thought at all.

Selection of chaplains was successively delegated to three rank-and-file employees who were given no instructions but to "call a pastor." C.A. App. A177. These employees had no system; they exercised unfettered discretion. *See* pages 12-13, *supra*. The one pattern was frequent reliance on a small number of repeat chaplains who would come whenever asked. *Id.*

The alleged policy of allowing "atheists and nonbelievers to open the meeting with a statement of their choosing" (Pet. Br. 20) was never written down, never formally adopted, and never announced or publicized apart from publicity incidental to this litigation. Pet. App. 20a, 30a. It produced exactly four prayers by non-Christians, all in 2008. Pet. App. 4a. In the following eighteen months all prayers were once again offered by Christian clergy. Pet. App. 5a. Petitioner's flirtation with pluralism, in response to this lawsuit, did not even last until the record closed. It cannot negate more than eleven years of Christian dominance.

Petitioner mentions only its "most recent prayer-giver list." Pet. Br. 6. That list, filed six months *after* discovery closed, makes a show of including non-

Christians but demonstrates that the task was not taken seriously. It lists more than a dozen Jewish groups, but several are cemeteries, several share a common address, and for nearly all of them, petitioner did not bother to find a phone number. C.A. App. A1053-55. Petitioner also did not go straight down the list, as it had promised the district court. *See* pages 13-14, *supra*. The court of appeals thus had ample reason to treat petitioner's claim of inclusivity with skepticism. Pet. App. 4a, 20a.

We do not now contend that petitioner intentionally excluded non-Christians. But neither did it affirmatively try to include them, except for a brief period at the beginning of the lawsuit. Nor did it create a genuine equal-access policy.

b. Even if petitioner had followed a truly neutral rotational scheme, that would not lift the Town's Establishment Clause obligations. Those obligations apply to what the government does, regardless of how it selects those who do it, and whether or not it pays them. For example, some government social-service departments use unpaid volunteers to serve clients. *See, e.g.*, Newport News, *Volunteer Services Program*, http://tinyurl.com/volunteer-services. Those volunteers cannot proselytize clients in any way that would be forbidden to paid employees in the same department.

Leading a captive audience of adults and children in government-sponsored prayer is a sensitive task. It cannot be casually delegated without any guidance. *Cf.* Jeremy G. Mallory, Comment, *"An Officer of the House Which Chooses Him, and Nothing More": How Should Marsh v. Chambers Apply to Rotating Chaplains?*, 73

U. Chi. L. Rev. 1421 (2006) (guest chaplains need oversight because, unlike in-house chaplains, they are unfamiliar with the audience and lack structural incentives to minister in a pluralistic way). The sectarian and often proselytizing content of prayers, and chaplains' requests for participation, were not products of chaplains' bad intentions; they followed from the Town's neglect of its constitutional obligations.

c. More generally, petitioner contends that all that matters is whether "the government purposely employs such prayers as a mouthpiece to advocate on behalf of a particular faith." Pet. Br. 18; *see also* Pet. Br. 38 (requiring "intent to proselytize"). The content of prayers, and the chaplains' intent, are allegedly irrelevant. Pet. Br. 20-22, 26, 44, 53.

But if petitioner *in fact* pressured its citizens to join in Christian prayer, it does not matter whether Board members intended to impose Christianity, were recklessly indifferent to the rights of religious minorities, or were simply oblivious. The Constitution necessarily applies to what petitioner did, whether or not it also applies to what petitioner thought. *See Lee*, 505 U.S. at 588 (the "question is not the good faith of the school").

"[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind" a legislature's actions. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). Where a law is constitutional in its actual operation, the difficulty of assessing intent has often been a reason to refrain from inquiring into suspected improper motive. But the

converse is equally true: where, as here, a legislative action is unconstitutional in its actual operation, government should not be allowed to hide behind the difficulties of proving intent. It does not "matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 559 (1993) (Scalia, J., concurring in part and concurring in judgment).

If the action itself were irrelevant, and intent were all that mattered, then a town council could open its meetings with even the most proselytizing prayer, claiming that it does so not with an "intent to proselytize" (Pet. Br. 38), but instead because the prayer is familiar to its members. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992).

Nor did *Marsh* turn on intent. *Marsh* referred to "impermissible motive" in discussing the selection of a chaplain, not the content of the prayers. 463 U.S. at 793. In discussing the prayers' content, the Court stated that the prayers had not been "exploited to proselytize or advance any one" faith (*id.* at 794-95). In reaching that conclusion, the Court did not analyze the legislature's intent; rather, it explained that the prayers "harmonize[d] with the tenets of some or all religions" and were a "tolerable acknowledgment of beliefs widely held." *Id.* at 792 (internal quotation marks omitted); *see also* pages 44-47, *infra*. The same cannot be said of the prayers in Greece.

C. Coercion And Sectarianism Are Mutually Reinforcing Burdens On Religious Conscience.

Petitioner's two constitutional violations are mutually reinforcing. Governmental pressure to participate in prayer is unconstitutional; governmental pressure to participate in sectarian prayer is worse. Government "may not thrust any sect on any person." *Zorach*, 343 U.S. at 314.

Petitioner forces minorities either to participate in Christian prayer in violation of their own religious beliefs, or visibly to withdraw and call attention to their religious nonconformity, just before they address the Board on some matter of public or personal importance. Pet. App. 23a. The objection to this choice is not merely a matter of taking offense, as petitioner assumes. Pet. Br. 47-48. It is that the citizen is pressed to participate in a prayer that conflicts with his own understanding of religion. The injury is not just to feelings, but also to conscience.

As a rabbi testified in what became one of this Court's leading cases, "the concept of Jesus Christ as the Son of God" is, to Jews, "practically blasphemous." *Schempp v. Sch. Dist. of Abington Twp.*, 177 F. Supp. 398, 401 (E.D. Pa. 1959) (internal quotation marks omitted), *aff'd after intervening remand*, 374 U.S. 203 (1963). To note this way of understanding Christianity is not to attack it, but to take it seriously.

Many adherents of minority faiths who can conscientiously join in a nonsectarian prayer cannot conscientiously join in a prayer that they may find blasphemous. When the State pressures them to do so,

it "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Lee*, 505 U.S. at 592.

Requiring petitioner to respect the consciences of non-Christians does not create a "heckler's veto." Pet. Br. 47. The heckler prevents others from speaking to a willing audience by shouting them down or creating a disturbance. Here, the objection is to being pressed to *join* in the prayers of others. Respondents are no more hecklers than were the plaintiffs in *Lee* and *Santa Fe*.

The charge of a veto also implies one or few objectors. But only 76% of the population self-identifies as any kind of Christian. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey (ARIS 2008), Summary Report* 3 (2009), *available at* http://tinyurl.com/aris-report. A quarter of the population—nearly eighty million Americans—cannot be dismissed as hecklers.

Petitioner seeks to impose the prayers of Christianity—a religion with a revered tradition of martyrs who went to the lions or the stake rather than go through the motions of praying to false gods. It cannot credibly dismiss as insignificant the burden of forced religious participation, real or feigned.

D. *Marsh* Did Not Address, Let Alone Approve, Coercive Or Sectarian Prayers.

Petitioner and its amici hinge nearly everything on *Marsh*. Pet. Br. 12 ("This case can begin and end with *Marsh v. Chambers*."). But the prayers at issue in *Marsh* were neither coercive nor explicitly Christian.

1. *Marsh* approved Nebraska's practice of legislative prayer. It did not approve all possible ways in which legislative prayer might be implemented, without regard to context.

After recounting the facts in Part I, the opinion in Part II rejected a challenge to "the bare fact that a prayer is offered." *Marsh*, 463 U.S. at 793. The Court reviewed the history of congressional prayer and, briefly, the history of prayer in state legislatures. *Id.* at 786-92. The opinion mentioned neither local government nor citizen participation.

Part III considered "whether any features of the Nebraska practice violate the Establishment Clause." *Marsh*, 463 U.S. at 792. Coercion was not among the challenged features, and understandably so. In Congress and state legislatures, "adults are free to enter and leave with little comment and for any number of reasons." *Lee*, 505 U.S. at 597. Much noncontroversial business, including the prayers, is conducted with few members present. Legislators who appear for the prayers do so voluntarily. Already in Madison's time, Congress's opening prayers received only "a scanty attendance." Elizabeth Fleet, *Madison's "Detached Memoranda,"* 3 Wm. & Mary Q. 534, 559 (1946).

In both Congress and state legislatures, ordinary citizens are excluded from the legislative floor and confined to a gallery. They are mere spectators, not permitted to address the legislative body and with no business to conduct before it. Twenty-three states explain that "no one—other than (perhaps) an elected legislator—has a right to speak on the floor" of a state

legislature. Indiana Br. 14. The Nebraska legislature was no different. *See Marsh*, J.A. 71-72 (legislative chamber closed to public, which is confined to gallery and, even then, "usually is not there" for prayer).

Accordingly, as one of petitioner's amici explains, prayer before a state legislature is properly understood as directed to legislators: the "chaplain is not serving the general public or imposing religious practices on the rest of society; rather, the chaplain is accommodating the voluntary religious practices of government employees"; "government is appointing ministers to minister to itself." Becket Fund Br. 23, 25.

Indeed, the district court in *Marsh* found that the prayers there were "an internal act[,] that is, one directed at the governmental unit itself or its own members," "by and for the legislators themselves," "with no significant impact on anyone else." *Chambers v. Marsh*, 504 F. Supp. 585, 588-89 (D. Neb. 1980), *rev'd in part*, 675 F.2d 288 (8th Cir. 1982), *rev'd*, 463 U.S. 783 (1983). Likewise, in this Court, Nebraska described the prayers as "a matter of internal daily procedure directed only at the legislative membership, not at the public at large." Pet. Br. 30, *Marsh v. Chambers*, 463 U.S. 783 (1983) (No. 82-23).[11]

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[11] Even congressional prayers, directed solely to legislators, are far less commonly sectarian than the prayers directed to the audience in Greece; they are also far less commonly sectarian than petitioner and its amici suggest. Today, fewer than fifteen percent of prayers in the House, and fewer than five percent in the Senate, invoke "Jesus," "Christ," "Your Son," or the "Holy Spirit." Considering other explicitly Christian terms (such as "resurrection" and "crucifixion," which are unmentioned), non-Christian terms (such as "Allah," "Buddha," and "Muhammad"),

2. One of the plaintiff's objections in *Marsh* was that the prayers were "in the Judeo-Christian tradition." 463 U.S. at 793. In rejecting that challenge, the Court distinguished explicitly Christian prayers, which had already been eliminated:

> Palmer [the chaplain] characterizes his prayers as "nonsectarian," "Judeo-Christian," and with "elements of the American civil religion." Although some of his earlier prayers were often explicitly Christian, Palmer removed all references to Christ after a 1980 complaint from a Jewish legislator.

Id. at 793 n.14 (citation omitted). Thus, the only prayers actually upheld were nonsectarian, Judeo-Christian, and *not* explicitly Christian. That is why

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and even terms such as "King of Kings" and "Lord of Lords" (Pet. Br. 42), does not materially change the numbers. Almost never does a chaplain ask citizens physically to participate. *See* Office of the Chaplain, U.S. H.R., *Prayer Archive*, http://chaplain.house.gov/archive/index.html; *Id.*, *Guest Chaplains*, http://chaplain.house.gov/chaplaincy/guest_chaplains.html; *Congressional Record Online*, http://thomas.loc.gov/home/Browse.php?&n=Issues&c=112 (click "HTML" in "Senate" column; then click hyperlink in item 1); *see also Prayers in the 112th Congress*, http://prayersinthe112thcongress.com/ (collecting transcripts for 112th Congress in searchable form).

The mistaken claim that a majority of prayers in the 112th Congress were explicitly Christian (*see* U.S. Br. 20 (citing Br. of Members of Cong. in Supp. of Cert. 10-20)) was based on a vastly expansive definition in which, for example, "Holy and Righteous Father," and "Lord and Creator," were deemed explicitly Christian. Members Cert. Br. 17-18. Such a count bears no relationship to the facts of this case or to anything in our argument.

they "harmonized with the tenets of some or all religions" and represented a "tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792 (citation omitted).

Petitioner and its amici labor to erase these facts. Petitioner says that the "prayers after 1980" were not in the record. Pet. Br. 25. But as the Court's citation to the Joint Appendix shows, the chaplain's account of his prayers in 1980 and later *was* in the record, and the Court relied on it. *Marsh*, 463 U.S. at 793 n.14 (citing J.A. 49 for the end of explicitly Christian prayers).

Reverend Palmer now contends that by "nonsectarian," he meant only that his prayers did not specify details upon which *Christian* denominations differ. Palmer Br. 15. But how Palmer understood "nonsectarian" is a red herring. What matters is the Court's understanding that his prayers were no longer "explicitly Christian" and that all references to Christ had been removed. *Marsh*, 463 U.S. at 793 n.14; *id.*, J.A. 49a; *see also* Palmer Br. 15 n.10 (quoting Palmer's testimony (from J.A. 76a) that "the name of Christ Our Lord" is not consistent with the "Judeo-Christian tradition"). The Court's understanding about that cannot be altered by a witness's statements thirty years later about what he really meant.

Petitioner says that voluntary cessation of an earlier practice would not have been a defense to an injunction in *Marsh*. Pet. Br. 26. That would be true if the Court had attended to that issue, but voluntary cessation went unmentioned, and the Court was under no obligation to raise the issue on its own. Justice Stevens in dissent may have been unwilling to rely on

the chaplain's new practice, but the majority *did* rely on it. *Marsh*, 463 U.S. at 793 n.14.

3. Petitioner repeatedly quotes or paraphrases one clause in *Marsh*: that legislative prayer may not be "exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95; *see* Pet. Br. 2, 9, 12, 17-20, 25-27, 38, 51, 55. But petitioner misses the point of the sentence. The prayers in *Marsh* did not "advance any *one* * * * faith or belief," because they were no longer "explicitly Christian." 463 U.S. at 793 n.14, 794-95 (emphasis added). They did not proselytize or *advance* that one faith for the same reason. Petitioner ignores the word "advance," effectively deleting it from the sentence.

The Solicitor General struggles with "advance" before also depriving it of meaning: "It is not clear" what the Court meant by advance, but "presumably" the word was used to encompass "a government affiliation with or a declaration of government allegiance to a particular faith or belief." U.S. Br. 17. By the end of the page, the government's treatment of "advance" has collapsed into the claim that explicitly Christian prayers do not advance Christianity because *Marsh* upheld them. U.S. Br. 17-18. But, as already explained, *Marsh* did *not* uphold explicitly Christian prayers.

4. In *Allegheny*, the Court explained *Marsh* as we do: "The legislative prayers involved in *Marsh* did not violate this principle [against the government's affiliation with a single faith] because the particular chaplain had 'removed all references to Christ.'" *Allegheny*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at

793 n.14). Nor did any dissenters claim that *Marsh* had approved explicitly Christian prayer. Rather, they argued that the créche and menorah at issue there, each specific to a single faith, were temporary and passive displays acknowledging widely celebrated holidays that had acquired secular significance. *Allegheny*, 492 U.S. at 663-65 (Kennedy, J., concurring in judgment in part and dissenting in part). Petitioner's prayer practice is not temporary, not passive, not tied to a holiday, and not significantly secular.

In later opinions, three of the four *Allegheny* dissenters also described *Marsh* as we do. In his *McCreary* dissent, Justice Scalia placed *Marsh* alongside George Washington's first Thanksgiving Proclamation as illustrations of permissible governmental sponsorship of "monotheistic" but "nondenominational" religious observances. *McCreary*, 545 U.S. at 893-94 (Scalia, J., dissenting); *see also Van Orden*, 545 U.S. at 688 n.8 (Rehnquist, C.J., plurality opinion) (characterizing *Marsh* as case in which "chaplain removed all references to Christ").

5. Unlike in *Marsh*, the prayer opportunity here has been exploited to advance Christianity because the prayers are explicitly Christian. The prayer opportunity has also been exploited to proselytize Christianity. *See* Part I.B., *supra*. The coercive environment serves only to exacerbate that exploitation. *See* Part I.A., *supra*.

E. Coercion Should Be Ameliorated, And Obviously Sectarian Prayers Should Be Eliminated.

Because neither court below has yet considered remedies, we address them only in broad outline.

We assume that some form of prayer will be allowed at meetings of local legislative bodies, and we have not, at any point in this litigation, asked that they be eliminated altogether. If prayers are to be presented, the challenge is to do so with the least violence to constitutional principles and to conscience.

Pressure to join in the prayers is inherent in Board meetings; it cannot be eliminated without discontinuing the prayers. But the pressure can be ameliorated. The Board could schedule the prayer a few minutes before meetings are called to order, and make clear that the prayer is only for those who choose to participate. The podium could be turned so that chaplains face the Board. Chaplains could be instructed not to request citizen participation. *See also* U.S. Br. 23-24 (suggesting various partial remedies for coercion, without acknowledging a violation).

Because the pressure to join in the prayers cannot be eliminated, it is essential to eliminate sectarianism. Hence, prayers that are obviously sectarian—using the definition of "sectarian" that Justice Scalia provided in his *Lee* dissent, 505 U.S. at 641—should be prohibited. This remedial measure would follow the lead of the National Conference of State Legislatures, which has endorsed Guidelines that tell chaplains "to use common language and shared symbols which are acceptable and understandable and not offensive or

unintelligible." Nat'l Conf. of State Leg., *Inside the Legislative Process, Prayer Practices* 5-146 (2002), *available at* http://tinyurl.com/ncslprayer. "In opening and closing the prayer, the leader should be especially sensitive to expressions that may be unsuitable to members of some faiths." *Id.*

Thirty-seven state legislative bodies have guidelines for chaplains—including legislative bodies from twelve states that joined an amicus brief denouncing such guidelines. *Compare id.* at 5-153 (listing legislative bodies with guidelines for chaplains), *with* Indiana Br. 19-20. The House of Representatives reminds guest chaplains that the House "is comprised of Members of many different faith traditions," and it prohibits mention of "sectarian controversies." App. 1a-3a (obtained from guest chaplain). Similar steps should be taken here.

II. NOTHING REQUIRES EITHER THE COURT OR THE TOWN TO IGNORE THE CONTENT OF THE PRAYERS.

Petitioner claims not only that it may impose on the consciences of religious minorities, but that the Constitution actually prohibits any remedy. In petitioner's view, neither the Court nor the Town can review the prayers' content, because doing so would require difficult judgments, conflict with language in *Marsh* and *Lee*, and violate the Free Speech Clause. Petitioner is wrong on all counts.

A. Obviously Sectarian References Can Be Readily Identified.

Petitioner argues that it cannot review the content of its guest chaplains' prayers because it is impossible to distinguish between sectarian and nonsectarian prayers without making thorny religious judgments. Pet. Br. 41-44. If that were true, the solution would be to prohibit *all* the prayers, not to permit even the most extreme ones. But in practice, the distinction is easily drawn.

This Court has had no difficulty identifying the obviously sectarian. *Marsh* readily identified "all references to Christ" as "explicitly Christian." 463 U.S. at 793 n.14. *Allegheny* easily concluded that the créche was sectarian, and no dissenter disagreed. 492 U.S. at 598. And Justice Scalia has twice analyzed the nation's nonsectarian historical tradition without becoming ensnared in difficulties. *See McCreary*, 545 U.S. at 897 (Scalia, J., dissenting); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

The Fourth Circuit, which for several years has enforced a rule requiring government-sponsored prayers to be nonsectarian, has also focused on obvious markers of sectarianism. *See, e.g.*, *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 349-50 (4th Cir. 2011) (references to Jesus Christ, "Cross of Calvary," and "Virgin Birth"); *Wynne v. Town of Great Falls*, 376 F.3d 292, 298-300 (4th Cir. 2006) (frequent references to Jesus Christ). Even petitioner and its amici had no difficulty recognizing obviously sectarian prayers. *See, e.g.*, Pet. Br. 31 (arguing that certain prayers were "explicitly Christian"); Bradley Br. 30 ("clearly sectarian"

prayers); Indiana Br. 10-11 ("exclusively Christian prayers"); Becket Fund Br. 8 ("faith-specific prayers").

Petitioner nevertheless asserts that the line between explicitly sectarian and inclusive prayers is hard to draw at the margin. Pet. Br. 42-44. But "[o]ur jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State." *Lee*, 505 U.S. at 598. Even if "King of Kings" were difficult to classify (*see* Pet. Br. 42), "Jesus Christ" is not. The prayers in this record contain religious doctrines and names for God that are unambiguously associated only with Christianity.

Petitioner's argument simply proves too much: if courts, towns, and chaplains cannot draw lines in this area, then *all* prayers would be allowed—or all would be disallowed. *Marsh*'s prohibition against prayers that proselytize, advance, or disparage would be unconstitutional. Sectarian prayers are in fact easier to identify than prayers that proselytize: a tradition dating to the Founding identifies the former; no such history exemplifies the latter.

Petitioner's line-drawing argument rests largely, if not entirely, on hypotheticals. Pet. Br. 42-43. Forsyth County joined an amicus brief here, but it makes no claim that it has had trouble complying with the ruling in *Joyner*, 653 F.3d at 349-50. There has been no showing that the municipalities involved in *Turner v. City Council*, 534 F.3d 352 (4th Cir. 2008), *Wynne*, 376 F.3d at 298-99, or *Simpson v. Chesterfield County*, 404 F.3d 276 (4th Cir. 2005), have experienced difficulty maintaining a court-ordered or self-imposed

nonsectarian requirement. These real-world experiences provide a firmer basis for a constitutional rule than does a litigator's conjecture.

B. *Marsh* Does Not Preclude Review Of The Town's Prayers.

Petitioner contends that *Marsh*'s conditional admonition against parsing "the content of a particular prayer" precludes any review of religious language. Pet. Br. 41-42. But *Marsh* did not say that courts are to *ignore* the content of prayers. Here is what the Court actually said:

> The content of prayer is not of concern to judges *where, as here*, *there is no indication* that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. *That being so*, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.

463 U.S. at 794-95 (emphasis added).

Thus, before a court adopts a hands-off approach, it must satisfy itself that there is "no indication" that the prayers proselytize or advance any one faith. As Judge Wilkinson explained in *Joyner*, simple review of invocations cannot constitute impermissible "parsing," for that "stark approach [would] leave[ ] the court without the ability to decide the case, by barring any substantive consideration of the very practice under challenge. It is to say the least an odd view of the judicial function that denies courts the right to review the practice at issue." 653 F.3d at 351.

C. *Lee* Does Not Preclude Guidelines For Guest Chaplains.

Petitioner also argues that language in *Lee* requires disregarding the content of prayers and precludes guidelines for guest chaplains. Pet. Br. 41 ("[I]t is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." (quoting *Lee*, 505 U.S. at 588 (internal quotation marks omitted))). The court of appeals cited a related passage from *Lee*, which stated that government may not "establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds." Pet. App. 15a (quoting *Lee*, 505 U.S. at 590). But those statements, made in a context in which all government prayer is prohibited, are inapplicable here, where some government prayer *is* permitted.

Lee holds that where government-sponsored prayer is *prohibited*, making the prayer nonsectarian will not save it. It does not answer the question at issue here: where government-sponsored prayer is *permitted*, does sectarian prayer exceed the scope of the permission? *See Turner*, 534 F.3d at 355-56 (O'Connor, J.) (rejecting argument that passage from *Lee* invalidated city's rule requiring prayers to be nonsectarian). *Lee* did not say that the prayer must be delivered uncensored (*see* Pet. Br. 41); it said the prayer could not be delivered at all. Where government-sponsored prayer is permitted, a prayer to God is plainly more inclusive than one to "Jesus" or "Allah." Indeed, *Lee* recognized that "a prayer which uses ideas or images identified with a particular religion may foster a different sort of

sectarian rivalry than an invocation or benediction in terms more neutral." 505 U.S. at 588; *see also id.* at 640 (Scalia, J., dissenting) (speaking favorably of "giving general advice on inclusive prayer for civic occasions").

The court of appeals suggested that the quoted language from *Lee* might leave municipalities with "few means" to cabin chaplains' remarks. Pet. App. 27a. But if the Board delegates the prayer to volunteers, of course it may control the scope of the delegation. A governmental entity may "regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). Those who are unable or unwilling to offer inclusive prayers are free to decline the invitation, but they are not free to change the delegated task.

D. Public-Forum Doctrine Does Not Immunize The Town's Prayers From Review.

Petitioner asserts yet another reason for ignoring its prayers: guest chaplains allegedly pray in a public forum protected by the Free Speech Clause and exempt from Establishment Clause scrutiny. Pet. Br. 44-45, 52-53. Chaplains cannot be given rules or even guidelines, says petitioner, for fear of viewpoint discrimination. Pet. Br. 44, 53. *But see* U.S. Br. 12 n.4 (no forum because prayers perform public function); *id.* at 17 n.6 (*Marsh*'s limitations on content of prayers apply to guest chaplains).

Petitioner has not created a public forum; its prayers are manifestly governmental. The Board

decides to include a prayer. The Board's employee selects the prayer-giver. The Board calls that person its "chaplain"—a term that refers to clergy who serve a secular institution such as a legislature, military, prison, or hospital. Petitioner's chaplains perform a function for the Town, not for themselves or their churches.

The Board chooses the prayer's place on the agenda. The selected chaplain, and no one else, gets that time to pray. The prayer slot is not open "for indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983).

Chaplains are invited to pray. Some may make brief personal remarks incidental to the prayer, but their speech is narrowly circumscribed by the governmental function they are called upon to perform. They are not free to complain about potholes or to ask for a zoning change.

Petitioner's suggestion that a chaplain might give a nonreligious "opening statement" (Pet. Br. 53) is a litigator's fiction. The presentation is introduced, and listed on agendas, as a "prayer." J.A. *passim*; C.A. App. A448-A570. Even petitioner's brief in this Court uniformly refers to "prayer-givers," not opening speakers or any other euphemism.

In *Lee*, where the school controlled the event and decided that a prayer should be given, the Court treated the prayer as obviously governmental even though it was composed and delivered by outside clergy. 505 U.S. at 581, 587. Similarly in *Santa Fe*, where the school controlled the event and decided to allow a "prayer or message," the prayer was

governmental even though the selection process was delegated to a student election, the elected student could deliver some messages other than a prayer, and the student composed the prayer without input from the school. 530 U.S. at 297-98 & n.6, 302-03. The "alleged 'circuit-breaker' mechanism of the dual elections and student speaker [did] not turn public speech into private speech." *Id.* at 310. *Lee* and *Santa Fe* are dispositive. *See also Marsh*, 463 U.S. at 794 n.18 (noting that some legislatures use guest chaplains, without suggesting that the analysis would differ in those circumstances).

Petitioner cites cases on religious speech in public forums. Pet. Br. 53. But those cases involve speech with no hint of governmental sponsorship, and only those who chose to attend received the message. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (after-school club with parental permission slips); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (films shown outside school hours); *Widmar v. Vincent*, 454 U.S. 263 (1981) (student club on college campus). Likewise, in cases on funding schools through "true private choice," the religious education is chosen by a willing recipient. *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002). Here, as in *Lee* and *Santa Fe*, everyone listens to the Board's chaplain, not because they chose to do so, but because the Board chose for them.

There is an actual public forum later in the meeting, named as such, in which citizens petition the government for redress of grievances. In that forum, the Board does not select the speakers, it does not tell them what to talk about, and more than one person is

permitted to speak. The differences between that forum and the official prayer are obvious.

Moreover, if guest chaplains have free-speech rights, *Marsh*'s ban on prayers that proselytize, advance, or disparage would be impermissible. Such prayers are obviously protected when not governmental. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 160-62 (2002) (proselytizing); *Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940) (disparaging). Indeed, because prayer itself reflects a viewpoint (*see Good News*, 533 U.S. at 110), the Board would have to open the opportunity to purely secular messages and to anti-prayer rants. And the guidelines issued by many states and the House of Representatives, and countless municipalities' self-imposed policies requiring nonsectarian prayers (*e.g.*, *Simpson*, 404 F.3d 276), also would be unconstitutional.

Petitioner cannot have it both ways. The Town cannot simultaneously rely on the governmental tradition and prerogative identified in *Marsh* (Pet. Br. 27-35) and on the hands-off regime that governs private speech (Pet. Br. 44-45, 52-53). It cannot sponsor prayer in its meetings but disclaim responsibility for that prayer. When the Town delegates to a single clergyman the power to control part of an official Town meeting, the constitutional obligations that bind the Town accompany the delegation. Petitioner may not use "established clergy [as] convenient auxiliaries." James Madison, *Memorial & Remonstrance Against Religious Assessments*, para. 8 (1785), reprinted in *Everson*, 330 U.S. at 68.

III. THE CUMULATIVE EFFECT OF PETITIONER'S POSITIONS WOULD BE TO LICENSE SECTARIAN, PROSELYTIZING WORSHIP BY THE GOVERNMENT IN ANY SETTING.

Petitioner proposes that the Court eliminate the *Lemon* and endorsement tests (Pet. Br. 22-27, 40-50) and replace them with its anemic version of the coercion test (*see* pages 30-32, *supra*). It seeks to eliminate one test, and gut the other. The cumulative effect of its proposals is staggering.

Petitioner's objection is not just to *Lemon* or the endorsement test; it is to the whole history of Establishment Clause jurisprudence. *Lemon* was a formulation of "the cumulative criteria developed by the Court over many years." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). The endorsement test has been applied for half a century. *See Engel v. Vitale*, 370 U.S. 421, 430-31, 436 (1962) (invalidating "governmental endorsement of * * * prayer," with or without coercion). Six Justices applied the endorsement test in *Santa Fe*, 530 U.S. at 305-08, 316. To discard this jurisprudence in one fell swoop is to invite renewed litigation of all the practices that the Court has already considered and to wreak havoc in the lower courts. That is especially ill-advised because there is coercion here; the Court "can decide the case without reconsidering the general constitutional framework" for the myriad contexts subject to the Establishment Clause. *Lee*, 505 U.S. at 587.

Furthermore, petitioner would let government endorse or advance not merely religion in general, but "a particular religion." Pet. Br. 41. Government could

endorse or advance Christianity, Lutheranism, biblical inerrancy, or any other religious doctrine. According to petitioner, the line-drawing involved in "censor[ing]" such messages "is precisely what this Court declared unconstitutional in *Lee*." *Id.* But whatever disagreement there may be about government's endorsing religion in general, there is broad consensus against "government-sponsored endorsement of religion * * * where the endorsement is sectarian." *Lee*, 505 U.S. at 641 (Scalia, J., dissenting).

If, as petitioner proposes, sectarian endorsements are permitted (Pet. Br. 41-42), dominance by a single faith is "irrelevant" (Pet. Br. 21), and guidelines are unconstitutional "censorship" (Pet. Br. 41), nothing would preclude the Dearborn City Council from opening its meetings with a steady stream of Imams who lead participants in Koranic recitation. Other cities could open meetings with Catholic mass or evangelical prayer meetings; petitioner's standard suggests no limit on length. And followers of Fred Phelps could open government meetings by denouncing homosexuality as a sin against God. *Cf. Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

Petitioner does not suggest that the rules would be different when the prayers are delivered by governmental officials themselves. One council member could offer Muslim prayers; another could read from the Book of Common Prayer; and a third could lead citizens in reciting the Lord's Prayer. *Cf. Mullin v. Sussex Cnty.*, 861 F. Supp. 2d 411 (D. Del. 2012) (issuing preliminary injunction against that practice).

Under petitioner's approach, no pressure short of legal sanctions counts as coercion (Pet. Br. 36), so guest chaplains and government officials would be free to browbeat citizens to participate in all of these prayers, provided that no formal penalties were imposed.

Petitioner would apply its anything-goes regime to all three branches of government, without regard to context. Pet. Br. 30-35. All local bodies could pray—even zoning boards and school boards—as long as no legal sanctions were imposed on resisters. *But see Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) (*Marsh* inapplicable to school boards); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999) (same). Courts could open with Christian prayer. Pet. Br. 34. *But see N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1150-53 (4th Cir. 1991) (holding even nonsectarian judge-delivered prayers unconstitutional). Committee hearings, naturalization ceremonies, and agency rate-making proceedings could likewise begin with sectarian prayer. Petitioner is no longer arguing that legislative prayer is a special case; it is arguing that government may sponsor explicitly Christian prayer in any and all contexts.

This is not just a lawyer's parade of horribles based on the logical implications of an opposing argument. At a recent utility-rate hearing in Alabama, all present were asked to stand, and the invited prayer-giver asked for a show of hands on who believed in prayer. He then led a nearly four-minute prayer, proclaiming:

> God, we've taken you out of our schools, we've taken you out of our prayers, we've murdered

> your children, we've said it's okay to have same-sex marriage, God. We have sinned. And we ask once again that you'll forgive us for our sins. * * * I ask in the powerful, the most mighty name, the name that's above all names, and that's Jesus. Everybody say it, "Amen."

See Alabama Government Agency Begins Meeting With Anti-Gay Marriage Prayer, http://tinyurl.com/rate-hearing-prayer; *PSC Won't Abandon Prayer*, Montgomery Advertiser, Aug. 3, 2013, at A1, *available at* 2013 WLNR 19128932. Petitioner's test would allow the Greece Town Board, and any other governmental meeting, to open the same way.

CONCLUSION

The judgment should be affirmed and the case remanded for implementation of an effective remedy.

Respectfully submitted,

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SEPTEMBER 16, 2013

APPENDIX

INSTRUCTIONS FOR GUEST CHAPLAINS IN THE U.S. HOUSE OF REPRESENTATIVES

ON THE DAY AS GUEST CHAPLAIN

The guest chaplain should arrive at the sponsoring Member's congressional office by 11:15 a.m. (or 45 minutes before the prayer is scheduled). The time of the prayer is listed in the confirmation letter. It is usually 12:00 noon.

The guest chaplain and his/her family or guests will be escorted to the Capitol to meet the Chaplain in the Speaker's Lobby by 11:45 am (or 15 minutes before the prayer). At that time, the guest chaplain will be given instructions for offering the prayer while family members are escorted to the House Gallery to watch the proceedings.

Following the prayer, if arranged by the congressional office, the Member will give a one-minute speech to honor the guest chaplain and then a picture will be taken in a room off the House Floor commemorating the event. This concludes the guest chaplain duties for the day. The sponsoring Member's office can arrange for a Capitol tour, if requested. Guest chaplains are also reminded that their prayer will be shown live on C-SPAN if family and friends at home would like to watch.

CONCERNING THE OPENING PRAYER

The guest chaplain should keep in mind that the House of Representatives is comprised of Members of many different faith traditions.

The length of the prayer should not exceed 150 words.

The prayer must be free from personal political views or partisan politics, from sectarian controversies, and from any intimations pertaining to foreign or domestic policy.

It must be given exclusively and in its entirety in the English language.

It must be free from references to the national day observances of any other nation.

The prayer must be submitted at least one week ahead of time for incorporation in the Congressional Record.

When introduced by the Speaker for the prayer, the guest chaplain ***should not*** make any introductory remarks, but rather just begin the prayer.

ARRIVAL IN WASHINGTON

The guest chaplain should plan to be in Washington the evening prior to his/her appearance in the House and should provide the Chaplain's office with a local telephone number where they can be reached in case of last minute changes. A list of hotels closest to the Capitol is enclosed.

If we are provided with the vehicle information ahead of time, the guest chaplain will be cleared to park on the Capitol Drive, located at the south entrance of the Capitol at Independence Ave. and New Jersey Ave. SE.

No funds are provided for gratuity or expenses.