

No. 12-696

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In The  
**Supreme Court of the United States**

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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*  
SOUTHEASTERN LEGAL FOUNDATION  
SUPPORTING PETITIONER**

—◆—

SHANNON LEE GOESSLING  
*Counsel of Record*  
KIMBERLY STEWART HERMANN  
SOUTHEASTERN LEGAL FOUNDATION  
2255 Sewell Mill Road, Suite 320  
Marietta, Georgia 30062  
(770) 977-2131  
shannon@southeasternlegal.org

*Counsel for Amicus Curiae*

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**INTEREST OF *AMICUS CURIAE***<sup>1</sup>

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on key policy issues, and litigates regularly before the Supreme Court.

SLF has an abiding interest in the protection of American religious and legal heritage. From a public interest perspective, SLF asserts that this Court's Establishment Clause jurisprudence and this Country's history require that the government accommodate religious practices, such as the 200-year-old practice of opening sessions of legislative and deliberative bodies with a prayer. America's religious heritage is a vital component of its system of laws. A balanced constitutional approach protects against unconstitutional hostility toward religion while ensuring that the government's accommodation does not amount to the unconstitutional establishment of religion.



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<sup>1</sup> Pursuant to this Court's Rule 37.6, SLF hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs by filing letters evidencing their consent with the Clerk of Court.



## SUMMARY OF THE ARGUMENT

This Country's history reflects, and this Court's Establishment Clause jurisprudence mandates, the accommodation of religion. Since America's founding, legislative prayer has been an accepted part of its political and cultural heritage. In 1789, the First Congress, many of whose members had taken part in the framing of our Constitution, enacted legislation authorizing the appointment of paid chaplains and commenced the practice of opening each day of Congress with prayer. Nearly two centuries later, in *Marsh v. Chambers*, 463 U.S. 783 (1983), this Court found constitutional the Nebraska legislature's practice of opening each session day with a prayer. The Court found that legislative prayer is constitutional absent an impermissible motive in selecting the prayer-giver and absent evidence that the government exploited the prayer opportunity to proselytize or advance any one, or disparage any other, faith or belief. This Court's review focused on the government's actions and intent.

When reviewing the constitutionality of the Town of Greece's practice of opening its town council meetings with a prayer, the Second Circuit acknowledged that *Marsh* is the only Supreme Court decision that has ruled on the constitutionality of legislative prayer. Despite this acknowledgement, the Second Circuit disregarded both *Marsh* and this Court's Establishment Clause jurisprudence and instead, shaped and utilized its own test; a test which exhibits hostility toward and appears to render all accommodations of

religion, including legislative prayer, unconstitutional. Rather than analyzing the government's actions and intent, the Second Circuit looked to *Lemon v. Kurtzman*, 403 U.S. 602 (1991), and its progeny, focusing its review on the hypothetical feelings of an unknown observer. According to the Second Circuit, any evidence that an unknown observer may feel offended by an otherwise constitutional legislative prayer practice renders that practice unconstitutional. This test not only contradicts *Marsh*, but it further offends the historical principles underlying the Establishment Clause, U.S. Const. amend. I, and this Court's Establishment Clause jurisprudence.

Consistent with the text and intent of the Establishment Clause and America's longstanding accommodation of legislative prayer, this Court should reaffirm and clarify *Marsh*, such that a legislative or deliberative body does *not* violate the Establishment Clause when it permits a prayer to be said at or during a meeting of that body, absent evidence that it acted with an impermissible motive in selecting the prayer-giver; and so long as the government neither composed nor dictated the prayer's content. If the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, then a court may review that content to determine whether the legislative or deliberative body exploited the prayer opportunity by coercing an observer to pray.

Such an approach loyally complies with the central meaning of the Religion Clauses, which

promote tolerance of all creeds. It is true to the text because it focuses on whether the government established religion, it protects observers from the perils our Framers sought to protect, and it is consistent with this Court’s jurisprudence which mandates the accommodation of religion. This Court should adopt this approach and preserve the best of America’s traditions – tolerable acknowledgement of beliefs widely held among the people of this Country.



## ARGUMENT

### I. Introduction.

For over 200 years, legislative and deliberative bodies have opened their meetings with prayer. *Marsh*, 463 U.S. at 792. This Court has consistently recognized that any interpretation of the Establishment Clause should “comport[] with what history reveals was the contemporaneous understanding of its guarantees.”<sup>2</sup> *Lynch v. Donnelly*, 465 U.S. 558, 673 (1984). “[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the [legislative prayer] practice

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<sup>2</sup> See *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 233-34 (1963) (Brennan, J., concurring); *Walz v. Tax Comm’n of the City of N.Y.*, 397 U.S. 664, 671 (1970) (explaining that the Court must be careful to not “undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history”) (citation omitted).

authorized by the First Congress – their actions reveal their intent.” *Marsh*, 463 U.S. at 790. Following these principles of constitutional interpretation, and heeding Justice Holmes’ aphorism that “a page of history is worth a volume of logic,” *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921), history provides the backdrop for determining whether a legislative prayer practice “establishes” religion.

“Government policies of accommodation, acknowledgement, and support for religion are an accepted part of our political and cultural heritage.” *County of Allegheny v. ACLU*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment and dissenting in part). “There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789.” *Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (quoting *Lynch*, 465 U.S. at 674). America’s founding and history is replete with official acknowledgments of religion and accommodation of prayer. Constitutional Framers including George Washington, Thomas Jefferson and James Madison, all offered prayers in their inaugural addresses and Thanksgiving Proclamations. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 633-35 (1992) (Scalia, J., dissenting); *County of Allegheny*, 492 U.S. at 671 (citing 1 J. Richardson, *A Compilation of Messages and Papers of the Presidents, 1789-1897*, p. 64 (1899) (quoting President George Washington’s first Thanksgiving Proclamation)). Federal courts opened their sessions with prayers offered by clergymen invited by this Court’s

first Chief Justice, John Jay.<sup>3</sup> Letter from John Jay to Richard Law (Mar. 10, 1790), *reprinted in* 2 The Documentary History of the Supreme Court of the United States: 1789-1800, The Justices on Circuit, 1790-1800 at 13-14 (Maeva Marcus ed., Columbia University Press 1988). And, in 1789, the First Congress enacted legislation authorizing the appointment of paid chaplains and commenced the practice of opening each day with prayer. *Marsh*, 463 U.S. at 788.

With the knowledge and understanding that prayers are inherently religious,<sup>4</sup> “the first Congress

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<sup>3</sup> Opponents of legislative prayer frequently cite John Jay’s objection to the appointment of Reverend Jacob Duche, an Anglican minister, as chaplain of the First Continental Congress as evidence that delegates objected to government prayer in general. *See Marsh*, 463 U.S. at 791. Their reliance on Jay’s objection is misplaced. His objection was to the particular minister and not to the practice, as evidenced by his invitations to clergymen to open sessions of Article III courts with a prayer.

<sup>4</sup> On June 28, 1787, Benjamin Franklin spoke to the Constitutional Convention and stated,

I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth – *that God governs the affairs of men* . . . I therefore beg leave to move – that henceforth prayers, imploring the assistance of Heaven, and its blessing on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that service –

Max Farrand, *1 The Records of the Federal Convention of 1787*, 451-52 (Max Farrand ed., Yale University Press 1911), *available at* <http://oll.libertyfund.org/title/1057/95866> (last visited July 24, 2013).

assembled under the Constitution, many of whose members had taken part in framing that instrument[,]” did not believe that opening legislative sessions with prayer established religion. *Marsh*, 463 U.S. at 790 (citations omitted). If they had, then they would not have authorized such prayers only three days after they finalized the Bill of Rights. *Id.* at 788. The contemporaneous nature of these actions provides “weighty evidence” of the true meaning of the Establishment Clause, consistent with this Court’s holding in *Marsh* that legislative prayer *per se* does not violate the Establishment Clause. *See id.* at 790, 792.

In *Marsh*, this Court further held that a legislative prayer practice is constitutional absent evidence of an “impermissible motive” in selecting the prayer-giver and absent evidence that the government exploited the prayer opportunity to “proselytize or advance any one, or disparage any other, faith or belief.” *Id.* at 792-95. History mandates that in reviewing a government act to determine whether it establishes religion, the inquiry must focus on the government’s actions. *See id.* at 788-91; *Van Orden*, 545 U.S. at 686-87. This approach is consistent with the understanding that the Establishment Clause “does not purport to protect individual rights.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in judgment). Rather, the Establishment Clause is a federalism provision

meant to protect states from federal interference<sup>5</sup> and to prevent the federal government from “coerc[ing] anyone to support or participate in religion or its exercise” by the force of law. *Lee*, 505 U.S. at 587 (majority opinion); *see id.* James Madison “apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship in any manner contrary to their conscience.” *Wallace*, 472 U.S. at 95. The Framers’ sponsorship of prayer at inaugurations, in federal courts and in Congress, combined with the Framers’ desire to prohibit the government from exerting its power over the states or coercing citizens through the use of force, provides historical support for reaffirming the test set forth by this Court in *Marsh*. Thus, if the government does not coerce the listener and the listener may do as he likes, then the government prayer does not establish religion. *See generally Lee*, 505 U.S. 577.

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<sup>5</sup> In his dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Rehnquist provides a detailed history of the Founders’ debate regarding the precise language of the Establishment Clause. *Id.* at 92-99 (Rehnquist, J., dissenting). Notably, Justice Rehnquist explains that James Madison found the Establishment Clause necessary to address concerns expressed at several state conventions that “Congress might rely on the Necessary and Proper Clause to infringe the rights of conscience or to establish a national religion[.]” *Id.* at 95-96.

## **II. The Second Circuit disregards this Court’s Establishment Clause jurisprudence and instead utilizes a test hostile to constitutionally protected religious accommodation.**

When reviewing the constitutionality of a legislative prayer practice, circuit courts acknowledge that *Marsh* “is the only Supreme Court decision . . . that has ruled on the constitutionality of legislative prayer.”<sup>6</sup> *Galloway v. Town of Greece*, 681 F.3d 20, 26 (2d Cir. 2012); see *Rubin v. City of Lancaster*, 710 F.3d 1087, 1091 (9th Cir. 2013), *petition for cert. filed*, (U.S. July 17, 2013) (No. 13-89); *Joyner v. Forsyth County*, 653 F.3d 341, 346 (4th Cir. 2011). Despite acknowledging that legislative prayer is constitutional absent evidence of an “impermissible motive” in

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<sup>6</sup> “The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.” *Schempp*, 374 U.S. at 220 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)). Ignoring this basic tenet of Establishment Clause jurisprudence, opponents of legislative prayer commonly refer to *Marsh* as an exception. To do so, they exploit Justice Brennan’s characterization of *Marsh* as a “narrow” opinion with the hope that by doing so enough times, it becomes an exception rather than the rule. *Marsh*, 463 U.S. at 795 (Brennan, J., dissenting). But, constitutional jurisprudence does not work that way. In explaining that *Marsh* is not an exception to the First Amendment, Justice Kennedy wrote, “The First Amendment is a rule, not a digest or compendium. A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause.” *County of Allegheny*, 492 U.S. at 670.



the prayer-giver selection and absent exploitation by the government of the prayer opportunity, the Second Circuit disregards both precedent and historical practice. Instead, it uses an unworkable “endorsement” test that focuses on the imagined perceptions of an unknown observer and that is inherently hostile to the accommodation of religion.

Specifically, the Second Circuit asked, “whether the town’s practice, viewed in the totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs[.]” *Galloway*, 681 F.3d at 29. It found the prayer practice unconstitutional because it is “an endorsement of a particular religious viewpoint.” *Id.* at 30. The Second Circuit crafted its unknown observer test by piecing together portions of the *Lemon* tripartite “test,” Justice O’Connor’s clarification of the *Lemon* test (commonly referred to as the endorsement test), and an over-reading of this Court’s dictum in *Allegheny* which re-characterizes *Marsh* as an endorsement test.<sup>7</sup> In doing so, it added to the “tangle”

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<sup>7</sup> As explained in detail by both the Eleventh and Ninth Circuits, the dictum in *Allegheny* does not alter the *Marsh* holding, it “merely illuminates [*Marsh*’s] boundaries.” *Rubin*, 710 F.3d at 1092-94; *Pelphrey v. Cobb County*, 547 F.3d 1263, 1271-72 (11th Cir. 2008). Circuit courts often mischaracterize the dictum in *Allegheny* as re-interpreting this Court’s holding in *Marsh* to require that legislative prayers be nonsectarian and mandating a review that focuses on the effect prayer has on a hypothetical listener. To reach its conclusion, the Second Circuit had to take this a step further and assert that *Allegheny*’s “holding” re-characterized *Marsh*’s “holding” into an endorsement test

(Continued on following page)

of various tests and promoted analysis under which a hypothetical government could wipe all religious remnants from society, contradicting *Marsh's* rejection of the *Lemon* test. No doubt aware of the persuasive criticism of *Lemon* and its derivative, the endorsement test,<sup>8</sup> the Second Circuit did not cite *Lemon*. The circuit court's lack of citation however, does not negate its reliance on *Lemon* and its progeny which have "no more grounding in the history of the First Amendment than does the wall theory upon which [they] rest." *Wallace*, 472 U.S. at 110.

First developed in 1971, the *Lemon* test requires a three-step examination to determine the constitutionality of government action concerning religion. Such action: (i) must have a secular purpose; (ii) its primary effect must neither advance nor inhibit religion; and (iii) it must avoid excessive entanglement with religion to pass constitutional scrutiny.

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focused on an unknown observer's feelings. *Galloway*, 681 F.3d at 29 n.3.

<sup>8</sup> See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in judgment) (referring to the *Lemon* test as "some ghoul in a late-night horror movie" and noting that over the years six of the then-seated Justices had "personally driven pencils through the creature's heart"); see also *Newdow*, 542 U.S. at 45-54 (Thomas, J., concurring in judgment); *County of Allegheny*, 492 U.S. at 655-59 (Kennedy, J.); *Edwards v. Aguillard*, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); *Wallace*, 472 U.S. at 108-13 (Rehnquist, J.); *Roemer v. Md. Bd. of Pub. Works*, 426 U.S. 736, 767-69 (1996) (White, J., concurring in judgment).

*Lemon*, 403 U.S. at 612-13. *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service." *Wallace*, 472 U.S. at 110. That faulty doctrine, the idea that a wall must separate church and state, is "not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state," *Lynch*, 465 U.S. at 673, and is wholly inapplicable to the constitutionality of legislative prayer. . As evidenced by Jefferson's offering of prayers in both his first and second inaugural addresses and in the drafting of bills that specifically accommodated religion in the public sphere,<sup>9</sup> the Constitution does not "require complete separation of church and state; [rather,] it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch*, 465 U.S. at 672.

Recognizing the weak link between the *Lemon* test and the "principles enshrined in the Establishment Clause," Justice O'Connor articulated the endorsement test in her *Lynch* concurrence. *Id.* at 688-89 (O'Connor, J., concurring). That test is based

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<sup>9</sup> Jefferson "prayed in his first inaugural address" and in his second he "acknowledged his need for divine guidance and invited his audience to join his prayer." See *Lee*, 505 U.S. at 633-34 (Scalia, J., dissenting); see generally Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C.L. Rev. 159 (1990).

on the premise that government may neither endorse nor disapprove religion. A perceived government endorsement of religion sends a message to nonbelievers that they are “outsiders” and to adherents that they are “favored members of the political community.” *Id.* at 688. Further expounding on the “effect” prong of *Lemon*, the Second Circuit employed a “reasonable observer” standard that also focused not on government actions, but on the feelings of an unknown observer. *Galloway*, 681 F.3d at 29-30. While Justice O’Connor sought to make clear how the tripartite test was grounded in history, any test that focuses on an individual’s feelings and personal interpretation of a government act rather than the government act itself, exhibits an “unjustified hostility toward religion, a hostility inconsistent with our history and our precedents[.]” *County of Allegheny*, 492 U.S. at 655.

**A. *Lemon* and its progeny are constitutionally incompatible with accommodation of religion.**

The test employed by the Second Circuit violates the Constitution’s affirmative mandate of accommodation. *See Lynch*, 465 U.S. at 672-74 (majority opinion) (explaining that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any”). Rather than accommodate religion, the *Lemon* and endorsement tests exhibit a hostility towards religion that is “most unwelcome.” *County of Allegheny*,

492 U.S. at 668-69. Under the endorsement tests and arguably the effect prong of *Lemon*, any practice having “the effect of communicating a message of government endorsement or disapproval of religion” or having the effect “whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community” violates the Establishment Clause. *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring). These tests base “the unconstitutionality of a government practice that does not *actually* advance religion on the hopes of the government that it *would* do so.” *McCreary County v. ACLU*, 545 U.S. 844, 901 (2005) (Scalia, J., dissenting).

This Court’s Establishment Clause jurisprudence holds that certain religious practices that *accommodate* religion do not *establish* religion. In *Marsh*, the Court examined several of these practices and concluded that “legislative prayer presents no more potential for establishment than the provision of school transportation, *Everson v. Board of Education*, 330 U.S. 1 (1947), beneficial grants for higher education, *Tilton v. Richardson*, 403 U.S. 672 (1971), or tax exemptions for religious organizations, *Walz*[, 397 U.S. 664].” *Marsh*, 463 U.S. at 791. Since *Marsh*, the Court continues to affirm that anything less than accommodation would require “callous indifference” towards religion. *Van Orden*, 545 U.S. at 684 (quoting *Zorach*, 343 U.S. at 306). Had the Framers wanted to rid this Country of any reference that may make religion relevant, they could have done so. Instead,

they authorized legislative prayer, invited clergymen to open sessions of federal courts, and offered prayers in their own official capacities.

**B. The Framers sought to promote tolerance of religion, not to rid this Country of any act that may offend an unknown observer.**

The *Lemon* and endorsement tests which focus on “whether nonadherents would be made to feel like ‘outsiders’ by government recognition or accommodation of religion[,]” “require a relentless extirpation of all contact between government and religion.” *County of Allegheny*, 492 U.S. at 657, 669. The Establishment Clause did not create any individual rights. *Newdow*, 542 U.S. at 50. If it had created an individual right to not hear or see something that may offend, then nearly everything, including legislative prayer, could be viewed by some unknown observer as violating the Establishment Clause. As Justice Kennedy explained in his separate opinion, “[i]f the intent of the Establishment Clause is to protect individuals from mere feelings of exclusion, then legislative prayer cannot escape invalidation.” *County of Allegheny*, 492 U.S. at 673.

History teaches that this was not what the Framers intended. In drafting the Establishment Clause, they sought to rein in any future Congress that tried to impose a religion on the states and citizens through the use of force. *Newdow*, 542 U.S. at

50. The Framers “looked at invocations as conduct whose effect harmonized with the tenets of some or all religions.” *Marsh*, 463 U.S. at 792 (internal quotations omitted). Evidencing this intent and accommodation of legislative prayer, Samuel Adams stated that, “he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at the same time a friend to his country.” *Id.* at 791-92. “To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry.” *Lee*, 505 U.S. at 590 (majority opinion).

**III. This Court should reaffirm and clarify *Marsh* by articulating a test for adjudicating Establishment Clause challenges to legislative prayer practices, focusing on the government’s actions and intent.**

Consistent with the text and intent of the Establishment Clause and America’s longstanding accommodation of religion, this Court should reaffirm the constitutionality of America’s 200-year tradition of opening meetings of its legislatures and deliberative bodies with prayer. In doing so, this Court should clarify *Marsh* and denounce any review of legislative prayer that focuses on the feelings of, or effect on, an unknown observer. This will allow government to accommodate the practice of legislative prayer and protect against the unwarranted hostility inherent in the *Lemon* and endorsement tests.

Specifically, this Court should find that a legislative or deliberative body does not violate the Establishment Clause when it permits a prayer to be said at or during a meeting of that body, absent evidence that it acted with an impermissible motive in selecting the prayer-giver; and so long as the government neither composed nor dictated the content of the prayer, other than to suggest that the prayer not proselytize or advance any one, or disparage any other, faith or belief. If the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, then a court may review that content to determine whether that body exploited the prayer opportunity by coercing an observer to pray.

**A. Legislative prayer practices are constitutional absent evidence that the government selected or rejected a prayer-giver because of his faith or beliefs.**

Review of a legislative prayer practice must start with a review of the government's selection of the prayer-giver. In *Marsh*, this Court focused on the government's actions and held, "Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause." *Marsh*, 463 U.S. at 793-94. Necessarily, the following question arises: What is an impermissible motive? In *Marsh*, although the Court did not



elaborate on this, its holding made clear that the government did not act with an impermissible motive because it found the uninterrupted sixteen-year tenure of a single-faith Presbyterian minister did not demonstrate a preference for a particular faith. *Id.* Thus, for purposes of impermissible motive analysis, the bar for proving such impermissible motive is quite high.

This Court should define “impermissible motive” such that, if a legislative or deliberative body’s prayer-giver selection practice is neutral towards all religions, then the government did not act with an impermissible motive. Stated another way, absent evidence that the government selected or rejected a potential prayer-giver because of his faith or beliefs, the government did not act with an impermissible motive. Focusing the inquiry on the government’s actions and intent is consistent with the understanding that the Establishment Clause imposes restraints on the government while allowing the government to accommodate religion.

In *Marsh*, the Court focused its inquiry on the government’s actions and intent. *See Rubin*, 710 F.3d at 1096 (noting that the *Marsh* Court trained its analysis not only on history but on the government’s actions and looked at evidence that went solely toward the government’s reasons for retaining the chaplain). This Court explained that Congress did not select and retain the chaplain because of his particular faith or beliefs, but rather “because his performance and personal qualities were acceptable to the

body appointing him.” *Marsh*, 463 U.S. at 793. In reflecting on *Marsh*, the Eleventh Circuit explained: “the ‘impermissible motive’ prohibition seems directed at the conscious selection of a speaker from one denomination or sect for the purpose of promoting or endorsing the beliefs held by that speaker.” *Pelphrey*, 547 F.3d 1263, 1281 (11th Cir. 2008) (adopting district court’s interpretation of Establishment Clause). It continued, “the Court appeared to deem constitutionally unacceptable the selection and retention of a particular speaker *because* of that speaker’s sectarian affiliation or religious beliefs.” *Id.* “[T]he impermissible motive standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.” *Id.*

This approach loyally complies with “the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored.” *Lee*, 505 U.S. at 590 (majority opinion). “[T]he [Establishment Clause’s] guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839 (1995).

In 2008, the Eleventh Circuit reviewed two prayer-giver selection practices employed by Cobb

County, Georgia and applied this definition of “impermissible motive.”<sup>10</sup> Under the first practice, the county invited clergymen from all religious organizations listed in the Yellow Pages, the internet and business cards. *Pelphrey*, 547 F.3d at 1267. Under the second practice, the county invited only clergymen from Christian churches and excluded clergymen from Jewish, Islamic and other religions. *Id.* at 1267-68. The court found the first practice constitutional because the county “did not exclude religious institutions based on their beliefs” and in many instances, the county was “unfamiliar with the beliefs of the institutions.” *Id.* at 1278. But, the court found the second practice unconstitutional because the county considered the faith and beliefs of potential prayer-givers and “categorically excluded certain faiths” from the list of potential invocational speakers. *Id.* at 1282.

In contrast, circuit courts employing the *Lemon* test or endorsement tests consistently either disregard the government’s selection process or incorrectly focus their review on an unknown observer’s perceptions of the prayer-giver selection process and identity.<sup>11</sup> This approach ignores this Court’s Establishment

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<sup>10</sup> See also *Rubin*, 710 F.3d at 1098 (finding the city’s selection process constitutional because the city clerk invites “every local religious group he can find” and “schedule[s] appearances on ‘a first-come, first-served’ or other random basis”).

<sup>11</sup> See *Turner v. City Council of Fredericksburg, Va.*, 534 F.3d 352 (4th Cir. 2008) (declining to review the selection process); *Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004); *Bacus v. Palo Verde Unified Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (rev’d on standing grounds); see

(Continued on following page)

Clause jurisprudence which provides that the government may not prefer one religion over another or nonreligion over religion. *County of Allegheny*, 492 U.S. at 605 (majority opinion). The Second Circuit's test requires the government to review and to select the prayer-giver based on the prayer-giver's faith and beliefs and whether those beliefs would lead an unknown observer to feel offended. Because this approach requires that the government, in effect, intentionally discriminate against certain faiths or beliefs; it provides the government with no means to accommodate legislative prayer and instead, forces the government to violate the Establishment Clause.<sup>12</sup> This Court should reject the Second Circuit's interpretation of *Marsh* because it fails to allow for the accommodation of religion and is openly hostile toward legislative prayer.

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*also Bacus v. Palo Verde Unified Dist. Bd. of Educ.*, 11 F. Supp. 2d 1192, 1197-98 (C.D. Cal. 1998) (reviewing selection process, but failing to apply a government-act-focused approach).

<sup>12</sup> The Second Circuit explained that it would even find unconstitutional a completely random prayer-giver selection process such as a lottery, or a prayer-giver selection process that actively pursues prayer-givers of all faiths whose members reside within the town. *Galloway*, 681 F.3d at 31.

**B. Merely providing a forum for legislative prayer does not violate the Establishment Clause.**

If the government exercised neutrality in its selection of the prayer-giver and did not act with an impermissible motive, the following question arises: Whether the content of the prayer causes an Establishment Clause violation? A two-step analysis answers this question. Courts should only review the content of a legislative prayer if there is evidence that the *legislative or deliberative body* exploited the prayer opportunity to proselytize or advance any one, or disparage, any other belief or faith. Thus, courts must first determine whether the evidence indicates that the legislative or deliberative body composed or dictated the content of the prayer, other than to suggest that the prayer neither proselytize or advance any one, nor disparage any other, faith or belief. If it did not, then the court should refrain from reviewing the prayer content because the government cannot violate the Establishment Clause unless it affirmatively acts. If the government did compose or dictate the prayer's content, then the court may review that content to determine whether the government exploited the prayer opportunity by coercing anyone to support or participate in any religion or its exercise or to disparage a faith or belief.

“Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political cultural heritage.” *County of Allegheny*, 492 U.S. at 657. Religious accommodation

“follows the best of our traditions.” *Zorach*, 343 U.S. at 314. A legislative or deliberative body’s act of providing its citizens with the opportunity to give a prayer before or during its meetings is an example of a constitutionally permissible accommodation of religion. *See Marsh*, 463 U.S. at 792. A finding that the government does not violate the Establishment Clause by providing a forum for legislative prayer is consistent with *Marsh* and this Court’s Establishment Clause jurisprudence which require the government to remain neutral between religions. Generally speaking, prayer is an exercise that spans across all religions, faiths and beliefs. Legislative prayer does not itself amount to a government establishment of religion because of its inherent religious content; there must be something more. In *Marsh*, this Court held, “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.” *Marsh*, 463 U.S. at 794-95. Even though the prayers were often “explicitly Christian[,]”<sup>13</sup> the Court explained that “it [was] not for [it] to embark on a sensitive evaluation or to parse the content of a particular prayer.” *Id.* at 795. The courts themselves have stated that they “can hardly

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<sup>13</sup> *Marsh*, 463 U.S. at 792-93 n.14 (references to Christ were removed only *after* the lawsuit was filed); *see Van Orden*, 545 U.S. at 688 n.8 (describing the prayers in *Marsh* as “explicitly Christian”).

imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.” *Rubin*, 710 F.3d at 1101 (quoting *Pelphrey*, 547 F.3d at 1272). Thus, courts should only embark on such a review when the government has composed or dictated the content of legislative prayer.

**C. Absent evidence that the government coerced observers to participate in a prayer, government composure of the prayer is a tolerable constitutional accommodation of religion.**

Although “[i]t is a cornerstone principle of our Establishment Clause jurisprudence that it is no part of the business of a government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government[,]” *Lee*, 505 U.S. at 588 (internal quotations omitted), a government’s composure of a prayer is not *per se* unconstitutional. When a court finds that the legislative or deliberative body dictated or composed the prayer, it must address the following question: Does the government’s composure of legislative prayer cross the line from accommodating religion to establishing religion?

The Court’s self-described “tangle” of various tests leaves lower courts and the attorneys practicing in them with a confusing, convoluted maze through which they must travel to determine the most efficient

way to adjudicate and litigate Establishment Clause cases. In addition to this “hopeless disarray,” *Marsh* provides little guidance on what it meant by “prose-lytizing or advancing any one, or disparaging any other, faith or belief.” Lower courts that strictly follow *Marsh* also do not provide guidance because in the absence of evidence that the government composed or dictated the content of the prayers, those courts have properly declined to review the prayer content. See *Jones v. Hamilton County*, 891 F. Supp. 2d 870, 888-90 (E.D. Tenn. 2012) (declining to review prayer content because of lack of evidence that the government intended to proselytize, advance or disparage any faith or belief); see also *Rubin*, 710 F.3d at 1100-01 (expressly refusing to review prayer content); *Pelphrey*, 547 F.3d at 1278 (affirming the district court’s ruling and refusing to parse the content of prayers absent evidence of government exploitation). This Court is left to rangle with the unknown observer approach derived from *Lemon* and the endorsement tests, and the coercion test articulated by Justice Kennedy in *Allegheny* and *Lee*.

Of these, the coercion test is the most sensible because it focuses on the government’s actions and intent, and ensures that the government will recognize all religious and nonreligious perspectives. According to the coercion test, “[n]oncoercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more



substantial than practices that are accepted in our national heritage.” *County of Allegheny*, 492 U.S. at 670 (Kennedy, J.). This test supports the conclusion that absent evidence that the government coerced observers into praying or disparaged any religion, a legislative prayer should be found constitutional. Our national heritage includes many examples of persons acting on behalf of our government who composed and recited prayers. This practice has continued into modern-day America, as evidenced by our current President’s composure and recitation of prayers.<sup>14</sup> Where, like here, the legislative or deliberative body does not force the citizens attending its meetings to support or participate in the prayer offered by a neutrally selected prayer-giver, the government does not act coercively, and thus does not establish religion.

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<sup>14</sup> President Barack Obama has invoked God and offered prayers in his official acts as President of the United States, including during his first official act, his inaugural address, and various Thanksgiving Proclamations and National Day of Prayer Proclamations in which he has asked for “God’s continued guidance, mercy, and protection.” Proclamation No. 8974, 3 C.F.R. Proclamation 8974 (May 1, 2013). *See also* President Obama’s Inaugural Address, 1 Pub. Papers 4 (Jan. 20, 2009), available at <http://www.gpo.gov/fdsys/pkg/PPP-2009-book1/pdf/PPP-2009-book1-Doc-pg1.pdf> (last visited July 24, 2013) (“America, . . . let it be said by our children’s children that when we were tested we refused to let this journey end, that we did not turn back nor did we falter; and with eyes fixed on the horizon and God’s grace upon us, we carried forth that great gift of freedom and delivered it safely to future generations.”).

To find otherwise is contrary to the text of the Establishment Clause and to this Court's Establishment Clause jurisprudence. The coercion test ensures religious liberty. It protects observers from the perils that our Framers sought to protect against, government acts that forced citizens to observe religious acts and/or financially support particular religions. At the same time, it respects the best of our traditions and accommodates a 200-year "tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. As Jefferson once wrote, "it does no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."<sup>15</sup>



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<sup>15</sup> Thomas Jefferson, 1743-1826, "Notes on the State of Virginia," Query XVII, *available at* <http://etext.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=17&division=div1> (last visited July 24, 2013).

**CONCLUSION**

For the foregoing reasons, *Amicus Curiae* respectfully requests that this Court reverse the decision below.

Respectfully submitted,

SHANNON LEE GOESSLING

*Counsel of Record*

KIMBERLY STEWART HERMANN

SOUTHEASTERN LEGAL FOUNDATION

2255 Sewell Mill Road, Suite 320

Marietta, Georgia 30062

(770) 977-2131

shannon@southeasternlegal.org

*Counsel for Amicus Curiae*

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