American Bar Association
www.supremecourtpreview.org

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 Seven Prayer-Givers as *Amici Curiae* in Support of Petitioner

Barry A. Bostrom
Counsel of Record
Kaylan L. Phillips
ACTRIGHT LEGAL FOUNDATION
209 W. Main Street
Plainfield, IN 46168
(317) 203-5599
bbostrom@actrightlegal.org
Counsel for Amici Curiae

Table of Contents

Table of Authorities iii

Interests of *Amici Curiae* 1

Summary of the Argument 2

Argument 3

I. The Establishment Clause Does Not Apply to the Town's Legislative Prayer Policy 3

   A. The Establishment Clause Applies Only to Government Speech 3

   B. The Town's Legislative Prayer Policy Is Not Government Speech 5

      1. Government Speech Is Speech Controlled by the Government 6

      2. The Town Does Not Control the Speech of *Amici* and Other Private Individuals ... 7

II. *Amici* and Other Private Individuals Spoke in a Limited Public Forum 9

   A. The Government May Create Different Fora for Private Individual Speech 9

   B. The Government May Create a Limited Public Forum for the Solemnization of Board Meetings 11

   C. The Town Created Such a Limited Public Forum 12

III. The First Amendment Protects the Speech of *Amici* and Other Private Individuals 14

A. The Speech of *Amici* and Other Prayer-Givers Is Private Speech Protected Under the First Amendment............ 14

B. Censorship of Sectarian Speech Violates the First Amendment Prohibition on Viewpoint Discrimination.................................. 16

Conclusion 20

Table of Authorities

Cases

Ark. Educ. Television Comm'n v. Forbes,
523 U.S. 666 (1998)... 9-11

Bd. of Educ. of the Westside Cmty. Schs. v. Mergens,
496 U.S. 226 (1990)... 3

Chiu v. Plano Indep. Sch. Dist.,
260 F. 3d 330 (5th Cir. 2001).......................... 10

Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez,
130 S. Ct. 2971 (2010)..................................... 19

City Council of Los Angeles v. Taxpayers for Vincent,
466 U.S. 789 (1984) 16

City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n,
429 U.S. 167 (1976)... 10

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,
473 U.S. 788 (1985)... 9-11

County of Allegheny v. ACLU,
492 U.S. 573 (1989) 4

DeBoer v. Vill. of Oak Park,
267 F. 3d 558 (7th Cir. 2001)......................... 11

Everson v. Bd. of Educ. of Ewing Twp.,
330 U.S. 1 (1947)... 3

Galloway v. Town of Greece,
732 F. Supp. 2d 195 (W.D.N.Y. 2010) ....*passim*

Galloway v. Town of Greece,
681 F. 3d 20 (2d Cir. 2012) 8, 20

Good News Club v. Milford Cent. Sch.,
533 U.S. 98 (2001).................................. 4, 10, 16

Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.,
452 U.S. 640 (1981)... 10

Johanns v. Livestock Mktg Ass'n,
544 U.S. 550 (2005)..................................5-7, 14

Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,
508 U.S. 384 (1993)..................................... 4, 12

Marsh v. Chambers,
463 U.S. 783 (1983) ....*passim*

Perry Ed. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983).. 9

Pleasant Grove v. Summum,
555 U.S. 460 (2009)................................. 6, 14-16

Rosenberger v. Rector & Visitors of the Univ. of Va.,
515 U.S. 819 (1995) ....*passim*

Salazar v. Buono,
130 S. Ct. 1803 (2010)...................................... 4

Shelley v. Kraemer,
334 U.S. 1 (1948).. 5

Van Orden v. Perry,
545 U.S. 677 (2005).. 4

Ward v. Rock Against Racism,
491 U.S. 781 (1989).. 19

Widmar v. Vincent,
454 U.S. 263 (1981)... 10

Statutes and Constitutional Provisions

U.S. Const. Amend. I ....*passim*

Other Authorities

Joint Appendix 17-19

Interests of *Amici Curiae*[1]

Amici Curiae are private individuals living in or around the Town of Greece, New York (the "Town") that have given prayers before Town Board Meetings. *Amici* believe that their prayers are their own speech and are concerned about the effect this case will have on their First Amendment rights.

Dr. Robert Brado, the Associate Pastor of First Bible Baptist Church and Director of North Star Bible Institute in the Town of Greece, delivered the opening prayer at approximately four Board Meetings. Pastor Vince DiPaola, Senior Pastor at Lakeshore Community Church in Rochester, delivered the opening prayer at a Board Meeting on several occasions. Pastor Kirk Dueker, the Associate Pastor at Hope Lutheran Church in Rochester, delivered the opening prayer at a Board Meeting. Pastor George Grace, Pastor at First Bible Baptist Church in Rochester, delivered the opening prayer at a Board Meeting on several occasions. Pastor Nathan Miller, the Greece Campus Pastor at Northridge Church in Rochester, delivered the opening prayer at a Board Meeting. Rev. Anne O'Connor, Pastor of Aldersgate United Methodist Church in Rochester, delivered the opening prayer at a Board Meeting a few times. Pastor Larry Stojkovic,

---

[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief.

Senior Pastor at Hope Lutheran Church in Rochester, delivered the opening prayer at approximately three Board Meetings.

Summary of the Argument

The Establishment Clause only applies to government speech. Therefore, the legislative prayer policy of the Town of Greece ("the Town") implicates the Establishment Clause only if the prayers offered before the Town Board Meetings are government speech.

But speech by private citizens cannot be attributed to the government unless the government exercises sufficient control over the content. In this case, the Town does not control the content of the prayers or messages offered before the Town Board Meetings. Rather, the Town allows any individual to offer the prayer before the Board Meetings and does not review or censor any prayer. Thus, the Town's legislative prayer policy does not result in government speech but, instead, creates a limited public forum that is open to private individuals who desire to solemnize government proceedings with a prayer. The solemnization of government proceedings with prayer was affirmed as a legitimate purpose by this Court in *Marsh v. Chambers*, 463 U.S. 783 (1983).

While the *Marsh* court analyzed legislative prayer under the Establishment Clause, this practice must be considered under the Free Speech Clause because legislative prayer is private speech endorsing religion, not government speech. Such private speech is fully protected under the Free Speech Clause and the Free Exercise Clause.

Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 841 (1995) (citing *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)). Thus, this case is about the freedom of speech, not the establishment of religion.

Amici request that this Court reverse the Second Circuit Court of Appeals and hold that the Town's legislative prayer policy creates a legitimate limited public forum for private individuals to engage in private speech.

Argument

I. The Establishment Clause Does Not Apply to the Town's Legislative Prayer Policy.

The Establishment Clause of the First Amendment applies to only government speech, not to private speech. The speech at issue in this case is not government speech because it is not controlled by or attributable to the government. Rather, the prayers and messages given at the beginning of Board Meetings are the speech of *amici* and other private individuals. Therefore, the Establishment Clause is not implicated by this case.

A. The Establishment Clause Applies to Only Government Speech.

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. The Establishment Clause has been incorporated to state governments through the Fourteenth Amendment. *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 15 (1947). The purpose of the Clause is to prevent the government from establishing an official church. *Id*.

Yet not all government recognition of religion rises to the level of establishment. *See*, *e.g.*, *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) ("Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause"). Avoiding a violation of the Clause "does not require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 130 S. Ct. 1803, 1818 (2010). *See also County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., dissenting) ("Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society").

In fact, the government must not, in an attempt to avoid violating the Establishment Clause, run afoul of the other First Amendment principles by discriminating against religious viewpoints when extending state benefits to private groups. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (school district preventing religious group from using a limited public forum is illicit viewpoint discrimination when similar, non-religious groups are allowed to use the forum); *Rosenberger*, 515 U.S. at 845-46 (university's refusal to reimburse costs for the printing of student religious newspaper was illicit viewpoint discrimination when the university reimbursed other student newspapers). Extending a benefit to religious groups based upon religion-neutral criteria does not offend the Establishment Clause's

guarantee of neutrality, but rather respects it. *Id*. at 839.

Similarly, in the legislative prayer context, this Court has held that solemnizing a legislative session with the invocation of divine guidance is not "an 'establishment' of religion or a step toward establishment." *Marsh*, 463 U.S. at 792. Rather, such a practice is simply the government's "tolerable acknowledgment of beliefs widely held among the people of this country." *Id*.

But the Establishment Clause is not even implicated unless there is government action. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) ("[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct."). Here, the Establishment Clause is not implicated as the speech in question is not government speech but is instead attributable to private individuals.

B. The Town's Legislative Prayer Policy Is Not Government Speech.

The courts below, narrowly focusing on whether the Town's policy violates the Establishment Clause, failed to consider the threshold question of whether the prayers given by *amici* and others were even government speech. Government speech is speech that is *controlled* by the government. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005). As the undisputed record shows, the Town exerted no control over the speech at issue here. *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 197 (W.D.N.Y. 2010). Therefore, there is no government speech.

1. Government Speech Is Speech Controlled by the Government.

This Court provided guidance on determining whether speech is "government speech" in *Johanns*. There, two cattle associations challenged a mandatory congressional beef promotional program as compelled speech in violation of the First Amendment. 544 U.S at 555-6.

Central to the associations' challenge was their assertion that the promotional program was not government speech because the content was "effectively controlled by a nongovernmental entity," the Cattleman's Beef Promotion and Research Board. *Id.* at 560. Specifically, all "promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary [of Agriculture.]" *Id.*

This Court disagreed, finding that the speech was controlled by the government as Congress and the Secretary established, implemented, and approved the entirety of the promotional program. *Id.* at 561; *see also Pleasant Grove v. Summum*, 555 U.S. 460, 461 (2009) (finding government speech when "City 'effectively controlled' the messages . . . by exercising 'final approval authority'") (internal citations omitted). Therefore, "when . . . the government sets the overall message to be communicated and approves every word that is disseminated," the message is still government speech even if the government "solicits assistance from nongovernmental sources in developing specific messages." *Johanns*, 544 U.S. at 562.

Yet the district court and the Second Circuit failed to analyze the threshold question of whether the prayers offered as a result of the Town's policy are even government speech. Had the courts done so, they would have declined to reach the Establishment Clause analysis and dismissed Respondents' claims.

2. The Town Does Not Control the Prayers of *Amici* and Other Private Individuals.

The prayers given by *amici* and other private individuals are not government speech because the government did not control the message. Unlike the government program in *Johanns,* where a nongovernmental entity implemented the government's message, the messages of the prayers are controlled by, and therefore attributable only to, the private speakers. The Town merely created a forum for the speech of *amici* and other private individuals.

It is undisputed that "the Town has never set any guidelines concerning the content of prayers, and has never asked to review the wording of prayers." *Galloway*, 732 F. Supp. 2d at 197. Similarly, the Town has never censored a prayer or turned away anyone who wanted to pray. *Id*. In fact, all *amici* that offered prayers before Town meetings believed they were doing so on his or her own behalf and not on behalf of the Town.

Despite no evidence of governmental control and citing only the use of common vernacular such as "let 'us' pray" and "'we' ask," the Second Circuit asserted that *amici* and other private individuals "appeared to speak on behalf of the town and its residents,

rather than only on behalf of themselves." *Galloway v. Town of Greece*, 681 F. 3d 20, 32 (2d Cir. 2012).

But the evidence shows, and *amici* reassert, that the prayers given were the speech of private individuals. Each prayer was spoken based on the speaker's own convictions and not based on the Town's control.

The district court and Second Circuit erred in assuming that their analyses must begin with *Marsh* instead of considering whether the Establishment Clause is implicated at all. *Galloway*, 681 F. 3d at 26; *Galloway*, 732 F. Supp. 2d at 220. While *Marsh* and the current case deal with a similar subject—prayers held before a government body—the facts of the current case are distinguishable from *Marsh*.

In *Marsh*, the Nebraska Legislature hired a Presbyterian pastor to open each legislative session with a prayer. This pastor was paid with public funds, rehired for 16 consecutive terms, and consistently offered prayers in the Judeo-Christian tradition. *Marsh*, 463 U.S. at 793. This Court held that, because of the longstanding history and tradition of legislative prayer, the pastor's speech did not violate the Establishment Clause. *Id.* at 795.

Notably, in *Marsh*, this Court did not expressly discuss whether the speech was government speech. But the Court was presented with facts supporting the conclusion that the government selected the speaker and controlled the speech, a conclusion that cannot be reached in the present case.

For example, unlike the singular, paid pastor in *Marsh*, the Town allows any individual to offer the invocation (even those who are not religious) and it

does not pay any of the prayer-givers. *Compare Galloway*, 732 F. Supp. 2d at 197, with *Marsh*, 463 U.S. at 793. The Town's distinct lack of control over the message of the prayer-givers shows that the prayers were private speech, not government speech.

II. *Amici* and Other Private Individuals Spoke in a Limited Public Forum.

In addition to the government not controlling the speech, the speech of the various individuals before the Town Board meetings took place in the context of a limited public forum that is generally available to a class of speakers. Speech in a limited public forum is protected by the First Amendment.

A. The Government May Create Different Fora for Private Individual Speech.

This Court has recognized three types of fora. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985). First, there is the traditional public forum, which may or may not be created by the government. These are areas "devoted to assembly and debate," *Perry Educ. Assn v. Perry Local Educators' Assn*, 460 U.S. 37, 45 (1983), which are "open for expressive activity regardless of the government's intent." *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 678 (1998). Typical examples of public fora include sidewalks and public parks. Speech in a public forum is not government speech and is fully protected by the First Amendment. The government may restrict speech in a public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius*, 473 U.S. at 800.

Next, there is the limited public forum. These fora are established by purposeful government action to open nontraditional fora for expressive activity for a limited amount of time, *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), or for a limited class of speakers, *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), or for a limited number of topics, *City of Madison, Joint Sch. Dist. v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976). The government may reserve a forum for certain classes of people and for the discussion of certain topics so as to confine that forum to the limited and legitimate purposes for which it was created. *Rosenberger*, 515 U.S. at 829. Speech in a limited public forum is also private speech that is fully protected by the First Amendment and restrictions on such speech must be viewpoint neutral and reasonable in light of the purpose of the forum. *Good News Club*, 533 U.S. at 106-07.

Finally, other government properties are either nonpublic fora or not fora at all. *Forbes*, 523 U.S. at 677. The government may restrict access to such fora so long as the restrictions are reasonable and not calculated to suppress expression of a particular viewpoint. *Id.* at 677-8. Because of the control exercised by the government, speech in nonpublic fora is considered government speech. *Chiu v. Plano Indep. Sch. Dist.*, 260 F. 3d 330, 347 (5th Cir. 2001). In nonpublic fora, First Amendment protections are lessened for the speaker, but the likelihood of a violation of the Establishment Clause is increased. *See Cornelius*, 473 U.S. at 800.

B. The Government May Create a Limited Public Forum for the Solemnization of Board Meetings.

The distinction between a limited public and a nonpublic forum primarily turns on whether the government has made the property "generally available" to a class of speakers. *Forbes*, 523 U.S. at 679. The government has not created a limited public forum when it merely allows selective access for individual speakers. *Id.* If speakers are required to obtain permission to use the forum or if the government makes non-ministerial judgments in its selection process, then the forum is considered nonpublic. *Cornelius*, 473 U.S. at 803-4. The more selective the government is in granting access, the more likely the forum will be considered nonpublic. *DeBoer v. Vill. of Oak Park*, 267 F. 3d 558, 566 (7th Cir. 2001). On the other hand, if the selection process is simply ministerial and the forum is open to all of a certain class and permits all speech on a certain topic, a limited public forum has been created. *Cornelius*, 473 U.S. at 804.

The government may set up limited public fora in a variety of legitimate contexts. For example, public hospitals and airports may have chapels. These areas are designated to afford individuals an opportunity to worship. They are not open to any public use, and the government may legitimately limit the use to comport with the purpose of the space. Beyond that, however, the government does not exercise control over who may use the space or over the speech itself, other than for ministerial purposes, such as scheduling. Just as these worship spaces are legitimate, so too may the Town

legitimately create a time and space designated for prayer by individuals to solemnize the Town's meetings.

C. The Town Created Such a Limited Public Forum.

Here, the Town set up a limited public forum for solemnizing meetings. The forum is not a traditional public forum, but is a limited opportunity for private individuals to offer an invocation before Town meetings to solemnize the weighty task of governance. This Court, acknowledging the perennial traditions of the nation, recognized the validity of such a purpose. *Marsh*, 463 U.S. at 792. The forum was, therefore, legitimately limited to the solemnizing messages. The government "may legally preserve the property under its control for the use to which it is dedicated." *Lamb's Chapel*, 508 U.S. at 390.

More importantly, the prayer time was not a nonpublic forum because the Town did not limit access based on non-ministerial judgment or require prayer-givers to obtain permission. *Galloway,* 732 F. Supp. 2d at 197. Anyone, of any or no religion, can come forward and offer to give a solemnizing message or prayer, and no one has ever been rejected. *Id*. The Town will accept any volunteer to deliver his or her message or prayer and would not regulate the content of the message or prayer. *Id*. The Town's "selection process" is purely ministerial and consisted of nothing more than compiling a list of all religious leaders in the Town and contacting them, without exclusion, to extend invitations to offer the message or prayer. *Id*. at 217. The

necessities of order and efficient operation of meetings justified lining up prayer-givers in advance to ensure that the Town was not obligated to wait for volunteers and that each meeting was opened with a solemnizing message or prayer.

Furthermore, the creation of a limited public forum for offering solemnizing messages or prayers before a town meeting does not itself establish religion. Such a result would be inconsistent with the precedent established in *Marsh*. If the hiring of a chaplain to offer prayer before government meetings does not violate the Establishment Clause, as was the case in *Marsh*, then creating a limited public forum open to all volunteers to speak as they wish cannot violate the Establishment Clause. In the former instance, the speaker and the content of the speech are controlled by the government, while in the latter, the government does not dictate who speaks or what they say.

Because the Town has created a forum designed for the purpose of solemnizing government meetings and because individuals are invited or may volunteer without exclusion to speak as they see fit, this Court should reverse the Second Circuit and find that this practice does not result in government speech, but private speech in a limited public forum, and, therefore, does not implicate Establishment Clause concerns at all.

III. The First Amendment Protects the Speech of *Amici* and Other Private Individuals.

The First Amendment states that "Congress shall make no law…abridging the freedom of speech." U.S. Const. amend. I. While the prayer-givers engaged in speech on government property, "the government does not have a free hand to regulate private speech on government property." *Summum*, 555 U.S. at 469. Where a government has created a limited public forum, such as an opening prayer before a town board meeting, restrictions on speech "must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest." *Id.*

Because the speech of *amici* and other prayer-givers is private speech within a limited public forum that does not implicate the Establishment Clause, it is protected speech under the Free Speech Clause of the First Amendment. As there is no compelling government justification restricting this speech, enforcing Respondents' requested injunction would violate the prayer-givers' First Amendment rights.

A. The Speech of *Amici* and Other Prayer-Givers Is Private Speech Protected Under the First Amendment.

In offering a prayer before a Town meeting, *amici* and other prayer-givers engaged in private speech within a limited public forum. As such, their speech is not subjected to the same requirements of government speech under the Establishment Clause.

As in *Johanns*, this Court analyzed the distinction between private speech and government

speech in *Summum*. There, a religious organization sought to build a permanent religious monument in a government-owned public park. Although the park in question already contained at least eleven other monuments, including one depicting the Ten Commandments, the city denied the organization's request, explaining that the city's practice was to only put monuments in the park that "either (1) directly relate to the history of [the city], or (2) were donated by groups with longstanding ties to [the city's] community." *Id.* at 465. This Court stated that "government entities are strictly limited in their ability to regulate private speech" in traditional, *id.* at 469, and limited public fora, *id.* at 470. However, because the monuments were permanent structures on government property, this Court held that the placement of monuments was a form of government speech rather than private speech and upheld the city's decision. *Id.* at 472. This Court further justified its finding of government speech by stating that "[i]t certainly is not common for property owners to open up their property for the installation of permanent monuments that convey a message with which they do not wish to be associated." *Id.* at 471.

Unlike the religious group in *Summum*, the prayer-givers' speech here was not a permanent form of speech; their speech was only a temporary presence within a limited public forum. The Board "reserv[es the designated prayer time] for certain groups or for the discussion of certain topics" that include the prayers given. *Rosenberger*, 515 U.S. at 829. Because of its temporary nature, the private speech heard through the prayers given during the

Town Board meetings is set apart from government speech. The Town Board meetings have already been opened by numerous different prayer-givers, including *amici*, without interfering with the main work of the Town Board. Therefore, the prayers are private speech, made in a limited public forum, and any restrictions would be subject to strict scrutiny under the First Amendment. *See Summum*, 555 U.S at 469-70 ("Government restrictions on speech in a designated [or limited] public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.").

B. Censorship of Sectarian Speech Violates the First Amendment Prohibition on Viewpoint Discrimination.

Because the speech of *amici* and other private individuals fits "[i]n the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828 (citing *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)); *see also Good News Club*, 533 U.S. at 106-07 ("The State's power to restrict speech…is not without limits. The restriction must not discriminate against speech on the basis of viewpoint."); *see also Cornelius*, 473 U.S. 788. Respondents seek to eliminate the use of "sectarian" language, which is intended to mean "prayers that invoke a particular religion or particulars of a particular religion." *Galloway*, 732 F. Supp. 2d at 204 (internal citations omitted). Limiting the prayers to only "nonsectarian" language as Respondents desire would be a form of viewpoint discrimination in violation of the prayer-givers' First Amendment rights.

Respondents define “sectarian” language to be language that is specific to one religion. *Galloway*, 732 F. Supp. 2d at 204. Specifically, Respondents assert that the words “Jesus” and “Holy Spirit” are unacceptable. *Id.* Forcing speakers to exclude sectarian language, including words like “Jesus,” “Jesus Christ,” “Allah,” and “Holy Spirit,” *id.*, would affect certain prayer-givers while leaving others unaffected; it would force many of the prayer-givers to change the content of their speech. Therefore, adopting Respondents’ definition of sectarian language itself amounts to viewpoint discrimination that is prohibited under the First Amendment. For example, this restriction might censor much of a Christian prayer-giver’s message while leaving a Bahá’í prayer-giver’s message relatively uncensored. Such an example is demonstrated by a prayer given by Fr. Alex Bradshaw of Our Mother of Sorrows Church on March 15, 2005. A portion of his prayer, edited in an effort to placate Respondents’ objections, would read as follows:

> Let us pray. Lord, ~~God of all creation~~, we give you thanks and praise for your ~~presence and action~~ in the world. We look with anticipation to the ~~celebration~~ of ~~Holy Week~~ and ~~Easter~~. It is in the solemn events of next week that we find the very ~~heart and center of our Christian faith~~. We ~~acknowledge~~ the ~~saving sacrifice~~ of ~~Jesus Christ on the cross~~. We draw strength, vitality, and confidence from ~~his resurrection~~ at ~~Easter~~. ~~Jesus Christ~~, ~~who took away the sins~~ of the world, ~~destroyed~~ our

> ~~death~~, through ~~his dying and in his rising~~, ~~he has restored~~ our ~~life~~. Blessed are you, ~~who has raised up the Lord Jesus~~, ~~you who will raise us~~, in our turn, and put us by ~~His~~ side. We pray for peace in the world . . . We pray also for the protection of our armed forces . . . May this season of the year, of ~~Good Friday~~, followed by the ~~joy~~ of ~~Easter~~, be a time of hope for the future. We acknowledge the role of the ~~Holy Spirit~~ in our lives . . . So we pray . . . for the ~~guidance of the Holy Spirit~~. . . . Bless this Town of Greece and all who live here. Praise and glory be yours O Lord, now and forever more. ~~Amen~~.

J.A. 88a-89a. Comparatively, a portion of Thomas Lynch, Chairman of the Local Spiritual Assembly of the Bahá'í Community of Greece's prayer, similarly edited, would read as follows:

> O thou kind Lord, this gathering is turning to Thee, these hearts are radiant with Thy love, these minds and spirits are exhilarated by the message of Thy glad tidings. O God, let this American democracy become glorious in spiritual degrees, even as it has aspired to material degrees, and render this just government victorious…O God, this American nation is worthy of Thy favors and is deserving of Thy mercy. Make it precious and near to Thee through Thy bounty and bestowal. ~~Alláh-u-Abhá~~.

> And also, O thou kind Lord, these are Thy servants who have gathered in this meeting, have turned onto Thy kingdom, and are in need of Thy bestowal and blessing. O thou God, manifest and make evident the signs of ~~Thy oneness~~ that have been deposited in all the realities of life…Free us from the fetters of material existence…O God, resuscitate ~~us~~ …Every bestowal emanates from Thee, every benediction is Thine. Thou art mighty, Thou art powerful, Thou art the giver, and Thou art the ever bounteous. ~~Alláh-u-Abhá.~~

J.A. 127a-128a. Censoring the use of sectarian language, which is more likely to be employed by certain faiths, creates more than an "'incidental effect'" on speech and would render such a restriction on speech beyond the point of viewpoint neutrality. *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2971, 2994 (2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Additionally, censorship of nonsectarian language is viewpoint discrimination because the restriction is related to the content of the message. In order for censorship of speech to stand, it must be content neutral, and only "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral." *Ward*, 491 U.S. at 792. In this instance, however, the goal of the restriction would be to eliminate content that would align a prayer with a particular religion. In regards to the prayer from Fr. Alex Bradshaw, the content and message

desired from his prayer would be greatly altered by Respondents' requested relief barring what they define as "sectarian" language. Because the content of the message is censored, the restriction against nonsectarian prayer is viewpoint discrimination in violation of the First Amendment.

The real aim of Respondents' requested relief appears to be to silence Judeo-Christian language, not all sectarian language. As Respondents point out, "Christian clergy members have delivered nearly all of the prayers relevant to this litigation." *Galloway*, 681 F. 3d at 23. But, notably, the "[r]eligious congregations in town are primarily Christian." *Id*. at 24. In fact, only four prayers were given by non-Christians during the time period in question, *id*. at 23, only one of which, conducted by a Jewish layperson in 2008, offended Respondents. *Galloway*, 732 F. Supp. 2d at 207. Although the respondents do say that other religious terms, such as "Allah" in relation to Islam, would be sectarian as well, no prayers were conducted by an Islamic clergyman. Therefore, Respondents purported injury is directly related to the expression of Judeo-Christian beliefs, the targeted censorship of which cannot be allowed under the First Amendment.

Conclusion

The Establishment Clause ensures religious neutrality in government speech and action; it does not eradicate all private religious speech and action in the public square. The Town shows respect for the free speech rights of its citizens when it creates a limited public forum for the solemnization of the Town's Board Meetings. By ruling that such creation

is impermissible, the Second Circuit impermissibly censored the free speech of private individuals. This Court should prevent this unconstitutional censorship from occurring and reverse the judgment of the Second Circuit below.

Respectfully submitted,

Barry A. Bostrom
Counsel of Record
Kaylan L. Phillips
ACTRIGHT LEGAL FOUNDATION
209 W. Main Street
Plainfield, IN 46168
(317) 203-5599
bbostrom@actrightlegal.org
Counsel for Amicus Curiae

August 2, 2013