No. 12-696

In the Supreme Court of the United States

TOWN OF GREECE, NEW YORK,
Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Second Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. Co-counsel Deborah J. Dewart is the author of *Death of a Christian Nation* (2010) and holds a degree in theology (M.A.R., Westminster Seminary, Escondido, CA). JFF has made numerous appearances in this Court as *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Establishment Clause protects religious liberty and conscience by ensuring that Americans are not compelled to endorse, practice, or support a religious

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[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

mission. But "[i]t would be ironic indeed if this Court were to wield our constitutional commitment to religious freedom so as to sever our ties to the traditions developed to honor it." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 44-45 (2004) (O'Connor, J., concurring). The Constitution restricts government ties to religion while guarding private religious expression. These complementary concepts intersect in legislative prayer, a time-honored tradition this Court affirmed in light of American history. *Marsh v. Chambers*, 463 U.S. 783 (1983).

The Second and Fourth Circuits have both thrust governmental bodies into legal quicksand where they risk crippling liability in spite of carefully crafted invocation policies. The Fourth Circuit plunges government into a theological abyss by asserting that "in order to survive constitutional scrutiny, invocations must consist of the type of nonsectarian prayers that solemnize the legislative task and seek to unite rather than divide." *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 342 (4th Cir. 2011). The Second Circuit leaves municipalities in a twilight zone of confusion where—despite their best intentions and efforts—they "may still have trouble preventing the appearance of religious affiliation." *Galloway v. Town of Greece*, 681 F.3d 20, 34 (2d Cir. 2012). The Court admits that "the touchstone of our analysis must be *Marsh*, which is hard to read, even in light of *Allegheny*, as saying that denominational prayers, in and of themselves, violate the Establishment Clause." *Id.* at 29. But in spite of its repeated acknowledgment that *Marsh* does not mandate a nonsectarian policy (*id.* at 28, 33)—the Court creates a fuzzy "totality of the circumstances" test and concludes that the Town's policy and practice

affiliate it too closely with Christianity (*id.* at 34). *Galloway* thus circumvents *Marsh* and leaves local governments with virtually no choice but to abandon the historical, cherished American tradition of opening legislative sessions with an invocation.

One escape from this legal quagmire is to require evidence of "exploitation"—the standard announced in *Marsh* and followed recently by the Ninth and Eleventh Circuits. *Marsh v. Chambers*, 463 U.S. at 794-795; *Rubin v. City of Lancaster*, 710 F.3d 1087, 1094 (9th Cir. 2013); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, *33 (11th Cir. 2013); *see also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1273, 1277 (11th Cir. 2008). Any standard that restricts or bans "sectarian" references is unworkable and unconstitutional. So is any other standard where the government polices prayer. All the government can do is adopt a neutral selection process for inviting speakers to pray and respect the conscience of these volunteers by avoiding control or censorship where no "exploitation" is evident. *Marsh* provides a workable test, in sharp contrast to the hopelessly muddied *Galloway* and *Joyner* rulings.

ARGUMENT

I. ANY POLICY THAT EVALUATES PRAYER CONTENT WOULD CREATE INSURMOUNTABLE LEGAL HURDLES.

Legislative prayer is a unique genre sanctioned by this Court—a hybrid combining elements of public and private expression.

Unlike *Joyner*, *Galloway* does not attempt to mandate a non-sectarian prayer policy. But its "totality of the circumstances" analysis is equally untenable, improperly relegating the government to a role where it must evaluate the prayers of private citizens. The Second Circuit does not categorically exclude sectarian references but suggests that "the distinction between sectarian and nonsectarian prayers merely serves as a shorthand, albeit a potentially confusing one, for the prohibition on religious advancement or affiliation outlined in *Marsh* and *Allegheny*." *Galloway*, 681 F.3d at 28. This confusing "shorthand" would either thrust courts into forbidden theological territory or squelch the liberties of citizens who volunteer to pray for their governments. Such a classic Catch-22 violates both Establishment Clause and Free Speech principles. The government becomes enmeshed in religion if the prayers are government speech but risks viewpoint discrimination if they are private speech. Existing precedent does not require either alternative.

"There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 765 (1995), citing *Bd. of Educ. v. Mergens,* 496 U.S. 226, 250 (1990) (emphasis added). *Marsh* strikes the right balance and preserves liberty: "The *Marsh* test allows courts to guard against governmental promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition by refusing to police the content of prayers." Pet. 23.

Legislative prayer cases have not fleshed out the critical public-private speech distinction where *private* citizens pray in a *government* setting. Courts gloss over the difference. Two cases expressly hold that legislative invocations are government speech: *Simpson v. Chesterfield Cnty. Bd. of Comm'rs*, 404 F.3d 276, 288 (4th Cir. 2005); *Turner v. City Council*, 534 F.3d 352, 355 (4th Cir. 2008). Others presuppose government speech by using an Establishment Clause analysis: *Wynne v. Town of Great Falls*, 376 F.3d 292, 296-302 (4th Cir. 2004); *Snyder v. Murray City Corp.,* 159 F.3d 1227, 1231-34 (10th Cir. 1998); *Joyner*, 653 F.3d at 349; *Rubin*, 710 F.3d at 1091 n. 4; *Atheists of Fla.*, 713 F.3d at *32. *Galloway* follows the latter line of cases. *Galloway*, 681 F.3d at 26.

The Eleventh Circuit implicitly acknowledged the tension between public and private expression when it upheld one prayer policy against an Establishment Clause challenge while finding a prior policy unconstitutional because it excluded certain faiths. *Pelphrey*, 547 F.3d at 1268-79. The exclusion of particular faiths is tantamount to the viewpoint discrimination prohibited where *private* speech is at issue. The Tenth Circuit observed the "inversion of the usual posture" in some Establishment Clause challenges to legislative prayer. These cases often involve the member of a particular faith alleging the state has "established" a religion by allowing a government-sanctioned speaker to deliver an invocation while denying him the opportunity to pray. *Snyder,* 159 F.3d at 1231. The *Snyder* plaintiff complained when the city council denied him the opportunity to offer a "prayer" that mocked the genre itself (legislative prayer). The Court framed the issue

as an Establishment Clause challenge, but it reads more like a Free Speech claim alleging viewpoint discrimination. *Id.* at 1228.

Where private citizens pray in a government context, lines are not easily drawn. The government speech doctrine has only developed since *Marsh*. Outside the legislative prayer arena, some courts have used a four-factor test to distinguish government from private speech: purpose, editorial control, identity of the literal speaker, and ultimate responsibility for the content. *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1094-95 (8th Cir. 2000) (public radio station program was government speech); *Wells v. City & County of Denver,* 257 F.3d 1132, 1141 (10th Cir. 2001) (city's holiday display was government speech, allowing exclusion of atheist plaintiffs' "Winter Solstice"). Only one legislative prayer case has utilized the *Knights'* test. The Fourth Circuit applied it to conclude that Fredericksburg's nondenominational invocation policy did not violate the free speech rights of a Baptist minister (Turner) who was also a Council member. *Turner,* 534 F.3d at 355. The invocation was on the agenda (*id.* at 354), the Council exercised editorial control and the "literal speaker" was a Council member acting in his official capacity (*id.* at 355).

Most courts—including the Second Circuit—refuse to hold that the Constitution mandates a nonsectarian policy. *Galloway*, 681 F. 3d at 28; *Atheists of Fla.,* 713 F.3d at 38; *Turner,* 534 F.3d at 356; *Snyder,* 159 F.3d at 1233-34; *Pelphrey,* 547 F.3d at 1271 ("The taxpayers argue that *Allegheny* requires us to read *Marsh* narrowly to permit only nonsectarian prayer, but they

are wrong.") The Ninth Circuit reaches all the way back to 1800, when:

> ...to mark the death of George Washington, a legislative chaplain petitioned that all "may obtain unto the resurrection of life, through Jesus Christ our Lord; at whose second coming in glorious majesty to judge the world . . . those who sleep in him shall be . . . made like unto his own glorious body." Henry Lee III, *An Address and a Form of Prayer, in An American Prayer Book* 58-59 (Christopher L. Webber ed., 2008).

Rubin, 710 F.3d at 1093. Even *Joyner* declared only that "legislative prayer must strive to be nondenominational so long as that is reasonably possible." *Joyner*, 653 F.3d at 349.

Any demand that legislative prayer conform to a nonsectarian or other government-imposed standard is "fraught with constitutional peril" (*Rubin*, 710 F.3d at 1097)—a "remedy [that] comes with its own set of First Amendment infirmities" (*id*. at 1100). Even the Second Circuit warns that such a policy "runs into two sizable doctrinal problems"—establishing a civic religion plus the difficulty in reconciling such an approach with *Marsh*, even in light of *Allegheny*. *Galloway*, 681 F. 3d at 28-29. In addition to Establishment Clause concerns, government regulation of private prayer would be equally unlawful.

A. Government-Controlled Prayer Is Both Unconstitutional And Unworkable.

In spite of its illicit journey into theological territory, the Second Circuit warns that "[u]nder the First Amendment, the government may not establish a vague theism as a state religion any more than it may establish a specific creed." *Galloway*, 681 F.3d at 29.

If invocations are government speech, as courts often presume, the Establishment Clause precludes any policy that requires the government to monitor prayer content. Invocation speakers are comparable to the teachers in *Lemon*—they are not static like a book or monument, but persons who pray according to conscience. *Lemon v. Kurzman*, 403 U.S. 602, 619 (1974). Ongoing government surveillance of their prayers enmeshes the government in a theological exercise it is not competent to perform. Indeed, this Court signaled that a nonsectarian prayer policy might be constitutionally flawed. *Lee v. Weisman,* 505 U.S. 577, 588 (1992) ("it is no part of the business of government to compose official prayers for any group of the American people"—quoting *Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

A nonsectarian policy would be extraordinarily vague and impractical. How many sectarian references are "too many"? What time frame should be considered? Must speakers write their prayers and submit them in advance for approval? (That scenario raises the issue of prior restraint.) How does government control a speaker who violates the policy? The Second Circuit admitted that *Marsh* does not

mandate nonsectarian prayers but engaged in the very "parsing" *Marsh* forbids, analyzing the content of the Town's invocations without citing evidence of prohibited exploitation. *Galloway*, 681 F.3d at 28-29. The Court even suggested that the Town look beyond its borders to select clergy. *Id*. at 31. But how far must it look?

Any test that hinges on the frequency of sectarian references—as in *Joyner* and *Galloway*—is not only hopelessly subjective but compels the government to parse content. The Eleventh Circuit wisely noted that the line between "sectarian" and "nonsectarian" is "best left to theologians, not courts of law." *Pelphrey,* 547 F.3d at 1267. *Pelphrey* read *Turner* as declining to hold that *Marsh* mandates a non-sectarian prayer policy. "[T]he Establishment Clause does not absolutely dictate the form of legislative prayer." *Id.* at 1273, quoting *Turner,* 534 F.3d at 356; *see also Snyder,* 159 F.3d at 1233-34. *Snyder* also cautions that a government entity might fall "dangerously close to the 'quagmire' of 'excessive entanglement'" if a volunteer speaker were rejected on the basis of religious persuasion. *Id.* at 1231.

The government should never empower officials to censor private prayers. *Marsh* does not require that result, but instead cautions that courts must *not* consider the content *unless* there is already evidence "that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh v. Chambers,* 463 U.S. at 794-795, quoted by *Atheists of Fla.*, 713 F.3d at *38. In *Wynne*, the Fourth Circuit permitted "parsing" only because the record was already "replete with powerful

indication[s] that the Town Council did indeed 'exploit' the prayer opportunity 'to proselytize or advance' one faith." *Wynne,* 376 F.3d at 299, n. 4. *Wynne* is unusual because the Town Council—the government itself—refused to allow non-Christian prayers.

Even *Joyner* does not support *Galloway's* radical approach. The Fourth Circuit restricted sectarian references but did not decree an absolute ban. *Joyner*, 653 F.3d at 351 ("courts should not be in the business of policing prayers for the occasional sectarian reference"). Forsyth County's neutral policy welcomed a diversity of invocations speakers. Although a high percentage of the invocations contained sectarian references (*id*. at 344), this was solely the result of *private* choices—not *government* exploitation or influence. Under *Galloway's* rationale, even the most carefully crafted policy will fail if the random selection process results in too many volunteers from the same religious tradition, as it did in Forsyth County and the Town of Greece. That can easily happen if followers of a particular faith are concentrated in a region—and in the Second Circuit, the government is now obliged to look beyond its own borders, creating an even more unworkable standard and a heightened risk of litigation. *Galloway*, 681 F.3d at 31 ("The randomness of the process...was limited by the town's practice of inviting clergy almost exclusively from places of worship located within the town's borders."). Drawing the precise line immerses the government in religion by requiring it to evaluate the content or count the number of prayers from a particular faith. But *Marsh* only excludes aggressive advocacy. "[T]he mere fact a prayer evokes a particular concept of God is not enough

to run afoul of the Establishment Clause." *Snyder,* 159 F.3d at 1234, n. 10.

B. If The Prayers Are *Private* Speech, Government Oversight Of The Content Is Impermissible Viewpoint Discrimination.

Even in the context of a government-sponsored activity, the content of prayer must be "left to the particular prayer-giver's conscience, consistent with the rights to freedom of speech and religious expression." Pet. 22. The Eleventh Circuit recently reviewed a prayer policy that characterized invocations as the "voluntary offering of a private citizen." *Atheists of Fla*., 713 F.3d at *18. *Galloway* misses this point. The Second Circuit recognized the dangers of censorship but framed the problem as a risk the government might establish a "civic religion." *Galloway*, 681 F.3d at 34. That is indeed a risk, but the problem is that such a "religion" potentially transgresses private speech rights. The Ninth Circuit made the connection and cautioned that:

> [A]dopting a "vague theism" as civic religion would also risk shutting out those religious leaders who, perhaps for doctrinal reasons, are disinclined to restyle or dilute their prayers. *See* Robert J. Delahunty, "*Varied Carols": Legislative Prayer in a Pluralist Polity*, 40 Creighton L. Rev. 517, 526-27 (2007) ("Faced with the choice of praying in conformity with a government-imposed standard of orthodoxy or not praying at all, many clergy (to their credit) will choose not to pray at all.").

Rubin, 710 F.3d at 1100 n. 15. Under a mandatory "vague theism," viewpoint discrimination is inescapable. One Ten Circuit judge warned that it is:

> ...misguided...to read this single passage from *Marsh* [463 U.S. at 794-795] as standing for the far-reaching proposition that a governmental body can, in all circumstances, allow certain legislative prayers while censoring and barring others because they "proselytize" or "disparage" another faith or religious belief.

Snyder, 159 F.3d at 1237 (Lucero, J., concurring). *Snyder's* caution underscores the private speech component when community volunteers offer invocations. If the prayers are private speech, the government cannot censor the expression merely because it represents the viewpoint of a unique faith tradition rather than an elusive "civic religion."

The "identity of the invocational speaker" is a crucial element for legislative prayer in the Eleventh Circuit. *Pelphrey*, 547 F.3d at 1277. The speaker's identity varies in legislative prayer cases. Government agents were responsible for the invocations in *Marsh,* 463 U.S. at 784 (chaplain employed by state); *Wynne,* 376 F.3d at 294 (council member); and *Turner,* 534 F.3d at 353 (same). Private speakers said the prayers in *Simpson,* 404 F.3d at 279; *Pelphrey,* 547 F.3d at 1266; *Snyder,* 159 F.3d at 1228; *Joyner*, 653 F.3d at 343. It is difficult to conceive of these invocations as *government* speech. But in spite of the speakers' personal responsibility in *Joyner*, the Fourth Circuit dismissed the "identity of the speaker" as irrelevant (*Joyner*, 653 F.3d at 350) and invalidated the prayers

because of their "proximity...to official government business" (*id*. at 347). But where randomly selected private speakers are invited to pray without government oversight—as they commonly are in post-*Marsh* cases—the risk of impermissible viewpoint discrimination is high and cannot be so easily dismissed.

Several cases involving license plates highlight the dangers of viewpoint discrimination when government and private speech elements overlap:

> Although the Supreme Court has not yet recognized that speech can be governmental and private at the same time, its decisions on government speech and viewpoint discrimination provide instruction on whether the State's viewpoint discrimination in the license plate forum can stand.

Planned Parenthood of S.C., Inc. v. Rose, 361 F.3d 786, 795-796 (4th Cir. 2004). Two factors favored government speech while two others leaned toward private speech. *Id.* at 794, citing *Sons of Confederate Veterans, Inc. v. Comm'r of the Va. DMV,* 305 F.3d 241, 244-45 (4th Cir. 2002) (suggesting it is an "oversimplification [to assume] that all speech must be either that of a private individual or that of the government and that a speech event cannot be *both* private and governmental at the same time"). Suppression of a particular viewpoint—preventing the veterans' organization from including the Confederate flag in its design—was impermissible.

The Eleventh Circuit, tracking *Marsh*, explained that "[t]he 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray [but] instead prohibits purposeful discrimination." *Atheists of Fla.*, 713 F.3d at *35, citing *Pelphrey*, 547 F.3d at 1281-82 (holding that "categorical exclusion of certain faiths based on their beliefs is unconstitutional"). Such deliberate exclusion is tantamount to prohibited viewpoint discrimination where private speech is at issue.

In other Establishment Clause contexts, this Court has stressed the element of private choice, "holding time and time again that when a neutral government policy or program merely allows or enables private religious acts, those acts do not necessarily bear the state's imprimatur." *Rubin*, 710 F.3d at 1099. Modern invocation policies strive for inclusivity and facilitate the voluntary prayers of private citizens. It would be improper for the government to regulate those choices.

II. THE TOWN'S POLICY AND PRACTICE FITS SQUARELY WITHIN THE CONTOURS OF *MARSH*.

By refusing to police the content of prayers, *Marsh* provides a liberty-focused framework that "allows courts to guard against *governmental* promotion of a particular faith tradition, while respecting the right of any prayer-giver to offer an invocation in that individual's religious tradition." Pet. 23. *Marsh* established legislative prayer as a unique genre "with its own set of boundaries and guidelines." *Simpson,* 404 F.3d at 281, citing *Snyder,* 159 F.3d at 1232. It has

coexisted with disestablishment since colonial times. *Marsh,* 463 U.S. at 786.

Although history alone does not establish the constitutionality of a practice or create a vested right in violation of the Constitution, contemporaneous actions of the draftsmen shed light on their intent. *Id.* at 790. "[A]n unbroken practice...is not something to be lightly cast aside." *Walz v. Tax Comm'n,* 397 U.S. 664, 678 (1970). Legislative prayer is "part of the fabric of our society." *Marsh,* 463 U.S. at 792. *Marsh* involved a chaplain hired and paid by the state, but Congress has also historically practiced a system of inviting local clergy to officiate. *Simpson,* 404 F.3d at 286, citing *Marsh,* 463 U.S. at 789 n. 10. As *Turner* observed, "both varieties of legislative prayer...recognize the rich religious heritage of our country." *Turner,* 534 F.3d at 356. Moreover, courts have extended *Marsh* to comparable activities rooted in historical tradition: *Murray v. Buchanan*, 720 F.2d 689, 689 (D.C. Cir. 1983) (en banc) (paid legislative chaplain at the United States Congress); *Newdow v. Eagen,* 309 F. Supp. 2d 29 (D.D.C. 2004) (same); *Katcoff v. Marsh,* 755 F.2d 223 (2d Cir. 1985) (prayer offered by military chaplains on Army bases); *Newdow v. Bush*, 355 F.Supp.2d 265 (D.D.C. 2005) (Presidential Inauguration).

Even the *Marsh* dissent recognized that "government cannot, without adopting a decidedly *anti*-religious point of view, be forbidden to recognize the religious beliefs and practices of the American people as an aspect of our history and culture." *Marsh,* 463 U.S. at 810-811 (Stevens, J., dissenting). *Lemon* also attests to the importance of history in evaluating Establishment Clause claims, noting this Court's

rejection of a claim that tax exemptions for houses of worship might lead to establishment. That contention could not stand against "more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present." *Lemon v. Kurzman,* 403 U.S. at 624, citing *Walz v. Tax Comm'n,* 397 U.S. 664. This Court has rejected a "rigid, absolutist view of the Establishment Clause" that "would undermine the ultimate constitutional objective as illuminated by history." *Lynch v. Donnelly,* 465 U.S. 668, 678 (1984), citing *Walz v. Tax Comm'n,* 397 U.S. at 671. *Allegheny* qualified the role of history with its caution against affiliating the government with a particular religion, but noted that "legislative prayer does not urge citizens to engage in religious practice." *County of Allegheny v. ACLU Greater Pittsburgh Chapter,* 492 U.S. 573, 603 n. 52 (1989).

Modern prayer policies are "in many ways more inclusive than that approved by the *Marsh* Court." *Simpson,* 404 F.3d at 285; *see Atheists of Fla.*, 713 F.3d at 37 (Lakeland's policy more expansive than the one approved in *Pelphrey*). The *Marsh* chaplain was paid with public funds, while speakers in later cases are typically unpaid volunteers. *Id*. Governments now welcome a broad spectrum of religious leaders, in contrast to the Presbyterian minister employed for 16 years in *Marsh*. *Id*. The normal policy is to schedule speakers in a neutral manner that precludes government oversight. *Id*. These factors bring modern policies well within *Marsh*—and even enable them to pass more traditional Establishment Clause tests. A nonsectarian mandate—or any other approach requiring government regulation of prayer—would generate a whole new set of legal obstacles. Indeed,

"invalidating a practice of prayer more inclusive than that upheld in *Marsh* 'would achieve a particularly perverse result.'" *Pelphrey*, 547 F.3d at 1273, quoting *Simpson*, 404 F.3d at 287.

The Ninth Circuit recently hammered the importance of the government's role, summarizing the inquiry as "whether *the City itself* has taken steps to affiliate itself with Christianity" (emphasis added), not merely "the frequency of Christian invocations." *Rubin*, 710 F.3d at 1097. "Whatever the content of the prayers or the denominations of the prayer-givers, the *City* chooses neither." *Id*. at 1098 (emphasis in original). The *Rubin* majority quoted *Joyner's* dissent with approval:

> In determining what it means to "advance" one religion or faith over others, the touchstone of the analysis should be whether *the government* has placed its imprimatur, deliberately or by implication, on any one faith or religion.

Id. at 1095-1096, quoting *Joyner,* 653 F.3d at 362 (Niemeyer, J., dissenting). This approach is consistent with *Marsh*, severely limiting government control over prayer content.

The Town of Greece did not orchestrate the "steady drumbeat of often specifically selected Christian prayers" that the Second Circuit complains would affiliate it with Christianity. *Galloway*, 681 F.3d at 32. In order to reach that conclusion and formulate its "totality of the circumstances" test, the Court had to engage in the parsing of prayer content that *Marsh* forbids (*id.* at 32, e.g., critiquing invocations using the

first person plural)—all the while admitting that "the prayers in the record were not offensive in the way identified as problematic in *Marsh*" (*id*. at 31-32).

III. LEGISLATIVE PRAYER IS A UNIQUE GENRE THAT BLENDS ELEMENTS OF GOVERNMENT AND PRIVATE SPEECH AND COMPLIES WITH BASIC FIRST AMENDMENT PRINCIPLES FOR BOTH.

The Town of Greece has an informal invocation policy that complies with the First Amendment—both the Establishment Clause *and* private expression.

"The interaction between the 'government speech doctrine' and Establishment Clause principles has not...begun to be worked out." *Pleasant Grove City v. Summum*, 129 S.Ct. 1125, 1141 (2009) (Souter, J., concurring). Legislative prayer is a unique form of expression combining elements of both public and private speech, and classification may hinge on a particular policy's wording. In the Town of Greece, invocations occur in the context of government business—but private speakers are volunteers scheduled on a rotating basis that encourages diversity and excludes government oversight of the prayers. *Galloway*, 681 F.3d at 23-24 (describing current procedure for compiling a list of potential speakers). The Town has never denied a request to give the invocation, nor has it has attempted to control the content of the prayers. *Id.* at 23. The private citizens who volunteer to pray are ultimately responsible for what they say. This tracks the broader principle that the *government* does not advance religion when any indirect benefit results solely from *private* choices.

Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1448 (2011) ("contributions result from the decisions of private taxpayers regarding their own funds").

Long before the government speech doctrine emerged, this Court described legislative prayer as "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh,* 463 U.S. at 792; cited in *Simpson,* 404 F.3d at 282 and *Atheists of Fla.*, 713 F.3d at *32. *Marsh* is a "striking example of the accommodation of religious belief intended by the Framers," because America's first congressmen had no constitutional problem with employing chaplains to offer daily prayers in the Congress. *Lynch v. Donnelly*, 465 U.S. at 674. The government is permitted "some latitude in recognizing and accommodating the central role religion plays in our society.... Any approach less sensitive to our heritage would border on latent hostility toward religion." *Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring).

The Second Circuit's approach is insensitive to America's heritage and hostile toward religion. This is contrary to the well-established principle *Marsh* illustrates:

> [T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e. g., Zorach v. Clauson,* 343 U.S. 306, 314, 315 (1952); *Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 211 (1948). Anything less would require the 'callous indifference' we

> have said was never intended by the *Establishment Clause*. *Zorach*, *supra*, 343 U.S. at 314.

Lynch v. Donnelly, 465 U.S. at 673. Even the *Marsh* dissent acknowledged "that, in one important respect, the Constitution is *not* neutral on the subject of religion: Under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not." *Marsh,* 463 U.S. at 812 (Stevens, J., dissenting). The *Marsh* majority respected both the Establishment Clause and the free speech rights of volunteers who offer to pray for their governments.

A. Even If *Lemon* Applied, Legislative Prayer Is Constitutional.

Several Justices of this Court and numerous scholars "have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.,* 508 U.S. 384, 399 (1993) (Scalia, J., concurring).[2] *Lemon's* incoherent test has proved unworkable in practice and should be relegated to the scrap heap of history as a failed 40-year experiment. Yet *Lemon* still "stalks our Establishment Clause jurisprudence" as this Court applies, buries, and sometimes ignores it—but so far refuses to renounce it. *Id*. at 398.

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[2] *See id*. at 399-400 for details of these critiques.

In *Marsh*, this Court abandoned *Lemon* because legislative prayer is "deeply embedded in the history and tradition of this country." *Marsh,* 463 U.S. at 786. Legislative prayer has stood the test of time—over two centuries—in striking contrast to the recently minted *Lemon* test. The Eighth Circuit decision overruled in *Marsh* applied *Lemon*, holding that the "purpose and primary effect" was to advance religion, because of the chaplain's long tenure, and forbidden "entanglement" resulted from the use of state funds. *Marsh,* 463 U.S. at 786. This Court rejected that approach and should reaffirm its own precedent in this case.

Lemon itself acknowledged the "blurred, indistinct, and variable barrier" between church and state, noting that absolute separation is impossible and some interaction is inevitable. *Lemon v. Kurzman,* 403 U.S. at 614. A year later, this Court reaffirmed the need to "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that...total separation of the two is not possible." *Lynch v. Donnelly,* 465 U.S. at 672.

Marsh rightly eschewed *Lemon*. But even if it applied, modern prayer policies address the *Lemon* concerns of the *Marsh* dissent and could survive either *Lemon* or Justice O'Connor's more recent "endorsement" test.

1. Legislative Invocations Serve A Recognized Secular Purpose: They Solemnize Government Proceedings.

The Framers "would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it." *McCreary Cnty., Kentucky v. Am. Civil Liberties Union of Kentucky,* 545 U.S. 844, 902-903 (2005) (Scalia, J., dissenting). *Lemon's* "secular purpose" prong clashes with one of the First Amendment's key purposes—to protect religious liberty.

Nevertheless, legislative prayer serves legitimate secular purposes, such as "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch v. Donnelly,* 465 U.S. at 693 (O'Connor, J., concurring); *Atheists of Fla.*, 713 F.3d at *12-13; *Joyner*, 653 F.3d at 347; *Simpson,* 404 F.3d at 283. As Petitioner observes, "[u]nder *Marsh*, the touchstone for whether legislative prayer is constitutional is whether the government acts with impermissible motive." Pet. 17-18. A crucial inquiry, tracking *Marsh*, is whether the government has "categorically excluded specific faiths based on their beliefs." *Pelphrey*, 547 F.3d at 1282. In fact, "the bar for proving such impermissible motive is quite high" in light of *Marsh*—"the virtually uninterrupted sixteen year tenure of a single Presbyterian minister." *Pelphrey v. Cobb Cnty.*, 410 F. Supp. 2d 1324, 1337 (N.D. Ga. 2006). In *Marsh*, this Court found no

impermissible motive in spite of the chaplain's lengthy tenure and payment from public funds. *Marsh,* 463 U.S. at 793-794. Even the disproportionate representation of one faith does not, per se, prove that an impermissible motive exists. *Pelphrey*, 547 F.3d at 1277. It may merely reflect the religious composition of the local community (*Atheists of Fla.*, 713 F.3d at *36)—and does not detract from the legitimate purpose of solemnizing government meetings.

2. Legislative Prayer Does Not Impermissibly Advance Religion.

In contrast to *Lemon's* second prong, the First Amendment arguably "advances" religion through its heightened protection for religious expression:

> [P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.... [G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.

Capitol Square Review, 515 U.S. at 760. It is "a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment...forbids endorsement of religion in general." *Lamb's Chapel,* 508 U.S. at 400 (Scalia, J., concurring). Even so, legislative prayer does not transgress *Lemon's* boundary line. Any benefit the Town's policy confers on a particular faith is at best "indirect, remote, and incidental." *Lynch v. Donnelly,* 465 U.S. at 683, citing

Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973), *Widmar v. Vincent*, 454 U.S. 263, 273 (1981).

Even *Marsh* does not condone the use of legislative prayer to affiliate the government with a particular faith. *Wynne,* 376 F.3d at 297, citing *Allegheny,* 492 U.S. at 603. The Eleventh Circuit identified three factors to assess whether that has happened: (1) the identity of the speaker; (2) the selection procedures employed; and (3) the nature of the prayers. *Pelphrey,* 547 F.3d at 1277. In the Town of Greece, invocations are given by unpaid volunteers, selected by "telephoning, at various times, all the religious organizations listed in the town's Community Guide." *Galloway*, 681 F.3d at 23. The Second Circuit admits that none of the prayers in the record offend *Marsh*—"they did not preach conversion, threaten damnation to nonbelievers, down other faiths, or the like." *Id.* at 31-32. No one—legislator or citizen—is required to participate in the invocation. The prayers—which must be offered by the representative of *some* particular faith—are simple blessings in line with over two centuries of unbroken American practice.

A few cases interpret *Allegheny's* comments about *Marsh*—warning about government affiliation with a particular faith—as holding that *Marsh* mandates a nonsectarian policy. *See Allegheny,* 492 U.S. at 603. Two of these cases were vacated, remanded, and later dismissed for lack of standing: *Doe v. Tangipahoa Parish Sch. Bd.,* 494 F.3d 494 (5th Cir. 2007) and *Hinrichs v. Bosma,* 440 F.3d 393 (7th Cir. 2006). In another case, the Town Council refused to *allow* invocations that were not explicitly Christian. *Wynne,*

376 F.3d at 295. In the Town of Greece, as in the City of Lakeland (*Atheists of Fla.*), Christian references result solely from a random procedural process, coupled with the private choices of volunteers who respond to an open invitation designed to foster diversity. Those choices do not affiliate the *government* with Christianity, nor do the sectarian references per se constitute the aggressive advocacy precluded by *Marsh* and *Allegheny*.

3. Modern Legislative Prayer Policies Avoid Forbidden Entanglement By Opening The Prayer Opportunity To A Wide Variety Of Randomly Selected Speakers.

The *Marsh* dissent contended there was entanglement in the process of selecting a "suitable" chaplain and limiting that person to "suitable" prayers. *Marsh,* 463 U.S. at 798-799 (Stevens, J., dissenting). The Town's policy avoids this objection by inviting a wide spectrum of potential speakers without inquiry into their beliefs or oversight of their prayers, and then scheduling them on a rotating basis. This process avoids the entanglement that would almost certainly result if the Town adopted a mandatory nonsectarian policy or otherwise monitored the content of the invocations. It is the Second Circuit—not the Town—that entangles itself in the prayers of private citizens.

B. A Reasonable Observer Would Not Perceive The Town's Policy Or Practice As Government Endorsement Of A Particular Faith.

The Second Circuit creates a novel and nearly unattainable standard for legislative invocation policies. Its rationale twists the endorsement test and widens the split among circuit courts, which "are hopelessly divided over whether legislative prayer practices should be analyzed under *Marsh's* historical test or instead under an 'endorsement' test derived from *County of Allegheny*." Pet. 2.

Based on *Marsh*, Justice O'Connor's endorsement test is not the proper analysis. And like the *Lemon* test from which it derives, it is a failed modern experiment. This highly subjective test requires fine tuning to apply and has spawned lawsuits over trivial offenses—based on the disapproval of an imaginary "reasonable" observer. But a careful review of the test—as explained and interpreted by Justice O'Connor's own observations—reveals that the Town's policy would survive it. The test is qualified: The *reasonable* observer "must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape." *Elk Grove v. Newdow*, 542 U.S. at 35 (O'Connor, J., concurring). The consequences would be overwhelming if the test were read to encompass even the slightest offense and allow a "hecker's veto" to rule the outcome. *Id.* at 35 (O'Connor, J., concurring), citing *Capitol Square Review,* 515 U.S. at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably

might perceive a particular action as an endorsement of religion.").

The endorsement test rests partially on the same historical foundation as *Marsh*: "[T]he history and ubiquity of a practice...provides part of the context in which a reasonable observer evaluates whether a challenged government practice conveys a message of endorsement of religion." *Allegheny,* 492 U.S. at 630 (O'Connor, J., concurring). Legislative prayer and other similar practices "are not understood as conveying government approval of particular religious beliefs." *Lynch v. Donnelly,* 465 U.S. at 693 (O'Connor, J., concurring).

The Second Circuit is oblivious to the role of religion in American history and culture. The First Amendment itself endorses religion. The Framers "would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it." *McCreary,* 545 U.S. at 902-903 (2005) (Scalia, J., dissenting). Decades ago, this Court found "no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach v. Clauson,* 343 U.S. 306, 313-314 (1952). On the contrary, religious expression holds a place at the core of protected First Amendment speech. *See Capitol Square Review,* 515 U.S. at 760.

People who reject religion are entitled to reasonable accommodation but not complete protection from

exposure to religious expression: "[S]ome references to religion in public life and government are the inevitable consequence of our Nation's origins." *Elk Grove v. Newdow,* 542 U.S. at 35 (O'Connor, J., concurring); *see also Capitol Square Review,* 515 U.S. at 780 (O'Connor, J., concurring). A reasonable observer—presumed to be familiar with the time-honored practice of legislative prayer, America's rich religious history, and the Town's policy—would not perceive the invocations as government endorsement of a particular faith.

C. The Town Respects The Parameters Of The Limited Public Forum It Has Created.

The Establishment Clause applies only to government speech—not private expression in a public forum. *Capitol Square Review,* 515 U.S. at 767, 770. Although the Town's policy should pass muster even under a government speech analysis, the Town may have created a forum for private speech by using community volunteers rather than a paid chaplain. Pet. 23-25 (Sect. III). If so, it properly avoids the "purposeful discrimination" against any particular faith (*Pelphrey*, 547 F.3d at 1281) that would be tantamount to prohibited viewpoint discrimination against private speakers.

The Town's broad invitation to religious leaders in the community is comparable to the policies examined in *Pelphrey, Simpson, Rubin, Atheists of Fla.,* and *Joyner*. Commissioners in *Pelphrey* randomly selected "volunteer leaders of different religions, on a rotating basis, to offer invocations with a variety of religious

expressions." *Pelphrey,* 547 F.3d at 1266. In *Simpson*, Chesterfield County sent letters "designed to foster widespread participation" and scheduled speakers on a first-come, first-serve basis. *Simpson,* 404 F.3d at 279. In *Atheists of Fla.*, city officials combed the Yellow Pages, the internet, and other sources to identify places of worship and extend a broad invitation. *Atheists of Fla.*, 713 F.3d at *37. The city clerk in *Rubin* and the Forsyth County Commissioners in *Joyner* compiled similar comprehensive lists. *Rubin*, 710 F.3d at 1089, 1098; *Joyner*, 653 F.3d at 343. These procedures strongly suggest a forum for diverse private expression.

This Court has articulated a three-step framework to analyze restrictions of private speech on government property—classify the speech, identify the forum (public or nonpublic), and then evaluate the reasons for exclusion. *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.,* 473 U.S. 788, 797 (1985). The government may designate a place or channel of communication as a public forum, either for the public at large, or for use by certain speakers and/or discussion of certain topics. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45-46 (1983); *Cornelius v. NAACP,* 473 U.S. at 802. Speakers cannot be excluded absent a compelling state interest—and never to suppress the speaker's viewpoint. *Perry,* 460 U.S. at 46; *Cornelius v. NAACP,* 473 U.S. at 799. Government may also open a more limited "nonpublic forum." Here, access is restricted on the basis of subject matter (invocation) and speaker identity (local religious leaders), but the forum must be viewpoint neutral and restrictions reasonable in light of its purpose. *Id.* at 806. Some cases have used the term "limited public forum," but again, viewpoint discrimination is an "egregious form of content

discrimination" that is impermissible. *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 829-830 (1995); *Lamb's Chapel,* 508 U.S. at 390. The government "must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 829.

The Town's policy is consistent with principles governing private expression in a government-created forum. Its restrictions on the speaker (local religious leaders) and topic (invocation) are both reasonable in light of the general purpose for legislative prayer—to "solemnize the weighty task of governance." *Joyner*, 653 F.3d at 347. Inviting a religiously diverse group of volunteers to pray, and using a list compiled from various public sources, the policy avoids the impermissible viewpoint discrimination that could result from a mandatory nonsectarian policy. The Town merely confines the forum "to the limited and legitimate purposes for which it was created." *Cornelius v. NAACP,* 473 U.S. at 806; *Perry*, 460 U.S. at 49. Additional scrutiny of the content would impermissibly "raise the specter of government censorship to ensure that all [invocations] meet some baseline standard of secular orthodoxy." *Rosenberger,* 515 U.S. at 844.

IV. THE GOVERNMENT IS NOT REQUIRED TO EJECT RELIGION FROM THE PUBLIC SQUARE.

Lemon has sparked demands for a radical "neutrality" that restricts liberty rather than preserving it. But "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the

Constitution." *Salazar v. Buono,* 130 S. Ct. 1803, 1818 (2010), quoting *Lee v. Weisman,* 505 U.S. at 598. Although *Galloway* does not expressly prohibit legislative prayer, its muddled standard subjects government entities to an unreasonably high risk of litigation and thus tends to discourage the practice.

The Religion Clauses are complementary sides of the same coin. Together they form a shield guarding religious liberty from government intrusion. Courts misinterpret the purpose and application of the Establishment Clause when they strike down time-honored practices that merely encourage liberties the Constitution protects. Objectors are free to disregard public acknowledgments of the nation's religious heritage but have no iron-clad right to be free of all exposure to such references. A more principled approach to these two clauses would focus on whether liberty is threatened by the challenged practice.

The First Amendment does not require this Court to purge the public square and sever America from its religious roots. *Salazar v. Buono*, 130 S. Ct. at 1818 ("The Constitution does not oblige government to avoid any public acknowledgment of religion's role in society."). *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring) ("[T]he Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious."). On the contrary, the blurry "wall" between church and state should not be so high and thick that government callously disregards religion. Americans "are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. at 313. This Court has consistently rejected an absolutist

approach (*Lynch v. Donnelly,* 465 U.S. at 678), refusing "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Walz v. Tax Comm'n,* 397 U.S. at 671.

A. No One Has An Absolute Right To Be Free *From* Religion.

The Religion Clauses were designed to prevent an established national church like the Church of England, controlled and funded by government, and to prohibit governmental preference for any one Christian sect. *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 49 (1815). In the "crucible of litigation," modern courts have acknowledged "the right to select any religious faith or none at all." *Wallace v. Jaffree,* 472 U.S. 3, 52-53 (1985); *see also Allegheny*, 492 U.S. at 590. No one is compelled to affirm a belief, practice a religion, or financially support a church. "[L]eaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political." *Elk Grove v. Newdow,* 542 U.S. at 44 (O'Connor, J., concurring).

But the First Amendment grants heightened protection to *religious* faith, "too precious to be either proscribed or prescribed by the State." *Lee v. Weisman,* 505 U.S. at 589. The corollary is not true in every respect. Nonbelievers are entitled to deference, but the Religion Clauses protect *religion*. *Id.* at 589. They were "written by the descendents of people who had come to this land precisely so that they could practice their religion freely." *McCreary,* 545 U.S. at 881. Government may neither compel nor prohibit religious

exercise. "[T]he Constitution's authors sought to protect religious worship from the pervasive power of government." *Lemon v. Kurzman,* 403 U.S. at 623. It frustrates this purpose—*to protect religion*—to erase it in the public realm.

No one can escape offense:

> [T]he Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

Elk Grove v. Newdow, 542 U.S. at 44 (O'Connor, J., concurring). Exposure to unwelcome ideas is the price of preserving American freedoms. Americans must "develop thicker skin." David E. Bernstein, *Defending the First Amendment From Antidiscrimination*, 82 N.C. L. Rev. 223, 245 (2003).

The Establishment Clause has sparked many fractured opinions, but this Court recently denied that "irreligion" is always on a par with religion:

> Despite Justice Stevens' recitation of occasional language to the contrary...we have not, and do not, adhere to the principle that the Establishment Clause bars any and all governmental preference for religion over irreligion.

Van Orden v. Perry, 545 U.S. at 684 n. 3. Justice Scalia's *McCreary* dissent foreshadows this

pronouncement. "With all of this reality (and much more) staring it in the face, how can the Court *possibly* assert that 'the First Amendment mandates governmental neutrality between . . . religion and nonreligion....' Who says so? Surely not the words of the Constitution. Surely not the history and traditions that reflect our society's constant understanding of those words." *McCreary,* 545 U.S. at 889 (Scalia, J., dissenting) (citing majority opinion, *id*. at 875-876).

B. Legislative Invocations Have No Coercive Impact—The Hallmark Of Historical Establishments.

Legislative prayer respects the observer's autonomy to embrace, reject, or ignore another person's expression. In *Marsh*, the *dissent* highlighted coercion. Legislative prayer allegedly "intrudes on the right to conscience by forcing some legislators...to participate in a 'prayer opportunity'" and "forces all residents of the State to support a religious exercise that may be contrary to their own beliefs." *Marsh v. Chambers,* 463 U.S. at 808 (Stevens, J., dissenting). The "coercion" in *Marsh* is far removed from the penalties of historical establishments. *Marsh* respects liberty on both sides—the conscience of the speaker and the observer's freedom to respond. The *Marsh* approach is objective, in contrast to the highly subjective *Lemon* and endorsement tests that have spawned lawsuits and splintered court rulings over their relatively short lifespan.

This Court has long recognized the link between the Religion Clauses and governmental compulsion. 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). In contrast to such oppression, legislative invocations are "rarely noticed, ignored without effort, conveyed over an impersonal medium, and directed at no one in particular." *Lee v. Weisman,* 505 U.S. at 630. "The coercion that was a hallmark of historical establishments...was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Van Orden v. Perry,* 545 U.S. at 693 (Thomas, J., concurring), citing *Lee v. Weisman,* 505 U.S. at 640 (Scalia, J., dissenting) (emphasis in original). Legislative invocations do not place "the power, prestige, and financial support of government behind a particular religious belief." *Engel v. Vitale,* 370 U.S. at 431.

C. Government May Acknowledge And Even Benefit Religion.

Public acknowledgments of religion—through passive displays, presidential proclamations, and invocations of divine guidance—pose no threat to liberty and are consistent with both Religion Clauses. In fact, the government's role in preserving religious liberty creates a tension with the first two prongs of *Lemon*. Where government actively facilitates religious liberty, it may have not a purely "secular" purpose and could be accused of "advancing" religion. But such action is entirely consistent with America's history and Constitution.

Legislative prayer is "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers*, 463 U.S. at 792. This is

unremarkable because "a vast portion of our people believe in and worship God and...many of our legal, political and personal values derive historically from religious teachings." *Abington Sch. Dist. v. Schempp,* 374 U.S. 203, 306 (1963) (Goldberg, J., concurring, joined by Harlan, J.). Government may accommodate and even offer benefits to facilitate religious freedom: *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483* U.S. 327, 338 (1987) (religious employers exempt from religious discrimination law); *Walz v. Tax Comm'n,* 397 U.S. at 673 (church property tax exemption); *Zorach v. Clauson,* 343 U.S. at 308 (public school students allowed time off-campus for religious instruction).

Striking down legislative prayer or imposing *Galloway's* unattainable standard would convey the message that government is determined to erase public recognition of America's religious roots—contrary to this Court's caution that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm." *Salazar v. Buono*, 130 S. Ct. at 1818.

CONCLUSION

The Second Circuit decision strays far from this Court's precedent. Its bewildering double-speak creates an unworkable, precarious standard that will strangle religious expression in the public square, contrary to decades of established American tradition. This Court should reverse this deeply flawed decision.

Respectfully submitted,

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