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 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.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-appellee below, is the Town of Greece, New York.

Respondents, who were plaintiffs-appellants below, are Susan Galloway and Linda Stephens.

In addition, John Auberger, the Town of Greece Supervisor, was a defendant in the district court in his official capacity. The claims against Mr. Auberger were dismissed by the district court and respondents did not appeal that ruling. Pet. App. 9a-10a.

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BRIEF FOR PETITIONER

The Town of Greece, New York, respectfully submits that the judgment of the court of appeals should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 681 F.3d 20. The order of the court of appeals denying rehearing *en banc* (Pet. App. 132a-33a) is unreported. The order of the district court (Pet. App. 28a-131a) is reported at 732 F. Supp. 2d 195.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2012. The court of appeals denied rehearing *en banc* on August 8, 2012. On October 17, 2012, Justice Ginsburg extended the time within which to file a petition for certiorari to and including December 6, 2012. No. 12A366. The petition was filed on December 6, 2012, and granted on May 20, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . .

U.S. Const. amend. I.

INTRODUCTION

This case concerns whether the Town of Greece, New York, can open its monthly board meetings with an invocation to solemnize the proceedings, offered by any Town resident from any faith tradition (or no faith tradition) who volunteers to speak. The Town's practice is by no means novel or unique: Both Houses of Congress have opened their legislative sessions with a prayer throughout their 224-year existence, and all fifty States and countless municipalities and counties have employed similar practices both historically and today. Each President has invoked Divine guidance on assuming office, each presidential inauguration since 1937 has included an invocation and benediction, and each session of this Court opens by asking "God" to "save the United States and this Honorable Court."

In recognition of this "unambiguous and unbroken history," this Court has unequivocally held that opening legislative sessions with invocations does not violate the Establishment Clause. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983). The Court in *Marsh* understood that "[t]o invoke Divine guidance on a public body entrusted with making the laws is not" an "'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id*. Thus, unless the government acts with "impermissible motive" in selecting prayer-givers or "exploit[s]" "the prayer opportunity" to advance or proselytize on behalf of a particular religion, courts may not "embark on a sensitive evaluation" or "parse the content of a particular prayer." *Id.* at 793-95.

Marsh resolves this case in the Town's favor. Respondents, two residents who object to the Town's

legislative-prayer practice, do not argue that the Town intentionally discriminated among prayer-givers. Pet. App. 10a. Nor could they, as the opportunity is open to all residents, and Christian, Jewish, Bahá'í, and Wiccan adherents all delivered prayers. Pet. App. 7a-8a. Neither were the prayers "offensive in the way identified as problematic in *Marsh*," as the Second Circuit correctly concluded: "[T]hey did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. These facts are dispositive. This Court need do no more than apply its holding in *Marsh* to conclude that the Town's prayer practice is constitutional.

Moreover, there is no justification for abandoning *Marsh*; its analysis "accords with history and faithfully reflects the understanding of the Founding Fathers." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). The Founders understood the Religion Clauses to accomplish two related objectives: to prohibit the establishment of a national church and to ensure the freedom of conscience and religious belief for which many early American settlers fled their European homelands. *See*, *e.g.*, *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-14 (1947). These twin objectives guarded against the measures that Old World countries used to compel religious observance—laws requiring adherence to specific beliefs or taxes supporting particular faiths. *See id.*; *Edwards v. Aguillard*, 482 U.S. 578, 605-06 (1987) (Powell, J., concurring). But while the Establishment Clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship," *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), it does not require

indifference to religious observance or a sanitized quarantine of religion from public life.

To the contrary, the Religion Clauses allow the government to accommodate the spiritual needs of its citizens by solemnizing important public occasions with invocations. Legislative-prayer practices fit comfortably within those "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." *Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). By hiring a paid chaplain and starting its own legislative sessions with an invocation, the First Congress (which drafted the Bill of Rights) understood that such civic acknowledgments of religious belief are fully compatible with the Religion Clauses. *Marsh*, 463 U.S. at 790.

The court of appeals in this case departed from *Marsh* and the historical understanding of the Religion Clauses by importing an "endorsement" test from *Allegheny* into *Marsh*. The court construed *Marsh* to require an inquiry into whether "the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs." Pet. App. 17a. Applying this test, the court concluded that the proportion of Town prayers with Christian content, among other things, "must be viewed as an endorsement of a particular religious viewpoint." Pet. App. 19a.

The lower court's focus on "endorsement" and the "reasonable observer" mirrors the much-criticized analysis employed by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its progeny. But

Marsh rejected that approach in the legislative-prayer context, and with good reason: *Lemon* and the "endorsement" test require this Court to "sit as a national theology board," which it is "ill equipped" to do. *Allegheny*, 492 U.S. at 678 (Kennedy, J.); *see also Lee v. Weisman*, 505 U.S. 577, 592 (1992). Far from enhancing freedom of religion, a test that requires courts to invalidate prayers whose content purportedly reflects endorsement of a particular creed is bound to promote a "brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious." *Schempp*, 374 U.S. at 306 (Goldberg, J., concurring). At least in the context of legislative prayer, the "endorsement" test has no place.

To be sure, the legislative-prayer practices of various governing bodies are likely to differ. Some legislative bodies, like the Nebraska legislature in *Marsh*, may hire a paid chaplain of a single denomination to solemnize their proceedings. Others, like the Town of Greece, may allow volunteers of any religious or nonreligious persuasion to perform that task. In the latter case, the demographics of a particular state or town may result in a significant proportion of prayers that reflect one or a small number of faith traditions. But these variations in prayer practices merely reflect the freely held and constitutionally protected religious beliefs and opinions of the people who live in a particular locality, and are no more suspect than the prayer practice affirmed in *Marsh*.

In short, there is ample breathing room between the Free Exercise and Establishment Clauses to allow the Town of Greece and other deliberative public bodies to acknowledge their citizens' religious beliefs by providing an opportunity for them to open ses-

sions with a prayer or invocation of their own choosing. The alternative—having courts act as theological censors, deciding, for example, whether particular invocations are too religious or too "sectarian"—is antithetical to the principles of religious liberty underlying the Religion Clauses. This Court should reaffirm that the centuries-old practice of legislative prayer is consistent with the Establishment Clause, and overturn the contrary decision below.

STATEMENT

1. Since 1999, the Town of Greece has allowed its citizens to open monthly board meetings with a prayer. Pet. App. 29a. To identify potential prayer-givers, the Town telephoned clergy from religious communities in the Town, using a list in the Community Guide, a publication of the Greece Chamber of Commerce. Pet. App. 31a. The Town then created a list of clergy who had accepted an invitation to offer a prayer, which the Town periodically updated based on requests from community members and new listings in the Community Guide and a local newspaper. Pet. App. 5a. Town employees would work their way down the list in advance of each meeting until they found someone willing to give the invocation. *Id*.

The prayer-giver list resulting from the Town's neutral procedures reflects a broad cross-section of religious perspectives. For example, the most recent prayer-giver list in the record includes a Jewish layman, a Mormon church, the Vietnamese Buddhist Association, an individual whose church is listed as "Cherokee Indian," two Jehovah's Witness congregations, the Bahá'í faith, a "Wiccan High Priest," a number of Catholic churches, and several Protestant

churches from a wide range of denominations. C.A. App. A1053-55.

The Town allowed any citizen to volunteer to deliver an invocation, and never rejected such a request. Pet. App. 20a. Members of many different religious traditions (including Catholicism, multiple Protestant denominations, Judaism, Bahá'í, and Wicca) accepted the opportunity to offer an invocation. Pet. App. 125a. Under the Town's practice, atheists and nonbelievers were also welcome to volunteer to give an invocation. *Id*.

The Town has never had any guidelines concerning the appropriate content for a prayer, nor has the Town ever asked to review the wording of any prayer before its delivery. Pet. App. 29a-30a. According to the court of appeals, roughly two-thirds of the prayers included uniquely Christian references; others spoke in "generically theistic terms." Pet. App. 7a. Some prayers contained specific references to other faith traditions: the Jewish layperson referred to "David, your [*i.e.*, G-d's] servant," J.A. 110a, the Bahá'í prayer-giver offered the Bahá'í greeting "*Alláh-u-Abhá*," J.A. 127a, 128a, and the Wiccan priestess invoked Athena and Apollo. J.A. 112a.

Respondents, who periodically attend Town meetings, complained to Town officials starting in September 2007 that the prayers "aligned the town with Christianity" and "were sectarian rather than secular." Pet. App. 8a. In response to these concerns, Town officials met with respondents and explained that anyone could volunteer to deliver the opening prayer and that the Town would not police the content of the prayers offered. *Id.*

2. Respondents filed suit against the Town in February 2008, alleging two Establishment Clause violations: (1) that the Town's procedure for selecting prayer-givers unconstitutionally "prefer[red] Christianity over other faiths," and (2) that the Town impermissibly permitted individual citizens to deliver "sectarian" prayers. Pet. App. 57a-58a.

With respect to the Town's selection process, the district court focused on the Town's motives for its legislative-prayer practice, and found no admissible evidence that anyone ever "intentionally excluded [members of] non-Christian faiths from offering prayers." Pet. App. 74a. The court also found "no indication that the Town established its unwritten policy of having prayer before meetings for an improper purpose." Pet. App. 121a. Accordingly, the court ruled that the Town's selection procedures did not violate the Establishment Clause. Pet. App. 78a.

As for respondents' claim that the prayers were impermissibly "sectarian," the district court observed that "[a]ny analysis of the constitutionality of legislative prayer necessarily begins with" this Court's decision in *Marsh v. Chambers*. Pet. App. 79a. The district court noted that this Court affirmed legislative-prayer practices in *Marsh* based on the unbroken history of legislative prayer in the United States. Pet. App. 79a-82a. The district court deemed legislative prayer to be an "exception to the *Lemon* test, based primarily if not exclusively on the long history of legislative prayer in Congress, which is often overtly sectarian." Pet. App. 127a.[1]

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[1] Under the *Lemon* test, a practice that touches upon religion is permissible under the Establishment Clause if it "ha[s] a secular legislative purpose"; "its principal or primary effect"

The district court noted that there was dictum in *Allegheny*, 492 U.S. at 603, suggesting that the prayers in *Marsh* were acceptable because "the particular chaplain [in that case] had removed all references to Christ." Pet. App. 129a (internal quotation marks omitted). The district court concluded, however, that this "statement does not indicate that legislative prayers must be nonsectarian." *Id*. Rather, the test under *Marsh* for evaluating the constitutionality of legislative prayer "is not whether the prayer is sectarian or nonsectarian, but whether, based on the totality of the circumstances, the prayer is being exploited to advance or disparage a belief, or to associate the government with a particular religion." Pet. App. 129a-30a.

Because the prayers offered by Town members did not "proselytize" in favor of one, or disparage any other, creed or belief, the court concluded that there was no constitutional infirmity. Pet. App. 126a, 131a. The court also found that the Town's practice of permitting "a variety of clergy to give invocations" lessened the likelihood "that the government could be viewed as advancing a particular religion, and therefore less[ened] concern over the sectarian nature of particular prayers." Pet. App. 129a.

By contrast, the court found that respondents' "proposed non-sectarian policy" was "vague and unworkable," since "many of the prayers that [respondents] say are sectarian are indistinguishable from prayers that they say are not." Pet. App. 130a-31a. Even if the Town could differentiate between sec-

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"neither advances nor inhibits religion"; and it does not "foster an excessive government entanglement with religion." 403 U.S. at 612-13 (internal quotation marks omitted).

tarian and nonsectarian prayers, the court explained that any attempt "to control the content of prayer" would impose a "state-created orthodoxy," which itself would violate the Establishment Clause. Pet. App. 130a (quoting *Lee*, 505 U.S. at 592). The court therefore granted summary judgment in favor of the Town.

3. On appeal, respondents "expressly abandoned the argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." Pet. App. 10a. Indeed, the court of appeals acknowledged that the Town had "no religious animus" in implementing its legislative-prayer practice. Pet. App. 22a. Nevertheless, the court reversed the grant of summary judgment because, in its view, "the town's prayer practice had the *effect*, even if not the purpose, of establishing religion." Pet. App. 10a (emphasis added).

The Second Circuit recognized that *Marsh* "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon v. Kurtzman*." Pet. App. 10a. Nevertheless, based on Justice Blackmun's observation for the Court in *Allegheny* that the prayers in *Marsh* did not have "the *effect* of affiliating the government with any one specific faith or belief," the court of appeals proceeded to apply the "endorsement" test to evaluate the Town's prayer practices. *See* Pet. App. 17a & n.3 (internal quotation marks omitted).

In applying its "endorsement" test, the Second Circuit purported to adopt the viewpoint of an "ordinary, reasonable observer," Pet. App. 17a, and from that vantage closely scrutinized the content of the prayers offered. Pet. App. 21a-23a. The court acknowledged that the prayers delivered by Town

residents "were not offensive in the way identified as problematic in *Marsh*," that is, they did not seek to convert nonadherents or denigrate or disparage other faith traditions. Pet. App. 21a. Nevertheless, the court placed substantial weight on the fact that most of the prayers "contained uniquely Christian references," and at times were often phrased in the "first-person plural," such as "let 'us' pray." Pet. App. 20a, 23a. The court reasoned that the fact that "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 concluded its analysis by cautioning government entities about the numerous purported pitfalls that could attend the practice of legislative prayer. "People with the best of intentions may be tempted," the court warned, "to convey their views of religious truth, and thereby run the risk of making others feel like outsiders." Pet. App. 26a. Even if prayer-givers resisted such temptations, "municipalities with the best of motives may still have trouble preventing the appearance of religious affiliation." *Id.* Indeed, "even a single" errant invocation may, in the court's view, "appear to suggest an affiliation" with a particular religion. Pet. App. 27a. But because governments cannot "make demands regarding the content of legislative prayers," municipalities have "few means" at their disposal to prevent prayer-givers from delivering a prayer suggesting forbidden endorsement or affiliation. *Id.* "These difficulties," the court concluded, "may well prompt municipalities to pause and think carefully before adopting legislative prayer." *Id.*

SUMMARY OF ARGUMENT

Legislative prayer is a firmly embedded practice in this Nation, long exercised by deliberative public bodies at the federal, state, and local levels to solemnize the proceedings of lawmaking institutions. Its historical pedigree, dating back to the First Congress that authored the Bill of Rights, confirms that the Establishment Clause poses no obstacle to the Town's practice of legislative prayer.

I. This case can begin and end with *Marsh v. Chambers*. *Marsh* recognized that the historical practice of legislative prayer is consistent with a proper understanding of the Establishment Clause, and is one of many ways in which government may permissibly acknowledge and accommodate the beliefs of "'a religious people whose institutions presuppose a Supreme Being.'" *Marsh*, 463 U.S. at 792 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

A. *Marsh* placed two modest limitations on the constitutionality of legislative prayer, neither of which applies here. First, the government cannot act with "impermissible motive" in selecting prayer-givers. *Id.* at 793. There is no evidence of any such religious animus here; to the contrary, any Town resident of any faith or no faith may offer the invocation. Indeed, respondents expressly abandoned any claim to the contrary. Second, the Town cannot "exploit[]" the prayer opportunity "to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. Again, there is no evidence of any such exploitation here. While the prayers reflected the faith traditions of the residents who delivered them, they did not preach conversion, denigrate other religious traditions, or threaten non-

adherents. Pet. App. 21a. Thus, under *Marsh*, the Town of Greece's prayer practice presents no constitutional concerns.

If anything, this is an easier case than *Marsh*. *Marsh* correctly held that there is nothing constitutionally suspect about a state hiring a single paid chaplain from one Christian denomination to offer prayers for sixteen years; indeed, Congressional chaplains have had similarly long tenures. *Marsh*, 463 U.S. at 794 n.17. Here, the prayer opportunity was open to anyone, prayer-givers were unpaid volunteers, and different individuals drawn from a multitude of faith traditions offered the invocations. These features provide additional confirmation that the Town did not improperly "exploit[]" the prayer opportunity. *Id.* at 794-95.

B. The court of appeals erred by importing an "endorsement" test from *Allegheny* to evaluate the Town's prayer practice. The court incorrectly concluded that *Allegheny*'s statement (in dictum) that the legislative chaplain in *Marsh* had "removed all references to Christ," 492 U.S. at 603, effectively modified *Marsh*'s historical test, rendering unconstitutional prayers whose "sectarian" content had the purported effect of endorsing religion. Quite simply, the "endorsement" test stands *Marsh* on its head. Whereas under *Marsh*, legislative prayer is presumptively constitutional and the government may not "parse the content" of the prayers delivered, 463 U.S. at 795, under the Second Circuit's approach, prayers that "contain[] uniquely Christian references" may convey to the "reasonable observer" that the Town is improperly affiliating itself with a particular religion. Pet. App. 17a, 20a. This Court should reaffirm that *Marsh*'s historical analysis gov-

erns the constitutionality of legislative-prayer practices.

II. *Marsh* reflects a correct understanding of the Constitution's Religion Clauses, because it "comport[s] with what history reveals was the contemporaneous understanding of [the Constitution's] guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984).

A. Actions taken by the First Congress are "contemporaneous and weighty evidence of [the] true meaning" of the Constitution. *Marsh*, 463 U.S. at 790 (internal quotation marks omitted). The First Congress "in the same week . . . voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states." *Id*. This history confirms that the Founders "saw no real threat to the Establishment Clause" arising from the practice of legislative prayer. *Id.* at 791.

B. Moreover, the First Congress's acceptance of legislative prayer was not merely an uncritical adoption of a vestigial practice at odds with the recently drafted Bill of Rights. Rather, it was consistent with the Framers' understanding that the Religion Clauses were adopted to protect religious liberty against the coercive practices associated with established churches—laws that taxed citizens to support a particular church or compelled adherence to particular tenets or beliefs. *See Everson*, 330 U.S. at 8-14. This Court's cases thus "disclose two limiting principles" on state action under the Establishment Clause—"government may not coerce anyone to support or participate in any religion or its exercise," and may not "give direct benefits to religion" to a degree that amounts to establishment. *Allegheny*, 492 U.S. at 659 (Kennedy, J.). At the same time, however, the

law must avoid "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents." *Id*. at 655. But between the shoals of prohibited establishment and improper hostility lies a significant channel in which the government can permissibly "respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs." *Zorach*, 343 U.S. at 314. The First Congress and this Court in *Marsh* recognized that legislative prayer was one such permissible accommodation, no less so than higher-education grants or tax exemptions for religious organizations. 463 U.S. at 791.

C. In contrast to the liberty-centric approach to the Religion Clauses exemplified by *Marsh*, the "endorsement" test threatens to impose a "state-created orthodoxy," in which judges reviewing invocations for hints of impermissible endorsement would "put[] 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. The "endorsement" test is inconsistent with a proper understanding of the Establishment Clause and, at minimum, should not invade the context of legislative prayer.

III. While *Marsh* controls this case, the Town's prayer practice would also be constitutional under any other test that the Court might apply. This Court's precedents instruct that, at minimum, longstanding historical practices such as legislative prayer do not amount to an impermissible "endorsement" of religion. *See*, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 699-701 (2005) (Breyer, J., concurring in the judgment). Thus, under any plausible application of an "endorsement" test, the Town's practices

pass muster. Similarly, if the Court were to evaluate the Town's decision to offer a prayer opportunity to all citizens, regardless of faith, as creating a "limited public forum" for private speech, the invocations voluntarily offered by individual private citizens would be constitutionally protected, as "[t]here is no Establishment Clause violation" when the government "honor[s] its duties under the Free Speech Clause" in the context of a limited public forum. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846 (1995).

ARGUMENT

I. THE TOWN OF GREECE'S PRACTICE OF OPENING ITS DELIBERATIVE SESSIONS WITH AN INVOCATION IS CONSTITUTIONAL UNDER THIS COURT'S DECISION IN *MARSH V. CHAMBERS*.

A. *MARSH* CONFIRMED THAT LEGISLATIVE PRAYER IS CONSTITUTIONAL.

In *Marsh v. Chambers*, this Court held that the "opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," and therefore does not run afoul of the Establishment Clause. 463 U.S. at 786. In light of "the unambiguous and unbroken history" of legislative prayer stretching back "more than 200 years," the Court had "no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society" and is consistent with the Constitution. *Id.* at 792.

The Court observed that from colonial times to the present, the practice of legislative prayer "has coexisted with the principles of disestablishment and religious freedom" that animate the First Amendment's Religion Clauses. *Id.* at 786. Noting that the

First Congress approved the Establishment Clause during the same week that it passed legislation to appoint and pay a chaplain for each House, the Court concluded that it could "hardly be thought" that Congress had forbidden in the Establishment Clause "what [it] had just declared acceptable" by legislation. *Id.* at 790. Far from infringing upon citizens' religious liberties, legislative prayer was understood as conduct that "'harmonize[s] with the tenets of some or all religions.'" *Id.* at 792 (quoting *McGowan v. Maryland*, 366 U.S. 420, 442 (1961)).

Having determined that legislative prayer is presumptively consistent with the Establishment Clause, this Court held that prayer practices are constitutional so long as the government does not select prayer-givers out of an "impermissible motive" or otherwise exploit "the prayer opportunity" to "proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 793-95. Absent evidence that the government has violated these principles, courts are not to "embark on a sensitive evaluation or to parse the content of [any] particular prayer." *Id.* at 795.

Applying this test, the *Marsh* Court easily disposed of arguments that Nebraska had violated the Establishment Clause by (i) appointing the same Presbyterian clergyman as chaplain for sixteen years, (ii) paying the clergyman out of public funds, or (iii) allowing the clergyman to deliver prayers derived almost exclusively from the Judeo-Christian tradition. The Court concluded that the minister's reappointment over many years demonstrated only that his "performance and personal qualities were acceptable" to the legislature; it did not "advance[] the beliefs of a particular church." *Id.* at 793. Fur-

ther, paying the minister out of public funds did not violate the Constitution because "the same Congress that drafted the Establishment Clause" also paid its chaplain. *Id.* at 794. Finally, the Court refused to parse the content of the prayers, even though they were often explicitly Christian, because it found no evidence that the State had exploited the prayer opportunity to proselytize or to advance or disparage any faith. *Id.* at 793 n.14, 794-95.

Marsh teaches that the touchstone of the Establishment Clause inquiry in this context is whether the government acts with "impermissible motive" or "exploits" the prayer opportunity; in other words, whether the government purposely employs such prayers as a mouthpiece to advocate on behalf of a particular faith and thereby takes "the first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 664 (Kennedy, J.). Such facts, if presented in a given case, may disrupt the otherwise peaceful coexistence of legislative prayer with "the principles of disestablishment and religious freedom" underlying the Religion Clauses. *Marsh*, 463 U.S. at 786. Absent such circumstances, however, "legislative prayer presents no more potential for establishment than" a host of other practices that accommodate or provide incidental benefits to religion, such as "the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." *Id.* at 791 (citations omitted). Indeed, as the Court observed in *Lynch*, "[i]t would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers" than legislative prayer. 465 U.S. at 674.

B. THE TOWN'S PRAYER PRACTICE IS PLAINLY CONSTITUTIONAL UNDER *MARSH*.

There can be no serious doubt that the Town of Greece's prayer practice is constitutional under the standard set forth in *Marsh*.

As an initial matter, there is no issue in this case about whether the Town was motivated by any improper purpose in selecting its prayer-givers. As the court of appeals noted, respondents "expressly abandoned [their] argument that the town intentionally discriminated against non-Christians in its selection of prayer-givers." Pet. App. 10a. Even if that issue had been preserved, moreover, the result would be the same, because there is "no evidence" that the Town would not "have accepted any and all volunteers who asked to give [a] prayer" to open a Town board meeting. Pet. App. 20a. Thus, under *Marsh*, the only question is whether the Town exploited the prayer opportunity to "proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-95. Respondents cannot show that the Town violated this principle; indeed, the entire record is to the contrary.

The Town made reasonable, good-faith efforts to open the opportunity to diverse prayer-givers. The Town used various sources to identify potential prayer-givers and contacted them in random order to gauge their interest in offering the prayer to open board meetings. Pet. App. 31a. Further, the Town placed no restrictions on who could volunteer to offer the prayer. Pet. App. 20a. As a result, representatives from many different religions, including Catholics, Protestants of multiple denominations, a Wiccan priestess, a leader of a Bahá'í assembly, and a lay Jewish man, have given opening prayers at board

meetings. Pet. App. 125a. And it is undisputed that the Town would have welcomed atheists and nonbelievers to open the meeting with a statement of their choosing. Pet. App. 4a, 20a.

To be sure, a majority of prayer-givers were Christian. Pet. App. 19a. But that fact does not support the conclusion that the Town exploited the prayer opportunity to proselytize or to advance or disparage any faith. Indeed, the *Marsh* Court refused to take that inferential leap even though the prayer-giver in that case was from a single Christian denomination and offered the State's often explicitly Christian prayers for sixteen consecutive years. 463 U.S. at 793. Rather than infer impermissible advancement of religion, the Court accepted a more benign explanation for the chaplain's consistent reappointment: adequate job performance. *Id.* The explanation for the prevalence of Christian prayer-givers in the Town is at least equally benign: "local demographics and the choices of religious leaders who responded out of their own initiative to the [Town's] invitation." *Rubin v. City of Lancaster*, 710 F.3d 1087, 1098 (9th Cir. 2013) (internal quotation marks omitted); *see* Pet. App. 125a (respondents "could not identify a single non-Christian house of worship in the Town, despite having lived there for decades").

Other aspects of the Town's prayer practice further serve to demonstrate that the Town did not impermissibly exploit the prayer opportunity. As the Second Circuit acknowledged, the "prayers in the record were not offensive in the way identified as problematic in *Marsh*: they did not preach conversion, threaten damnation to nonbelievers, downgrade other faiths, or the like." Pet. App. 21a. Thus it is

irrelevant that roughly two-thirds of the prayers allegedly included uniquely Christian references. Pet. App. 7a. Moreover, the content of the prayers cannot be ascribed to the Town because, consistent with this Court's opinion in *Lee*, 505 U.S. at 588, the Town exercised no editorial control over the invocations and affirmed that it would not review or censor prayers. Pet. App. 4a.

If anything, this case is even further from the constitutional line than was *Marsh*, for at least two reasons. First, the Town permitted multiple prayer-givers from a variety of faiths to offer prayers, rather than selecting one prayer-giver from a single denomination. This Court correctly held in *Marsh* that one cannot "perceive *any* suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church," 463 U.S. at 793 (emphasis added); it follows *a fortiori* that allowing clergy and laypeople from a variety of denominations to offer invocations does not advance one specific set of beliefs.

Second, the Town's prayer-givers were volunteers and not paid out of government funds. As a result, the Town's involvement in supporting the prayer opportunity was limited to providing a forum for others to speak. As *Marsh* confirmed, employing a paid chaplain does not raise constitutional concerns; indeed, legislative chaplains have been a fixture since the Founding. 463 U.S. at 794; *see also Rosenberger*, 515 U.S. at 858 (Thomas, J., concurring). But the Town's use of private volunteers in lieu of a paid chaplain further separates the Town from identification with the prayers delivered. Under the Town's policy, citizens first volunteer to give the opening invocation and then choose the content of their invocations without any governmental interference or over-

sight. This critical element of private choice ensures that no "imprimatur of state approval" can be deemed to have been conferred on any particular religion, or on religion generally. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *see also Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002) (holding that a neutral government program that aids religion only as a result of "genuine and independent private choice . . . is not readily subject to challenge under the Establishment Clause").

For the foregoing reasons, the Town's prayer practice is well within the bounds established by *Marsh*. Under this Court's controlling precedent, therefore, its constitutionality cannot be in doubt.

C. THERE IS NO BASIS FOR IMPORTING *ALLEGHENY*'S "ENDORSEMENT" TEST INTO THE *MARSH* ANALYSIS.

Rather than applying the straightforward, historically grounded analysis from *Marsh*, the Second Circuit erroneously imported into the legislative-prayer context an "endorsement" test sometimes used to evaluate other Establishment Clause challenges in cases like *Allegheny*.[2] According to that

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[2] As the *Allegheny* Court observed, the first sustained treatment of this test appears in Justice O'Connor's concurrence in *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This Court has since applied elements of the "endorsement" test in Establishment Clause cases, but only selectively. *Compare McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 866-68 (2005) (applying objective-observer inquiry to one courthouse display of Ten Commandments), *with Van Orden*, 545 U.S. at 686 (plurality opinion) (applying an analysis "driven both by the nature of the monument [at issue] and by our Nation's history" to another Ten Commandments display), *and id.* at 700 (Breyer, J., con-

test, the relevant question is not whether the Town has exploited a presumptively constitutional prayer opportunity, but whether, when viewed in context by an "ordinary, reasonable observer," it could "be seen as endorsing a particular faith or creed over others." Pet. App. 17a, 25a. Thus, in spite of its inability to "ascribe [any] religious animus to the town or its leaders," and its conclusion that the prayers "were not offensive in the way identified as problematic in *Marsh*," Pet. App. 21a-22a, the court of appeals nonetheless held that the Town's prayer practice violated the Establishment Clause because in the court's view it "had the *effect*, even if not the purpose, of establishing religion." Pet. App. 10a (emphasis added).

The decision below adopted this observer-based "endorsement" test based on language in *Allegheny* stating that "*Marsh* had found that the prayers did not 'have the *effect* of affiliating the government with any one specific faith or belief.'" Pet. App. 17a n.3 (quoting *Allegheny*, 492 U.S. at 603).[3] *Allegheny*, however, cannot bear the weight that the court of appeals placed on it.

In *Allegheny*, this Court concluded that the display of a crèche on the staircase of a local government building during the Christmas season violated the Establishment Clause because it had the "effect of endorsing a patently Christian message." 492 U.S.

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curring in the judgment) ("I see no test-related substitute for the exercise of legal judgment.").

[3] Other courts of appeals have likewise read *Marsh* and *Allegheny* to require an inquiry into endorsement and have held that "sectarian" prayers therefore violate the Establishment Clause. *See*, *e.g.*, *Joyner v. Forsyth Cnty.,* 653 F.3d 341, 347-48 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012). That approach reflects a misreading of the precedents.

at 601. Justice Kennedy, joined by three others, dissented in part and urged the Court to apply *Marsh*'s historical approach to the crèche display. *Id.* at 669-70 (Kennedy, J.).

Justice Kennedy observed that it is "settled law that," whatever else the Establishment Clause does, it does not invalidate historical practices like legislative prayer "that, by tradition, have informed our First Amendment jurisprudence." *Id.* at 669. He concluded that the crèche display posed no more threat to religious liberty than the practice of legislative prayer, because there was "no suggestion here that the government's power to coerce has been used to further" religion "in any way." *Id.* at 664.

In response, writing for the Court, Justice Blackmun sought to cabin *Marsh*'s holding to the historical practice of legislative invocation. *See id*. at 602-03. He also suggested that even this Court's opinion in *Marsh* could not justify prayers that, for example, "demonstrate the government's allegiance to a particular sect or creed." *Id.* at 603. He added dictum to the effect that the Court had not confronted this situation in *Marsh* because the chaplain in that case had eliminated the possibility of a constitutional violation by "remov[ing] all references to Christ." *Id.* (internal quotation marks omitted).

Allegheny could not and did not modify the *Marsh* test or announce a new standard for assessing whether "sectarian" references are constitutionally impermissible in a legislative invocation. The constitutionality of legislative prayer was not at issue in *Allegheny*, and Justice Blackmun's dictum was therefore unnecessary to the disposition of the case. Such "[d]ictum settles nothing, even in the court that ut-

ters it." *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005).

The *Allegheny* majority's characterizations of *Marsh* also lack precedential force because they are demonstrably incorrect. According to Justice Blackmun, *Marsh* "recognized that" the Establishment Clause prohibits "legislative prayers that have the effect of affiliating the government with any one specific faith or belief." *Allegheny*, 492 U.S. at 603 (citing *Marsh*, 463 U.S. at 794-95). In reality, however, *Marsh* is silent on the questions of "effect" and "affiliation." Rather, under *Marsh*, the criterion used to evaluate a legislative-prayer practice is whether the government has exploited the prayer opportunity to advance or proselytize in favor of one faith or to denigrate others, or has acted out of religious animus in selecting prayer-givers. *Marsh*, 463 U.S. at 793-95; *see also id.* at 823 n.1 (Stevens, J., dissenting) (observing that *Marsh* "makes the subjective motivation of legislators *the decisive criterion* for judging the constitutionality of a state legislative practice" (emphasis added)). In fact, far from forbidding any hint of affiliation, *Marsh* upheld the practice of hiring a paid chaplain belonging to a single religious denomination who offered prayers in the tradition of that denomination.

Further, Justice Blackmun's assertion that the prayers in *Marsh* "did not violate" his "affiliat[ion]" test "because the particular chaplain had 'removed all references to Christ'" after 1980 is contrary to the reasoning and record in *Marsh*. *Allegheny*, 492 U.S. at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). The prayers after 1980 were not even part of the *Marsh* record and could not have been the basis of the Court's holding. *Marsh*, 463 U.S. at 793 n.14; *see al-*

so Van Orden, 545 U.S. at 688 n.8 (plurality opinion) (noting that "[i]n *Marsh*, the prayers were often explicitly Christian" and that references to Christ were not removed until the year after the suit was filed). And voluntary cessation could not have saved an unlawful practice in any event. *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203 (1968). Further, the "Christological references" in many of the prayers at issue were a primary basis for both dissents in *Marsh*. *Marsh*, 463 U.S. at 800 n.9 (Brennan, J., dissenting); *id*. at 823-24 & n.2 (Stevens, J., dissenting); *see also* Brief of *Amicus Curiae* Rev. Dr. Robert E. Palmer Supporting Petitioner ("Palmer Br.") at 5-10, No. 12-696 (Jan. 7, 2013). In any event, even after 1980, the prayers were still offered "in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. These facts conclusively demonstrate that Justice Blackmun was incorrect in concluding that *Marsh*'s holding turned on the removal of "sectarian" references from the prayers.

Finally, *Marsh* itself made clear that the presence or absence of references to Christ was irrelevant to its analysis. According to *Marsh*, the "content of the prayer[s] is of no concern to judges" absent evidence "that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." 463 U.S. at 794-95. In other words, the *Marsh* Court had no occasion to weigh the presence or absence of references to Christ, because that issue has no constitutional significance under the Court's test.

Allegheny's dictum thus cannot be taken as a correct or binding description of *Marsh*'s reasoning. It therefore does not undermine *Marsh*'s holding that deliberative public bodies, like the Town's board, do

not violate the Establishment Clause when they follow in the Founders' footsteps and open their sessions with prayers, so long as their decision to do so is not motivated by a desire to proselytize or to advance or disparage a particular faith.

II. *MARSH*'S HISTORICAL, LIBERTY-FOCUSED ANALYSIS IS CONSISTENT WITH A PROPER UNDERSTANDING OF THE ESTABLISHMENT CLAUSE.

The Town's prayer practice is constitutional not only because it follows directly from this Court's holding in *Marsh*, but also because *Marsh* itself is indisputably correct in its analysis of history and its understanding of the Establishment Clause. This Court's Establishment Clause cases "have recognized the special relevance in this area of Mr. Justice Holmes' comment that 'a page of history is worth a volume of logic.'" *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777 n.33 (1973) (citation omitted). There is no basis in the many pages of history underlying the Establishment Clause for this Court to abandon *Marsh* in favor of an "endorsement" test.

A. THE *MARSH* COURT CORRECTLY RELIED ON THE HISTORICAL PRACTICES OF THE FIRST CONGRESS, WHICH HAVE BEEN RATIFIED BY TWO CENTURIES OF HISTORY.

1. Interpretation of the Establishment Clause must "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673; *see also Allegheny*, 492 U.S. at 670 (Kennedy, J.) ("*Marsh* stands for the proposition" that "the meaning of the [Establishment] Clause is to be determined by reference to historical practices and understanding."). The practice of open-

ing sessions of deliberative public bodies with invocations was well known and accepted by the same generation that adopted the Constitution's Religion Clauses, including the First Congress that drafted the clauses.

The actions of "the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument," are "contemporaneous and weighty evidence of its true meaning." *Marsh*, 463 U.S. at 790 (internal quotation marks omitted). It "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of the fundamental instrument." *Myers v. United States*, 272 U.S. 52, 174-75 (1926).

Beginning in 1774, the Continental Congress "adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." *Marsh*, 463 U.S. at 787.[4] The First Congress continued this tradition, "adopt[ing] the policy of selecting a chaplain to open each session with prayer." *Id.* at 788. In April 1789, both the Senate and House of Representatives appointed committees to consider the manner in which chaplains should be selected. *See*, *e.g.*, 1 Annals of Cong. 19 (1789) (Joseph Gales ed., 1834). And on September 22, 1789, President Washington signed into law a statute appropriating payment for these chaplains. *See* 1 Stat. 71 (1789). James Madison, draftsman of the Establishment

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[4] The first prayer before the Continental Congress concluded: "All this we ask in the name and through the merits of Jesus Christ, Thy Son and our Savior." Rev. Jacob Duché, First Prayer of the Continental Congress (Sept. 7, 1774), Office of the Chaplain: U.S. House of Representatives, http://chaplain.house.gov/archive/continental.html.

Clause, sat on the House Committee tasked with considering the manner in which chaplains should be selected, 1 Annals of Cong. 104-05 (1789) (Joseph Gales ed., 1834), and voted for the bill authorizing payment. *Id.* at 688.[5] This vote occurred the very same week that the First Congress approved a draft of the Establishment Clause for submission to the States. *Marsh*, 463 U.S. at 790.

The First Congress did not adopt legislative prayer without reflection; to the contrary, the vote followed a period of vigorous debate. *Id.* at 791. John Jay and John Rutledge objected to opening the first session of the Continental Congress with prayer, because the delegates "'were so divided in religious sentiments'" that they "'could not join in the same act of worship.'" *Id.* Samuel Adams replied that "'he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.'" *Id.* at 792 (quoting Charles Frances Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams, During the Revolution* 37-38 (1875)). As *Marsh* explained, this "evidence of opposition to a measure . . . infuses [the historical argument] with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society." *Marsh*, 463 U.S. at 791. That Adams' view carried the day demonstrates that the Founders were satisfied that legislative prayer was consistent with their aspirations for the new country's Constitution.

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[5] The First Congress appointed two chaplains of different Christian denominations who alternated between the House and Senate on a weekly basis. *See* 463 U.S. at 793 n.13.

This historical evidence "sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought the Clause applied to the practice authorized by the First Congress." *Id.* at 790. The First Congress's action in authorizing legislative prayer at the same time it drafted the Establishment Clause is overwhelming evidence that it deemed such prayer practices constitutional.

2. The actions of the First Congress are not the only historical evidence showing that public prayer at government functions is consistent with a proper interpretation of the Establishment Clause. Rather, that evidence is confirmed by an "unambiguous and unbroken history of more than 200 years." *Id*. at 792. Our national history "is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." *Lynch*, 465 U.S. at 675. This "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789," *id.* at 674, confirms that *Marsh* correctly understood and applied the Establishment Clause.

Congress. Congress has continued to open its sessions with prayer, without interruption, over the 224 years that have elapsed since the First Congress sat. "These legislative prayers . . . are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official chaplains and paid from the Treasury of the United States." *Wallace v. Jaffree*, 472 U.S. 38, 85 (1985) (Burger, C.J., dissenting).

Throughout our history, the offered prayers have often been explicitly Christian, and the conscience of the prayer-givers has dictated the prayers' content. One of the Senate's first chaplains, Episcopal Bishop William White, often began the Senate's sessions with the Lord's Prayer, the Collect for Ash Wednesday, a prayer for Congress, and a prayer for "the grace of our Lord Jesus Christ." 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* 322 (1839) (Letter to Rev. Henry V.D. Johns, Dec. 29, 1830). Many of these prayers contain explicit Christological references. *See*, *e.g.*, A Prayer for Congress, *The Book of Common Prayer* (Philadelphia, Hall & Sellers 1790) ("[W]e humbly beg in the Name and mediation of Jesus Christ, our most blessed Lord and Saviour.").

Fast-forwarding to the present day, the most recently published pages of the Congressional Record are replete with prayers that refer specifically to Jesus or other deities or prophets. *See*, *e.g.*, 158 Cong. Rec. H5633 (daily ed. Aug. 2, 2012) (Imam Nayyar Imam) ("The final prophet of God, Muhammad, peace be upon him, stated . . . ."); 158 Cong. Rec. H4786 (daily ed. July 11, 2012) (Rabbi David Algaze) ("[A]s the prophet Zachariah proclaimed: 'On that day, God shall be One, and His Name one.'"); 158 Cong. Rec. S4379 (daily ed. June 21, 2012) (Rev. Ron McCrary) ("This we pray in the matchless name of Jesus Christ our Lord."); Brief of Members of Congress as *Amici Curiae* in Support of Petitioner at 20-21, No. 12-696 (Jan. 7, 2013). Under the Second Circuit's decision, this practice and these prayers would violate the Establishment Clause.

Public laws have also long required public invocations of Divine guidance. For example, the U.S. Code directs the President to "each year issue a proclamation designating the first Thursday in May as National Day of Prayer on which the people of the United States may turn to God in prayer." 36 U.S.C. § 119; *see also* 1 Annals of Cong. 949-50 (J. Gales ed., 1834). The Code likewise requires that our national motto, "In God we trust," 36 U.S.C. § 302, be prominently displayed on every coin and paper bill. 31 U.S.C. §§ 5112(d)(1), 5114(b).[6]

The Executive. Religious acknowledgment has also permeated the activities of the Executive Branch since the Founding. Each President from George Washington to Barack Obama has, "upon assuming his office," invoked "the protection and help of God." *Engel v. Vitale*, 370 U.S. 421, 446 & n.3 (1962) (Stewart, J., dissenting).[7] President Washington, for example, stated that "it would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe." *Id.* at 446 n.3. Presidents Jefferson and Madison—both often cited as advocates for strict separation between church and state—likewise invoked Divine blessing in their inaugural addresses. *Id*. And President Obama, in his 2013 inaugural ad-

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[6] *See also* Joint Resolution Authorizing and Requesting the President To Proclaim 1983 as the "Year of the Bible," Pub. L. No. 97-280, 96 Stat. 1211 (1982); 36 U.S.C. § 116 (requiring the President to call "on the people of the United States to observe Memorial Day by praying" and to designate "a period of time on Memorial Day during which the people may unite in prayer").

[7] *See also* Chronology of Inaugural Addresses, Joint Congressional Committee on Inaugural Ceremonies, http://www.inaugural.senate.gov/swearing-in/addresses.

dress, stated that "the oath I have sworn before you today" was "an oath to God and country," and asked that "[God] forever bless these United States of America."[8]

Each Presidential inauguration since 1937 has likewise included both an invocation and a benediction.[9] Many of these prayers were explicitly Christian and used the first-person plural, both of which the court of appeals deemed to be evidence of an impermissible endorsement of religion. Pet. App. 22a-23a, 26a. To cite two of the many examples, the invocation at President Carter's inaugural concluded with, "[a]ll this we ask in the name of Jesus Christ, Thy Son and our Savior. Amen." 123 Cong. Rec. 1862 (1977). President Obama's second inauguration included an invocation from Myrlie Evers-Williams that concluded by stating, "[i]n Jesus's name and the name of all who are holy and right, we pray. Amen." 159 Cong. Rec. S184 (daily ed. Jan. 22, 2013).

Moreover, Presidents Washington, Adams, and Madison, and every President since Lincoln have issued Thanksgiving Proclamations calling for a national day of celebration and prayer. President Franklin Roosevelt similarly suggested that the period between Thanksgiving and Christmas be devoted to "a nationwide reading of the Holy Scriptures" so that "we may bear more earnest witness to our gratitude to Almighty God." Proclamation No. 2629, 58

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[8] Second Inaugural Address of President Barack Obama, *available at* http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama.

[9] *See also* Chronology of Swearing-In Events, Joint Congressional Committee on Inaugural Ceremonies, http://www.inaugural.senate.gov/swearing-in/chronology.

Stat. 1160 (1944). Many of these proclamations—part of our national heritage from the Founding and consistent with a reasoned understanding of the Establishment Clause—would likely fail the Second Circuit's "endorsement" test.

The Judiciary. Public prayer has also long been part of the functions of the Judicial Branch. The phrase "God save this Honorable Court," or a close variation thereof, has been part of the traditional opening of this Court's sessions since at least the Marshall Court. 1 Charles Warren, *The Supreme Court in United States History* 469 (1922). And when riding circuit, John Jay, the first Chief Justice of the United States, invited clergymen to open court sessions with prayer. John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 *Documentary History of the Supreme Court of the United States, 1789-1800* ("*Documentary History*"), at 13-14 (Maeva Marcus et al. eds., 1988). Other Supreme Court Justices also followed this tradition. *E.g.*, Columbian Centinel (Oct. 17, 1792), *reprinted in* 2 *Documentary History*, at 317 ("After the Rev. Dr. Lathrop had addressed the throne of Grace, in prayer, the Hon. Judge Iredell gave an elegant charge to the jury, and the business of the session commenced.").

The Constitution itself, which this Court is charged with protecting, evinces the Framers' belief that public religious devotions are consistent with the rights granted and protected by the Establishment Clause. The Oath Clauses suggest that both national and state leaders are publicly undertaking a solemn or religious duty when they pledge fidelity to the laws and Constitution of the Republic. *See* U.S. Const. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, [the President] shall take the fol-

lowing Oath or Affirmation . . . ."); *see also id.* art. VI, cl. 3. At the time the Constitution was adopted, the contemporary meaning of the word "oath" referred to the invocation of God as a witness to the undertaking of the obligation. *See* 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining oath as "[a]n affirmation, negation, or promise, corroborated by the attestation of the Divine Being").

The "unbroken practice" of all three branches of the federal government "is not something to be lightly cast aside." *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970). Like the prayer practice upheld in *Marsh*, the Town's prayer practice reflects this long and unbroken tradition of civic invocation of the Divine, and is plainly consistent with the Establishment Clause, as understood by its drafters and throughout this Nation's history.

B. Civic Acknowledgements Of Religion That Do Not Threaten The Establishment Of An Official Religion Or Coerce Adherence To A Particular Faith Do Not Violate The Establishment Clause.

Marsh rests on the premise that civic acknowledgments of religious belief, like legislative prayer, are consistent with the "principles of disestablishment and religious freedom" that animate the First Amendment's Religion Clauses, and are among the ways in which government may permissibly accommodate religious beliefs without establishing an official religion. 463 U.S. at 786, 792. A proper understanding of what the Religion Clauses were designed to accomplish confirms the correctness of that premise.

The Establishment Clause was designed to prohibit the establishment of a national religion of the sort that existed in Europe in the colonial era and at the time of the Founding. *Edwards*, 482 U.S. at 605 (Powell, J., concurring). As understood by the Founders, governments "established" religion either by compelling the payment of taxes to support a favored religion or by compelling obedience to the tenets of a particular faith. *See Everson*, 330 U.S. at 8-14; *id.* at 8 (explaining that the Framers understood that the country was founded by settlers who "came here from Europe to escape the bondage of laws which compelled them to support and attend government-favored churches").

Even James Madison and Thomas Jefferson described their concerns about establishment in terms of coercion. Madison's *Memorial and Remonstrance Against Religious Assessments*, which predates the Constitution, is considered to be the fullest expression of his views regarding religious establishments. Madison drafted his Remonstrance in response to a proposal to tax Virginia citizens in order to support teachers of the Christian religion. *Edwards*, 482 U.S. at 606 (Powell, J., concurring). Madison's primary fear was that the bill would be a "dangerous abuse of power" if it were "armed with the sanctions of a law." *Memorial and Remonstrance Against Religious Assessments* (1785), *reprinted in* 8 The Papers of James Madison 298, 299 (Robert A. Rutland et al. eds., 1973). According to Madison, religion should be the product of "reason and conviction" rather than "force or violence." *Id.* Thus, "compulsive support" of religion—including by means of a tax—should be unlawful, and "attempts to enforce by legal sanctions, acts obnoxious to so great a proportion of Citizens,

tend to enervate the laws in general." *Id.* at 301, 303.

In place of the bill to provide taxpayer funds to teachers of Christianity, Virginia enacted Thomas Jefferson's "Act for Establishing Religious Freedom." Jefferson's bill focused likewise on coercion and was aimed at preventing Virginia from "compel[ing]" people "to frequent or support any religious worship, place, or ministry whatsoever," and from causing people to "suffer, on account of [their] religious opinions or belief[s]." *A Bill for Establishing Religious Freedom*, *reprinted in* 2 The Papers of Thomas Jefferson 546 (Julian P. Boyd ed., 1950).

As a Member of Congress, Madison's concerns about religious establishments continued to focus on coercion, even during the debates regarding the Establishment Clause itself. *See Wallace*, 472 U.S. at 92-98 (Rehnquist, J., dissenting) (detailing Madison's involvement in drafting the Religion Clauses). According to Madison, the meaning of the Establishment Clause was that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 730 (1789) (J. Gales ed., 1834). The motivating concern behind the Establishment Clause was that "one sect might obtain a pre-eminence, or two combine together, and establish a religion *to which they would compel others to conform*." *Id.* at 731 (emphasis added). According to Madison, the government cannot "compel men to worship God in any manner contrary to their conscience" or compel them to conform to any religion not of their own choosing. *Id.* at 730. In short, "the historical evidence overwhelmingly supports the coercion test." Michael Stokes Paulsen,

Lemon *Is Dead*, 43 Case W. Res. L. Rev. 795, 826 n.115 (1993) (collecting authorities).

Under a proper, historical reading of the Establishment Clause, government may not "coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Allegheny*, 492 U.S. at 659 (Kennedy, J.) (quoting *Lynch*, 465 U.S. at 678). Respect for religious liberty does not, however, demand a "relentless extirpation of all contact between government and religion." *Id.* at 657. In the space between interference with religious freedom and establishment of an official religion, "there is room for play in the joints." *Walz*, 397 U.S. at 669. Indeed, when the government "respects the religious nature of our people and accommodates the public service to their spiritual needs," it "follows the best of our traditions." *Zorach*, 343 U.S. at 314.

The Court's decision in *Marsh* suggests a liberty-focused test for analyzing legislative prayer under the Establishment Clause. It holds that legislative prayer is presumptively permissible unless it is "exploit[ed]" to advance or proselytize on behalf of one religion to the exclusion or detriment of others. *See* 463 U.S. at 794-95. An extreme case, where the government places its "weight behind an obvious effort to proselytize on behalf of a particular religion," could represent "the first step down the road to an establishment of religion." *Allegheny*, 492 U.S. at 661, 664 (Kennedy, J.). But absent an intent to proselytize, when the government's "act of recognition or accommodation is passive and symbolic," "any intan-

gible benefit to religion is unlikely to present a realistic risk of establishment." *Id.* at 662.

The other limitation on government action in this sphere is that it cannot coerce anyone to adopt a particular tenet or belief. But the mere existence of a legislative-prayer opportunity is not coercion. Coercion occurs when an individual is *required* to participate in religious activities. *Cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."). In *Zorach v. Clauson*, for example, this Court held that a release-time program, which permitted students to leave public school to receive religious instruction, did not exert coercive influence on students who chose not to avail themselves of the program. 343 U.S. at 311-14. In upholding the program, the Court emphasized the fact that students were not compelled to attend the religion classes. *Id.* at 311.

By the same token, an individual is not coerced by a civic acknowledgment of religion so long as that individual is not required to participate in it or assent to the views expressed. The Framers' understanding of ceremonial acknowledgments of religion hinged, in part, on an understanding that people should be tolerant of their fellow citizens' differing views. *See Marsh*, 463 U.S. at 792 (noting Samuel Adams's statement that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue" with whom he disagreed (internal quotation marks omitted)). Indeed, the expectation that citizens should be respectful of others' religious beliefs is consistent with this Court's broader First Amendment jurisprudence, which presupposes that citizens will

be exposed to a variety of viewpoints that they may disagree with or even find offensive. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 26 (1971). Because there is no evidence here that the Town compelled anyone to pray or to agree with the viewpoints of the prayer-givers, or that it conditioned any governmental benefits on participation, the mere fact that attendees at meetings might disagree with a prayer is insufficient to constitute an Establishment Clause violation.

"[T]he measure of constitutional adjudication" in the Establishment Clause context "is the ability and willingness to distinguish between real threat and mere shadow." *Schempp*, 374 U.S. at 308 (Goldberg, J., concurring). Absent evidence of exploitation or coercion, however, the risk posed to religious liberty by legislative prayer is no more than "mere shadow." *Id.* The longstanding coexistence of legislative prayer with the twin constitutional mandates of disestablishment and religious liberty "gives abundant assurance that there is no real threat while this Court sits." *Marsh*, 463 U.S. at 795 (internal quotation marks omitted).

C. THE "ENDORSEMENT" TEST IS CONTRARY TO A PROPER UNDERSTANDING OF THE ESTABLISHMENT CLAUSE, AND AT MINIMUM, SHOULD NOT EXTEND TO THE LEGISLATIVE-PRAYER CONTEXT.

In sharp contrast to *Marsh*'s historical analysis, the "endorsement" test derived from *Lemon* and applied by the court below conflicts with a historical understanding of the Establishment Clause and does more to undermine the protections guaranteed by the Religion Clauses than to safeguard them.

1. Whereas *Marsh*'s approach provides breathing room to prayer-givers to express their religious beliefs consistent with the dictates of their own consciences, the "endorsement" test impermissibly enmeshes the government in disputes over the appropriateness of prayer content. Specifically, the approach adopted by the court of appeals encourages federal, state, and local deliberative public bodies to supervise and censor prayers, in the hope of ensuring that, individually or collectively, they cannot be seen as affiliating the government with a particular religion.

Such censorship, however, is precisely what this Court declared unconstitutional in *Lee*. There, the Court clearly held that the Establishment Clause prohibits school officials from superintending the content of prayers to ensure that they are nonsectarian because it "is a cornerstone principle of [the Court's] Establishment Clause jurisprudence that it 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." 505 U.S. at 588 (internal quotation marks omitted). Religious beliefs, and the manner in which they are expressed, are "too precious to be either proscribed or prescribed by the State." *Id*. at 589.

It is impossible to apply the Second Circuit's "endorsement" test without parsing the content of the prayer at issue and making assessments about whether certain prayers are, individually or collectively, too religious. To conclude that the Town had endorsed Christianity, the Second Circuit not only evaluated the challenged prayers' religious language, but also went so far as to dissect the syntax of the

sentences in which those words were used. Pet. App. 23a (noting with disapproval that prayers made use of the "first-person plural[s]" "us," "our," and "we").

Marsh, of course, prohibited such parsing, absent cause for concern that the prayer opportunity had been exploited in furtherance of an impermissible objective. It did so for good reason: Close parsing of prayer language "not only embroils judges in precisely those intrareligious controversies that the Constitution requires [courts] to avoid, but also imposes on [the courts] a task that [they] are incompetent to perform." *Rubin*, 710 F.3d at 1100. As Justice Souter stated in *Lee*, there is hardly a task "less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than that of distinguishing "'sectarian' religious practices" from "ecumenical" ones. 505 U.S. at 616-17 (Souter, J., concurring); *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1272 (11th Cir. 2008) (noting that courts "would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions").

The task of distinguishing those isolated words and phrases that could be seen as affiliating the government with religion from those that do not—to say nothing of the difficulty of carrying out that task with respect to months or even years of prayers offered from a variety of different faith perspectives—is daunting. For example, references to "Jesus," "Allah," "Muhammad," and "Buddha" may be easy to categorize. *But see Hinrichs v. Bosma*, No. 05-813, 2005 WL 3544300, at *7 (S.D. Ind. Dec. 28, 2005) (holding that prayers addressed to Allah do not affiliate the government with Islam). Other phrases like "Lord of Lords" and "King of Kings" may provoke dif-

ferences of opinion; one court has designated those as comfortably ecumenical, *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 284 (4th Cir. 2005), but those phrases are used to refer to Jesus in the New Testament. *See Revelation* 19:16. The Second Circuit's "reasonable" observer might conclude that other Judeo-Christian references—such as "Lord" and "Moses"—have the impermissible effect of making adherents to the Hindu or Muslim religion feel like outsiders. *See Joyner*, 653 F.3d at 364 (Niemeyer, J., dissenting).

Respondents are similarly confused as to what prayers would or would not be appropriate, further highlighting the difficulty that would be faced by elected officials and courts forced to administer the "endorsement" test. *See*, *e.g.*, Pet App. 45a (noting one of the respondent's confusion regarding whether prayer in the name of Allah would be impermissible). Notably, one of the respondents in this case candidly admitted that she could not determine whether various phrases are sufficiently nonsectarian because she is "not . . . a theologian." C.A. App. A769. But neither are the judges who sit on this Nation's courts, and a legal test that requires them to act as if they were cannot be reconciled with this Court's precedents.

The "endorsement" test's task of distinguishing prayers that are "too" religious from those that are sufficiently stripped of religious content casts the Court in the ill-equipped role of "a national theology board." *Allegheny*, 492 U.S. at 678 (Kennedy, J.). Requiring the courts to decide whether a prayer practice is constitutional based on "an unguided examination of marginalia is irreconcilable with the imperative of applying neutral principles in constitu-

tional adjudication." *Id.* at 676. Establishment Clause litigation should not be handled "as if it were a trademark case" with experts testifying whether one religion is more or less like another or witnesses testifying whether they would be offended by four mentions of "Jesus" as opposed to five. *Id.* (internal quotation marks omitted).

2. Application of the "endorsement" test in the legislative-prayer context would also threaten rights protected by the Free Speech and Free Exercise Clauses. The Town's prayer policy offers private individuals a forum in which to open meetings of its legislative body in a manner consistent with their own consciences. The Town's policy is neutral and permits volunteers of any faith tradition, or no faith tradition at all, to deliver an invocation. The Town exercises no editorial control over the invocations. The prayers that resulted from this policy thus reflect the personal beliefs of the prayer-givers, in keeping with the rights protected by the Free Speech and Free Exercise Clauses.

As the Second Circuit made clear below, such facts hardly matter under its "endorsement" test. According to the court of appeals, many of the invocations at issue conveyed a message of endorsement to a "reasonable" observer because they contained explicitly Christian references, used the first-person plural, or invited members of the audience to participate. Pet. App. 20a-23a. But it may often be the case that prayer-givers hold religious views that *require* them to incorporate such references into their prayers. Brief of *Amici Curiae* Dr. Mark L. Bailey *et al*. in Support of the Petition for a Writ of Certiorari at 11, No. 12-696 (Jan. 7, 2013). Thus, the Second Circuit's "endorsement" test gives some prayer-givers

an untenable choice: check their faith at the door and offer only sanitized versions of prayers, or run the risk that their prayers will violate the Establishment Clause.

3. Relatedly, such applications of the "endorsement" test to legislative prayer would also have the effect of promoting a "latent hostility" toward religion. *Allegheny*, 492 U.S. at 657 (Kennedy, J.). As noted above, the Establishment Clause allows the government latitude to acknowledge and accommodate different religious beliefs. Adherence to the Establishment Clause thus does not require the State to engage in viewpoint discrimination among potential prayer-givers. In fact, to do so would "foster[] a pervasive bias or hostility to [some] religion[s], which [would] . . . undermine the very neutrality the Establishment Clause requires." *Rosenberger*, 515 U.S. at 846.

The approach taken by the court of appeals to the "endorsement" test, however, necessarily leads to this sort of discrimination. Under that approach, governments must censor some views in a quixotic quest to strike what might look like a "proper balance" to a supposedly neutral observer.

The "endorsement" test likewise discourages legislative prayer in municipalities where the population is not religiously diverse. In such municipalities, the government may be unable to find a cross-section of volunteer prayer-givers large enough to enable the Second Circuit's "reasonable observer" to conclude that the prayer practice is "substantially neutral amongst creeds." Pet. App. 20a. The standard thus has the effect of making municipalities "think carefully before adopting legislative prayer." Pet. App. 27a. Discouraging religious accommoda-

tion in this way, however, is anathema to this Nation's traditions and signifies a "callous indifference toward religious faith" not required by this Court's cases and our Nation's traditions. *Allegheny*, 492 U.S. at 663-64 (Kennedy, J.). By discouraging historical prayer practices, the "endorsement" test "prefer[s] those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. Nothing in the Constitution requires that outcome.

Moreover, by flipping *Marsh*'s presumption of constitutionality on its head, the "endorsement" test would effectively require courts to serve as "jealous guardians of an absolute 'wall of separation,'" an act which sends a "clear message of disapproval" to the religious. *Allegheny*, 492 U.S. at 657 (Kennedy, J.). By "disabling the government from . . . recognizing our religious heritage," the Second Circuit's application of the "endorsement" test "evince[s] a hostility to religion." *Van Orden*, 545 U.S. at 684 (plurality opinion).

Indeed, the "endorsement" test threatens national traditions of legislative prayer and other civic acknowledgements of religious belief that are rooted in centuries of history. That is because the identity of a prayer-giver or the content of a prayer could cause a putatively "neutral" observer—depending on the characteristics of such an observer—to conclude that the government has affiliated itself with a particular religion.

Under the "endorsement" test as applied by the Second Circuit, invocations delivered by Christian prayer-givers at recent presidential inaugurations would be suspect, *see supra* at 33, as would the prayer practice used by the Nebraska legislature in *Marsh* itself. *See supra* at 26 (discussing dissenting

opinions in *Marsh*); *see also Allegheny*, 492 U.S. at 673 (Kennedy, J.) ("If the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation."); *cf. also* Palmer Br. 8-10. Rather than giving "government some latitude in recognizing and accommodating the central role religion plays in our society," *Allegheny*, 492 U.S. at 657 (Kennedy, J.), the Second Circuit's test encourages government to minimize religion's societal role. That is not consistent with our Nation's traditions or a proper understanding of the Religion Clauses.

4. Application of the "endorsement" test to legislative prayer also has the unfortunate, added side-effect of providing a "heckler's veto" to individuals who may disagree with the personal religious expression of a legislative prayer-giver. By focusing on whether the prayer practice "'sends a message to nonadherents that they are outsiders [and] not full members of the political community,'" *Allegheny*, 492 U.S. at 595 (Blackmun, J.) (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)), the endorsement approach empowers nonreligious people to challenge legislative-prayer practices simply on the ground that they disagree with what they see as the prayers' messages. But this Court has specifically "decline[d] to employ Establishment Clause jurisprudence using a modified heckler's veto" based on the perceptions of certain members of an audience. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001).

The heckler's veto is the wrong model for Establishment Clause jurisprudence because the Clause is not aimed at protecting individuals from feeling offended. *See Lee*, 505 U.S. at 597 ("People may take offense at all manner of religious as well as nonreli-

gious messages, but offense alone does not in every case show a violation."). Rather, the core purpose of the Clause is to prevent citizens from being coerced into religious participation. *See supra* Section II.B. Legislative prayer, like speech in general, "is not coercive" because "the listener may do as he likes." *Am. Jewish Cong. v. City of Chicago*, 827 F.2d 120, 132 (7th Cir. 1987) (Easterbrook, J., dissenting). No one is compelled to deliver or join in the invocations offered at the Town board meetings. And anyone who disagrees with the message conveyed by the prayers is free to ignore the prayer-giver, sit silently, or leave the room, just as he is free to do when he disagrees with any other form of speech uttered at a session of a public deliberative body. *See Allegheny*, 492 U.S. at 664 (Kennedy, J.). Fears that a handful of individuals may hear legislative prayers offered voluntarily by private citizens and feel like outsiders are not sufficient justifications to trump the Court's historical understanding of the Establishment Clause and the unbroken tradition of legislative prayer.

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The problems associated with the "endorsement" test are not limited to the legislative-prayer context. Rather, this Court has invoked the test to invalidate other public acknowledgments or accommodations of religious belief without any showing that the challenged conduct established religion or coerced adherence to any particular faith. *See*, *e.g.*, *Allegheny*, 492 U.S. at 601 (crèche display at county courthouse); *McCreary*, 545 U.S. at 869 (Ten Commandments display). Whenever it is used, the "endorsement" test subjects public acknowledgements and accommodations of citizens' sincerely held religious beliefs to

oversight by an ahistorical, judicially created abstraction—the "reasonable observer."

The construct of the "reasonable observer" is fatally flawed. He or she is a "purely fictitious character" who seems to "perceive precisely as much, and only as much, as its author wants it to perceive." Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 292 (1987). As a result, "the endorsement test is . . . no test at all, but merely a label for the judge's largely subjective impressions[,] . . . obscuring intuitive judgments made from the individual judge's own personal perspective." Paulsen, *supra*, at 815-16. Not surprisingly, the "endorsement" test has produced irreconcilable results in this Court and the lower courts. *See generally Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from the denial of certiorari) (collecting cases).

Far from being a welcome "refine[ment]" of this Court's much-criticized *Lemon* test, *Allegheny*, 492 U.S. at 592, the "endorsement" test inherited *Lemon*'s weaknesses: Both tests are incapable of consistent application, enmesh the judiciary in making doctrinal judgments best left to particular individuals and religious communities, and ultimately threaten religious pluralism and free expression. *See Am. Atheists*, 132 S. Ct. at 14-23 (Thomas, J.); *Lamb's Chapel*, 508 U.S. at 398-401 (Scalia, J., concurring in the judgment), *Edwards*, 482 U.S. at 636-40 (Scalia, J., dissenting); *Wallace*, 472 U.S. at 108-114 (Rehnquist, J., dissenting).[10] It also makes it

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[10] Notably, only eight years ago, Justice Scalia observed that a "majority of the Justices on the . . . Court" at that time had "re-

impossible for government officials to know, *ex ante*, whether their conduct and policies comport with the Constitution. "It is irresponsible to make the Nation's legislators walk this minefield." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 768-69 n.3 (1995) (plurality opinion). *Lemon* and its endorsement-test offspring should be replaced with an approach that is more faithful to the original meaning of the Religion Clauses and respectful of our Nation's religious heritage. At minimum, the test is an inappropriate standard for analyzing the constitutionality of legislative-prayer practices.

III. THE TOWN'S NEUTRAL POLICY PERMITTING VOLUNTEER PRAYER-GIVERS OF ANY OR NO FAITH TO DELIVER UNCENSORED INVOCATIONS IS CONSTITUTIONAL UNDER ANY TEST.

This Court's decision in *Marsh*, informed by a historical understanding of the Religion Clauses, provides the proper lens through which to evaluate and uphold the Town's legislative-prayer practice. But that practice, which permits citizens from any or no faith tradition to provide an uncensored invocation, passes constitutional muster under any standard this Court might apply.

1. Even leaving aside the fatal shortcomings of the "endorsement" test described above, this Court's precedents make clear that, at minimum, "the reasonable observer in the 'endorsement' inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]." *Good News Club*, 533 U.S. at 119 (in-

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pudiated the brain-spun '*Lemon* test.'" *McCreary*, 545 U.S. at 890 (Scalia, J., dissenting).

ternal quotation marks omitted) (alteration in original); *see also McCreary*, 545 U.S. at 863; *Pinette*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment).

Any well-informed, impartial observer would deem the Town's practice of opening sessions with an invocation permissible for at least two reasons. First, the observer would be acquainted with the Nation's centuries-long history of legislative prayer, and would conclude that the historical evidence "suggest[s] more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the [practice] as amounting, in any significantly detrimental way, to a government effort to" establish religion. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment); *see also id.* at 699 (noting, per *Marsh*, "the Establishment Clause's tolerance . . . of the prayers that open legislative meetings"). For this reason, Justice O'Connor recognized in her concurring opinion in *Lynch* that "governmental 'acknowledgments' of religion [such] as legislative prayers of the type approved in *Marsh*" do not amount to "endorsement" of religion. *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). In contrast, the amnesiac observer employed by the Second Circuit ignored this history in declaring the Town's practice an impermissible endorsement.

Second, any well-informed reasonable observer would be aware that the Town's policy for selecting prayer-givers is facially neutral and that there is no evidence the Town exploited the prayer opportunity to convey a particular message or advance or proselytize for a particular faith. Pet. App. 20a, 22a. Neutral policies of this sort do not amount to an "en-

dorsement" of religion. That is true even if neutral outcomes do not result. *See Zelman*, 536 U.S. at 658 (declining to "attach constitutional significance to the fact that 96% of scholarship recipients . . . enrolled in religious schools"). No truly reasonable and fully informed observer could conclude that legislative prayers offered by private volunteers from multiple faith traditions according to a facially neutral policy affiliated the Town with or endorsed any particular religion.

2. The Town's practice would also be constitutional if this Court chose to evaluate it under its limited-public forum jurisprudence, which affords protection to private individuals who express their views in a forum created by the government for a particular purpose that is equally open to all citizens.

Marsh confirms that the government does not take even "a step toward establishment" when it employs a government official to invoke Divine guidance on a deliberative public body, even when the prayers are often explicitly Christian. 463 U.S. at 792, 793 n.14. It thus follows that *Marsh* permits government to open a forum that grants private citizens the opportunity to open a session of their legislative body with an invocation consistent with their own personal religious beliefs.

In a limited public forum, the government may confine acceptable speech to certain subjects and speakers, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983), and can restrict the content of the speech to certain topics so long as the restrictions are reasonably related to the purpose of the forum and viewpoint neutral. *See Good News Club*, 533 U.S. at 106-07. Here, the

Town's forum for voluntary invocations meets the parameters of this test.

Under the Town's practice, unpaid private volunteers from any or no religion are permitted to deliver an opening statement according to the dictates of their own consciences and free from any form of governmental guidance or censorship. The Town neither controlled nor "effectively controlled" the viewpoint of the citizens' speech. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560 (2005). Nor is there any indication, for example, that the Town has "enlist[ed] private entities to convey its own message." *Rosenberger*, 515 U.S. at 833. Rather, the Town simply provided a neutral opportunity for its citizens to speak, and did not "promote any of the particular ideas aired." *Widmar*, 454 U.S. at 271-72 n.10. In fact, because private, volunteer citizens with no connection to the Town's government delivered invocations, any religious content resulted from the speakers' own choices and could not have violated the Establishment Clause. *See Rosenberger*, 515 U.S. at 846; *cf. Mueller v. Allen*, 463 U.S. 388, 399 (1983) ("no imprimatur of state approval" of religion where religious choice is made by private individuals (internal quotation marks omitted)).

The Town could not have censored its citizens' views based on their religious content without engaging in impermissible viewpoint discrimination. *Cf. Good News Club*, 533 U.S. at 119; *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993). Rather, once the Town established an opportunity for private citizens to open the legislative session and allowed all to participate, the freely held views of its citizens are entitled to constitutional protection and cannot be disturbed.

IV. THE NATION'S LONGSTANDING AND WIDELY PRACTICED TRADITION OF LEGISLATIVE PRAYER IS WORTHY OF PROTECTION AS A PERMISSIBLE ACCOMMODATION OF RELIGIOUS BELIEFS.

Legislative prayer has been a fixture of this Nation's democracy since the Founding. Deliberative public bodies at every level of government—from the United States Congress to local municipalities—open their sessions with prayer. Every state contains at least one legislative chamber that opens its sessions with an invocation. National Conference of State Legislatures, Prayer Practices, *in Inside the Legislative Process*, at 5-148 (2002), *available at* http://www.ncsl.org/documents/legismgt/ILP/02Tab5Pt7.pdf (listing all states except for New York and South Carolina, neither of which responded to the survey); *see also* N.Y. Assembly R. VI, § 2(b); N.Y. Sen. R. X, § 4(a); S.C. Sen. R. 32A.[11]

In reliance on this Court's precedents and more than 200 years of history, deliberative public bodies are permitted to carry forward a rich cultural tradition that both predates the Founding and that acknowledges the solemnity of their proceedings and the various religious heritages of their particular constituencies. For example, some legislative bodies employ paid chaplains, while others rely on visiting

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11 It is worth noting, however, that the Hawaii Senate recently ended its practice of legislative prayer due to threats of litigation. *See* Kerry Picket, *Hawaii Senate Becomes First Legislative Body To End Daily Prayer*, Wash. Times Water Cooler Blog (Jan. 21, 2011, 4:44 PM), http://www.washingtontimes.com/blog/watercooler/2011/jan/21/hawaii-senate-becomes-first-legislative-body-end-d/.

chaplains or volunteer prayer-givers.[12] Some provide guidelines for delivering opening invocations; others do not.[13] Some review prayers before they are presented, while others do not.[14] So long as the legislative bodies do not exploit the prayer opportunity to proselytize or to advance or disparage any particular religion or exercise editorial control over prayer content, all of these prayer practices are permissible under *Marsh*.

If respondents' brand of the "endorsement" test were applied to evaluate the constitutionality of invocations offered at legislative sessions, Congress's legislative-prayer practice as well as other longstanding practices at the state and municipal levels would be cast into serious doubt. That is unfortunate, because the tradition of legislative prayer is well worth preserving. The Town's prayer practice (like those employed by deliberative bodies nationwide) provides prayer-givers with the opportunity to offer an invocation according to the dictates of their own consciences, and for citizens to take comfort that their government is operating "with a firm reliance on the protection of divine Providence." The Declaration of Independence para. 5 (U.S. 1776). Such prac-

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12 Like the Town, legislatures in thirty-seven States have not designated a permanent chaplain to deliver their opening invocation. *See* Prayer Practices, *supra*, at 5-158. Legislatures in twelve States do not rotate visiting chaplains among religions. *Id.* at 5-171.

13 Legislatures in thirty States do not provide prayer-givers with guidelines for the delivery of an opening prayer. *Id.* at 5-153.

14 Of the states that responded to the National Council of State Legislature's survey, only Florida and Ohio review prayers before they are given. *Id.* at 5-157.

tices also have the beneficial effects of "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

The Second Circuit's application of the "endorsement" test, by contrast, threatens to stifle religious expression and communicate a message to people in many American communities that the expression of sincerely held religious beliefs is unwelcome and unacceptable in the public square. Indeed, the court of appeals candidly acknowledged that application of the "endorsement" test in the context of legislative prayer "may well prompt municipalities"—and, presumably, states and the federal government—"to pause and think carefully" about the practical vitality of operating a constitutional legislative-prayer practice. Pet. App. 27a.

Such a restrictive test has no basis in the text, structure, history, or purposes undergirding the Establishment Clause, and borders on a "callous indifference," *Lynch*, 465 U.S. at 673, or a "latent hostility toward religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious." *Allegheny*, 492 U.S. at 657 (Kennedy, J.). The ironic, and tragic, result is that application of the "endorsement" test would "promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

That should not be: As this Court has recognized, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313. Therefore, "[g]overnment policies of accommo-

dation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *Allegheny*, 492 U.S. at 657 (Kennedy, J.). Legislative bodies throughout this country should have the freedom to acknowledge and accommodate the religious heritage of their citizens by adopting a practice substantially similar to one adopted by the very people who drafted the Establishment Clause, thereby participating in this Nation's "unbroken history" of legislative prayer. *Marsh*, 463 U.S. at 792.

CONCLUSION

This Court's historical analysis in *Marsh* affirms the important role of public prayer from the very founding of this Nation. Deliberative public bodies at every level of government—from the United States Congress to the Town of Greece—have adopted legislative-prayer practices and solemnize their deliberative meetings with invocations. This widespread practice reflects the deeply embedded historical tradition of our Nation. Under *Marsh*, and in keeping with the proper understanding of the Constitution, legislative-prayer practices like those at issue here do not run afoul of the Establishment Clause. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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