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 OF *AMICUS CURIAE* REV. DR. ROBERT E. PALMER SUPPORTING PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Rev. Dr. Robert E. Palmer, a Presbyterian minister, was the chaplain of the Nebraska Legislature whose paid role and daily prayers were challenged in *Marsh* v. *Chambers*, 463 U.S. 783 (1983). In *Marsh*, this Court held that the Establishment Clause did not prohibit either Rev. Palmer's compensated position as chap-

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and his counsel made such a monetary contribution. Petitioner and Respondents have filed letters with the Clerk's office consenting to the filing of all *amicus* briefs.

lain, his continued reappointment over sixteen years, or the content of the prayers he offered at the start of each legislative workday. *Id.* at 792-795.

The present case is of considerable interest to Rev. Palmer. The judgment below, if adopted by this Court, would effectively abrogate *Marsh*'s recognition of the propriety of Rev. Palmer's own civic contribution.[2] Rev. Palmer believes that *Marsh* was correctly decided, because legislative bodies which desire to exercise their First Amendment right to solemnly invoke divine guidance should not be impaired by court rulings that inject uncertainty and discourage assemblies from exercising that right. For the benefit of all state or local legislative assemblies, and of chaplains like Rev. Palmer, this Court should reaffirm *Marsh* and the legitimacy of legislative prayer.

Rev. Palmer has another unique interest in this case. The Second Circuit emphasized the need for a "nonsectarian" prayer practice. *E.g.*, Pet. App. 12a. *Marsh* indeed used that word—but only once, and then as a quotation of Rev. Palmer's own characterization of his prayer practice. 463 U.S. at 793 n.14. That characterization came from Rev. Palmer's deposition, which—like many of his prayers—is in the *Marsh* record in this Court. See Record on Appeal & Cross-Appeal, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (hereinafter "*Marsh* Record"). Rev. Palmer, a defendant in *Marsh*, explained in his deposition that his prayers were simultaneously "nonsectarian" *and* that many were identifiably Christian. A prayer would be "sectarian," he explained, if it advances a particular sect or denomination within the

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[2] Rev. Palmer also filed a brief as *amicus curiae* urging the Court to grant the petition for a writ of certiorari, which petitioner's merits brief cites. See Pet. Br. 26, 47. The present brief provides further explanation for the arguments raised in Rev. Palmer's initial brief.

Judeo-Christian tradition (such as Rev. Palmer's own Presbyterianism). He did not mean, and this Court plainly did not take him to mean, that any prayer is "sectarian" unless so drained of religious content as to be of no identifiable religious tradition.[3]

Thus, the Second Circuit invoked Rev. Palmer's use of the word "nonsectarian," but did so to reach exactly the opposite result from the one this Court intended when, in *Marsh*, it quoted Rev. Palmer's language. Rev. Palmer's interest extends to ensuring that this Court is fully aware of this background to *Marsh*, so that the Second Circuit's gloss on that case may be seen as the retreat from the *Marsh* holding that it is.

SUMMARY OF ARGUMENT

1. When this Court decided *Marsh* v. *Chambers*, there was no doubt that the prayers being challenged were often "explicitly Christian." 463 U.S. 783, 793 n.14 (1983). The record before the Court was replete with Christian prayers, and dissenting justices regarded that as reason enough to strike down Nebraska's practice. But the Court refused. In full knowledge of his prayers' religious content, the Court credited Rev. Palmer's deposition statement that they were "nonsectarian"—a term understood in context to mean that the prayers did not advance a particular sect within the Judeo-Christian tradition, like Rev. Palmer's Presbyterian faith. Consistent with Rev. Palmer's description, the Court held that his prayers posed no constitutional concerns, so long as "the

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[3] As the Court noted, Rev. Palmer did omit using the name of Jesus Christ itself in 1980 in response to a Jewish legislator's request. *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.14 (1983). But the record of prayers in *Marsh* closed in 1979; this Court accordingly only had an opportunity to evaluate the full text of the pre-1980 prayers and those pre-1980 prayers were the subject of this Court's decision. See *infra* pp. 7-13.

prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-795.

The record in *Marsh*, and the publicly available prayers that were printed in the Nebraska legislative journal, constitute a concrete demonstration that these prayers were often identifiably Christian—and that this Court therefore found such prayers to create no constitutional problem.

2. The holding in *Marsh* is correct and consistent with the case's record. This Court in *Marsh* found that the "unambiguous and unbroken history" of legislative prayer left "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S. at 792-793. Even confronted with a record abounding in often "explicitly Christian" prayers, *id.* at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality, *id.* at 795. The *Marsh* Court thus found no need to import an endorsement analysis or any other Establishment Clause "test," such as that announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

The Second Circuit excused its departure from *Marsh*'s clear guidance because of a puzzling passage from a later case that had nothing to do with legislative prayer. In *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989), a brief dictum suggested that Rev. Palmer's prayers were constitutional because, in 1980, he accommodated a Jewish legislator by omitting the name of Jesus Christ in prayers. That assertion is contrary to the record of *Marsh*, which closed before 1980 and is full of identifiably Christian prayers. And it ignores *Marsh*'s holding, which put prayer content generally off-limits to judges—a holding that would be hard to explain if the result would have been different

but for Rev. Palmer's omission of Christ's name in prayers that were not even part of the record. If that *were* central to *Marsh*, one would at least have expected the Court to state that the prior sixteen years did *not* survive First Amendment scrutiny, and that future years would not survive it if Rev. Palmer or a successor were to again use Jesus' name in prayers.

The consequence of diluting the *Marsh* holding with the *Allegheny* dictum is evident from the Second Circuit's intrusive inquiry into the minutest details of specific prayers offered before the Town Council. Departing from *Marsh* converts federal courts into prayer patrols, despite *Marsh*'s admonition to the contrary. The *Allegheny* dictum is utterly inconsistent with *Marsh* itself. Thus, either the *Allegheny* dictum (and by extension, the judgment below) or *Marsh* itself must be wrong. More to the point, Rev. Palmer's prayer practice was in every measureable way *more* identifiably Christian than is the practice of the Town of Greece. *Marsh* and the judgment below cannot coexist; there is room in the legal universe for only one of them. Because *Marsh* was correctly decided, the judgment below is necessarily in error, and it should be reversed.

3. Departing from *Marsh* chills the exercise of a constitutionally protected right—the right of legislative assemblies across the Nation to begin their sessions with invocations. *Marsh* provided broad scope for such prayers, subject to a narrow exception preventing truly extreme situations. But affirming the judgment below would reverse that balance and turn ordinary practices into opportunities for full-scale litigation. As the Second Circuit was plainly aware, many towns give up in frustration when faced with so many obstacles. The court even hinted that prudent towns would abandon the plan to have legislative prayer. Pet. App. 27a. Such an assault on constitutional freedom is intolerable.

ARGUMENT

This Court affirmed the constitutionality of legislative prayer in *Marsh* and, fully aware of the religious and Christian nature of Rev. Palmer's prayers, expressly declined to subject the content of such prayers to judicial scrutiny. In recent years, however, some courts have revised this history. They have ascribed to Rev. Palmer's prayers an essentially non-religious character, and have interpreted *Marsh* as approving his prayers because of their purported blandness. The Second Circuit indulged this double error. This Court should reaffirm *Marsh*.

I. THIS COURT UPHELD REV. PALMER'S PRAYERS WITH FULL KNOWLEDGE OF THEIR IDENTIFIABLY CHRISTIAN NATURE

Marsh's record makes clear what this Court did and did not hold. It did hold that such prayers were constitutional even if their contents were faithful to the chaplain's religious views. It did not hold that federal judges could strike down prayer practices at will if individual prayers ever happened to be "too" religious.

A. Rev. Palmer's prayers in the *Marsh* record were identifiably Christian

In *Marsh*, Nebraska Senator Ernest Chambers, a legislator and taxpayer, argued that Nebraska's legislative prayer practice was unconstitutional because the chaplain's daily "prayers are in the Judeo-Christian tradition." *Marsh*, 463 U.S. at 793. Senator Chambers's complaint in federal district court emphasized that Rev. Palmer's prayers "have frequent references to the Christian religion," and that Rev. Palmer made "[n]o effort" to drain those prayers of such content. J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶ 8).

Senator Chambers was correct—Rev. Palmer's prayers were routinely identifiably Christian. The record in *Marsh* contained annual "prayer books," compiling Rev.

Palmer's prayers, ending in 1979. *See* 1979 Prayer Book, Exh. 3, *Marsh* Record.[4] These prayers—the prayers that Senator Chambers presented to the federal courts for decision—were identifiably Christian, routinely naming Christ and making other unmistakable references to Judeo-Christian theology. Accordingly, the Court could not have, and did not, put off for a future day the question of whether prayers that clearly come from a specific religious tradition are constitutional when part of a legislative-prayer practice.

Prayers in the *Marsh* record bear this out. For example, on January 13, 1975, Rev. Palmer prayed:

> *Our heavenly Father*, in this moment of prayer, when there is silence in this senate chamber, may there not be silence in Thy presence. May our prayers be heard.
>
> May no short circuits be made by our lack of faith, our high professions joined to low attainments, our fine words hiding shabby thoughts, or friendly faces masking cold hearts.
>
> Out of the same old needs, conscious of the same old faults, we pray on the same old terms for new mercies and new blessings. *In the name of Christ our Lord. Amen.*

1975 Prayer Book at 1, Exh. 1, *Marsh* Record (emphasis added). As this prayer shows, Rev. Palmer began and ended his prayers with an invocation of one member of the Holy Trinity. Each prayer also ended with "Amen," a well-known Judeo-Christian expression of communal assent to the prayer. These Christian elements were also present in his prayer of February 18, 1977:

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[4] Originally published in the Nebraska Legislative Journal, Rev. Palmer's prayers were periodically collected and republished as prayer books, which were later made exhibits in the *Marsh* record. *Marsh*, 463 U.S. at 785 n.1.

> *Our Father*, as we pray for Your guidance and help, we know that You did not intend prayer to be a substitute for work. We know that we are expected to do our part for You have made us, not puppets, but persons with minds to think and wills to do. Make us willing to think, and think hard, clearly, and honestly, guided by Your voice within us, and in accordance with the light You have given us. May we never fail to do the very best we can. We pray in the knowledge that it all depends upon You. Help us then to work as if it all depended on us, that together we may do that which is pleasing in Your sight. *For Jesus' sake. Amen.*

1977-78 Prayer Book at 2, Exh. 2, *Marsh* Record (emphasis added). Rev. Palmer's prayer of February 14, 1978 is another typical example of how he integrated Christian vocabulary into his prayers:

> *O God*, we consider our resources in money, men and land, yet forget the spiritual resources without which we dare not and cannot prosper. Forgive us for all our indifference to the means of grace thou hast appointed. *Thy Word*, the best seller of all books, remains among the great unread, the great unbelieved, the great ignored. Turn our thoughts again to that book which alone reveals what man is to believe concerning God and what duty God requires of man. Thus informed, thus directed, we shall understand the spiritual laws by which alone peace can be secured, learn what is the righteousness that alone exalteth a nation. For the sake of the world's peace and our own salvation, we pray *in the name of Christ*, thy revelation. *Amen.*

Id. at 18 (emphasis added).

Other prayers quoting the Bible are even more easily identifiably Christian. For instance, Rev. Palmer's pray-

er of May 10, 1979 reads:

> *O God*, who has given to all persons talents and varying capacities, Thou dost only require of us that we utilize Thy gifts to the maximum. In this Legislature to which Thou has entrusted special abilities and opportunities, may each recognize his stewardship for the people of the State. Through the perplexing problems and needed decisions give them calmness and wisdom. May heated debates always be on the issues and not develop into personal jealousies which only defeat the purpose of our representative government. May we at the beginning of a new morning say, *"This is the day that the Lord hath made, let us rejoice and be glad in it." Amen.*

1979 Prayer Book, Exh. 3, *Marsh* Record (emphasis added), at Nebraska Legislative Journal, 86th Leg., 1st Sess. 2149 (1979) (hereinafter 1979 Journal).[5] Likewise, in his prayer of January 3, 1979, Rev. Palmer quoted from the Bible as he asked for God to bestow grace upon the Nebraska legislators:

> *Eternal God*, Who makes all things new, as we begin another new Session together * * * .
>
> Give us what we need for the challenges which confront us, endurance for the trivia that clogs our calendars, and the wisdom to tell the difference between the two. Instruct each one of us, the officers of this body, each Senator, each secretary, each aide, each one involved in the enactment of legislation for the people of this State this year, that together we may "*do justly, love mercy, and walk humbly with our God*" and with one another so that, when this Session ends, we may be greeted by Your

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[5] The Nebraska Legislative Journal for 1979 is available online at http://www.nebraskalegislature.gov/FloorDocs/86/PDF/Journal/ at the "r1journal.pdf" hyperlink.

> benediction, "*Well done, good and faithful servants*." *Amen.*

1979 Prayer Book, 1979 Journal at 69-70 (emphasis added).

Because the topics of his prayers varied day by day, Rev. Palmer also incorporated Jewish and Christian holy days into his prayer cycles. For instance, one prayer offered near Easter, on April 12, 1977, invoked Christ's death and resurrection:

> *Father in Heaven*, we thank You this day for the gift of life. As spring returns to our countryside, we are reminded that the inevitable cycles of Nature are Your creation and no one is exempt.
>
> We thank you for the gift of *Your Son, whose Resurrection we are celebrating*, who is the reason for our hope and source of our joy. Help us now, rejuvenated by the recess, and inspired by *Your Son's* victory over death, to take up the business of the people and conduct it with justice, equality and love. *Amen.*

1977-78 Prayer Book at 6 (emphasis added). Two years later on April 9, 1979, Rev. Palmer's prayer reflected both Easter and Passover:

> Today as *we are about to celebrate the great Holy Days of Christians and Jews, Holy Week and Passover,* let us be reminded again through the faith and beliefs of our religions of the principles and directives which should guide us. May there be a continuing concern on your part as legislators for those who are in need, for those who are deprived of any of their rights in our State, and for the promotion of justice and prosperity for all. May these Holy Days, then, enable us to act as true followers of the beliefs which we have and may it find expression in every act and law that is passed. May this Holy Season be a happy season for us and for all people of

this State. *Amen.*

1979 Prayer Book, 1979 Journal at 1490 (emphasis added). And given that Rev. Palmer's prayers, offered in service of a governmental body, also fell in the broad tradition of the American civil religion, *Marsh*, 463 U.S. at 793 n.14, other of his prayers commemorated patriotic holidays, such as Abraham Lincoln's birthday on February 12, 1975:

> We are grateful for the lives of men and women who serve the needs of their times. The life of Abraham Lincoln speaks to us of the possibilities of our own lives. As we celebrate his birthday we would ask of Thee to help us to acquire his spirit of compassion, patience, and courage. Help us also to respond to the cries for help and guidance in our own times; this day is such a time; give us then a right spirit for the cries of this day. *We ask for this in the Name of Thy loving Son, Christ our Lord. Amen.*

1975 Prayer Book at 7 (emphasis added).

Rev. Palmer's prayers were recognizably Judeo-Christian beyond their references to Christ, the Bible, or holy days. Rev. Palmer's prayers drew deeply from the well of Judeo-Christian theology.[6] As Rev. Palmer's foreword to one prayer book said,

> * * * The prayers are a sincere effort of this part of the "people of God" to raise their minds and hearts in praise of the Father of us all. * * *
>
> Often, we have thanked God for the many blessings that He has bestowed on us. On occasion we have sought His forgiveness for our transgressions of His law. Almost daily we asked our Lord on be-

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[6] See also *infra* Part I.B, recounting Rev. Palmer's deposition testimony about the Judeo-Christian inspiration for his prayers.

> half of ourselves and our fellow citizens to alleviate sufferings, inspire righteous laws, motivate and guide us all in our pursuit of the Will of God.

1977-78 Prayer Book, Foreword. Indeed, without disparaging any other religion, some of Rev. Palmer's prayers were Judeo-Christian to the implicit exclusion of other faiths and non-faiths, as seen in his prayer of April 5, 1979, which quotes the Bible's exclusive language:

> Father in Heaven, we labor unceasingly to learn more about our job; to stay up with trends; to please our constituents, and to pass better laws in order to better people.
>
> * * * [L]et us recall the words of the Psalmist: "Unless the Lord build the house, they labor in vain who build it. Unless the Lord guard the city, in vain does the guard keep vigil. It is vain for you to rise early, or put off your rest, you that eat hard-earned bread, for He gives to His beloved in sleep." *Amen*.

1979 Prayer Book, 1979 Journal at 1442. Rev. Palmer continued to pray along these Christian lines until the final prayer in the record, May 23, 1979, a solemn blessing at the close of the legislative session:

> *Dear Lord*, an honest prayer some of us might make this morning is simply, "Thank God its over." These many weeks have been such a drain on so many of us, taking us away from responsibilities and loved ones elsewhere, and demanding so much of us.
>
> Lord, we are also grateful for these past months and for all the good that has been accomplished. May our decisions be for the benefit of the people of this State. Continue during the interim to give vision, courage, and integrity to each of the Senators. Bless them, their families and loved ones, till we meet again. Be with our Governor and Lieutenant Governor, the various officers and servants of this

> Legislature.
>
> * * * Implant again upon our minds the truth that greatness is found in serving, and success in helpfulness. *May this Legislature continue to love You, their God, and serve all the people. In our Lord's name. Amen.*

1979 Prayer Book, 1979 Journal at 2431 (emphasis added).

The predominantly Christian nature of Rev. Palmer's sixteen years of prayers did not go unnoticed by the Court. Indeed, Justice Stevens quoted one such prayer at length to show how identifiably Christian the prayers were. *Marsh*, 463 U.S. at 823-824 & n.2 (Stevens, J., dissenting) (quoting prayer of March 20, 1978).

B. Rev. Palmer's description of his prayers as "nonsectarian" has been taken out of context

The *Marsh* Court also adopted Rev. Palmer's description of his prayers as Christian yet nonsectarian.[7] Rev. Palmer, a defendant in the suit brought by Senator Chambers, provided deposition testimony about the legislative-prayer practice that he administered as chaplain for sixteen years. This Court quoted Rev. Palmer's deposition in a two-sentence footnote:

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

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[7] As discussed in Part II.A, *infra*, the "sectarian" or "nonsectarian" label is not an appropriate basis for judicial review of a prayer practice under *Marsh*. But because it was the fulcrum of the Second Circuit's effective abrogation of *Marsh*, *amicus* provides this background to demonstrate that the Second Circuit's understanding of the word "sectarian" is deeply flawed.

Marsh, 463 U.S. at 793 n.14 (citations omitted).

At first glance, it is not self-evident what this description really means. As the record reveals, see *supra* Part I.A, the Court was quite correct to observe that Rev. Palmer's "prayers were often explicitly Christian." *Marsh*, 463 U.S. at 793 n.14. But Rev. Palmer's description of *those very prayers* as "nonsectarian" may seem at odds with their "explicitly Christian" content.

One mistaken resolution of the seeming puzzle is to assume that the Court's reference to Rev. Palmer's 1980 accommodation of a Jewish legislator made the prayers "nonsectarian." But that is wrong. After all, despite Rev. Palmer's continued service, the prayers that actually appear in the record ended with his 1979 prayers (and Senator Chambers's complaint was filed on December 12, 1979).[8] Nor is there any indication that Rev. Palmer's accommodation either was a matter of binding policy—something he or his successors were bound to maintain—or that omitting Christ's name would on its own be sufficient to render an otherwise "sectarian" Christian prayer automatically "nonsectarian." Nothing in the Court's opinion, or in any dissenting opinion, suggests that the absolute key to the decision was buried in the footnote and took the form of a bare mention of Rev. Palmer's 1980 practice—much less that the Court would rule on that post-litigation modification to the exclusion of *sixteen years* of Christian prayers actually challenged.[9]

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[8] Rev. Palmer deposed that, in 1980, after the start of the lawsuit, he began omitting Christ's name, not in response to the suit but at the request of "a personal friend, in confidence." Deposition of Def. Palmer at 11, Exh. 5, *Marsh* Record.

[9] See also *infra* Part II.B, addressing this inference in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 603 (1989).

The objectively correct resolution is, instead, drawn from Rev. Palmer's deposition, which was the source for footnote 14. The deposition makes crystal clear that the word "nonsectarian" is not a synonym for "devoid of identifiably Christian theology." Instead, Rev. Palmer called his prayers "non-sectarian" because they did not reflect the beliefs of one Christian "sect" or denomination over another—for instance, his own Presbyterianism. "*By sectarian I mean a prayer which promotes some particular denomination.*" Deposition of Def. Palmer at 6, Exh. 5, *Marsh* Record (emphasis added) (hereinafter "Deposition").

When pressed in his deposition to call a distinctly Christian prayer "sectarian," he declined:

> I wouldn't say sectarian, but I'd say Christian. * * * [A] sect is not a religion. To me it would be a gross injustice to millions of people around the world were I to say that Islam is a sect or the Jewish faith is a sect or the Christian faith is a sect. In no way is that a sect by any stretch of my imagination or by any jumble of semantics I can imagine. * * * *Nonsectarian is one that does not promote the furtherance of any specific group, cult or division of the Judeo-Christian faith.*

Deposition at 7-8 (emphasis added). Under this definition, any sub-groups of either Christianity or Judaism, such as Presbyterianism, Lutheranism, or Orthodox Judaism, could be called sects or denominations. Rev. Palmer's position was clear: despite his references to Christianity, his prayers were not sectarian, even if referencing Christ would make some prayers "Christian" as opposed to "Judeo-Christian."[10]

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[10] This is further illustrated when Rev. Palmer was asked whether his prayer of January 13, 1975, excerpted *supra* p. 7, reflected "the Judeo-Christian tradition" as opposed to a sect. Rev. Palmer replied

Nor was this an idiosyncratic definition. Throughout Rev. Palmer's chaplaincy, Black's Law Dictionary consistently defined "sect" as a group with particular religious doctrines "which distinguish them from others holding *the same general religious beliefs*," and "sectarian" as "[d]enominational" and "pertaining to, and promotive of, the interest *of a sect*," rather than the larger religion as a whole. Black's Law Dictionary 1520, 1521 (rev. 4th ed. 1968) (emphasis added); see also Black's Law Dictionary 1214 (5th ed. 1979) (identical text).

The representative prayer excerpts surveyed above bear out the truth of Rev. Palmer's explanation. None of Rev. Palmer's prayers is identifiably Presbyterian, or of any other denomination, to the exclusion of another Christian "sect." As he put it, "I've never given a sectarian prayer in the Legislature, ever, in 15 years." Deposition at 5.

Rev. Palmer was also asked to explain in what sense his prayers were "Judeo-Christian." He replied:

> I mean that heritage which reflects the story of humankind's search for the Almighty in the pages of the Bible that has been, in essence, the heritage which is the founding of America's heritage as a nation which calls itself a religious nation.

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that the entire prayer reflected "the Judeo-Christian tradition," "except for the last sentence," which referenced "the name of Christ Our Lord." Deposition at 7. He went on: "It's a Christian." *Ibid.* When asked if that "[n]arrows it down to a Christian prayer?" he responded, "*I wouldn't say sectarian, but I'd say Christian.*" *Ibid.* (emphasis added). This exchange, in full, makes clear that just because Rev. Palmer's prayers were openly Christian (as opposed to "Judeo-Christian"), they still were not sectarian. Rev. Palmer was consistent in his testimony that the Christian faith alone, as opposed to one denomination of Christianity, did not constitute a "sect."

Deposition at 20-21.[11] And Palmer acknowledged that "you will find Jesus' name throughout these prayers" but with "equal references to the Old Testament." *Id.* at 8, 12. Rev. Palmer's answers were entirely consistent. His prayers could be Christian, and clearly invoke the Judeo-Christian tradition, without being "sectarian." And the above examples of his prayers are just that.

This Court's opinion used the word "sectarian" or "nonsectarian" only once—in footnote 14, where it quoted Rev. Palmer as describing the prayers as "nonsectarian." *Marsh*, 463 U.S. at 793 n.14. Given that context, the Court's understanding of that term must be drawn from how Rev. Palmer used it in his deposition.

II. *MARSH* CONTROLS AND WAS CORRECTLY DECIDED

A. The religious content of legislative prayer is generally of no concern to courts

The holding in *Marsh* is correct and consistent with the case's record. If the Court had wished to hold that a legislative-prayer practice with prayers that are predominantly Christian (or of any identifiable faith) are unconstitutional, it had a ready-made record to establish that point.

But the Court rejected the challenge without recourse to any of the standard Establishment Clause "tests," including the test set forth in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). *Marsh* instead recited the "unambiguous and unbroken history" of legislative prayer and expressed "no doubt" that the practice was constitutional and "part of the fabric of our society." *Marsh*, 463 U.S.

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[11] In fact, Rev. Palmer stated that he aimed for his prayers to be "in the *mainstream* of the Judeo-Christian tradition"—a far cry from the extreme multiplicity of prayer-givers required by the Second Circuit. Deposition at 5 (emphasis added).

at 792-793.[12]

And against the backdrop of a record replete with often "explicitly Christian" prayers, *Marsh*, 463 U.S. at 793 n.14, the Court emphasized that the content of legislative prayers—Christian, non-Christian, or otherwise—was not relevant to the practice's constitutionality. It stated:

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

Marsh, 463 U.S. at 794-795. Indeed, despite a 16-year-long chaplaincy of a single minister of a single denomination—Rev. Palmer and his branch of Presbyterianism—this Court rejected the argument "that choosing a clergyman of one denomination advances the beliefs of a particular church." *Id.* at 793.[13]

Petitioner is therefore correct that, under *Marsh*, it should not be dispositive whether a legislative prayer is or is not "sectarian." Pet. Br. 9, 26. Judicial scrutiny is limited to whether "the prayer opportunity has been ex-

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[12] This accords with Rev. Palmer's understanding of his prayers as part of the American historical tradition and civil religion. *Marsh*, 463 U.S. at 793 n.14. As he stated, "Why do I use quotations from the Psalms or Moses or Abraham? Because this country is a country that recognizes the Bible." Deposition at 10.

[13] The Nebraska Legislature had a long tradition of lengthy terms for individual chaplains. In fact, Rev. Palmer's predecessor died while in office. Deposition at 3. Rev. Palmer unsuccessfully sought to persuade many other, more diverse, clergy to take a regular share of the legislative prayers. Deposition at 48 (noting that other clergy had "genuine reluctance, particularly if I asked them for the second time. And in all frankness, most clergy persons do not live in Lincoln who represent these Senators.").

ploited to proselytize or advance any one, or to disparage any other, faith or belief." *Marsh*, 463 U.S. at 794-795.

It is entirely improper for courts to parse the meaning of prayers, making theological judgments about their level of religiosity, or to enable private litigants to grill prayer-givers in trials and depositions. Indeed, under *Lee* v. *Weisman*, 505 U.S. 577, 590 (1992), prayer content is immune from judicial scrutiny *because* of its religious nature—the opposite of the Second Circuit's approach. See Pet. Br. 41-42. And this is not a hypothetical concern. Rev. Palmer experienced such improper questioning during his deposition in the trial court in *Marsh*.

For this reason, the court below erred when it interpreted *Marsh* to require a full evaluation of "the totality of the circumstances" of each prayer practice—or even each individual prayer. See Pet. App. 17a. Such an approach casts aside *Marsh*'s concerns for the limits of proper judicial scrutiny. Although the court below purports not to intend to drive out *all* Christian or denominational prayers, it still makes the Town responsible for the content of every prayer-giver, leading to a case-by-case weighing of "how much Christianity is too much." See *Rubin v. City of Lancaster*, 710 F.3d 1087, 1095 (9th Cir. 2013) (noting that the Second and Fourth "circuits have undertaken something like an observer-based 'frequency' analysis, invalidating any legislative prayer practice that, from the vantage point of the prayers' listeners, has resulted in too large a proportion of sectarian invocations from one particular religious group.").

This is hardly "neutrality." Indeed, judicial policing of the content of legislative prayer would lead to nothing more than the coercive enforcement of a civil orthodoxy. Yet even the Second Circuit recognized 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." Pet. App. 16a. An imposed civil

orthodoxy does not promote neutrality; rather, it excludes any speaker unwilling to discard his true beliefs to avoid crossing judge-drawn lines that demarcate appropriate from inappropriate religious content. Far from neutrality, this approach would amount to unmistakable hostility to religious belief that goes beyond whatever lukewarm standards that a court might invoke.

B. *Marsh*'s holding should trump the *Allegheny* dictum to the extent of any conflict

The source for the lower courts' undermining of *Marsh* lies in a brief dictum from this Court's opinion in *County of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989). The dictum stated that the prayer practice in *Marsh* was acceptable "because the particular chaplain had 'removed all references to Christ.'" *Id.* at 603 (quoting *Marsh*, 463 U.S. at 793 n.14). It suggested that identifiably Christian prayers were not a "nonsectarian reference[] to religion" but instead impermissibly affiliated the government with Christianity. *Ibid.*

But that dictum—dictum in part because *Allegheny* involved public holiday displays, not legislative prayer—contradicted the holding in *Marsh* and, as detailed in Part I, *supra*, misrepresented the *Marsh* record.[14] Even the Second Circuit in this case acknowledged that *Allegheny* contradicted *Marsh*. See Pet. App. 17a; see also *Rubin*, 710 F.3d at 1092 ("Footnote 14 notwithstanding, *Marsh* nowhere confines its review of Nebraska's practice solely to the short period in which Palmer delivered only nonsectarian prayers."). Just because Rev. Palmer noted the change in 1980 does not mean that such prayers were within the scope of the Complaint, which

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[14] Nor was *Marsh* central to the holding in *Allegheny*. The Court mentioned *Marsh* only to respond to Justice Kennedy's separate opinion referencing *Marsh*.

specifically alleged that "[n]o effort is made by the defendant Palmer to make the prayers nonsectarian." J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶8). Nor does it change the fact that this Court reviewed and held constitutional the Nebraska Legislature's *decades-long* practice as reflected in the earlier prayers on record.

Yet the dictum has caused some courts to characterize any Christian prayer as impermissibly "sectarian," leading them to strike down any prayer practice in which Christian prayer predominates. The most extreme example may be *Joyner* v. *Forsyth County*, 653 F.3d 341, 348, 353, 355 (4th Cir. 2011), which struck down a predominantly Christian legislative-prayer practice and instructed governments to be "proactive in discouraging sectarian prayer in public settings." And, of course, the judgment below states that a prayer practice that is sectarian may be invalid if, in the view of any given federal court, the "totality" of the practice could convey to a reasonable observer that "the town favored or disfavored certain religious beliefs." Pet. App. 17a. These courts seek to use a very broad definition of "nonsectarian," paired with an endorsement-style approach imported from the *Allegheny* and *Lemon* line of cases, to censor any prayer that can be identified as Christian or of any other religion. And the inevitable resulting confusion has already spread from the context of legislative prayer to a wide variety of practices involving prayerful participation in public life.[15]

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[15] The difficulty in reconciling *Marsh* and *Allegheny* arises in contexts separate from prayer before legislative sittings. *E.g.*, *Newdow* v. *Rio Linda Union School Dist.*, 597 F.3d 1007, 1035-1038 (9th Cir. 2010) (rejecting challenge to "under God" in the Pledge of Allegiance); *Newdow* v. *Roberts*, 603 F.3d 1002, 1017-1021 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (rejecting challenge to the presidential inaugural ceremony and oath's "So help me God" phrase); *Mellen* v.

Lower courts adopting some blend of this sectarian-versus-nonsectarian or endorsement-style approach have brushed aside *Marsh*'s warnings about the constitutional inappropriateness of such judicial scrutiny of prayers. But, the Ninth Circuit rightly realized, "the very act of deciding—as a matter of constitutional law, no less—who counts as a 'religious figure' or what amounts to a 'sectarian reference' not only embroils judges in precisely those intrareligious controversies that the Constitution requires us to avoid, but also imposes on us a task that we are incompetent to perform." *Rubin*, 710 F.3d at 1100. In fact, the Ninth Circuit could "'hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.'" *Ibid* (quoting *Lee*, 505 U.S. at 616-617 (1992) (Souter, J., concurring)). This did not deter the Second Circuit panel below from delving into the text and terminology of various volunteers' prayers—but it should have.

C. The judgment below departs from *Marsh*'s holding—and would require a different outcome in *Marsh* itself

The judgment below demonstrates that the *Marsh*/*Allegheny* split has real consequences. Despite paying lip service to the idea of moving beyond a sectarian-

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Bunting, 327 F.3d 355, 369-370 (4th Cir. 2003) (striking down Virginia Military Institute's supper prayer); *N.C. Civil Liberties Union Legal Found.* v. *Constangy*, 947 F.2d 1145, 1147-1149 (4th Cir. 1991) (holding unconstitutional a state judge's practice of opening court with prayer); *Freedom from Religion Found., Inc.* v. *Obama*, 705 F. Supp. 2d 1039, 1059-1063 (W.D. Wis. 2010), *vacated on other grounds by* 641 F.3d 803 (7th Cir. 2011) (holding that the National Day of Prayer violates the Establishment Clause); *Freedom from Religion Found., Inc.* v. *Hickenlooper*, No. 10CA2559, 2012 WL 1638718, at *14, *25-26 (Colo. Ct. App. May 10, 2012) (invalidating a governor's day-of-prayer proclamation).

versus-nonsectarian analysis of legislative prayer, and reciting that "the touchstone of our analysis must be *Marsh*," which "did not employ the three-pronged test the Court had adopted, eleven years earlier, in *Lemon*," Pet. App. 10a, 16a, the Second Circuit's conclusion rested on the supposedly "sectarian" nature of the prayers offered in the Town of Greece. Pet. App. 14a-17a, 20a-22a. And the court nevertheless imported into legislative prayer cases many concepts from *Lemon* that are foreign to *Marsh*—and consciously so, given that Chief Justice Burger was the author of *both* of those cases.[16] At its core, the judgment below held that the Establishment Clause was violated by "the impression, created by the steady drumbeat of often specifically sectarian Christian prayers, that the town's prayer practice associated the town with the Christian religion." Pet. App. 22a.

But there is no legal universe in which the judgment below and *Marsh* can both have been correctly decided. If the prayer practice invalidated by the Second Circuit is unconstitutional, there is no way that the Nebraska practice approved in *Marsh* could survive. *Marsh* involved a single, paid chaplain—an ordained clergyman—for 16 years, see 463 U.S. at 784-785, compared to a constantly rotating cast of unpaid volunteers from many backgrounds here, see Pet. App. 4a-6a. And the ostensibly "sectarian" prayers quoted by the Second Circuit, see Pet. App. 7a, are no more "explicitly Christian" than prayers in the *Marsh* record, see *supra* Part I.A.

In fact, on every conceivably relevant metric, Rev. Palmer's prayer practice in *Marsh* was more "problematic" than the Town of Greece's practice here:

- **Number of prayer-givers.** The Nebraska Legis-

[16] Chief Justice Burger was the author of both *Lemon* and *Marsh*. The Court's refusal to employ *Lemon*'s methodology in resolving *Marsh* was hardly an oversight.

lature hired Rev. Palmer as its regular chaplain, 463 U.S. at 784, 793, but the Town relies on a constantly rotating cast of volunteers, Pet. App. 6a.

- **Official status of prayer-givers.** The Nebraska Legislature appointed Rev. Palmer as an officer of the legislature,[17] and its official chaplain, 463 U.S. at 785, but there is no official position for anyone who prays before a Town Council meeting, Pet. App. 4a.
- **Payment for prayers.** The Nebraska Legislature not only gave Rev. Palmer an official status, but also a taxpayer-funded salary, 463 U.S. at 784-785, but all prayer-givers in the Town are *unpaid* volunteers, Pet. App. 4a, 8a.
- **Tenure of prayer-givers.** Rev. Palmer began his tenure sixteen years before litigation began, 463 U.S. at 784-785, but the Town invites new prayer-givers for each meeting, with any reinvitation being solely a matter of rotation, Pet. App. 4a.
- **Selection method.** The Nebraska Legislature directly and specifically hired Rev. Palmer, a Presbyterian minister, 463 U.S. at 784, 793, but the Town makes random cold calls (based on a business directory and newspaper) and accommodates community members' requests and volunteers, Pet. App. 5a, 31a.
- **Proportion of Christian prayers.** All prayers before the Nebraska Legislature were Judeo-Christian, 463 U.S. at 793, but only 66% of the Town's prayers have been identifiably Christian,

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[17] See Nebraska Legislative Journal, 75th Leg. 11 (Jan. 5, 1965) (Dr. Robert Palmer "elect[ed]" as "Chaplain," one of the "officers of the Legislature"). That volume is available online at http://www.nebraskalegislature.gov/FloorDocs/75/PDF/Journal/ at hyperlink "r1journal.pdf."

Pet. App. 7a.

- **Christian prayer content.** Rev. Palmer made "frequent references to the Christian religion," with "[n]o effort" to drain those prayers of such content, J.A. 2, *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (No. 82-234) (Complaint ¶8), but the Town's prayer-givers opened meetings with a variety of prayers, including non-Christian prayers, Pet. App. 4a-5a, 7a, 125a.

Given this comparison, petitioner aptly observed that if Rev. Palmer's chaplaincy was constitutional, then the Town's practice must *a fortiori* be constitutional. Pet. Br. 21. If there was a "steady drumbeat of often specifically sectarian Christian Prayers" in the Town of Greece, Pet. App. 20a-23a, the staccato was even more pronounced in Nebraska. Yet *Marsh* adopted Rev. Palmer's description of his prayers as "nonsectarian," and had "no doubt" that the Nebraska Legislature's practice was constitutional—indeed, even "part of the fabric of our society," 463 U.S. at 792-793. However much that description applied to the Nebraska practice, it must, as a matter of law, apply *even more* to the Town's.

While the Town's many accommodations make it readily apparent that respondents' challenge was meritless, the Town did not *have* to go beyond the practice in *Marsh* to comply with the First Amendment. It had no *obligation* to provide virtually anyone with the opportunity to open Town Council meetings with prayer. That is, the Town could have simply named any local clergyman as the "chaplain," and could even offer a salary, and easily comply with *Marsh*. In approving the Town's practice, the Court should reaffirm *Marsh*, and thereby provide constitutional security for *all* prayer practices, so long as they meet the one bar that *Marsh* imposes—that "the prayer opportunity has [not] been exploited to proselytize or advance any one, or to disparage any

other, faith or belief." 463 U.S. at 794-795. Accord Pet. Br. 5 (noting the wide diversity of practices).

The *similarity* between the two practices on this front is what matters. Neither governmental body—the State of Nebraska or the Town of Greece—regulated the content of prayers, see *Marsh*, 463 U.S. at 793 n.14; Pet. App. 4a, 8a, 29a-30a, and neither acted with the "impermissible motive" that *Marsh* proscribes, see *Marsh*, 463 U.S. at 793, 794-795; Pet. App. 10a, 21a. Indeed, the best way to ensure that a legislative prayer practice does not cross that line is to avoid governmental involvement in the text of the prayers, instead leaving that choice to whoever gives the prayer.

Marsh and the judgment below are irreconcilable. Either this Court must reverse the Second Circuit, or—by affirming—it will allow the Second Circuit to reverse *Marsh*.

III. THE JUDGMENT BELOW WILL UNJUSTIFIABLY CHILL CONSTITUTIONALLY PROTECTED LEGISLATIVE PRAYER

Legislative bodies across the United States should retain the constitutional right recognized in *Marsh* as "part of the fabric of our society"—the right to "open[] legislative sessions with prayer." 463 U.S. at 492. Decisions like the Second Circuit's here, or the Fourth Circuit's in *Joyner*, cause this right to atrophy. Assemblies have already started to avoid opening sessions with invocations—*not* after freely choosing that path, but because of the ever-present threat of lawsuits induced by jurisprudence derived from *Allegheny*. See Pet. Br. 45-47. As Judge Kelly has observed in a similar context, *Allegheny*'s handiwork means that "governments face a Hobson's choice: foregoing [legislative prayer] or facing litigation. The choice most cash-strapped governments would choose is obvious, and it amounts to a heckler's veto." *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095,

1106 (10th Cir. 2010) (Kelly, J., dissenting from denial of rehearing *en banc*).

The Second Circuit shows solicitude for hecklers, but is a demanding and unpredictable taskmaster for towns. *Marsh* accounted for the possibility that a legislative-prayer practice could cross the line and become little more than a tool for proselytizing of a particular sect. 463 U.S. at 794-795. But *Marsh* wisely emphasized that only such extreme circumstances warranted judicial scrutiny of legislative prayers. *Ibid.* Yet, where *Marsh* established a clear rule, the court below requires a full fact-intensive judicial inquiry whenever a complaint is filed, turning long-standing legislative-prayer practices into constitutional imbroglios. And after describing how hard it will be to design or defend a constitutionally-compliant legislative prayer practice, the court below ominously warns that "[t]hese difficulties may well prompt municipalities to pause and think carefully before adopting legislative prayer." Pet. App. 27a.

The court below is right about that, at least. A reasonable town attorney in New York, Connecticut, or Vermont, seeking to avoid costly litigation over legislative prayer, is indeed left with a series of questions which yield no satisfactory answer other than "wait and see." How far away must a town look for sufficiently diverse prayer-givers? Petitioner's rational response of using a directory of any religious entity within the town was neutral, but the Second Circuit somehow found that to be an element of "endorsement." Pet. App. 19a-20a. How can a town choose whom to call, and in what order should it call them? Random lotteries and working through business directories are out, the court below says. *Ibid.*; see *id.* at 24a-25a & n.9. Should a town then call no one, instead allowing the winds of chance to blow chaplains to the podium? What if, as here, adherents of Christianity, or some other religion, most often volunteer?

Each of the questions listed above, and dozens more like them, suggests that the litigation bonanza and intimidation campaign would only increase if this Court adopts the judgment below—unless cities accept the Second Circuit's hint and simply abandon any prayer practice to avoid that litigation. Instead, the Court should reverse, and reaffirm that legislative prayer is "deeply embedded in the history and tradition of this country" and is "not something to be lightly cast aside." *Marsh*, 463 U.S. at 790, 786 (quotation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted.

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August 2013