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 *AMICUS CURIAE* OF THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that a legislative-prayer practice violates the Establishment Clause notwithstanding the absence of discrimination in the selection of prayer-givers or forbidden exploitation of the prayer opportunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Constitutional Provisions

Organic Laws

INTEREST OF THE AMICUS[1]

The Becket Fund for Religious Liberty is a non-profit, public-interest legal and educational institute that protects the free expression of all faiths. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. The Becket Fund believes that because the religious impulse is natural to human beings, public and private religious expression is natural to human culture.

The Becket Fund has long worked to prevent abuse of the Establishment Clause to exile religion from public life. For example, The Becket Fund has defended against Establishment Clause challenges to a multi-faith religious display, *ACLU of New Jersey* v. *Schundler*, 168 F.3d 92 (3d Cir. 1999) (represented city), privately-owned highway crosses erected to honor fallen state highway troopers, *American Atheists, Inc.* v. *Davenport*, 637 F.3d 1095 (10th Cir. 2010 (represented State *amici*), and the use of a church auditorium for a high school graduation, *Elmbrook School District* v. *Doe*, No. 12-755 (cert. pet. pending) (representing petitioner).

The Becket Fund is concerned that the Second Circuit's decision, if affirmed, would eliminate the nation's long tradition of legislative prayer and would unjustly exile religious ideas and speech from the public square.

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[1] No party's counsel authored any part of this brief. No person other than the *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and letters indicating consent are on file with the Clerk.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Marsh v. *Chambers* held that faith-specific legislative prayer was not an establishment, because the Founders who wrote the Establishment Clause did not view it as one. 463 U.S. 783 (1983). As Petitioner has demonstrated, that alone should be enough to decide this appeal. Pet. Br. 16-27.

But this case is about more than correcting the Second Circuit's error in refusing to follow *Marsh*. It also presents the deeper doctrinal question of how to reconcile *Marsh*, which was decided in 1983, with the "endorsement" test derived from *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), which was decided twelve years earlier, and which now dominates Establishment Clause jurisprudence in the lower courts.

The relationship between *Marsh* and the "endorsement" test is a puzzle. Because they use entirely different methods of deciding whether there has been an Establishment Clause violation, the question arises: Which is the norm, and which the aberration?

The "endorsement" test starts from the premise that an "establishment of religion" is in the eye of the beholder—in particular, in the eye of the "ordinary, reasonable" beholder. Pet. App. 17a, 20a. If the ordinary, reasonable beholder would interpret the government's action "as endorsing a particular faith or creed over others," the action is unconstitutional. *Ibid.* This standard is notoriously "formless, unanchored, [and] subjective." *Doe* v. *Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (en banc) (Posner, J., dissenting). It has also produced widespread confusion and division in the lower courts. See *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 132 S. Ct.

12, 13 (2011) (Thomas, J., dissenting from denial of certiorari) ("Establishment Clause jurisprudence [is] in shambles.").

Marsh, by contrast, starts from the premise that an "establishment of religion" had a defined meaning at the time of the founding, and that history is an important guide to interpreting the Establishment Clause. As *Marsh* put it: "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress." 463 U.S. at 790. In other words, "their actions reveal their intent." *Ibid.* Because legislative prayer was common at the time of the founding, the historical method in *Marsh* yielded a straightforward result.

Marsh's historical method is far more reliable than the malleable "endorsement" test. It is also more consistent with the historical method applied by the Court in other areas of constitutional law, including under the Second Amendment, Fourth Amendment, Sixth Amendment and Fourteenth Amendment. In all of these areas, the Court routinely looks to the historical meaning of key constitutional terms. See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466, 478 (2000) (examining "the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"); *Crawford* v. *Washington*, 541 U.S. 36, 43 (2004) (examining "the historical background of the [Sixth Amendment's Confrontation] Clause to understand its meaning"); *District of Columbia* v. *Heller*, 554 U.S. 570, 598 (2008) (examining "the history that the founding generation knew" to interpret the Second Amendment) and *id.* at 642 (Stevens, J., dissenting)

(examining "contemporary concerns that animated the Framers"); *United States* v. *Jones*, 132 S. Ct. 945, 950 & n.3 (2012) (examining the "original meaning of the Fourth Amendment," because "we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted") (citations omitted). Indeed, in this Court's most recent Establishment Clause case, the Court relied heavily on just such an historical analysis. *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 702-4 (2012) (describing historical problems with English governmental control of church bodies and concluding "[i]t was against this background that the First Amendment was adopted"). Thus, this Court should affirm that the historical method of *Marsh* is an accepted and, in fact, the preferred means of interpreting the Establishment Clause.

But the Court should also take this opportunity to deepen the historical analysis offered in *Marsh*. Although *Marsh* convincingly showed that legislative prayer was common at the founding, and that the Founders did not view legislative prayer as an establishment, 463 U.S. at 786-792, *Marsh* failed to explain *why* the Founders did not view prayer as an establishment. This failure to explain the Founders' reasoning has limited *Marsh*'s usefulness to lower courts in deciding Establishment Clause cases outside the legislative prayer context.

* * * * *

The purpose of this brief is to answer the question *Marsh* did not: Why did the Founders view legislative prayer as unobjectionable? First, we demonstrate that faith-specific legislative prayer was even more

common at the founding than was described in *Marsh*.

Second, we show that legislative prayer was unremarkable because the Founders understood an "establishment of religion" to consist of four key elements—(1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices, and (4) government assignment of important civil functions to the church—all linked by an underlying concern about state coercion to participate in religious activity. See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part 1: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105, 2131 (2003). Because faith-specific legislative prayer lacked any of these elements, the Founders viewed it as unobjectionable.

Third, we explain how *Marsh*'s historical analysis is a good fit with the outcomes in the rest of this Court's Establishment Clause jurisprudence. Although this Court's modern Establishment Clause jurisprudence has not always adopted an explicitly historical method, the results largely track the four elements of establishment recognized by the Founders. Thus, the historical method is consistent both with the Founders' understanding of establishment and with this Court's precedent.

ARGUMENT

I. Legislative prayer was an accepted practice at the founding and has been ever since.

Legislative prayer was common at the founding, and that tradition continued through the adoption of the Fourteenth Amendment down to the present day.

Moreover, this prayer was typically faith-specific, including express references to Christ or to Jewish and Christian scriptures. Under the historical method adopted in *Marsh*, this means that faith-specific language in a prayer cannot, standing alone, make the prayer unconstitutional.

A. The founding generation practiced, encouraged, and funded legislative prayer.

There are numerous examples of faith-specific legislative prayer during the founding era. Respondents would view these faith-specific prayers as "sectarian" and, hence, unconstitutional.[2] But under *Marsh* and

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[2] The word "sectarian" is pejorative. See *Colo. Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1258 n.5 (10th Cir. 2008) (McConnell, J.) ("We recognize that the term 'sectarian' imparts a negative connotation * * * * [and that] the Supreme Court has not used the term in recent opinions * * * *"). As this Court has recognized, the word has a "shameful pedigree" of nativist sentiment against recent Catholic immigrants, epitomized by the Blaine Amendments. *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality op.). In fact, "it was an open secret that 'sectarian' was code for 'Catholic.'" *Id.* at 828. See also *Locke* v. *Davey*, 540 U.S. 712. 273 n.7 (2004) (noting "link" between Blaine Amendments and anti-Catholicism). Thus, "sectarian" is not less patronizing and discriminatory than other terms that have long since disappeared from the judicial lexicon, such as "colored," "imbecile," "idiotic," and "[t]he natural and proper timidity and delicacy which belongs to the female sex." See *Plessy* v. *Ferguson*, 163 U.S. 537, 551 (1896) (rejecting "assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."); *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough."); *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 54 (D. Me. 2001) (state's use of "archaic" and "stigmatizing" "terms * * * such as 'idiotic'" supported mentally disabled persons' equal protection claim); *Bradwell* v. *Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("natural and

the historical method it uses, there can be no question that faith-specific legislative prayer is not an establishment.

1. The Founders engaged in legislative prayer even before the Revolution. As both *Marsh* and Petitioner points out, Pet. Br. 28-29, a prominent example occurred in 1774, when the Continental Congress convened to determine the fate of the thirteen colonies. *Marsh*, 463 U.S. at 787. Two delegates objected to a prayer "because [they] were so divided in religious sentiments * * * that [they] could not join in the same act of worship." *Id.* at 791-2. (citing a letter from John Adams to Abigail Adams, C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, during the Revolution* 37-38 (1876)). But Samuel Adams quelled the objections by asserting that "he was no bigot, and could hear a prayer from any gentleman of Piety and Virtue, who was at the same time a friend to his country." *Ibid.* Accordingly, the delegates agreed on an Episcopal minister, and the next morning he opened the meetings with a prayer "in the name and through the merits of Jesus Christ." Office of the Chaplain, *First Prayer of the Continental Congress, 1774,* U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html (last visited August 1, 2013). Nor was the prayer a mere formality. John Adams reported to his wife that he had "never heard a better prayer," and that it "filled the bosom of every man present" and "had an excellent effect upon everybody here." 1 Anson Phelps Stokes, *Church and State in the United States* 450 (1950).

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proper timidity" reason not to allow women to become attorneys).

This debate strongly affirms the constitutional pedigree of legislative prayer, because, as *Marsh* explained, the debate "infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly." *Marsh*, 463 U.S at 791. And the result of the debate was a prayer that expressly invoked the name of Jesus Christ.

The Founders decided at the same time to fund legislative prayer. Beginning in 1774, the Continental Congress chose to open "its sessions with a prayer offered by a paid chaplain." *Marsh*, 463 U.S. at 787. The First Congress continued this practice by a formal statute passed in 1789—three days before it reached final agreement on the language of the Bill of Rights. *Id.* at 788.

Even apart from the paid chaplain, the Continental Congress itself encouraged and participated in faith-specific prayers. The Continental Congress's first Thanksgiving Proclamation in 1777 invoked Christ and encouraged the country to join it in prayerfully seeking God's blessing via "humble and earnest supplication * * * through the merits of Jesus Christ." 9 Journals of the Continental Congress, 1774-1789 at 855 (Worthington Chauncey Ford ed., 1904)). Similarly, the Continental Congress "sprinkled its proceedings liberally" with references to Jesus Christ and Christianity. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* 217 (1986).

While apparently none of the prayers of the chaplain hired by Congress have survived from the period between the Continental Congress and the death of George Washington in 1799, high government offi-

cials issued a number of public prayers that reflected the national tone. For instance, just before his retirement from the Continental Army in 1783, George Washington wrote a letter to all of the governors of the victorious United States, of which the last paragraph consisted of a now famous prayer, invoking both the Jewish prophet Micah and the example of Christ.[3]

Congress also encouraged citizens to pray. For example, the Continental Congress proclaimed a national day of humiliation and fasting on July 20, 1775, which was known as "Congress Sunday." Harry M. Ward, *The War for Independence and the Transformation of American Society: War and Society in the United States, 1775-83* 15 (2003). Colonial governments without established churches did the same. For instance, on April 3, 1777, and again on April 22, 1778, the Supreme Executive Council of Pennsylvania proclaimed days of fasting and prayer. The Minutes of the Supreme Executive Council of Pennsylvania 176, 439 (1852). Rhode Island did the same. See, *e.g.*, 7 Records of the Colony of Rhode Island and Providence Plantations in New England, 249-250 (John Russell Bartlett, ed., 1862) (proclaiming June 30, 1774 a day of fasting, prayer, and supplication for

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[3] Washington's letter stated:

> I now make it my earnest prayer, that God would * * * most graciously be pleasd to dispose us all, to do Justice, to love merc, and to demean ourselves with that Charity, humility & pacific temper of mind, which were the Characteristiks of the Divine Author of our blessed Religion, & without an humble imitation of whose example in these things, we can never hope to be a happy Nation.

Stokes, *supra*, at 494.

the City of Boston, which was then suffering under the Boston Port Act).

2. The Founders also engaged in legislative prayer after the Revolution, when the Bill of Rights was being considered. In his 1789 inauguration, George Washington set the precedent for inaugural religious solemnities. Based on a schedule set by the House and Senate, following his swearing in, Washington conducted a "grand procession" (which included the members of the Senate and the House) to St. Paul's Episcopal Church for an assembly. Stokes, *supra* at 485; see also 1 Annals of Cong. 25 (April 27, 1789) (Joseph Gales ed., 1834). At the assembly, which was presided over by the newly appointed Chaplain of Congress, Washington, the entire Congress, and the rest of the assembly sang the prayer *Te Deum*, which includes many expressly Christian references. Stokes, *supra* at 485; Jeffry H. Morrison, *The Political Philosophy of George Washington* 156-57 (2009).[4]

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[4] The text of the *Te Deum* includes:

> We praise thee, O God : we acknowledge thee to be the Lord.
> * * *
> The holy Church throughout all the world: doth acknowledge thee.
> The Father : of an infinite Majesty.
> Thine honorable, true : and only Son.
> Also the holy Ghost : the Comforter.
> Thou art the King of glory : O Christ.
> Thou art the everlasting Son : of the Father.
> * * *
> We therefore pray thee help thy servants : whom thou hast redeemed with thy precious blood.
> * * *

The Book of Common Prayer 51 (1662 ed., reprinted Eyre & Spottiswoode, 1892). The *Te Deum* dates to the fourth century

John Adams followed the precedent set by Washington's inauguration. In a Thanksgiving proclamation issued March 23, 1798, President Adams asked for "His infinite grace, through the Redeemer of the World, freely to remit all our offenses, and to incline us by His Holy Spirit to that sincere repentance and reformation." A Proclamation by President John Adams (March 23, 1798), *in* 1 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 269 (1902), H.R. Misc. Doc. No. 210 (1896).

Upon the death of George Washington in 1799, Major General Henry Lee III offered a prayer before both houses of Congress. Bird Wilson, *Memoir of the Life of the Right Reverend William White, D.D., Bishop of the Protestant Episcopal Church of the State of Pennsylvania* 351 (1839). Lee referred to Washington as "our beloved brother in Christ"; prayed that those present "may obtain unto the resurrection of life, through Jesus Christ our Lord"; and closed "through Jesus Christ our Lord." *Id.* at 351-52. And throughout much of this time period, faith-specific legislative prayers were also offered before Congress. While the text of these prayers were not recorded, the Senate Chaplain relayed in a personal letter the set formula that he followed for the prayers he offered during his tenure from 1790 to 1800. That formula included the Lord's Prayer, St. Chrysostom's Prayer, and thanksgiving for "the grace of the Lord Jesus Christ." Letter from Bishop William White to Reverend Henry D. Johns (Dec. 29, 1830), *reprinted in* Bird Wilson, *supra*, at 322.

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and has been part of the traditional daily office of prayers since then. F. Brittain, *Medieval Latin and Romance Lyric to A.D. 1300* 63 (Cambridge 2009) (1937).

3. Founding-era legislative prayer was also common at the municipal level. In New York, for example, the Anglican Church was formally disestablished in April 1777. N.Y Const. of 1777 art. XXXVIII. Yet in 1805, the New York City Council appointed a chaplain who served on behalf of the City's public institutions for some thirty years. Charles G. Sommers, *Memoir of the Rev. John Stanford, D.D.* 141 (1835). The City Council paid the chaplain $500 for his annual services. 18 Minutes of the Common Council of New York 1784—1831 590 (1917).

Similarly, during yellow fever outbreaks in 1803 and 1822, the New York City Council declared a city-wide day of prayer and recorded a written, faith-specific prayer offered by "a number of clergymen of different denominations of this City." 12 Minutes of the Common Council of New York 1784—1831, September 3, 1821 to March 31, 1823, 529 (City of New York 1917).

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These surviving prayers are a powerful indication of what was understood to be permissible in legislative prayer at the time of the founding. Specifically, they suggest that the invocation of Christ and the use of other explicitly Christian themes were commonplace and uncontroversial. There is no evidence to suggest that such features were an anomaly. The logic of *Marsh*, in light of this historical record, compels the conclusion that the presence of expressly Christian language in a prayer cannot possibly, of its own force, disqualify the prayer as unconstitutional.[5]

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[5] Although there was very little opposition to legislative prayer at the founding, James Madison did express opposition to Congressional chaplaincies in an unpublished essay in the

B. Since the founding, faith-specific legislative prayer has remained a widespread and accepted practice.

Successive generations of Americans have continued to treat faith-specific legislative prayer as an important and accepted part of civil government.

1. When the Fourteenth Amendment was ratified in 1868, faith-specific legislative prayer was still commonplace. This is strong evidence that legislative prayer was unobjectionable when the Establishment Clause was incorporated against the states. *See Heller*, 554 U.S. at 614 (understanding of the Fourteenth Amendment generation is "instructive" in interpreting the Bill of Rights). This time period is also signifi-

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1820s—over thirty years after voting to authorize paid chaplains. *Marsh*, 463 U.S. at 787 n.8, 791 n.12. But as Justice Brennan pointed out, "These arguments were advanced long after * * * the adoption of the Establishment Clause. They represent at most an extreme view of church-state relations, which Madison himself may have reached only late in life. He certainly expressed no such understanding of Establishment during the debates on the First Amendment. And even if he privately held these views at that time, there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights." *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 684 n.5 (1970) (Brennan, J., concurring) (citations omitted). Beyond that, Madison's objections were based on the fact that chaplains were "to be paid out of the national taxes," and that only chaplains of "the major sects" would be selected—neither of which is true here. Elizabeth Fleet, Madison's 'Detatched Memoranda,' 3 Wm. & Mary Q. 534, 558 (1946). Finally, the same essay objects to "tax exemptions for churches, the incorporation of ecclesiastical bodies[,] * * * the provision of chaplains in the Army and Navy, and presidential proclamations of days of thanksgiving or prayer"—all of which have long been upheld as uncontroversial. *Walz*, 397 U.S. at 684 n.5 (Brennan, J., concurring).

cant because prayers before legislatures were not officially recorded by congressional record-keepers until the 1860s, and even then they were not recorded regularly. Among the prayers that made it into the record, two of the earliest ones are in the Congressional Globe from July 4, 1861. The Senate Chaplain prayed that God's "Church and Kingdom may flourish" for "Jesus Christ's sake." Cong. Globe, 37th Cong, 1st Sess. 1 (1861). The House Chaplain concluded his prayer with a recitation of the Lord's Prayer. *Id.* at 2.

A few small collections of state legislative prayers from the same time period have also been published. Two sets of prayers from the Massachusetts legislature—100 prayers from 1868 and fifty prayers in 1892—reveal similar faith-specific prayer tendencies. According to *Amicus Curiae*'s review, the Unitarian minister referred to either Jesus Christ or the Bible in at least 42% of the prayers in 1868, while in 1892, 70% of the prayers by a Congregational minister referred to either Christ or the Bible. *See* William R. Alger, *Prayers Offered in the Massachusetts House of Representatives During the Session of 1868* (1868); Daniel Wingate Waldron, *The Chaplain's Prayers* (1892).

2. During and after Reconstruction, legislative prayer was also common in municipalities. In 1895, for instance, Philadelphia hired a chaplain for the City Council. 2 Journal of the Common Council of the City of Philadelphia from October 2, 1895, to April 2, 1896 53 (1896). Similarly, in 1877, the Mayor of Boston invited a chaplain to pray before a city-wide celebration. Oration Delivered Before The City Council and Citizens of Boston on the One Hundred and First Anniversary of the Declaration of American Independence, July 4, 1877, 5 (Order of the City Council

1879). When the texts of these prayers were recorded, they were almost invariably faith-specific. A typical example is the prayer of Rev. Joshua P. Bodfish, rector of the Roman Catholic Cathedral, which he delivered in 1879 before the Boston City Council: "We pray Thee, O Almighty and Eternal God! who, through Jesus Christ, hast revealed Thy glory to all nations, to preserve the works of Thy mercy * * * ." Oration Delivered Before The City Council and Citizens of Boston at 7 (1879).

3. The practice and funding of faith-specific legislative prayer have continued from the time of Reconstruction until today. Congress first regularly recorded legislative prayers after the turn of the century, around 1910. A five-year sample of those recorded prayers displayed a consistent pattern of faith-specific language: of 1,052 congressional prayers recorded between 1910 and 1914, 94% refer to Jesus Christ, the Bible, or both.[6]

Municipalities during this timeframe were no different. In one example, during a joint meeting of Boston's City Council and Board of Aldermen in 1909, the city chaplain offered a prayer with multiple biblical references: "Almighty God, our Heavenly Father, we lift our hearts in thankfulness to Thee [.] * * * And to [God] we will give the praise and honor, dominion and power, for He is the source of all power, world without end. Amen." Reports of Proceedings of

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[6] More data on these prayers, including the text of many of the prayers, is available in *Atheists of Florida, Inc.,* v. *City of Lakeland, Florida*, No. 12-11613 (11th Cir.), Brief *Amicus Curiae* of The Becket Fund for Religious Liberty, 13-22 (filed June 25, 2012), *available at* http://www.becketfund.org/wp-content/uploads/2013/07/Lakeland-Amicus.pdf.

the City Council of Boston For The Year Commencing January 1, 1909 and Ending February 5, 1910, 1 (City of Boston Printing Department 1910) (referring to *Matthew* 5:14, *Jude* 1:25, *Ephesians* 3:21, and *Psalm* 91:6).

That pattern of faith-specific prayers has persisted in recent years as well. A review of the prayers in Congress from 2009 through 2012 reveals that 62% used expressly Christian language, referring to "Christ," "Jesus," or the Christian New Testament.[7]

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The historical record of legislative prayer in this country shows that faith-specific prayers were commonplace. Indeed, it is difficult to find examples of founding-era prayers that were *not* faith-specific. Accordingly, the ultimate result of the lower court's holding—banning or chilling "sectarian" prayers—cannot be reconciled with the binding authority of *Marsh* and the plain historical record.

II. Legislative prayer is neither an establishment as originally understood, nor an establishment as recognized by this Court.

Given the unambiguous history of legislative prayer at the founding, it is obvious that the Found-

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[7] *Amicus* reviewed all 1,197 publicly available prayers recorded in Congress from 2009 through 2012. 743 of them contained explicit Christian references. For example, the House of Representatives Chaplain, Rev. Patrick Conroy, was a Jesuit and closed each of his prayers with the phrase "May all that is done this day be for Your greater honor and glory." This closing was a quote from *1 Timothy* 1:17 and the motto of the Jesuits, *ad majorem Dei gloriam,* or "for the greater glory of God." See, *e.g.*, 158 Cong. Rec. H7433 (2012).

ers did not view legislative prayer as "a step toward an established church." *Marsh*, 463 U.S. at 788 n.10. But *why* did the Founders not view legislative prayer as an establishment? To answer that question, it is essential to understand what the Founders understood as an establishment of religion. At the time of the founding, an establishment consisted of several well-defined practices centered on government coercion of religious belief or practice. Because legislative prayer does not involve any of these practices, the Founders did not view it as an establishment.

A. At the time of the founding, an establishment consisted of government control, government coercion, government funding, or assignment of government powers to church authorities.

The Founders knew establishments of religion well. They knew them from the centuries-old establishment in England, and they knew them from the established churches in nine of the thirteen colonies. And although these establishments often varied in their particulars, they all had one unifying feature in common: the use of government power to coerce religious belief or observance. See McConnell, 44 Wm. & Mary L. Rev. at 2131 ("[T]he key element of establishment" was state "control" of religious groups). At the time of the founding, the "essential * * * ingredients" of an establishment took one of four forms: (1) government financial support of the church, (2) government control of the doctrine and personnel of the church, (3) government coercion of religious beliefs and practices, and (4) government assignment of

important civil functions to church authorities. See *id.* at 2118, 2131.[8]

1. The first element of an establishment was public financial support of the church. This took many forms—from compulsory tithing, to direct grants from the public treasury, to specific taxes, to land grants. *Id.* at 2147. Land grants were the most significant form of public support. *Id.* They provided not only land for churches and parsonages, but also income-producing land that ministers used to supplement their income. *Id.* at 2148. Trinity Church in New York became the largest landowner in Manhattan through land grants, and still has millions of dollars worth of property in New York today. *Id.* at 2149. Similarly, Congress gave religious land grants as a part of its efforts to settle the Northwest Territory. *Id.* at 2150.

Notably, while public funding was part of most established churches, it was not a necessary feature. Established churches existed without access to public funds, as in South Carolina and (for a time) Virginia. *Id.* at 2112, 2157.

2. The second element of an establishment was state control over the institutional church. This control manifested itself in two ways that are startling to modern eyes: the control of religious doctrine and the appointment and removal of religious officials. *Id.* at 2132.

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[8] Professor McConnell lists six elements of establishment. We refer to three of those categories—"compulsory church attendance," "prohibitions on worship in dissenting churches," and "restriction of political participation," *ibid.*—using the shorthand "government coercion of religious beliefs and practices."

England set the standard for both. Parliament determined the articles of faith for the Church of England, approved the text of the Book of Common Prayer, made it doctrine that the King must be Supreme Governor of the Church, and mandated that all ministers accept the Church of England's doctrines. 1 William Blackstone, *Commentaries* 364-83; see also Thomas Berg, *Religious Freedom, Church-State Separation, and the Ministerial Exception*, 106 Nw. U. L. Rev. Colloquy 175, 180 (2011). American colonies followed suit, with Anglican colonies like Virginia essentially importing England's rules, and the Puritan colonies in New England accomplishing a similar result through localized rules. McConnell, 44 Wm. & Mary L. Rev. at 2133, 2135. Several of these American establishments continued after the Revolution. *See*, *e.g.*, S.C. Const. of 1778 art. XXXVIII (establishing the "Christian Protestant religion" and allowing churches to incorporate only if they assented to five articles of faith).

England also set the standard for controlling the appointment of church officials, as is apparent from the title of its religious uniformity law: "An Act * * * for establishing the Form of Making, Ordaining, and Consecrating Bishops, Priests, and Deacons in the Church of England." Act of Uniformity, Public Act, 14 Charles II, c. 4 (1662). So pronounced was England's control over church officials that "[political] loyalty * * * exceeded spirituality as a qualification" for the job. McConnell, 44 Wm. & Mary L. Rev. at 2137. The colonies did not import England's practice wholesale—for instance, Jonathan Swift's bid to be appointed the Anglican Bishop of Virginia failed because the colonists pointedly ignored his proposed amendment. *Id.* at 2143. But the power of appoint-

ment and removal still ended up in government hands, albeit colonial ones, and that power still rendered religious groups "subservient" to their state masters. *Id.* at 2140. See also *Hosanna-Tabor*, 132 S. Ct. at 702-3 (describing government control over ministerial appointments during the colonial period). This control over who was appointed a minister was an element of establishment the Founders sought to avoid. *Id.* at 703 (citing 1 Annals of Cong. 730–731).

3. The third feature of establishment was the coercion of individuals' religious beliefs and practices. This took three main forms: compelled church attendance, prohibition on worship in dissenting churches, and exclusion of dissenters from political participation. McConnell, 44 Wm. & Mary L. Rev. at 2144, 2159, and 2176.

England fined those who failed to attend Church of England worship services, and the colonies followed the English lead. Virginia's earliest settlers attended twice-daily services on pain of losing daily rations, whipping, and six months of hard-labor imprisonment. George Brydon, *Virginia's Mother Church and the Political Conditions Under Which It Grew* app. 1 at 412 (1947). While Virginia eased those laws, versions of them remained in force until 1776. Sanford Cobb, *The Rise of Religious Liberty in America: A History* 521 (Burt Franklin 1970) (1902). Connecticut and Massachusetts also had similar laws in place until 1816 and 1833, respectively. See *Id.* at 513; Mass. Const. of 1780, art. III (stating that the government may "enjoin upon all" attendance at "public instructions in * * * religion").

The laws creating an establishment not only compelled attendance at the established church, but also

frequently banned attendance at dissenting churches. Under the guise of heresy laws, England targeted Puritans, Baptists, Presbyterians, and especially Catholics. McConnell, 44 Wm. & Mary L. Rev. at 2160-61. Massachusetts notoriously enacted similar provisions that, for a short time, it used to banish, whip, mutilate, and even hang some non-Puritans. *Id.* at 2162. Virginia imprisoned some thirty Baptist preachers between 1768 and 1775 because of their undesirable "evangelical enthusiasm," and horse-whipped others for the same offense. *Id.* at 2118, 2166. Several states simply banned Catholic churches altogether. *Id.* at 2166.

Finally, those who dissented from the established church faced restrictions on political participation. England set the example by allowing only Anglicans to hold public office; the states almost universally took comparable measures. *Id.* at 2177. Maryland's version of religious disqualification lasted until 52 years ago, when it was invalidated by this Court. *Torcaso* v. *Watkins*, 367 U.S. 488 (1961). In a rather American twist, almost all of the colonies placed religious restrictions on the right to vote. McConnell, 44 Wm. & Mary L. Rev. at 2177.

4. The last element of establishment was government assignment of important civil functions to church authorities. States used religious officials and entities for social welfare, elementary education, marriages, public records, and the prosecution of certain moral offenses. Thus, at certain points in state history, New York recognized only those teachers who were licensed by a church; Georgia ministers were tasked with keeping vital statistics; South Carolina recognized only marriages performed in the Anglican church; and Virginia churchwardens were duty-

bound to make presentments to the county court about misdemeanors such as profanity, Sabbath-breaking, and fornication. *Id.* at 2171-76.

In sum, an "establishment of religion" had a very specific meaning for the Founders. It consisted of government funding of the church, government control over doctrine and personnel of the church, government coercion of religious belief and practice, and government use of the state church to carry out civil functions. Laws imposing these elements created an established church. Laws that lacked these elements did not.

B. Legislative prayer does not fall within any recognized category of establishment.

The historical understanding of establishment not only explains the result in *Marsh* but also explains a large part of this Court's Establishment Clause jurisprudence. This Court has repeatedly recognized that there are potential Establishment Clause problems with government funding of religious entities, government control over religious doctrine, government coercion of religious practices, or government use of religious entities to carry out civil functions. But because legislative prayer involves none of these elements, it does not violate the Establishment Clause.

1. Legislative prayer does not constitute impermissible government funding.

The first element of establishment is government financial support of religion. This Court has repeatedly recognized that certain types of funding raise establishment concerns. In *Texas Monthly Inc.* v. *Bullock*, for example, the Court struck down a state law that provided a sales tax exemption for religious pub-

lications but not for secular publications. 489 U.S. 1 (1989). Similarly, in *Lemon*, the Court struck down funding of secular instruction in religious schools on the ground that the program would require "state inspection and evaluation of the religious content of a religious organization," and thus was "pregnant with dangers of excessive government direction of church schools and hence of churches." 403 U.S. at 620.

Here, however, there is no issue of funding, because all prayer givers were unpaid volunteers. Pet. Br. 21. In that sense, this case is even easier than *Marsh*, which involved a paid chaplain. *Ibid.*

Even in *Marsh*, however, the funding was not constitutionally problematic. As the Court pointed out, both Houses of the First Congress hired a paid chaplain to offer legislative prayers. *Marsh*, 463 U.S. at 787-88. This is because employment of a legislative chaplain is different in kind from government funding of ministers or religious teachers for the general public. A paid legislative chaplain serves the unique needs of legislators—much like paid military chaplains, prison chaplains, and hospital chaplains serve the unique needs of soldiers, prisoners, and hospital patients. In each case, 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 or wards of the state—without government coercion or control of religious practice. *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) (comparing military chaplains and prison chaplains). In other words, a legislative chaplain is "a permissible legislative accommodation of religion"—not an establishment. *Id.* at 720.

Nor is there any concern here or in *Marsh* about discriminatory funding of religious practices. In *Marsh*, there was no evidence "that the chaplain's reappointment stemmed from an impermissible motive." 463 U.S. at 793-94. And here, not only is there no funding, but Respondents concede that prayer givers were chosen on a neutral basis. Pet. Br. at 3. Thus, there is no Establishment Clause problem.

2. Legislative prayer does not constitute government control over religious groups' practices.

The second element of establishment is government interference in the doctrine or governance of religious institutions. A prime example of this type of violation is *Hosanna-Tabor* v. *EEOC*, 132 S. Ct. 694 (2012). There, a religion teacher at a church school brought a retaliation claim against her former employer under the Americans with Disabilities Act. This Court held that for a court to overrule the church's decision about a ministerial employee would be to impermissibly interfere with a church's "ecclesiastical decisions." *Id.* at 706.

Similarly, in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976), this Court overturned a state court's attempt to reinstate a defrocked bishop. The Court held that the state had "unconstitutionally undertaken the resolution of quintessentially religious controversies whose resolution the First Amendment commits exclusively to the highest ecclesiastical tribunals of this hierarchical church." *Id.* at 720. In other words, in ecclesiastical matters, the government may not interfere with church decisions.

This element of establishment is completely absent here, as it was absent in *Marsh*. The practice of legislative prayer has no impact on church polity, internal church decisions, or church doctrine. It does not take sides in theological disputes or interfere with internal church governance. And it does not declare official state doctrine. Instead, it asks individual citizens to invoke their beliefs, whatever they may be, to solemnize the operations of government. To the extent that legislative prayer means that the government is "appointing ministers," *Hosanna-Tabor* 132 S. Ct. at 703, the government is appointing ministers to minister to itself. *Hosanna-Tabor* is specifically concerned with "government interference with a *church*'s ability to select *its own* ministers." *Id.* at 704 (emphasis added).

In the context of legislative prayer, the only risk of government control over religious doctrine is when the legislature seeks to "direct[ ] and control[ ] the content of the prayers." *Lee* v. *Weisman*, 505 U.S. 577, 588 (1992). Ironically, this is precisely what the lower court's decision would compel courts and legislatures to do—to police the content of prayers to ensure that they are not "sectarian." Such policing constitutes both a forbidden form of coercion and a forbidden intrusion into individual religious belief and practice. The only constitutional approach, and the one followed by Petitioner and *Marsh*, is to use a neutral process of selecting a chaplain and to make no attempt to dictate the content of the prayers.

3. Legislative prayer is not government coercion of private parties to engage in religious activity.

The Establishment Clause likewise forbids the government from coercing an individual to engage in religious practice contrary to her beliefs. In *Torcaso* v. *Watkins*, for example, this Court struck down perhaps the most obvious form of religious coercion: a law requiring individuals to declare a belief in the existence of God as a test for public office. 367 U.S. at 496. Similarly, in *Engel* v. *Vitale*, 370 U.S. 421, 424 (1962), *School District of Abington* v. *Schempp*, 374 U.S. 203 (1963), *Lee* v. *Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District* v. *Doe*, 530 U.S. 290 (2000), this Court struck down religious exercises sponsored by public schools, on the ground that minor students would feel compelled to participate.

Legislative prayer, however, does not involve coerced religious practice. When a chaplain offers a legislative prayer, no individual is compelled to listen to, acknowledge, or participate in the prayer. As *Marsh* put it, the audience for legislative prayer is "presumably not readily susceptible to 'religious indoctrination' * * * or peer pressure." *Marsh*, 463 U.S. at 792 (citations omitted). The chaplain who says the prayer is not exercising authority over schoolchildren, and thus even if children hear a legislative prayer on a school visit to a legislative chamber, they are not being coerced. As for legislators themselves, they can be expected to know the difference between a ceremonial invocation and coerced religious exercise.[9]

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[9] Indeed, elected officials have often stated that they are in great need of prayer as they govern the country. In 1854, for

4. Legislative prayer does not impermissibly cede government powers to religious organizations.

The last element of establishment is the assignment of important civil functions to religious authorities. In *Larkin* v. *Grendel's Den Inc.*, 459 U.S. 116 (1982), for example, this Court struck down a state law giving religious organizations veto power over liquor licenses for third parties. Similarly, in *Board of Education of Kiryas Joel* v. *Grumet*, 512 U.S. 687, 689 (1994), the Court struck down the creation of a special school district for a religious enclave because it "grant[ed] political control to a religious group."

These cases stand for the same principle: Churches or other religious organizations should not be vested with exclusive government powers. *Marsh* and the practice of legislative prayer do not violate this principle. Legislative prayer does not task religious bodies with carrying out functions that properly belong to the State alone, such as issuing liquor licenses or exercising political control over school district boundaries. Instead the State invites a religious official—or as in this case, volunteer citizens—to solemnize government activities.

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example, the House Judiciary Committee rejected an argument that the Congressional chaplaincy violated the Establishment Clause, concluding: "[W]e submit, that there never was a deliberative body that so eminently needed the prayers of righteous men as the Congress of the United States." *See* Robert C. Byrd, *The Senate, 1789-1989* at 301 (vol. 2, 1982); *available at* http://www.senate.gov/artandhistory/history/resources/pdf/Chaplain.pdf.

C. Legislative prayer is an important acknowledgment of the founding-era political philosophy of limited government and inalienable rights.

Based on the historical record and the Founders' understanding of establishment, it is clear that the Founders did not view legislative prayer as constitutionally problematic. But that does not tell us why the Founders engaged in it or why they believed it was important. Further examination of history shows that the Founders viewed legislative prayer as a natural outflow of their political philosophy of limited government and inalienable, God-given rights.

As the Declaration of Independence explains, the Founders believed that all people are "endowed by their Creator with certain unalienable Rights," including "Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (1776). "[T]o secure these rights, Governments are instituted among Men[.]" *Id.* In other words, the government does not create rights; it protects rights that are beyond the reach of government because they come from God.

Similarly, as James Madison, Alexander Hamilton, and Oliver Ellsworth wrote in an address for the Continental Congress: "[I]t has ever been the pride * * * of America, that the rights for which she contended were the rights of human nature. By the blessings of the Author of these rights on the means exerted for their defence, they have prevailed against all opposition, and form the basis of thirteen independent states." 1 *Elliot's Debates* 100 (1836). In other words, the Founders believed not only that rights

were God-given, but that their defense depended on "the blessing of the Author of these rights." *Ibid.*

The importance of this political philosophy has been recognized in cases upholding the inclusion of the words "under God" in Pledge of Allegiance. By stating that we are "one nation under God," the Pledge recognizes the founding ideals of limited government and inalienable rights. In *Newdow* v. *Rio Linda Union School District*, the Ninth Circuit acknowledged that "one nation under God" refers to "the belief that it is the people who should and do hold the power, not the government. [The Founders] believed that the people derive their most important rights, not from the government, but from God." 597 F.3d 1007, 1013 (9th Cir. 2010). Therefore the government's role is only to secure rights, not to grant rights. *Id.* at 1028. The use of "God" in the Pledge was therefore a "predominantly patriotic exercise." *Id.* at 1014.

Just as "the phrase 'one Nation under God' constitutes a powerful admission by the government of its own limitations" in the Pledge of Allegiance, *id.* at 1036, so too does legislative prayer constitute a powerful reminder to duly-elected government officials of the limits of their powers. "In a republic, where the people are self-governing, it was generally thought that coercion had to be replaced, or at least supplemented, with a regard to the public good." McConnell, 44 Wm. & Mary L. Rev. at 2195. Representatives had to "somehow be persuaded to submerge [their] personal wants into the greater good of the whole." Gordon Wood, The Creation of the American Republic 68 (1969).

Legislative prayer, by beginning the legislator's work with a call to service, serves this crucial purpose. Legislators at every level of government are frequently reminded that they are called to be public servants acting for the general welfare. Legislative prayers frequently take on this character, calling for an increase in virtues like wisdom, compassion, and humility, while warning against vices like selfishness or envy. *See, e.g.* 158 Cong. Rec. H695 (2012); 158 Cong. Rec. S1099 (2012); 158 Cong. Rec. H3173 (2012). Legislative prayer thus serves as a constant reminder of the Founders' political philosophy of limited government and God-given rights. To suppress legislative prayer is to suppress a vital reminder of those founding principles.

CONCLUSION

Under *Marsh*, this case is easy. But many cases in the lower courts are hard because the *Lemon* test and its "endorsement" corollary continue to be the predominant method of deciding Establishment Clause cases. The Court should therefore clarify that an historical method is the preferred way to decide Establishment Clause claims, and that lower courts should evaluate those claims in light of the elements of establishment recognized at the founding.

Respectfully submitted,

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